

THE HIGH COURT
JUDICIAL REVIEW

Record No. 2020 / ⁴³⁷ JR

BETWEEN:

NOYB – EUROPEAN CENTER FOR DIGITAL RIGHTS

Applicant



- AND -

THE DATA PROTECTION COMMISSION

Respondent

STATEMENT REQUIRED TO GROUND APPLICATION
FOR JUDICIAL REVIEW

- A. **NAME OF APPLICANT:** noyb – European Center for Digital Rights
- B. **ADDRESS OF APPLICANT:** Goldschlagstr. 172/4/3/2, 1140 Vienna, Austria
- C. **DESCRIPTION OF APPLICANT:** A not-for-profit organisation established pursuant to the Austrian Non-Profit Act ("VereinsG"), registered in Austria under ZVR (Registration N°): 1354838270, and which fulfils the criteria of a representative body established pursuant to Art. 80 GDPR.
- D. **RELIEFS SOUGHT:**
1. A Declaration that the Respondent has failed to carry out an investigation into the Complaints (as defined herein) within a reasonable period, as required by Art. 57 GDPR and/or s. 113 of the Data Protection Act, 2018 ("the 2018 Act");
 2. A Declaration that the Respondent not provided information and/or a draft decision to the relevant national authorities "without delay", as required by Art. 60(3) GDPR;
 3. A Declaration that the Respondent is in breach of its obligations under the GDPR and/or the Data Protection Act, 2018;

4. An Order of *mandamus* directing the Respondent to complete its investigation of the Complaints within such time as may be directed by this Honourable Court;
5. Insofar as may be necessary for the determination of the within proceedings, a reference to the Court of Justice of European Union, pursuant to Art. 267 of the Treaty on the Functioning of the European Union;
6. Such further interim, interlocutory or perpetual relief as may be required;
7. Such further or other order or relief as to this Honourable Court may seem meet;
8. Costs.

E. GROUNDS UPON WHICH JUDICIAL REVIEW IS SOUGHT:

INTRODUCTION

1. The Applicant is not-for-profit organisation and a representative body pursuant to – Art. 80 GDPR, and is registered in Vienna, Austria. It acts in the interests of data subjects across the EU and promotes the observance of and compliance with data subjects' rights pursuant to *inter alia* the GDPR, the Charter of Fundamental Rights of the European Union and member states' relevant national legislation, which in Ireland is the Data Protection Act 2018 ("**the 2018 Act**").
2. The Respondent is the competent supervisory authority within the State in respect of GDPR, pursuant to the 2018 Act. Pursuant to the relevant provisions of the GDPR and the 2018 Act, the Respondent is also the lead supervisory authority in respect of data controllers whose main establishment is within the State.
3. In the within proceedings, the Applicant claims that the Respondent has breached its obligations under the GDPR and/or the 2018 Act by failing to substantially progress and/or substantially complete the investigations into the Complaints within "a reasonable period" and/or "without delay". On this basis, the Applicant seeks the within Orders compelling the Respondent to fulfil its obligations to reach a decision in respect of each of the Complaints and, further, to communicate all necessary information to the relevant national supervisory authorities in other EU Member States.

FILING AND TRANSFER OF THE COMPLAINTS

4. Since the commencement of the GDPR, in its representative role the Applicant has filed a number of complaints with national supervisory authorities across the EU on behalf of data subjects. In particular, the Applicant has filed the following complaints ("**the Complaints**"), which are the subject of the within proceedings:

	Complainant	National Authority	Data Controller
I.	██████████	Germany (" the BfDI ")	Whatsapp Ireland Limited (" the Whatsapp Complaint ")
II.	██████████ ██████████	Belgium (" the APD/GBA ")	Facebook Ireland Limited, as operator of "Instagram" (" the Instagram Complaint ")

5. As can be seen therefrom, both Complaints were filed with their respective national supervisory authorities on 25 May, 2018, the day of entry into force of the GDPR.
6. While there are differences between the Complaints, they both raise the same essential complaint in relation to the respective Data Controllers: that each of the Data Controllers unlawfully purport to rely on the consent of data subjects, pursuant to Arts. 6(1)(a) and/or 9(2)(a) GDPR, to process the personal data, including sensitive personal data, of their users. On this basis, the Complainants allege that the Data Controllers are unlawfully processing their personal data and are in breach of the GDPR, the CFR and the 2018 Act.
7. By separate letters dated 20 August, 2018, some 87 days after their filing, the Respondent informed the Applicant that each of the Complaints had been transmitted by the respective national authorities and received by the Respondent, with the Whatsapp Complaint being assigned Case Reference Number C-18-5-6 and the Instagram Complaint Case Reference Number C-18-5-7.

INVESTIGATION OF THE COMPLAINTS BY THE RESPONDENT

8. In the letters of 20 August, 2018, the Respondent set out a brief summary of the alleged progress of the investigation into the Complaints at the stage, noting in

particular that *"the DPC has initiated a formal statutory inquiry in respect of your Complaint pursuant to Section 110(1) of the Act."* The letters further provided that the respective inquiries would examine whether or not WhatsApp Ireland Limited and/or Facebook Ireland Limited (**"the Data Controllers"**) had *"discharged [their] obligations in connection with the subject matter of [the] complaint and determine whether or not any provisions of the GDPR or the Act have been contravened"* by them. The letters stated that a copy of the relevant Complaint had been provided to the respective Data Controller.

9. In addition, the letters of 20 August, 2018 noted the Applicant's right to *"apply to either the Circuit Court or the High Court for an order which directs the DPC"* to handle the complaint in accordance with the relevant provisions of the 2018 Act should the Respondent fail to inform the Applicant within three months of the Complaint on the progress or outcome of same.
10. Further letters dated 23 November, 2018 from the Respondent purported to provide a further update on the progress of the inquiries referred to in the previous letters. These letters stated that the Respondent *"had engaged with [the Data Controllers] in relation to the on-going inquiry"*, and stated that this involved the Respondent asking the Data Controllers *"to address a number of queries relation to issues raised by [the Complaints]"* so as to *"allow the DPC establish the facts and analyse [the] Complaint in detail."* While the letter concerning the Whatsapp Complaint is silent on the issue, the letter of 23 November, 2018 concerning the Instagram Complaint noted that *"Facebook Ireland Limited as data controller for Instagram has provided responses to these queries, which are currently under review by the DPC."*
11. At this juncture, the Complaints were 182 days in being.

ALLEGATION THE APPLICANT WAS RESPONSIBLE FOR DELAY

12. While it was not mentioned in the letters of 23 November, 2018 concerning the Whatsapp Complaint, the Respondent had in or around 6 November, 2018, made a request, through the BfDI that the Applicant permit the Respondent to reveal the name of the Complainant in the Whatsapp Complaint. The Applicant had previously, on 20 September, 2018, granted such permission in respect of the Instagram Complaint, having been requested to do so by the APD/GBA.

13. In a single letter dated 3 December, 2018, the Applicant responded *inter alia* to the letters of 23 November in relation to the Complaints. In relation to the Complaints, the Applicant raised its concern about the delay in the investigation “*given the continuous violation of the fundamental rights of the complainants, the rather simple factual and legal issues before you and the lack of substantive progress within six months*”, and suggested the invocation of the urgency procedure under Art. 66 GDPR to accelerate the investigation.

14. The letter of 3 December, 2018 also noted the request made through the BfDI for the disclosure of the Complainant’s name to Whatsapp and raised a number of issues in relation to same, in particular that the request for disclosure and provision of information made of the Applicant did not apply *mutatis mutandis* to information provided by the Data Controllers. The Applicant suggested that a free exchange of information was more respectful of the principle of *audi alteram partem* and would better facilitate the investigation into the Whatsapp Complaint.

15. The Respondent responded to the Applicant’s letter of 3 December, 2018 44 days later by letter dated 16 January, 2019. That letter stated that the Respondent was

“prioritising these inquiries given the fundamental nature of the matters which have been raised in the Complaints and their systemic significance to millions of data subjects who also use social media platforms concerned. In progressing these inquiries to date, the DPC has written to [the Data Controllers] to confirm their status as data controllers comma and to establish on a preliminary basis the nature of processing operations conducted by the controllers, as well as the lawful basis for such processing, as relevant for the purposes of the inquiries. Further to this, legal analysis of the issues raised has been carried out, together with structural planning for the conduct of each inquiry.”

16. The Respondent then provided its reasons for the continuing delay in providing a decision on the Complaints, stating:

“However such inquiries cannot be conducted in a peremptory fashion and must be conducted, amongst other things, in accordance with the statutory requirements applicable under Irish national legislation implementing the GDPR - the Data Protection Act 2018 - as well as with Irish common law principles on natural and constitutional justice and fair procedures, and in accordance with the right to good administration under the Charter of Fundamental Rights of the EU. Updates on the

progress of the inquiries have been provided to you by way of correspondence from the DPC of 20 August, 2018 and 23 November, 2018 and we will continue to provide such updates in accordance with our statutory obligations."

17. The Respondent then seeks to attribute responsibility for the delay in the investigation to the Applicant in the following terms:

"However, as further detailed below, at this juncture in order to be able to progress the Complaints further in accordance with its legal obligations described above, the DPC needs to share the identity of the individual data subject in respect of each complaint with the respective controllers. The DPC is anxious to progress these complaints as expeditiously as possible but the failure on your part so far to confirm agreement the same is now holding up the progression of the inquiries. We have addressed these issues further below."

18. The Respondent also replied, in the letter of 16 January, 2019, regarding the disclosure of the identification of the Complainants, stating that the Applicant's arguments from the letter of 3 December, 2018 amount to a "conflation" of two legal issues which are "entirely separate and distinct". The letter states that the Respondent considers "that the Complaints raise important and complex issues which impact upon very large volumes of data subjects and the DPC is concerned to move ahead with its inquiries into the Complaints in an efficient and fulsome manner" before calling on the Applicant to consent to the sharing of the Complainants' identifying information.

19. Having received and considered the Respondent's arguments, by phone call in or around 23-25 January, 2019 and confirmed by emails of 25 January, 2019, the Applicant consented to the disclosure of the relevant information concerning the Complainants. Notwithstanding the decision ultimately to disclose the information, the Applicant did not cause in fact any delay in the investigations. In this regard, the Applicant relies on the following:

- a. The Applicant had previously, on 20 September, 2018, agreed to the disclosure of the details of the complainant in the Instagram Complaint;
- b. The letter of 6 November, 2018 from the BfDI was the first occasion the Applicant knew that disclosure was also sought in respect of the Whatsapp Complaint;

- c. The letters of 23 November, 2018 to the Applicant did not refer to the disclosure in respect of the Whatsapp Complaint as a requirement for progressing same, suggesting that it was not central to the investigation;
- d. The letters of 23 November, 2018 suggest that the Respondent was continuing unabated in the investigation of the Complaints. In this regard, the letter in relation to the Whatsapp Complaint stated that the Respondent was waiting on information from Whatsapp, while the letter in relation to the Instagram Complaint stated that Facebook Ireland Limited had provided information that was then being examined by the Respondent. It is difficult to understand how these actions, in particular the Respondent's review of the Facebook documents, were or could be in any way impeded by the Applicant's decision to query the necessity to provide the Complainants' personal data to the Data Controllers;
- e. Finally, the Applicant's sole function is to protect the Complainants' fundamental rights under the CFR and their rights under the GDPR and the 2018 Act. The Applicant is therefore under an obligation to protect those rights, including by querying the necessity for further disclosure of the Complainants' personal data for onward processing by the Data Controllers. This is particularly acute where the Applicant is expressly concerned such disclosure would work an unfairness against the Complainants' interests, such as in the present circumstances where the data controllers were permitted to assert "business secrecy" as a basis for refusing to disclose information, but the Complainants were not so permitted. On this basis, the Applicant was entitled to a fulsome explanation as to the necessity of such disclosure before agreeing to same, which explanation only came after some 44 days following the request being challenged by the Applicant.

20. Notwithstanding the above, even if the Applicant's initial refusal to disclose that information is proven to have caused a delay, such delay can only have affected the investigation into the Whatsapp Complaint, and can only be considered at maximum to run from the date of the initial request, being 6 November, 2018, to the date of consent, being 25 January, 2019, a total period of 80 days. Further, the Respondent took 44 days to respond to the Applicant's letter of 3 December, 2018 for which period the Applicant ought not properly be considered responsible. On this basis, the maximum period for which the Applicant might be held to have

delayed is only 36 days. At the time of provision of consent to the disclosures on 25 January, 2019, the Complaints had been pending for 249 days.

PROGRESS OF THE INVESTIGATION FEBRUARY 2019 TO MAY 2020

21. Thereafter, by email dated 26 February, 2019 the Respondent confirmed that a response had been received on 22 February, 2019 in relation to *inter alia* the Instagram Complaint; however, and notwithstanding that it was received 273 days after its filing, certain material therein was a subject to a claim of confidentiality, which the Respondent stated it would now have to consider. The email stated that no response had been received in relation to the WhatsApp Complaint but that same was "*expected in early March.*"
22. In a letter dated 27 February, 2019 the Applicant took issue with the claims of confidentiality asserted in respect of the Instagram Complaint and set out therein five bases on which the Respondent ought not to spend any significant time considering same.
23. On foot of a reminder email on 28 March, 2019, the Respondent replied to the Applicant by letter of the same date, setting out the procedure that would be adopted by the Respondent in relation to the progress of each of the three inquiries. The steps in this procedure may be summarised as follows:
 - (i) Receipt by the investigator of submissions from the Data Controller;
 - (ii) The investigator prepares a draft inquiry report, which will:
 - (a.) Identify the facts as well as the issues raised by the Complaint;
 - (b.) Identify the investigator's understanding of the issues and the position of the parties in relation to same;
 - (c.) Specify whether the investigator considers that the Complaint discloses an infringement of the GDPR and/or the 2018 Act; and
 - (d.) Identify the factual basis for such conclusions;
 - (iii) The draft inquiry report will then be furnished to the Complainant and the Data Controller, who will be invited to make submissions within a defined period of time;
 - (iv) The investigator will then consider these submissions and finalise the inquiry report;

- (v) The inquiry report will then be submitted to a nominated decision-maker within the Respondent;
- (vi) The decision-maker will then consider the inquiry report and all the information and materials furnished; and
 - a. If decision-maker so wishes he/she may invite the parties to make further submissions before the draft decision is made and circulated;
 - b. In which instance, the decisionmaker can determine the scope of a certain matter or any other submissions;
 - c. Whereafter the decision-maker will consider the submissions;
- (vii) If no further submissions are sought, or after consideration of same, the decision-maker will then proceed to make a "draft decision" under Section 113 of the 2018 Act and Article 60 GDPR;
- (viii) The decision-maker will then invite further submissions from the parties on the "draft decision";
- (ix) The decision-maker will then circulate the "draft decision" to the relevant national authorities pursuant to Art. 60 GDPR;
- (x) The decisionmaker will then write separately to each of the parties outlining the procedures to be adopted in relation to the Art. 60 GDPR procedures.

24. As can be seen therefrom, the Respondent does not specify the "defined" time limits in respect of submissions in respect of the draft inquiry report, nor does it specify whether it imposes any time limits for responses to other requests for information and/or submissions. Further, this procedure fails to specify the steps taken *prior to* the preparation of a draft inquiry report, in the initial inquiry stage, in particular as to whether there were any time limits imposed for the provision of information by the Data Controllers during that period.

25. In this regard, the letter of 28 March, 2019 sets out what the Respondent considered to be the relevant "issues" raised by each of the Complaints. However, in reality this amounts simply to a summary of the content of the Complaints and does not disclose whether or what investigative steps had been taken in the 307 days since the submission of the Complaints up to the issue of that letter.

26. The Applicant responded to this letter on 19 April, 2019 and took issue with many of the matters set out therein, in particular as to the procedure adopted by the

Respondent in its handling of the Complaints. By email of 24 April, 2019, the Respondent acknowledged receipt of the Applicant's email of 19 April.

27. After this juncture, however, and despite the assurances previously given by the Respondent, until receipt of the Respondent's letter dated 23 March, 2020 no further substantive correspondence from the Respondent was received by the Applicant in relation to the Complaints, nor were any substantive updates on the progress of the investigations and/or inquiries provided by the Respondent.
28. The Applicant was informed by the BfDI on 13 June, 2019, 384 days after filing the Complaints, that the Respondent had informed the BfDI in general terms about the procedure and had stated that the draft report in the Whatsapp Complaint was expected within four to six weeks. Notwithstanding same, no such draft report was produced by the Respondent in that timeframe, either to the Applicant or the BfDI. In addition, the BfDI informed the Applicant on 21 November 2019 that the Respondent was unresponsive to a request made by it to share the information received in the Whatsapp Complaint.
29. On foot of the Respondent's continuing failure provide the outcome or to provide any substantive update on the investigation into the Complaints, the Solicitors for the Applicant wrote on 1 November, 2019 highlighting the Respondent's failure to properly carry out its obligations under GDPR and the 2018 Act.
30. By letter dated 15 November, 2019 the Respondent purported to provide an update in relation to the Instagram Complaint. However, in reality the contents of this letter do little more repeat the letter of 23 November, 2018, received almost twelve months prior.
31. Notwithstanding this "update", the Respondent did not provide any further information as to the expected timeline or other actions that may be taken by the Respondent in order to comply with its obligations pursuant to the GDPR and the 2018 Act.
32. As a result, by letter dated 24 February, 2020 the Solicitors for the Applicant again wrote to the Respondent noting the passage of some 21 months since the submission of the Complaints and the failure of the Respondent to carry out its duties and obligations pursuant to the GDPR and 2018 Act within a reasonable period. In particular, that letter set out that the 21 months already taken,

purportedly in investigation of the Complaints, was in and of itself an unreasonable period to take in reaching a final decision. Further, that letter notes that the procedure adopted by the Respondent is unwieldy and/or unsuitable for this purpose and is contributing to and/or causing significant delays in the progressing and/or completion of the investigations in relation to the Complaints.

33. In the circumstances, the letter called upon the Respondent to provide a full and detailed explanation of the steps taken by it in relation to the Complaints, including an explanation for the significant and unreasonable delay that has occurred to date, and requested a full and detailed explanation of the steps to be taken by the Respondent in relation to the Complaints, including a projected timeline for the completion of the investigations.
34. The Respondent acknowledged receipt of the letter by email dated on 26 February, 2020, stating that the Respondent was *"considering all of the matters you have raised in your letters, and will respond in due course."*
35. Further to the above, the Applicant was informed by the APD on 12 March, 2020 that the APD had received a letter from the Respondent stating that the Respondent was in the process of preparing the draft inquiry report in relation to the Instagram Complaint. This letter referred to a previous letter of 28 March, 2019, which the Applicant understands was the only previous update provided by the Respondent to the APD.
36. By letter dated 23 March, 2020, the Respondent replied to the Applicant's Solicitors' letter of 24 February, 2020, which letter stated that the draft Inquiry Reports in relation to the Whatsapp and Instagram Complaints were "anticipated" to be delivered by 24 April, 2020 and 31 April [sic], 2020, respectively. In that letter the Respondent rejected allegations of delay in investigating and providing an outcome into the Complaints, again relying on the alleged delay on the part of the Applicant in consenting to disclosure of the Complainants' names in relation to same. Finally, the letter relies on and reiterates the Respondent's intention to follow the procedure set out in its letter of 11 March in relation to a different complaint, which procedure very closely mirrors the Applicant's understanding of same, derived from previous correspondence, as set out in paragraph 23 hereof.

37. The letter of 23 March marked 668 days since the filing of the Complaints. At the "anticipated" date of delivery of the respective draft inquiry reports, the Whatsapp and Instagram Complaints were 700 and 707 days in being.
38. The draft inquiry reports ("**the Draft Reports**") were not delivered by the "target dates" set by the Respondent, but an advance copy was delivered to the Applicant by email on 20 May, 2020, 728 days after the filing of the Complaints. Notwithstanding that, as was highlighted in an email of 25 April, 2019 from the BfDI and a letter of 16 May 2019 from the APD, all formal communication has to be done through the authority where the complaint was filed and under their procedural rules, the Applicant believes that, to date, neither the German nor the Belgian DPA have formally served the Complainant with the Report under the applicable Belgian and German procedural rules and in German and French.
39. Each of the Draft Reports sets out a summary of the investigation carried out to date in respect of the Complaints and sets out the anticipated future actions in relation to same. These actions correspond with those set out at para. 23 above, as deduced by the Applicant from previous engagement with the Respondent. Neither of the Draft Reports provides any indication of the timeline for completion of the investigation and/or delivery of a decision, nor for the circulation of a draft decision pursuant to Art. 60 GDPR.
40. In addition to the Draft Reports, the Respondent sent a letter to the Applicant's solicitors on 20 May, 2020, by way of response to the letter of 24 February, 2020, claiming *inter alia* that delivery of the Draft Reports addressed the concerns of the Applicant, as set out in the letter from its solicitors. In addition, the Respondent's letter of 20 May, 2020 claimed that the Respondent's letters of 11 March and 23 March had previously addressed the concerns of the Applicant.
41. Unfortunately, this is not the case. In particular, the Respondent has failed repeatedly in its correspondence and in both the Draft Reports to provide any or any adequate explanation for the near-2-year delay in delivery of the preliminary report. The Respondent also continues in its refusal to provide any estimated period for the conclusion of the investigation and delivery of the draft decision under Art. 60 GDPR, which would allow the Applicant to assess the reasonableness of same. In the circumstances, the Respondent remains in breach of its obligations under the Act and the GDPR in relation to delivery of its decision in respect of the Complaints.

42. In response to the delivery of the Draft Reports and the Respondent's letter of 20 May, 2020, on 25 May, 2020 the Applicant posted an open letter on its website, www.noyb.eu, addressed to all European data protection authorities (including the Respondent), the European Data Protection Board, the European Commission and the European Parliament, detailing the repeated and continuing failures on the part of the Respondent in relation to its handling of *inter alia* the Complaints. While the letter also addresses the substance of the Complaints, with which the Court is not currently engaged, this letter specifically highlights the extreme and continuing delay in the processing of and investigation into the Complaints, noting that a final decision may not be reached for up to ten years, which period is wholly unreasonable in all the circumstances. Further, this letter also highlights the importance of European cooperation in relation to complaints which concern the rights of data subjects across Europe, as in the instance Complaints, thus further underscoring the importance of furnishing a draft decision in relation to cross-border complaints under Art. 60 GDPR "without delay", which the Respondent has failed to do.
43. The Applicant's solicitors wrote to the Respondent on 3 June, 2020 drawing the Respondent's attention to the Applicant's open letter and stating that it was clear from the content of the recent exchanges that the Respondent had failed to address the Applicant's concerns and continued in its failure to meet its obligations under the Act and the GDPR. The Respondent replied by letter dated 4 June, 2020 and asked to be informed of any litigation brought by the Applicant in respect of the Complaints and further asked that all correspondence between the parties be brought to the attention of the Court in relation to an application for leave.

GROUND'S FOR REVIEW OF RESPONDENT'S ACTIONS AND INACTIONS

44. The Respondent is the lead supervisor for investigation of the Complaints, pursuant to Art. 56 GDPR, as it is the supervisory authority of the Data Controllers' main establishments, located in the State. It was on this basis that the Complaints were transmitted to and received by the Respondent from the German and Belgian national authorities, as appears from the letters of 20 August, 2018.
45. As a result of same, pursuant to the relevant provisions of the GDPR, in particular Art. 57 thereof, the Respondent must investigate the Complaints and is under an

obligation to "inform the complainant of the progress and the outcome of the investigation within a reasonable period". In this regard, both the GDPR and the 2018 Act impose an obligation on the Respondent to inform the Complainants of the "progress or outcome" of the Complaints "within three months".

46. Accordingly, where an outcome is not provided within that period, there is an obligation to provide reasons why same is not possible.
47. In this regard, the Applicant accepts that in relation to complaints raising very complex issues, such as those involving matters of foreign surveillance law, and/or alleging multiple infringements for consideration by the Respondent, the Respondent may reasonably extend an investigation beyond the three-month period.
48. In this instance, however, there are no such issues in relation to the substance of the complaint and, as set out in the Applicant's letter of 3 December, 2018, both Complaints raise simple factual and legal issues for the Respondent's consideration: whether the Data Controllers rely on consent for the processing of the Complainants' data. Although the issue in the Complaints is a simple one, the Applicant accepts that it is unlikely that the Complaints would be capable of resolution within the ordinary three month period.
49. However, the unreasonable nature of the Respondent's actions and procedures adopted in relation to the handling of the Complaints is demonstrated by the fact that it was not until the letters of 28 March, 2019, some 307 days following their filing, that the Respondent even summarised the content of the Complaints. The requirement for such a period of time to perform this task must be considered wholly unreasonable in any circumstance.
50. As set out above, from the "update" in March 2019 until receipt of the letter of 23 March, 2020 no substantive update nor reasons for the continuing delay were provided to the Applicant, whether through the German or Belgian authorities or otherwise. On 13 June, 2019, the Respondent informed the German authority that a draft report was expected within six weeks. No report was produced within that timeframe. By its letter of 23 March, 2020, 668 days since the filing of the Complaints, the Respondent stated its "anticipation" of the reports within 39 days thereafter, which target was not achieved. Ultimately, the Respondent produced the Draft Reports on 20 May, 2020, 728 days after the filing of the Complaints.

51. Further to the unreasonable period taken to produce the Draft Reports, the Respondent has failed and/or refused to outline a timetable for completion of the investigation and publication to the parties of an outcome. In addition, the procedure outlined by the Respondent for the future conduct of the investigation and/or inquiry is demonstrably unwieldy, inefficient and fails to acknowledge the simplicity of the issue raised in the Complaints. There is no clear basis upon which that procedure could not produce further, unreasonable delays, considering the time taken to date. In this regard, it is notable that it took the Respondent 728 days to produce draft inquiry reports in respect of the Complaints.
52. Even following the production of such the Draft Reports, under the Respondent's procedure, this simply heralds another round of "engagement" with the parties, following which the procedure then requires further drafts and further engagement before any decision would be taken by the Respondent. All the while, the Data Controllers may continue to infringe the rights of the Complainants, free from the protection that the Respondent ought to be providing by performing its duties.
53. In the first instance, where the Complaints allege breaches of specific provisions of the GDPR and infer infringements of the Complainants' and other citizens' rights under the CFR, a delay of in excess of 2 years, and continuing, without a result is plainly unreasonable. Second, a period of 728 days to complete only the first step in the procedure is unreasonable. Third, the continuing failure and refusal by the Respondent to provide a timeline for completion of the remaining steps in the investigation and delivery of the outcome is also demonstrably unreasonable, particularly as it prevents the Applicant from assessing the reasonableness of that timeline. Finally, in circumstances where the Complaints concern infringements of the GDPR which would affect large numbers of EU citizens' data rights, an investigation such as that being conducted by the Respondent, and envisaged by the procedure put forward, is wholly unreasonable.
54. In addition to the breach by the Respondent of its obligations to produce an outcome within "a reasonable period" pursuant to Art. 57 GDPR, the Respondent is in breach of the peculiar obligations imposed on the Respondent as the lead supervisory authority in relation to the Complaints. In this regard, the obligations are governed by *inter alia* the provisions of Art. 60 GDPR and Pt. 5, Ch. 2 of the 2018 Act, in which regard, Art. 60(3) GDPR mandates that:

"The lead supervisory authority shall, without delay, communicate the relevant information on the matter to the other supervisory authorities concerned. It shall without delay submit a draft decision to the other supervisory authorities concerned for their opinion and take due account of their views"

55. On this basis, a national supervisory authority's ordinary obligation to complete an investigation within a reasonable period is augmented where, as here, it is the lead supervisory authority. In such cases, it must also meet the heightened obligation that it circulate a draft decision to the relevant referring national supervisory authorities without delay.
56. As appears from the facts set out above, the Belgian and German authorities continue to await any substantive communication or interaction on the outcome of the investigation, in excess of 18 months post-transmission of the Complaints. This is notwithstanding the statement made on behalf of the Respondent to the BfDI that a draft report in the Whatsapp Complaint was due within six weeks of 13 June, 2019.
57. Further, the Respondent has failed to provide a draft decision, or any conclusions relating to the Complaints, or either of them, to the relevant national supervisory authorities since transmission over 18 months ago, which is a significant delay in all the circumstances.
58. As also appears from the facts set out above, the Respondent has also failed to share information with the relevant national authorities, notwithstanding that same was requested by the BfDI, in breach of its obligations pursuant to Art. 60(1) and (3) GDPR.
59. On the basis of the foregoing, the Applicants seek the reliefs set out in the Notice of Motion herein.

F. NAME AND REGISTERED ADDRESS OF THE APPLICANT:

NAME OF APPLICANT: noyb – European Center for Digital Rights

REGISTERED ADDRESS: Goldschlagstr. 172/4/3/2, 1140 Vienna, Austria

Dated: 30 June 2020.

Signed:



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TO: The Principal Registrar
Central Office
The High Court
Four Courts
Inns Quay
Dublin 7

AND TO: The Data Protection Commission
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THE HIGH COURT
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File Ref: 19220