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REFERENCE **LIBE Hearing on Schrems II/GDPR Resolutions on 17.03.2021**
CONCERNING Letters from Ms Helen Dixon (DPC) dated 09.02. and 12.03.2021

Dear Ladies and Gentlemen,
Dear Members of Parliament,

My colleague Dr. Andrea Jelinek has brought to my attention that you, as shadow rapporteur of the LIBE Committee on the topics of Schrems II and the GDPR evaluation, will hold a hearing tomorrow with Ms. Dixon, Dr. Jelinek and Mr. Schrems. In this context, I have also become aware of Ms Dixon's letters to the LIBE Committee.

Unfortunately, I have noticed that in these letters Ms Dixon also makes comments on other European supervisory authorities and the European Data Protection Board (EDPB). In doing so Ms Dixon makes statements, which on the one hand reflect her personal views in a very one-sided manner and on the other hand often leave her isolated in the circle of European data protection supervisory authorities. Since she addresses issues that also concern my authority, I would like to go into a few points as follows and inform you of my position in this regard in order to give you a more balanced basis of information for tomorrow's meeting.

1. Allegation that the Data Protection Authority of Hamburg (Hamburgische Landesdatenschutzbeauftragter) had received complaints by Mr Schrems prior to the entry into force of the General Data Protection Regulation (GDPR) but did not pursue them further. (Letter dated 09.02.2021, p. 6)

It seems questionable whether the consideration of the period prior to the entry into force of the GDPR is relevant to the question of whether the GDPR has been implemented sufficiently.

Nevertheless, I would like to clarify that – as far as I know – the colleagues in Hamburg, both before and after the entry into force of the GDPR, regularly dealt with questions from citizens about suspected data protection violations by Facebook and handled them in principle.

In addition, the BfDI has been dealing with suspected violations of data protection by Facebook's subsidiary WhatsApp for many years. Even before the GDPR came into force, a complaint against the Federal Network Agency in this regard had been brought, which was the only possible measure for the BfDI under the law at the time.

Finally, I would like to point out that after the entry into force of the GDPR in 2018, the BfDI alone sent more than 50 complaints about WhatsApp to the Irish data protection supervisory authority (DPC), none of which has been closed to date.

2. Allegation that, apart from the DPC, no supervisory authority had taken measures to respond to the requirements of the Schrems II ruling of the European Court of Justice (CJEU). (Letter dated 09.02.2021, p. 6 and letter dates 12.03.2021, p. 4)

This statement by Ms Dixon is simply wrong.

On 8 October 2020, i.e. shortly after the Schrems II ruling, the BfDI wrote an information letter on the consequences of the ruling to the bodies under its supervision. The BfDI also published this information transparently on its website. In addition to a detailed explanation of the consequences of the ruling for international data traffic, the letter explicitly points out, among other things, that international data transfers will be subject to reviews and the transfer instruments used will have to be adapted to the requirements resulting from the ruling if necessary. The letter also announced audits on this subject.

Parallel to this, other German supervisory authorities have already started investigating individual complaints based on the Schrems II ruling. In addition, a task force of the German supervisory authorities is working on sample questionnaires that concern certain case constellations of international data traffic. These questionnaires are supposed to be sent to various controllers independently of individual complaints and, if necessary, will form the basis for further audits.

3. Allegation that other supervisory authorities would also have to submit draft decisions pursuant to Article 60 GDPR on other areas in which data processing that is risky in terms of data protection law takes place (as is the case with social media providers). However, allegedly this would not happen either. (Letter of 12.03.2021, p. 3)

The focus of the supervisory authority's procedures depends on against what citizens direct their complaints. Due to the prevalence and number of users in the area of social media, it is therefore not surprising that a large part of the complaints come from this area.

Ms Dixon repeatedly emphasizes the resulting lead responsibility of the DPC. She takes great care to be closely involved via the EDPB in any decisions taken by other EU supervisory authorities in these areas and thus to a certain extent prevents any initiatives by other supervisory authorities. Any lack of draft decisions is therefore primarily due to the DPC's extremely slow case handling, which falls significantly behind the case handling progress of most EU supervisors – especially German supervisors.

The following figures provide evidence on this. As of 31.12.2020, Ireland had the European lead supervision in 196 proceedings. However, the DPC had concluded only four proceedings by a final decision. In comparison, the German supervisory authorities alone, with lead supervision in 176 proceedings, had already concluded 52 proceedings with a final decision by the same date.

Even if the degree of complexity and data protection significance of the procedures under German lead supervision does not reach that of the procedures under Irish lead supervision, one cannot deny a clear backlog in the processing of procedures by the Irish supervisory authority cannot. This also applies if one considers that the DPC has concluded several procedures by reaching an amicable solution with the parties, which happens without involving the concerned supervisory authorities and lies outside the EDPS's decision-making procedures. By its very nature, this mainly concerns simple cases such as requests for deletion or access.

Official statistics of the EDPB Secretariat as of 1 March 2021 also support this picture. They show only four current or completed draft decisions of the Irish supervisory authority, while the number of draft decisions by all German supervisory authorities is 78.

4. Allegation that the German concept of fines had been rejected by courts and should therefore not be praised in the resolution. (Letter dated 12.03.2021, p. 4)

This statement is also incorrect.

In fact only one court (LG Bonn) has so far commented on the German concept of fines, but it has by no means overturned it. The court has only indirectly commented on it and given the data protection authorities important advice on the calculation method. The court based the reduction of the fine imposed by the BfDI on a different assessment of the gravity of the violation. In all other legal questions, the court fully confirmed the BfDI's opinion.

In this respect, I would like to emphasise that the German concept of fines, despite the need for changes (the German supervisory authorities are continuously evaluating the concept), has contributed to the standardisation and transparency of the practice of fines within Germany and in this respect has proven itself as a fundamental instrument.

The DPC is also aware of all this from the BfDI's report to the EDPB, so it is incomprehensible why Ms Dixon is making the present statements.

Allegation that other supervisory authorities in the EDPB would not follow the procedure/approach of Articles 60 and 65 GDPR; in particular, how to make a relevant and reasoned objection to a draft decision. Allegedly, the EDPB had therefore rejected the vast majority of objections to the DPC's draft decision [on Twitter]. (Letter dated 12.03.2021, p. 5)

In fact, the EDPB rejected the majority of objections on the aforementioned decision. However, this was only due to formal reasons (among other things, in order to meet the statutory deadlines), as it was the first case ever in which the EDPB had to conduct such procedure. Accordingly, the EDPB had not yet developed a uniform position on the underlying problems, in particular on the question of whether the scope of the investigation could also be the subject of objections.

Ms Dixon neglects to mention that it was precisely this case that was decisive for the EDPB to start developing guidelines immediately afterwards, which, among other things, address and regulate the issues that became known. However, the EDPB's position on some of the procedural issues at stake at the last plenary in March has shown that it is rather the Irish view on key procedural concepts that could not prevail, as the guidelines were adopted contrary to the position of the DPC by a large majority.

I hope to have provided you with a little further background information for tomorrow's discussion and I will be happy to answer any further questions as the proceedings continue.

With kind regards

[Signature]

Ulrich Kelber