

## Unpacking Current Developments in the Information Space Insight Nr. 1 - September 2024

### Data protection authorities stand up to big tech: the importance of democratic institutions to safeguard citizens' privacy rights

#### Analysis in cooperation with [Data Privacy Brazil](#)

Meta's recent move attempting to use public information shared on its social media products to train its AI has faced backlash from data protection authorities in Brazil, Europe and the UK. In other countries, however, with less strict data protection laws, Meta is already implementing its new policy. Similarly, X has faced backlash by the Irish authority for the processing of personal data in public posts for its AI tool.

#### What is the issue ?

Meta announced on May 22, 2024 a new policy which includes that it will use public information to improve its AI in Europe and the UK relying on 'legitimate interests' to process this data. Meta also informed users that they can object to the use of their data through a dedicated form until 26 June 2024 when the new policy would take effect.<sup>1</sup> A similar announcement was made for Brazil.<sup>2</sup>

In other countries, such as Australia<sup>3</sup> and the US<sup>4</sup>, Meta is already training its AI on public information shared on its services since 2023 without providing users an option to opt-out. In this respect, the Agency for Personal Data Protection in Bosnia and Herzegovina complained that Meta is not providing the same options to its citizens.<sup>5</sup>

Data protection authorities in Brazil, the EU/EEA and UK stepped in halting the deployment of Meta's new policy based on their respective data protection legislations.

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<sup>1</sup> Meta (2024), Bringing Generative AI Experiences to People in Europe, <https://about.fb.com/news/h/bringing-generative-ai-experiences-to-people-in-europe/>

<sup>2</sup> Meta (2024), Como a Meta está desenvolvendo a Inteligência Artificial para o Brasil <https://about.fb.com/br/news/2024/05/como-a-meta-esta-desenvolvendo-a-inteligencia-artificial-para-o-brasil/>

<sup>3</sup> ArtsLaw (2024), Meta AI: The use of Facebook and Instagram content to train generative AI [www.artslaw.com.au/meta-ai-training/](http://www.artslaw.com.au/meta-ai-training/)

<sup>4</sup> Wired (2024), My Memories Are Just Meta's Training Data Now [www.wired.com/story/my-memories-are-just-meta-training-data-now/](http://www.wired.com/story/my-memories-are-just-meta-training-data-now/)

<sup>5</sup> Personal Data Protection Agency in Bosnia and Herzegovina (2024), Warning to users of Meta company services in Bosnia and Herzegovina, <http://azlp.ba/saopstenja/default.aspx?id=4242&pageIndex=1&langTag=en-US>

In Europe, noyb – European Center for Digital Rights, filed complaints in several countries, including with Ireland’s Data Protection Commission which is responsible for Meta in the EU/EEA, to counter Meta’s new policy. Noyb argues among others that Meta has no legitimate interest to use the data under GDPR, that it is employing dark patterns and does not respect users’ right to choose (as they can only opt-out instead of opting-in) and that data processing is irreversible which contradicts the right to be forgotten.<sup>6</sup> Following intensive engagement between the Irish Data Protection Commission and Meta, the company agreed to pause the deployment of its new policy which would process public content shared on Facebook and Instagram across the EU/EEA.<sup>7</sup> Similarly, Meta also paused its policy in the UK following the UK’s Information Commissioner’s Office request to ensure the protection of data privacy rights.<sup>8</sup> It resumed training its AI after having made changes to its objection policy.<sup>9</sup>

Brazil’s National Data Protection Authority, following its own investigation, also ordered the suspension of Meta’s privacy policy on 2 July 2024 arguing that Meta had no legitimate interest to process the data in line with Brazil’s data protection law (Lei Geral de Proteção de Dados). This is in particular the case, as it concerns sensitive personal data and data processing neither respects the principles of purpose nor of necessity.<sup>10</sup> On August 30, the authority reversed its decision to suspend Meta’s AI training after the presentation of a compliance plan by Meta, which addressed the main concerns of the initial decision. The compliance plan focused on four main issues raised by the authority: i) the use of legitimate interest as a valid legal basis for AI training; ii) increased transparency measures, with a direct notification to each user regarding the data processing in question; iii) improvement of the right to object, with a facilitated opt-out mechanism; and iv) suspension of data processing from accounts of users under 18 years of age. On this final issue, Meta emphasized that it would continue to discuss with the authority, as part of the ongoing inspection process, the legitimacy of processing personal data from this category of data subjects.<sup>11</sup> It is important to highlight that these two decisions are precautionary, and an

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<sup>6</sup> NOYB (2024), Complaint, [https://noyb.eu/files/meta\\_ai/complaint\\_ie.pdf](https://noyb.eu/files/meta_ai/complaint_ie.pdf)

<sup>7</sup> Irish Data Protection Commission (2024), The DPC’s Engagement with Meta on AI, [www.dataprotection.ie/en/news-media/latest-news/dpcs-engagement-meta-ai](http://www.dataprotection.ie/en/news-media/latest-news/dpcs-engagement-meta-ai)

<sup>8</sup> ICO (2024), Statement in response to Meta’s plans to train generative AI with user data <https://ico.org.uk/about-the-ico/media-centre/news-and-blogs/2024/06/statement-in-response-to-meta-s-plans-to-train-generative-ai-with-user-data/>

<sup>9</sup> ICO (2024), ICO statement in response to Meta’s announcement on user data to train AI <https://ico.org.uk/about-the-ico/media-centre/news-and-blogs/2024/09/ico-statement-in-response-to-metas-announcement-on-user-data-to-train-ai/>

<sup>10</sup> Ministério da Justiça e Segurança Pública (2024), ANPD determina suspensão cautelar do tratamento de dados pessoais para treinamento da IA da Meta [www.gov.br/anpd/pt-br/assuntos/noticias/anpd-determina-suspensao-cautelar-do-tratamento-de-dados-pessoais-para-treinamento-da-ia-da-meta](http://www.gov.br/anpd/pt-br/assuntos/noticias/anpd-determina-suspensao-cautelar-do-tratamento-de-dados-pessoais-para-treinamento-da-ia-da-meta)

<sup>11</sup> Ministério da Justiça e Segurança Pública (2024), Meta cumpre exigências da ANPD e poderá retomar, com restrições, o uso de dados pessoais para treinamento de inteligência artificial [www.gov.br/anpd/pt-br/assuntos/noticias/meta-cumprer-exigencias-da-anpd-e-podera-retomar-com-restricoes-o-uso-de-dados-pessoais-para-treinamento-de-inteligencia-artificial](http://www.gov.br/anpd/pt-br/assuntos/noticias/meta-cumprer-exigencias-da-anpd-e-podera-retomar-com-restricoes-o-uso-de-dados-pessoais-para-treinamento-de-inteligencia-artificial)

investigation process is still ongoing to analyze the controversy in more detail, especially regarding the use of legitimate interest as a legal basis.

Similarly, the Irish Data Protection Commission acting on behalf of EU/EEA and applying to the Irish High Court managed to get X suspend permanently the training of its AI on personal data contained in the public posts of X's EU/EEA users.<sup>12</sup>

### **Why is this important and what are the potential consequences?**

Meta's announcement and X's use of personal data for its AI and the reaction by several regulatory authorities show that there is a battle about how far data privacy goes and what data use is legitimate between big tech companies and democratic governments.

Big tech argues that halting the use of data for AI training will stifle innovation in the concerned countries and regions. The judgments of the respective regulatory authorities, however, show that democratic governments can step up to big tech and that they consider the respect of democratic values and rights as a precondition for innovation. They also show that democratic rules can be enforced to protect citizens rights, which can be an inspiration for other countries or regions.

### **Opinion on Meta's plans in Brazil**

The reversal of Brazil's data protection authority raises some concerns and shows that democratic control needs clearly defined parameters. First, the Legitimate Interest Assessment and compliance plan presented by Meta have been classified as confidential, preventing public assessment of how the company addressed the authority's concerns. Second, one key issue of the suspension was the possibility of sensitive data being processed incidentally. Since legitimate interest is not a valid legal basis for processing sensitive data, the processing was initially considered illegitimate. The Brazilian authority, in a preliminary analysis, considered that safeguards and pseudonymization techniques would be sufficient for Meta to resume its processing, with the issue to be explored in more detail later on, which is controversial since pseudonymised data is still considered personal data. Finally, Meta has already begun rolling out notifications to its users, but the opt-out mechanism was presented as a hyperlink in plain text, without any buttons or interface features giving it prominence to the user, raising questions about the effectiveness of the opt-out mechanism.

It should be noted that the Brazilian authority has required Meta to present a public version of its Legitimate Interest Assessment as well as the Data Protection Impact Assessment for

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<sup>12</sup> Irish Data Protection Commission (2024), Data Protection Commission welcomes conclusion of proceedings relating to X's AI tool 'Grok', [www.dataprotection.ie/en/news-media/press-releases/data-protection-commission-welcomes-conclusion-proceedings-relating-xs-ai-tool-grok](https://www.dataprotection.ie/en/news-media/press-releases/data-protection-commission-welcomes-conclusion-proceedings-relating-xs-ai-tool-grok)

the relevant processing activity. The deadline for these documents is September 11th. On one hand, this is a positive step toward transparency, but on the other hand, the authority's decision has already been made, limiting public debate and participation in the regulatory oversight process.

*"On one hand, it is positive that the Brazilian DPA's recommendations were quickly adopted by Meta, which demonstrates a degree of dynamic enforcement through a dialogical approach between the regulator and the regulated entity. On the other hand, the lack of transparency regarding basic compliance documents requested during the investigation process—such as the legitimate interest assessment—is highly problematic. This lack of transparency undermines a fundamental understanding of why and how the regulator deemed the adjustments satisfactory. Ultimately, it affects the legitimacy of the process, which by nature should be open to public oversight, whether by data subjects, civil society, or other controllers, as this would foster greater predictability for everyone,"* states Bruno Bioni - Founder-Director of Data Privacy Brasil