



Vienna, 25 May 2020

To  
the European Data Protection Authorities,  
the European Data Protection Board,  
the European Commission and  
the European Parliament

We are taking the extraordinary step of writing an Open Letter and providing all European DPAs with the relevant documents, as we are deeply concerned about the approach the Irish Data Protection Commission (DPC) has taken in three high profile cases against Facebook, Instagram and WhatsApp. These three cases do not only concern the three complainants that we represent under Article 80 GDPR, but millions of European users.

These three cases, in which the DPC acts as the lead authority, show that the cooperation mechanism under Chapter 7 of the GDPR becomes fundamentally dysfunctional if involved Data Protection Authorities (DPAs) do not cooperate in a swift and efficient manner. In a parallel procedure, the French CNIL was able to single-handedly issue a €50 million fine against Google within seven months. In contrast, after two years, the DPC has completed the first of six steps last week in the cases against Instagram and WhatsApp, while highly disturbing actions were taken in the first two steps of the DPC's 'six step procedure' in the case against Facebook (see details below).

At the current speed, these cases will easily take more than ten years until all appeals are decided and a final decision is reached. These overly long durations expose the lack of any effective remedies for average citizens under the current practices and application of the cooperation mechanism in Chapter 7 of the GDPR. The fact that the DPC has very recently [publicly highlighted these cases](#) as alleged proof of their efficiency is a slap in the face of EU data subjects who have been waiting for their fundamental rights to be enforced for more than 2 years.

The GDPR is only as strong as its weakest DPA: In practice, this is perhaps best illustrated by the fact that the Irish DPC has so far not issued a single fine under the GDPR against a private actor, despite reporting 7,215 complaints in 2019 and staff of more than 130. It comes as no surprise that Google immediately tried to switch to the jurisdiction of the Irish DPC right after the French CNIL issued its fine in the parallel procedure cited above.

After two years, we feel that the time has come to shine light on the shortcomings of GDPR enforcement as we experience in Ireland and trigger a public debate. To increase transparency, we wish to grant all DPAs access to all documents, despite the request of the Irish DPC not to share these documents even with their colleagues.

We call on the European Data Protection Authorities, the European Data Protection Board (EDPB), the European Commission, and the European Parliament to take the necessary steps to ensure that the GDPR provides Europeans with a fundamental right to data protection not only on paper – but also in reality and in every corner of the Union. In the spirit of European Cooperation, we equally call on you to ensure that the GDPR and the cooperation tools it provides are effectively implemented and enforced in all Member States of the European Union.

Mag. Maximilian Schrems  
*Honorary Chair of noyb.eu*

## (A) Material issue: Facebook's GDPR "consent bypass"

The GDPR has strict and solid protections against "forced consent". Consent to processing of personal data is only valid if it is freely given, informed, unambiguous, and specific. Article 7 GDPR further prohibits consent that is hidden in terms or where performance of a contract is conditional on consent.

Consequently, Facebook would have to limit the abuse of personal data and make functions like online tracking, personalized advertisement or third party data sharing conditional on "opt in" consent by users.

While Facebook has traditionally relied on consent, it has chosen to switch from consent to an alleged contract under Article 6(1)(b) GDPR on 25 May 2018 at midnight,<sup>1</sup> when the GDPR came into force. To justify this switch, Facebook simply added an introductory section to its terms and conditions that is supposed to define the service provided by Facebook. The section includes a generic description of these services, like a "*personalized experience*". In Facebook's view, stuffing this generic description into the terms and conditions amounts to a civil law contract and makes any processing "*in connection*"<sup>2</sup> with this "contract" legal – without the need for consent or a clear necessity for a certain provision of the contract.

Such an alleged "consent bypass" is illegal under countless provisions of the applicable Austrian contract law, the contract law of other EU Member States, the GDPR itself, and case law of the CJEU. It is a principle established since Roman times that an artificial transaction (Latin "*simulatio*") has to be taken for what the parties actually want to achieve, not for what the parties artificially describe. In more common words: "*If it looks like a duck, swims like a duck, and quacks like a duck, then it is a duck*".

This especially applies to cases where only one party clearly tries to circumvent the law that is meant to protect the other party. These general legal principles also apply to the alleged contract between the data subject and Facebook and the rules against forced consent as found in Article 4(11) and 7 GDPR.

In a [representative study by the Austrian Gallup Institute](#), 64% of all users identified the relevant declaration as GDPR consent. Only 1.6 to 2.5% thought the declaration would amount to a valid contract that included the duties that were argued by Facebook.<sup>3</sup>

Overall, Facebook simply tried to redefine a declaration of its users as a "data contract" in order to escape the GDPR's strict consent requirements – a laughable scam to undermine clear EU legislation.

*noyb* filed complaints against Facebook, Instagram, and WhatsApp on 25 May 2018 with the DPAs of Austria, Belgium, and Germany on behalf of three users. All complaints were forwarded to the Irish DPC as the lead authority, as Facebook claims that Facebook Ireland Limited is the relevant controller.

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<sup>1</sup> Submission of Facebook at the Vienna Regional Court in another procedure, where Facebook admits that the switch from Article 6(1)(a) to (b) GDPR was done on 25 May 2018. See Annex A to the Submission of 09/09/2019.

<sup>2</sup> For example: Facebook Submission of 22. Feb 2019, Paragraph 1.1.

<sup>3</sup> 16% of the others did not understand what this page means, 10% thought it was a mere information page, 10% believed this was a contract (10%), but a "contract" that does not include the Facebook's obligations. As a conclusion, only 1.6% and 2.5% of the users thought that they have concluded a contract under which Facebook has to provide them with "interesting advertisement" or that Facebook has a duty to "conduct research" with the data, which are some of the legal obligations Facebook is arguing to be providing under the contract.

## **(B) Secret cooperation of the Irish DPC and Facebook on the “consent bypass”**

To legitimize the “consent bypass”, Facebook relied in its submissions on ten meetings with the DPC before the GDPR became applicable on 25 May 2018, as well as a “White Paper” that was shared with the Irish DPC.<sup>4,5,6</sup> We are therefore under the impression that the DPC and Facebook cooperated when Facebook developed the alleged “consent bypass” to undermine the GDPR’s consent provisions.

Despite repeated requests for access to documents under the applicable procedural law, the DPC and Facebook have still not disclosed the content of these meetings, claiming that they do not form part of the complaints procedure.<sup>7</sup> This is despite the fact that Facebook explicitly relied on the ten meetings with the Irish DPC and the “White Paper” in its submissions in this procedure.

Given these exchanges between the DPC and Facebook, we have to assume that the DPC is following the Irish government’s approach of catering to large foreign investors through upfront legal advice on how to bypass the law (see the “consent bypass” described above). This exchange between Facebook and the Irish DPC immediately brings the so-called “tax rulings” to mind under which EU governments legitimized tax avoidance by investors upfront.

While the DPC does not dispute these meetings, they argue that they are not bound by any prior engagement with Facebook.<sup>8</sup> At the same time, it seems hard to imagine that the DPC would actually apply “effective” and “dissuasive” penalties (Article 83(1) GDPR) to Facebook if they simply followed the DPC’s advice. To avoid such conflict of interest, Article 57(1)(d) GDPR explicitly foresees that DPAs should only “promote awareness” of the GDPR among controllers, but not advise them. Being aware of the conflict of interest, this wording was explicitly used despite intensive lobbying efforts for upfront advice by DPAs.

Overall, it seems likely that the DPC has maneuvered itself into a situation where it is structurally biased because it is essentially reviewing its own legal advice to Facebook on how to bypass Article 6(1)(a) GDPR. Keeping these meetings confidential is only adding to the impression that the Irish DPC and Facebook have engaged in a relationship that is inappropriate for a neutral and independent oversight authority.

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<sup>4</sup> Submission by Facebook of 27 September 2018: “We have drafted this response against the background of our detailed direct engagement with the Commission prior to the implementation of the recent update to our terms, spanning 10 meetings, which covered many of the issues responded to herein. Facebook Ireland has not materially changed its compliance approach since these meetings.”

<sup>5</sup> Submission by Facebook of 27 September 2018, paragraph 2.24: “Given the scope of the Complaint and its explicit focus on consent pursuant to Article 6(1)(a) GDPR, along with our previous engagement with the Commission on this important legal basis (including the White Paper shared with the Commission on 6 July 2018, which we would be happy to re-share with the Commission should this be of assistance), we do not provide any further detail about this legal basis at this time.”

<sup>6</sup> Submission by Facebook of 27 September 2018, paragraph 2.64: “As also noted above, we engaged with the Commission extensively pre-25 May 2018 on the issues and measures adopted to ensure our processing of personal data is lawful, fair and carried out in a transparent manner. Among a wide variety of issues that were discussed, Facebook Ireland’s legal bases for processing (including its approach to transparency described above) and its Data Policy were subject to consideration.”

<sup>7</sup> See Letter from the DPC of 20 September 2019.

<sup>8</sup> See Letter from the DPC of 20 September 2019.

## (C) Course of the procedure

Our frustration predominantly stems from the highly inefficient and partly Kafkaesque procedure adopted by the Irish DPC (and not always necessary under Irish law). To demonstrate how slowly these cases have moved, it is unfortunately necessary to explain each step of the procedure so far:















### (1) Complaints (25 May 2018)

On 25 May 2018, two years ago, we filed four cases against Google (Android), Facebook, Instagram, and WhatsApp. While the Google case was swiftly dealt with by the CNIL, the cases against Facebook, WhatsApp, and Instagram were forwarded to the Irish DPC by the DPAs in Austria, Belgium and Germany.

- **No further action on WhatsApp and Instagram until 20 May 2020**

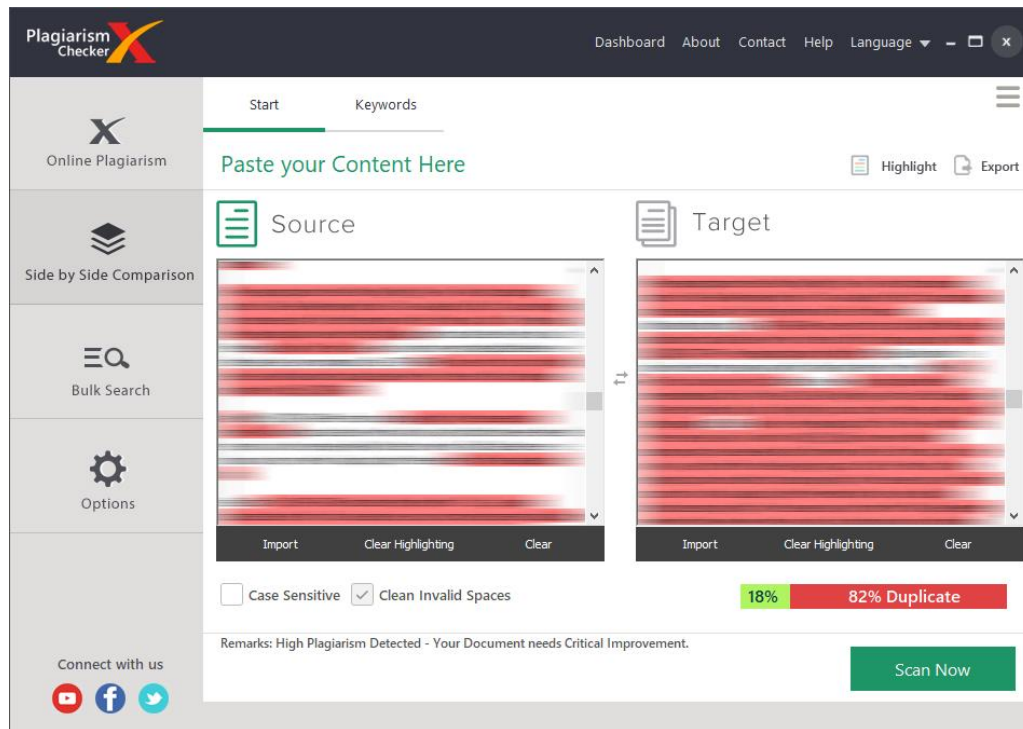
Up until last Wednesday, 20 May 2020, despite numerous deadlines that passed and were set by the DPC itself, and despite requests by other DPAs, we have not received a single submission by the controller in the cases against WhatsApp and Instagram.

It is only after having received a pre-litigation letter from *noyb* (see details below under E) and likely in light of the two year anniversary of the GDPR and of the procedure, that the DPC sent us the “Draft Inquiry Reports” on these two cases, somewhat surprisingly directly, without properly going through the German and the Belgian DPAs, where the complaints were filed. Some documents of the procedure and a translation to the relevant languages of the procedure (German and French) are still missing. This means that the first of six “Irish procedural steps” took two years.

			
Complaint	25.5.2018	25.5.2018	25.5.2018
Step 1: Irish Draft Inquiry Report	1.7.2019 (13 months)	20.5.2020 (2 years)	20.5.2020 (2 years)
Step 2: Irish Final Inquiry Report	10.4.2020 (22 months)		
Step 3: Irish Draft Decision			
Step 4: Irish Final Decision			
Step 5: Draft EU Decision			
Step 6: Final EU Decision			
Likely Appeals before Courts	3+ years	3+ years	3+ years

Overview: Progress on three complaints under Article 77 GDPR, within the Irish “six step” procedure.

A first analysis revealed that these reports are largely a copy/paste of the 2019 Facebook draft report, even if it took the DPC more than 10 months to issue them. A software tool to detect plagiarism found that about 76% of the WhatsApp draft report and 82% of the Instagram draft report are identical to the 2019 Facebook draft report.<sup>9</sup> It seems even copy/pasting took the DPC extraordinarily long.



*Screenshot: Overlap between Facebook and Instagram Draft Investigator Reports.*

As we were unable to fully review these “Draft Investigator Reports” in the two working days since receiving them and to see where exactly the differences to the Facebook draft report are, we have focused this open letter on the Facebook complaint from here on.

## **(2) Submission by Facebook (27 September 2018)**

On 27 September 2018, Facebook made extended submissions. Further submissions were made by Facebook in January and February of 2019 at the request of the DPC. These documents were initially withheld from the Austrian DPA and *noyb* and only delivered after repeated.

In summary, Facebook argues that the “consent bypass” is legal and that it is up to the controller alone to interpret a declaration of the data subject as either consent or contract. As the GDPR does not foresee any limitations to processing based on Article 6(1)(b) GDPR apart from being “*necessary for the performance of a contract*”, Facebook believes that a controller is free to add any elements to the scope of the contract that were previously based on consent (like advertising) to switch from Article 6(1)(a) to 6(1)(b) GDPR.

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<sup>9</sup> Based on word strings of four or more words that are identical in both documents.

- **Optional Step: Draft Inquiry Report (28 June 2019)**

The DPC decided to take the optional<sup>10</sup> step of conducting a preliminary and separate “investigation” by a separate investigator, despite the fact that the case only concerns narrow legal issues and no disputed factual questions. We think that the legal issues could have been decided by Helen Dixon as the Commissioner without a wholly separate “investigation” procedure that took two years in one case (Facebook) and more than two years in the other two cases (Instagram and WhatsApp).

Procedural law: Access to documents

On 1 July 2019, we received a “Draft Inquiry Report” without having been heard and without having received the two Facebook submissions it referenced.

On 9 July 2019, we received a 37-page extract of one of Facebook’s submissions of 22 February 2019. 26 pages constituted appendices of screenshots and similar. The remaining 11 pages were Facebook's material law arguments, of which 7.5 pages were redacted.

The submissions of Facebook from 27 September 2018 of 44 material pages and overall 108 pages including appendixes (like a Record of Processing Activities that only had 4 pages)<sup>11</sup> were not disclosed by the DPC. Only after *noyb* found references to this document and after interventions by the Austrian DPA did the DPC gradually provide more documents. It is still unclear if all documents were finally provided.

On the request to clarify that all documents were shared, the DPC only confirmed in a Letter from 20 September 2019 that we received all documents that were “*considered*” by the DPC for the draft inquiry report.<sup>12</sup> This raises the question as to the existence of other documents, calls, meetings or submissions that were not (officially) “*considered*”. It would be impossible to have a “fair trial” if a decision maker could simply not “*consider*” anything that does not support its decision and thereby conveniently deprive the parties of the access to these materials and grounds to challenge the decision.

Overall, the DPC initially only provided us with 3.5 pages of material submissions by Facebook, out of at least 55 pages. This amounted to only 6.3% of the other sides’ submission. Several documents, like the documents on meetings between the DPC and Facebook were still not shared with us today.

Procedural law: Reshaping of procedure

In paras 26 to 47 of the draft report (“*scope of investigation*”), the Investigator departed from the applications that were made in accordance with Austrian procedural law and decided to investigate only certain elements of our complaint and to reinterpret our requests. This violates the applicant’s procedural rights under Austrian procedural law, where the complainant defines the scope of a procedure.

Material law

On a material level, the report is hard to understand. It is not based on legal analysis as commonly understood, but rather (selectively) summarizes the arguments by the parties to then come to a “*view of the investigator*” that neither follows any legal analysis based on the parties’ arguments nor contains any

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<sup>10</sup> See for example Section 110(1) and (2), 123(1) or 137(1) Irish Data Protection Act. All of these provisions see an inquiry as an optional step (“*may*”) that the DPC must not undertake.

<sup>11</sup> See Attachment X – Facebook’s Record of Processing Activities (ROPA).

<sup>12</sup> Letter of the DPC from 20 September 2019 (File Number: “2020-10-01”).

form of common legal interpretation. Instead, it reads like an authoritarian decision-making process that does not rely on any transparent legal reasoning.

At the core, the Investigator seems to have mainly relied on the *grotesque* and circular logic that exactly because consent to the relevant clauses used by Facebook is neither unambiguous, freely given, informed nor specific, the clauses do not fulfill the definition of “*consent*” under Article 4(11) GDPR and therefore the rules on consent in Articles 6(1)(a) and 7 GDPR cannot apply to these clauses.<sup>13</sup>

As the declaration does not fall under the definition of freely given consent, the Investigator automatically assumed in a binary approach that these declarations must be viewed as a civil law contract. On the assumption that contracts are not regulated by the GDPR, the Investigator did not see any reason to assess these declarations under the applicable contract law. They were merely assumed to be legal.

In summary, this logic amounts to self-healing consent: any violation of Article 4(11) GDPR automatically excludes a consent clause from the consent rules and turns them into a legal contract under Article 6(1)(b).

Moreover, the Investigator rejected the views of the Article 29 WP and the EDPB on the interplay between Article 6(1)(a) and (b) GDPR and highlighted that they are non-binding,<sup>14</sup> which means that one cannot rely on a document adopted by the EDPB, of which the DPC is a full member with voting rights.

Surprisingly, the Investigator however found that Facebook should have been more transparent about the legal basis and therefore found a violation of Articles 5, 12 and 13 GDPR.

This leaves the informed reader with the impression that the Irish DPC sided with Facebook on the “consent bypass” but felt that users should be better informed about *how* users are fooled by Facebook.

- **Optional Step: Submissions by Parties on Draft Inquiry Report (9 September 2019)**

Both parties made submissions on the Draft Inquiry Report. While Facebook has engaged with the DPC for about a year, this was the first opportunity for the applicant to make any submissions on the arguments of Facebook, especially on the fact that Facebook relied on Article 6(1)(b) GDPR.

We therefore made the [requested submissions \(in German, see English Translation here\)](#) to explain to the DPC that under applicable Austrian contract law the relevant clauses and pages cannot possibly be interpreted as a contract but must be seen as (invalid) consent. But even if the declarations would be viewed as a contract, these clauses would not amount to a valid contract under the applicable Austrian civil law. Processing cannot be “*necessary for the performance of a contract*” under Article 6(1)(b) GDPR if the said contract is neither concluded nor legal.

- **Optional Step: Rejection of most submissions in Final Inquiry Report (17 April 2020)**

On 17 April 2020, the DPC issued a “Final Inquiry Report” that in essence rejected all relevant submissions by both parties and is materially a restatement of the findings in the “Draft Inquiry Report”. It took the DPC over seven months to issue this restatement.

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<sup>13</sup> Draft Report, for example in Paragraph 103.

<sup>14</sup> Draft Report, Paragraph 122 to 126

Even if this report is only advisory for Helen Dixon as the Commissioner, the report clearly suffers from a number of procedural shortcomings:

- (1) The report unlawfully rejected vast parts of our submissions because they were not “*appropriate*” to be considered, being fully aware that this is a violation of the right to be heard and to good administration under Irish, Austrian, and European law. The lack of a proper investigation of the entire complaint will likely require a second investigation under the applicable procedural rules. This is similar to the endless saga on Facebook’s EU-US data transfers. In this case, the DPC also decided to limit the investigation of the case to a “piecemeal” basis (first Safe Harbor, then the SCCs), leading to the second CJEU reference and no decision in over 7 years.
- (2) On the question of the underlying contract under Article 6(1)(b), the DPC did not analyse relevant contract law, but merely looked up the word “*contract*” in the Oxford English Dictionary.<sup>15</sup> It further found that actually investigating whether a contract could make the processing necessary for the contract would be outside of the powers of the DPC (“*ultra vires*”).<sup>16</sup> This means that as soon as a controller argues Article 6(1)(b) the DPC would have no powers to assess the legal basis for processing. In paragraphs 77 to 81 the Investigator refused any arguments on applicable Austrian contract law or Article 6(1)(b) GDPR. It is incomprehensible how a DPA should ever review whether processing is “*necessary*” for a contract without reviewing the relevant contract.
- (3) One of the arguments the DPC used to selectively<sup>17</sup> reject submissions was that they were made one year and three months after the complaint was initially submitted<sup>18</sup> – although it was only then that the DPC had given the complainant their first opportunity to make a submission. The DPC therefore held its own delays against the complainant.
- (4) Just like the “draft report”, the final report only (selectively) summarizes the arguments of the parties and then simply adds an “investigator’s view” that mostly lacks any legal reasoning. The lack of logic or legal reasoning makes it impossible to understand or challenge these findings. Overall, it amounts to an authoritarian process, in which a decision maker is not required to explain his or her decision.
- (5) In the few instances where any legal reasoning is provided, it is limited to a mere literal interpretation of the law, without remotely dealing with the other standard forms of legal interpretation. This leads to circular interpretations, such as that invalid consent does not fall under the definition of consent in Article 4(11) GDPR and must therefore be a valid contract instead.
- (6) The report indicates that the DPC had further informal exchanges with Facebook that were not made available to us or the Austrian DPA. It is therefore also difficult to qualify the procedure as impartial and fair for both parties.

#### *Exchange of letters on the confidentiality of documents (4-6 May 2020)*

On 4 May 2020, we raised a number of questions concerning the alleged “confidentiality” of the procedure and all of Facebook’s submissions that the DPC reads into Article 54(2) GDPR, but which violates § 17 of the Austrian Administrative Procedure Act (AVG). It is worth noting that Facebook has to publicly identify the legal basis it relies on under Article 13 and 14 GDPR. As the whole case centers on that question, there seems to be no issue that could legitimately be seen as a business or trade secret requiring confidentiality.

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<sup>15</sup> Footnote 135 of the Final Report on the definition of a “contract”

<sup>16</sup> Final Report, Paragraph 81

<sup>17</sup> Other submissions like the Gallup Report were relied on by the DPC – just for other elements than intended.

<sup>18</sup> Final Report, Paragraph 76



### Letter by the Irish Deputy Commissioner (6 May 2020)

On 6 May 2020, the Irish Deputy Commissioner sent a letter explaining the next steps of the procedure. The letter highlights that (1) the draft inquiry report and (2) the final inquiry report were completed, that (3) the draft decision by the DPC will follow next, (4) the final decision of the DPC thereafter, and that (5) a draft decision will be circulated among the other DPAs, which should finally lead to (6) a final decision by the Irish DPC or the Austrian DSB. This indicates that this procedure can well take a couple more years including all cooperation steps between Data Protection Authorities if there is no agreement between the involved authorities and subsequent appeals before courts by the parties.

### General order to keep documents and procedure confidential

The DPC has for a long time argued that *noyb* would be under some form of “gag order” under Irish law, and requested that “*information contained in such documents, or about such documents, should not be publicly discussed by NOYB staff or representatives on social media, or otherwise published or disclosed.*”<sup>19</sup> This would amount to a total prohibition to criticize the shortcomings of the DPC and Facebook in the public, which limits freedom of speech. No legal basis for such an order exists under Irish or Austrian law.

On 6 May 2020, the DPC tried to argue in a [letter that all documents are confidential](#), but now seemed to allow discussing these documents in public. We do not follow the view of the DPC that we are under any duty to keep these documents confidential, but we have nevertheless complied with the wishes of the DPC to prevent any accusation that our actions were the cause for further delays. We will therefore only discuss the problems we see in these procedures in public, but not make the documents themselves public.

### Confidentiality concerning the other DPAs

In its letter, the DPC surprisingly highlighted that documents may also not be shared with other DPAs, even though the DPAs fall under the same confidentiality rules under Article 54(2) as the DPC.

In previous correspondence, the DPC itself has highlighted that “*in addition to, the obligation to share ‘all relevant information’ with CSAs pursuant to Art. 60(1) GDPR, a free standing obligation exists on all SAs pursuant to Art. 57(1)(g) GDPR which provides for the sharing of information with other SAs to ensure consistency of enforcement of the GDPR.*”<sup>20</sup> It seems the DPC does not wish to comply with this obligation.

We do not think it is logical or appropriate to hold back all relevant documents from other DPAs, as it is the duty of the DPC under Article 60 GDPR to proactively share these documents with all European colleagues. After consultation with our lawyers, we have therefore decided to take the unusual step of sharing these documents with all DPAs, the EDPS, and the EDPB despite the DPC’s request to the contrary.

By doing so, we hope to overcome the lack of cooperation by the DPC that was publicly criticized by other DPAs.<sup>21</sup> We hope this will also allow other DPAs to understand the problems that data subjects are facing when confronted with the Irish authority.

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<sup>19</sup> Letter of the DPC from 20 September 2019 (File Number: “2020-10-01 ...”)

<sup>20</sup> Letter of the DPC to Facebook of 25 January 2019, page 2.

<sup>21</sup> See for example here: <https://www.politico.eu/article/data-protection-privacy-ireland-helen-dixon-gdpr/>

### **(3) Draft Report by the Commissioner (unknown)**

As indicated in the letter, the Commissioner (Helen Dixon) will now conduct her own investigation on the Facebook complaint. It is basically a duplication of the existing investigation: She will consider the Investigator's report, but is not bound by it and may even ask the Investigator to reopen the investigation. Given that most submissions made by us were not considered by the Investigator, she would have to engage in a substantial investigation of all elements that the investigator has rejected to meet the legal requirements under Irish and Austrian procedural law.

If these steps would not be taken, any negative decision (taken by the Austrian DPA under Article 60(8) GDPR) would likely be overturned by the Austrian administrative courts, as under Austrian procedural law the authority has a duty to consider all issues that were properly raised by the parties.

According to the DPC, both parties will have another chance for written submissions once Helen Dixon's draft report is issued. So far, the period to submit these documents has been one to two months. In practice, the periods were delayed because of the lack of access to documents granted by the Irish DPC. It should be noted that the parties will not get each other's submissions. As a result, the parties could theoretically submit new arguments that the other party will never be heard on. This would again violate the right to be heard and to good administration (under Irish and Austrian law as well as Article 41 CFR).

### **(4) Final Report by the Commissioner (unknown)**

After considering the second round of submissions, the DPC will issue a final decision under the Irish Data Protection Act. This would also be the "draft decision" under Article 60(3) GDPR.

### **(5) Submission of a "Draft Decision" ("without delay") under Article 60 GDPR (unknown)**

Under the cooperation procedure (also called "*one stop shop*") as laid down by Article 60 GDPR, the lead DPA shall cooperate with the other DPAs to reach a consensus and exchange all relevant information.

In this context, the lead DPA is supposed to communicate, without delay, this information to the other DPAs. The GDPR does not further define what should be interpreted as "without delay", nor does it provide for a maximum period of time.

Using the same method as the DPC to interpret the law,<sup>22</sup> we note that the Cambridge dictionary defines a delay as "*the situation in which you have to wait longer than expected for something to happen*". The explicit terms of the GDPR therefore require the DPC to communicate immediately all documents relevant to a case so that the concerned DPAs have enough time to analyse the documents, decide on their opinion for the next step, and possibly draft a reasoned objection (see hereunder).

- **Possible Step: Objections by other DPAs (4 Weeks)**

As soon as the DPC shares the draft measure with the other concerned DPAs, they have only four weeks to raise possible objections to the draft measure.

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<sup>22</sup> See above the use of the Oxford English Dictionary to assess what constitutes a "contract".

This objection should be reasoned,<sup>23</sup> which means that they will face the difficult task of digesting hundreds of pages of reports, submissions, and other documents before reaching a well-reasoned objection to the measure proposed by the DPC after several years of procedure.

- **Possible Step: Further Submission of “Draft Reports” under Article 60 GDPR**

Should at least one DPA raise an objection to the draft measure, the DPC may submit the issue to the EDPB directly (see below) or revise it and submit another draft decision. The GDPR does not foresee any clear deadline for this second draft decision to be submitted.

- **Possible Step: Further Objections by other DPAs (2 Weeks)**

DPAs will have another 2 weeks to raise an objection to the revised draft measure or decision. If the DPC does not agree with the new reasoned objection(s), the matter will be referred to the EDPB for a decision. Should the DPC accept the reasoned objection(s), the revised draft measure is adopted as a final decision.

- **Possible Step: Decision of the EDPB (2 Months and 2 Weeks)**

In case of disagreement between the DPC and the other DPAs, the case will be submitted to the EDPB. Here again, no deadline is mentioned regarding the period between the time of the disagreement and the submission to the EDPB. The EDPB will issue a decision within a maximum of 2 months and 2 weeks after the referral of the question (see Article 65 GDPR).

- **Possible Step: Application for Annulment before the CJEU (about 1,5 years)**

The EDPB decision can be challenged before the CJEU within 2 months after the decision has been notified or published. On average, the procedure before the CJEU takes 18 months.

- **Final Decision under Austrian and/or Irish Law (unknown)**

After the EDPB issues its decision, the DPC or, if the complaint is rejected (as the DPC already did partially in its report), the Austrian DPA, will have one month to adopt a final decision in line with the EDPB decision.

**(6) Appeals before the Austrian and/or Irish Courts (multiple years)**

The decisions of the DPC and the Austrian DPA may both be appealed before their respective national courts, in parallel procedures. This can take several years, taking into account possible appeals within the national court systems.

- **Possible Step: Reference to the CJEU (1,5 years)**

The courts reviewing the DPC and Austrian DPA decisions may submit a preliminary question to the CJEU, which will take another 18 months on average before the Court issues a ruling on the question.

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<sup>23</sup> See Article 4 (24) GDPR.

## (D) Identified issues in the cooperation mechanism

### (1) Causes for the delayed procedure

- **Extremely slow handling of the DPC's procedure**

Independently of all other issues, the DPC's Investigator needed about one to two years for each of the steps that were accomplished in the three cases so far, which is unacceptably slow and at odds with the requirement of an effective remedy under the GDPR and Article 41 of the CFR<sup>24</sup>. In comparison, the other DPAs will have only two to four weeks under Article 60(4) and (5) GDPR to take a decision on the whole procedure, which will by then consist of more than 1,000 pages in a foreign language that will need to be translated. This should be indicative of the duration the GDPR understands to be "*without delay*".

The DPC repeatedly made promises and set deadlines that were consistently not upheld. This seems to have frustrated the other DPAs involved, as well as the complainant. The DPC has, for example, promised in a letter of 21 November 2019 (wrongly dated 23 November 2018) on the WhatsApp complaint: "*Work on the draft inquiry report is at an advanced stage. The draft inquiry report and related materials will be provided to NOYB shortly*". In reality the documents were delivered last week – 5 months later.

- **Differences in national administrative procedure**

Irish and Austrian procedural law fully implement the GDPR by providing for a "two party" procedure. However, Ireland lacks a general administrative procedural act that would define basic questions like the scope of a procedure, the maximum duration of a procedure, rules on evidence or access to documents. As Article 60 GDPR foresees that the final decision must be issued either by the Irish DPC or the Austrian DPA (depending on the outcome), the procedure must be in line with both procedural laws.

Some examples from this procedure:

Although the complainant defines the scope of the procedure under Austrian law, the DPC took the view that it can unilaterally define the scope of the procedure. However, any elements that are not investigated would make a decision that is issued by the Austrian DPA (where the complaint is not upheld) likely invalid.

The DPC seems to take the view that all arguments and evidence must be included in the initial complaint and that later arguments or submissions can be rejected. This would mean that the complainants would have to make endless submissions, just to be sure that they have covered any possible counterargument. Under the procedural rules applied by the DPC, the controller cannot be challenged in any of their counterarguments (for example, the idea that Article 6(1)(b) could apply), whereas Austrian procedural law explicitly allows further and even novel legal or factual submissions during the procedure. If submissions are unlawfully rejected, the procedure may have to be repeated in Austria.

Under Austrian administrative procedure, an authority has to explicitly assess all preliminary questions, such as the existence of a contract under Article 6(1)(b) GDPR. In practice, it is hardly conceivable that any

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<sup>24</sup> "*Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union*". Emphasis added.

administrative authority could function without e.g. assessing ownership of properties, the legal capacity of a person or entity and alike. The DPC, however, takes the view that these issues are “*ultra vires*”.

The DPC and Facebook seem to be of the view that Facebook can rely on documents or meetings that were not disclosed to the complainant and that the DPC can decide which documents it wants to rely on. This could equally lead to an invalidity of any final decision under Austrian law.

In all of the examples above, the whole investigation may need to be repeated if a final decision is issued by the Austrian DPA and appealed, which would take another couple of years. Such situations could only be overcome by a proactive cooperation of the Austrian DPA and the Irish DPC (see below).

- **The optional “investigation” by the DPC that added two years**

The “investigation phase” is optional under the Irish Data Protection Act. While it seems reasonable to investigate cases with extended factual questions (e.g. reviewing software, hardware and alike), this case was centered on the purely legal question of the legal basis under Article 6(1) GDPR.

As the DPC is not bound by the investigator report, the procedure therefore lacks any additional protection that usually comes with a necessary agreement between a prosecutor and a decision maker (as for example is common in criminal law procedures, “two man rule”). The Commissioner also has to review all submissions herself and will invite all parties to a second round of submissions, which amounts to a duplication of the investigation already conducted. Overall, it appears that two years were wasted in an optional “investigation” that did not lead to any substantial improvement of the decision process.

- **Poor procedure management by DPC**

To our surprise, the Investigator had written a draft decision before all arguments by the parties had been exchanged: currently, the DPC writes a draft decision and *then* hears the parties.

We are not aware of any authority that would not gather all the evidence and arguments *in the first place*, before drafting a report as a *second* step. For example, a good part of the draft inquiry report circles around issues that both parties were later found to agree on anyways. At the same time, many of the arguments on Article 6(1)(b) could not possibly have been submitted before the draft report, as the relevant arguments by Facebook were not made available to the complainant.

In summary, a clear and quick exchange of positions (“ping-pong”) at the start of the procedure could have saved the parties and the DPC a lot of work, ensured a full right to be heard, and improved the quality of the decision tremendously. In the case of predominantly legal arguments, a short oral hearing of both parties would e.g. have been ideal to ensure that both parties could make their points in a focused fashion.

## **(2) Lack of Cooperation**

The DPAs in our case have not proactively cooperated to avoid foreseeable problems at an early stage.

The position of the Austrian DPA seems to be that the case is solely handled in Ireland and that the Austrian DPA will only engage once the draft decision is circulated under Article 60(3) GDPR. This may, however, be too late, if e.g. certain elements are excluded from the scope of the investigation and therefore could not even be addressed in the cooperation mechanism.

In this case, the Austrian DPA would ideally have assisted their Irish colleagues on matters such as Austrian procedural and contract law. They also would have highlighted that certain steps are required to stay in compliance with Austrian procedural law as it applies to the complainant. Had the Irish DPC been unable or unwilling to take these steps, the Austrian DPA could have taken action under Article 60(1), 61 or 66 GDPR to ensure that the procedure stays in sync.

### **(3) Inquiry Report: Rejection of EDPB and Article 29 WP Guidelines on Article 6(1)(b)**

While the DPC admittedly has the freedom to reject the common understanding of the DPAs in the Article 29 Working Papers and the EDPB Guidelines, it is nevertheless clear that this will diminish legal certainty and harm the legitimate expectations of data subjects and controllers towards the opinions adopted by the EDPB. It will also lead to delays and friction once the case reaches the European level.

### **(4) Inquiry Report: Lack of legal reasoning and methodology**

Finally, the Inquiry Report lacks any sound or stringent legal reasoning that would consider all relevant issues and properly digest them. Most arguments that were made by the complainant were not even touched upon. Where arguments made it into the report, they are hardly digested but merely listed.

The DPC only adds an “investigator’s view” that does not logically follow from the arguments, but is framed as an authoritarian ultimate truth which does not require legal reasoning.

### **(5) Slow Communication of Documents and alleged “confidentiality”**

As a basic issue, the DPC would have to swiftly exchange all documents. In the Facebook complaint, the Austrian DPA repeatedly requested documents (from December 2018 onwards), but the DPC simply did not provide them. This led to several additional months of delays.

Equally, the DPC’s attempt to limit the exchange of submissions that only contain legal arguments on the legal basis (which must in any case be made public under Article 13 and 14 GDPR) because of an alleged “confidentiality” of such arguments, can realistically only be explained by massive pressure from Facebook.<sup>25</sup> In practice, this does not only undermine the complainant’s options to publicly scrutinize the DPC, but also limits the options of other DPAs to effectively participate in the cooperation mechanism.

It almost seems like the DPC structurally excludes all other concerned authorities from the decision making process until the very last moment, when they will be overwhelmed with the thousands of pages that will have accumulated by then. Once again, the GDPR does not prevent - but rather encourages - DPAs to exchange relevant information at an earlier stage (see Article 60(3) GDPR).

## **(E) Legal actions by *noyb* to overcome this situation**

Our options to overcome any inherent structural problem of the GDPR’s cooperation mechanism are obviously limited. However, we would like to highlight the actions that we have taken and will take to ensure that data subjects’ rights are enforced under the cooperation mechanism:

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<sup>25</sup> Facebook repeatedly insisted on the confidentiality of all documents in its letters.

- **Applications with the Austrian DPA**

On 11 May 2020, we made a number of formal applications with the Austrian DPA.<sup>26</sup> These are aimed at either having the Austrian DPA decide that the Irish DPC has not “handled” the case within the meaning of Article 56 GDPR or, if the Irish DPC has, in the view of the Austrian DPA, handled the case, it asks that the Austrian DPA uses Articles 60, 61 and ultimately 66 GDPR to ensure that the DPC takes all necessary steps to handle the case appropriately. This approach is based on an understanding of mutual assistance in which DPAs also have a duty to take action if a lead authority does not handle a case “without delay” (Article 60(3) GDPR).

- **Judicial Review of the DPC procedure**

We have informed the DPC that we intend to file a Judicial Review in the named cases before the Irish High Court.<sup>27</sup> Unfortunately, the Irish Courts are currently in recess given the Corona crisis. We will make the relevant submissions as soon as the Irish Courts reopen. Despite extremely high costs, we want to use all possible options within the Irish legal system to overcome the inaction by the Irish DPC.

## **(F) Request to DPAs, the EDPB, Member States and the Commission to take action**

We request the **Irish DPC** to fundamentally streamline its procedures, ensuring that complaints under Article 77 GDPR lead to decisions within a matter of months - not years. Common sense approaches like hearing the arguments and counterarguments from both parties first and writing decisions in a second step would permit all parties to be heard, while also avoiding any unnecessary work by the DPC and ensuring decisions “without delay”. We also expect the DPC to disclose as a matter of routine all exchanges with controllers (including emails, documents, calls and meetings) to all parties to the procedure, as well as to all concerned DPAs, to ensure that no doubt can exist as to a fair and transparent procedure.

We are very much aware of the shortcomings of the cooperation mechanism in the GDPR with which DPAs have to deal. At the same time, we feel that within the existing framework **DPAs** must use the tools under Article 60, 61 and 66 GDPR to intervene when a lead supervisory authority does not take the necessary steps in a timely manner. Active cooperation during an early stage of a procedure is an avenue to avoid procedural shortcomings and inconsistencies that would lead to successful appeals at a later stage and delay the adoption of a final decision even further.

We expect all DPAs to exchange information (e.g. relevant factual and legal issues) at an early stage of the procedure, as foreseen by Article 60(3) GDPR. This would allow their colleague DPAs to timely prepare their positions on complex cross-border cases before the draft measure is shared with them. DPAs could also request additional procedural steps that may be necessary to finalize a procedure in time (for example, elements that need to be investigated only under the procedural law of the complainant).

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<sup>26</sup> See “2020-05-11 - Applications by noyb with the Austrian DPA of 11 May 2020”

<sup>27</sup> See notice that the DPC was served with on 24 February 2020.

DPA's should, at least informally (for example in a Memorandum of Understanding)<sup>28</sup> clarify timelines for each step of a cooperation mechanism and other practical questions that may not be defined in the GDPR. Such tools could at least establish a moral obligation when legal obligations are missing in the GDPR and could serve as a timeline that is used to determine if Article 66 GDPR should be applied.

DPA's should adopt interim measures or ask the **EDPB** to adopt a decision under Article 66 GDPR in order to provide an effective redress whenever investigations or decisions take too long.

**Member States** and DPA's should also streamline their procedures in order to achieve better harmonisation and facilitate cross-border cases, regarding, e.g., the role of the parties in the procedure, deadlines, translation, communication channels.

We request that the **European Commission** issue infringement procedures against:

- Any Member State with legislation that prevents the effective application of the GDPR, with overly complicated and long procedures, or without any effective remedy against delayed procedures.<sup>29</sup>
- Any Member State that statistically shows extremely low GDPR enforcement actions (e.g. no penalties in the private sector for two years, despite more than 7,125 complaints in 2019 alone)<sup>30</sup> in light of the duty of any Member State to ensure an effective enforcement of the GDPR.
- Any Member State having a national law preventing the effective participation of their DPA to the cooperation mechanism (e.g. by not adapting their national procedure to the "one-stop-shop" procedure), as well as statistically showing extremely lengthy complaint procedures under Article 77 GDPR and thereby preventing the effective application of EU law.

The Commission should also use its power under Article 67 GDPR to improve the exchange of information between DPA's and make sure there are no (legal or technical) obstacles for an effective exchange.

#### Attachments:

- 01 – Volume 1 on all documents of the three cases (DPAs only)
- 02 – [Complaints of 25 May 2018](#) (public)
- 03 – Submission by Facebook of 27 September 2018 (DPAs only)
- 04 – Draft Investigator Report of 28 June 2019 (DPAs only)
- 05 – [Submissions by noyb of 9 September 2019 \(in German and English\)](#) (public)
- 06 – [Study of 1,000 Facebook users by Gallup of 20 November 2019 \(in German and English\)](#) (public)
- 07 – Submissions by Facebook of 22 February 2019 (DPAs only)
- 08 – Letter of noyb's lawyers on the Judicial Review against the DPC of 24 February 2020 (DPAs only)
- 09 – Final Inquiry Report of 17 April 2020 (DPAs only)
- 10 – Letter on the next steps of the procedure by the DPC of 11 March 2020 (DPAs only)
- 11 – Letter concerning confidentiality by the DPC of 6 May 2020 (public)
- 12 – Applications by noyb with the Austrian DPA of 11 May 2020 (public)

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<sup>28</sup> See for example the MOU between the Irish DPC and the US Federal Trade Commission (FTC).

<sup>29</sup> See Recital 199 and 120 GDPR.

<sup>30</sup> Annual Report of the Irish DPC for 2019.