



SAN MARINO DATA PROTECTION AUTHORITY
THE BOARD

In its sitting of 6 July 2021, which was attended by Mr. Nicola Fabiano, President, Mr. Umberto Rapetto, Vice-President, Ms. Patrizia Gigante, Member of the Board and Ms. Maria Sciarrino, Director.

HAVING REGARD TO measure no. 1bis/2021 of 18 February 2021, notified to the company Facebook Ireland Ltd. on 31 March 2021, with which this Authority initiated an investigation procedure, by asking the company Facebook Ireland Ltd. to provide exhaustive and detailed information indicated therein;

HAVING REGARD to Law no. 171/2018 on the protection of natural persons with regard to the processing of personal data, in particular Articles 4, 5, 35, 58, 59, 72 and 73;

CONSIDERING, therefore, that Law no. 171/2018 “*guarantees that the processing of personal data respects the data subject’s fundamental rights and freedoms and human dignity, with particular regard to confidentiality, personal identity and the right to the protection of personal data*” and that “*everyone shall have the right to the protection of personal data relating to him or her*” (Article 1, paragraphs 2 and 3);

CONSIDERING that Art. 7 of Law no. 171/2018 “*Concerning the conditions applicable to child’s consent in relation to information society services*” states verbatim

- “1. Where processing is based on consent, in relation to the offer of information society services directly to a child, the processing of the personal data of a child shall be lawful where the child is at least 16 years old. Where the child is below the age of 16 years, such processing shall be lawful only if and to the extent that consent is given or authorised by the holder of parental responsibility over the child.
2. The controller shall make reasonable efforts to verify in such cases that consent is given or authorised by the holder of parental responsibility over the child, taking into consideration available technology.
3. Any information and communication, where processing is addressed to a child, should be given by the controller in such a clear and plain language that the child can easily understand”;

CONSIDERING that, pursuant to the aforementioned provision, in relation to the offer of information society services directly to a child, the processing of the personal data of a child shall be lawful where the child is at least 16 years old. Where the child is below the age of 16 years, such processing shall be lawful only if and to the extent that consent is given or authorised by





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the holder of parental responsibility over the child. The controller shall make reasonable efforts to verify in such cases that consent is given or authorised by the holder of parental responsibility over the child, taking into consideration available technology.

CONSIDERING the preliminary investigation carried out and the clarifications received by the Office of the Data Protection Authority from the company Facebook Ireland Ltd. on 30 April 2021;

CONSIDERING what Facebook Ireland Ltd. states in the aforementioned document on page 1 - note 1, namely *“Facebook Ireland is the sole controller and service provider of the Facebook and Instagram Services to users in its European region, which includes San Marino. As Facebook Ireland has its main establishment in Ireland, it is subjected to the General Data Protection Regulation 2016/679 (“GDPR”) and subject to regulatory oversight by its lead supervisory authority, the Irish Data Protection Commission (“IDPC”)”*;

CONSIDERING, therefore, that the company Facebook Ireland Ltd. acts as data processor;

CONSIDERING that the aforementioned document received by the Office of this Authority on 30 April 2021 on page 14 states verbatim: *“In terms of assessing a user’s compliance with the minimum age requirement of 13 years old for the Facebook and Instagram Services, Facebook Ireland employs a combination of measures: self-representation through an age-neutral sign-up process with technical restrictions, along with enforcement including via dedicated underage reporting tools”*;

CONSIDERING, moreover, that in the aforementioned document Facebook Ireland Ltd. on page 15 states verbatim: *“In terms of age verification methods, while Facebook Ireland considers its approach to age verification for the Facebook and Instagram Services as appropriate based on the available technology to date and in-line with industry standards for comparable services, Facebook Ireland notes that effective verification of age in an online environment remains a developing and technically challenging area. For example, figuring out how to verify age sufficiently accurately without excluding millions of users (both young and old) from online services who are unable to prove their age -- e.g., because they do not have access to an official ID -- is a challenge that the entire industry is facing. Also, age verification at the point of registration (i.e., in relation to new users of a service) can pose additional complications or hurdles, as novel technical solutions, such as modelling or machine learning by analysing user interactions with a service may be effective where an online service has little or no existing information regarding a prospective new user. **Despite ongoing investment and research, it is clear there are no obvious answers and no singularly effective (or one-size-fits-all) solutions to this complex and challenging issue”***;





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Considering that in point 25 of the aforementioned document Facebook Ireland Ltd. states verbatim: *“The complexities and difficulties around age verification are well recognized by data protection regulation. For example, in its draft Fundamentals, the IDCP recognises that “[t]he technological area of age verification mechanisms and tools is still very much in development” and “it is ultimately for industry to continue to innovate in this area”. The Information Commissioner’s Office in the United Kingdom (“ICO”) likewise noted in the AADC published in September 2020 (with provision for a one-year transition period until September 2021) that “[a]ge-assurance tools are still a developing area”. The appropriate means of verifying age must take into account the service at hand, the age to which the service is addressed and, if including children, the benefits the service brings to them as well as the safety and privacy by design safeguards put in place to address the risks of the specific processing activities, according to their likelihood and severity. This complexity is why the IDPC anticipates that “there is unlikely to be a one-size-fits-all solution to the issue of age verification” and why the ICO has given organisations one-year to review and implement relevant aspects of the AADC”;*

CONSIDERING, therefore, that the company Facebook Ireland Ltd. was and is fully aware of how technically challenging and still developing ascertaining the actual age of a natural person online can be - according to them -, by also adding that there are no obvious responses or uniquely effective solutions;

CONSIDERING, therefore, that the data controller - pursuant to the aforementioned Article 7 of Law 171/2018 - shall make reasonable efforts to verify that the consent of a child under 16 is given or authorised by the holder of parental responsibility over the child;

CONSIDERING, however, that Facebook Ireland Ltd. has not provided this Authority with adequate information, including technical information, concerning the methods used to check the age of children and, in general, of the persons who access the platform;

CONSIDERING that, in accordance with Law no. 171/2018, the principles relating to processing of personal data shall be respected (Article 4);

CONSIDERING that, pursuant to Law no. 171/2018, *“processing is only lawful if and to the extent that at least one”* of the conditions laid down in Article 5 is applied;

CONSIDERING, therefore, that this Authority has verified that Facebook Ireland Ltd. has not taken the measures that should have adopted to verify the age of children under 16, upon their registration or access to the Facebook platform, thus infringing the aforementioned Article 7 of Law 171/2018.

CONSIDERED that for the impositions of fines pursuant to Article 73, paragraph 2, this Authority has assessed the following circumstances:





With regard to letter a) *“the nature, gravity and duration of the infringement taking into account the nature, scope or purpose of the processing concerned as well as the number of data subjects affected and the level of damage suffered by them”*, this Authority considers that, within its own jurisdiction, the number of affected children under the age of 16 who already access the Facebook platform or could potentially access it is high and that what has happened is not only extremely serious, as it shows little interest in the protection of children, but, in the absence of specific information from the company Facebook Ireland Ltd., it is very probable that a large number of children may still be at risk today;

With regard to letter b) *“the intentional or negligent character of the infringement”*, this Authority considers that the conduct of Facebook Ireland Ltd. is to be qualified as negligent, having failed to implement any adequate system to check the age of children;

With regard to letter c) *“any action taken by the controller or processor to mitigate the damage suffered by data subjects”*, this Authority refers to the documents sent by the company Facebook Ireland Ltd., which does not show the adoption of any measure to mitigate the damage suffered by the affected data subjects or of any mention to planning future solutions;

With regard to letter d) *“the degree of responsibility of the controller or processor taking into account technical and organisational measures implemented by them pursuant to Articles 27 and 33”*, this Authority considers that the company Facebook Ireland Ltd. is fully liable for failure to adopt technical and organizational measures;

With regard to letter f) *“the degree of cooperation with the Data Protection Authority, in order to remedy the infringement and mitigate the possible adverse effects of the infringement”*, this Authority has positively considered the behaviour of Facebook Ireland Ltd. in sending documents;

With regard to letter g) *“the categories of personal data affected by the infringement”*, this Authority points out that this category is likely to include mainly "common" personal data. However, it cannot be completely excluded - in light of the amount of data involved - that there may also be processing of special categories of personal data;

With regard to letter h) *“the manner in which the infringement became known to the supervisory authority, in particular whether, and if so to what extent, the controller or processor notified the infringement”*, this Authority has initiated a preliminary investigation, but as documents that have been sent prove, Facebook Ireland Ltd. was fully aware of the issue and did not take any action to concretely find an effective solution;

With regard to letter i) *“where measures referred to in Article 59, paragraph 2 have previously been ordered against the controller or processor concerned with regard to the same subject-matter, compliance with those measures”*, this Authority notes that measure no. 1bis/2021 had





already been issued but the company Facebook Ireland respected it only partially by only providing clarifications to this Authority.

HAVING ESTABLISHED, therefore, the need, pursuant to Art. 59, paragraph 2, letter d) of Law no. 171/2018, to order the company “**Facebook Ireland Ltd.**” in the person of its pro-tempore legal representative with legal office in **4 Grand Canal – Square - Grand Canal Harbour - Dublin 2 Ireland**, in its capacity as data controller, to make reasonable efforts to verify in such cases that consent is given or authorised by the holder of parental responsibility over the child, taking into consideration available technology.

HAVING ESTABLISHED, moreover, the need to impose, pursuant to Art. 59, paragraph 2, letter i) of Law no. 171/2018, to the company “**Facebook Ireland Ltd.**” in the person of its pro-tempore legal representative with legal office in **- 4 Grand Canal – Square - Grand Canal Harbour - Dublin 2 Ireland**”, in its capacity as data controller, as stated in the documents, the fine provided for by Art. 72, paragraph 1 of Law no. 171/2018 for the infringement of Art. 7 of the same Law.

CONSIDERING that the fine for the aforementioned infringement of Article 33 of Law 171/2018, in application of the circumstances indicated in Article 73, paragraph 2, and in light of the assessments made to impose the fine, amounts to EUR 1,000,000 (EUR one million/00).

Therefore, in the light of the above and having regard to the documents on file,

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ORDERS

Pursuant to Art. 59, paragraph 2, letter d) of Law no. 171/2018, the company “**Facebook Ireland Ltd.**” in the person of its pro-tempore legal representative with legal office in **4 Grand Canal – Square - Grand Canal Harbour - Dublin 2 Ireland**, in its capacity as data controller to make reasonable efforts to verify that where the child is below the age of 16 years consent is given or authorised by the holder of parental responsibility over the child, taking into consideration available technology and consequently report to this Authority within seven days.

ORDERS

the company “**Facebook Ireland Ltd.**” in the person of its pro-tempore legal representative with legal office in **- 4 Grand Canal – Square - Grand Canal Harbour - Dublin 2 - Ireland**”, in its capacity as data controller as stated in the documents, pursuant to Art. 59, paragraph 2, letter i) of Law 171/2018 and in the light of the reasons indicated in the introduction of this measure, to pay EURO 1.000.000 (EUR one million/00) as an administrative fine for the infringements indicated above;

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the aforesaid companies to pay 1,000,000 (one million) euro, for the reason above, within 30 (thirty) days of notification of this measure.

Payment of this fine shall be made by wire transfer:

- **IBAN SM 81 K03225 09800 000010006039**
- **Ecc.ma Camera Repubblica di San Marino**
- **Area Code 225**
- **Purpose 592**
- **Please note in the wire transfer the no. and the date of the measure**

The Authority shall be informed of the payment of the administrative fine by receiving a proof of payment to the Office of the Data Protection Authority.

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to record this measure in the Authority's internal register and to publish it on the Authority's website.

Pursuant to Article 69 of Law no. 171/2018, an objection against this measure may be lodged with the ordinary judicial authority by a judicial appeal in accordance with Article 70 of Law no. 171/2018. The objection shall not suspend the enforcement of the relevant measure.

Worth specifying is that failure to promptly respond to the request pursuant to Article 59 shall be punished with the administrative fine referred to in Article 72, paragraph 2 of Law no. 171/2018.

San Marino, 6 July 2021

Director of the Office

The Board

