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To the

Members of the
Committee on Civil Liberties,
Justice and Home Affairs

Vienna, 26.2.2021

Subject: Letter of Helen Dixon on the Draft Resolution on the CJEU judgment in C-311/18

Dear Chair and Members of the LIBE Committee,

It was brought to my attention that the Irish Data Protection Commissioner, Helen Dixon, has sent you a letter on 9.2.2021, calling into question the contents of your Draft Resolution on the Ruling of the CJEU in C-311/18 of 13.1.2021.

As I was asked to comment on the criticism by the Irish Data Protection Commission (DPC) in relation to the LIBE Committee's resolution in a recent letter, I would like to quickly summarize the most crucial elements. While the DPC is right in pointing out certain elements in its defense, it unfortunately greatly departs from objective facts in other parts of its letter:

- **ON THE ISSUE OF COURT COSTS**

The DPC is correct that it did not seek to collect costs from me and agreed not to do so at the beginning of the case. However, it also refused to pay my costs (estimated at multiple million Euros, given the high legal fees in Ireland) despite filing a case against me as a defendant and losing this case. The intention of the DPC to not pay for my legal fees was quickly resolved by the Irish High Court, which decided that the DPC must cover said costs. I therefore personally think that this question need not be mentioned in a resolution by the LIBE Committee, as it was taken care of by the Irish national legal system.

- **ON THE INACTION OF OTHER DPAS**

I further agree with the DPC, when it mentions that other national Supervisory Authorities have not taken any proactive steps on EU-US data transfers and the enforcement of the CJEU rulings in *Schrems I* and *Schrems II*, which has already been highlighted in the Draft Resolution.

Nevertheless, I would like to mention that it was not the DPC's initiative that led to the procedures in Ireland, but instead our constant pressure. There was at no time any active attempt by the DPC to progress my complaint with due diligence and speed, which led to a procedure that lasted 7.5 years.

- **ON THE NEED FOR A REFERENCE TO THE CJEU**

The CJEU has no role in interpreting obvious legal provisions, especially when the CJEU has already ruled once on this very matter. There is no basis for referring to the CJEU simply because a case is "important" or has major political implications. The sole test for whether a reference is justified under the Treaties is (A) if EU law requires interpretation or (B) when it comes to matters of validity of EU law.

The DPC was the only party that argued that the "*Schrems II*" litigation was in fact a matter of validity of the SCC Decision. No other party before the CJEU (neither Facebook, the European Commission, the Member States nor myself) had any reason to believe that the SCC Decision was invalid. The most unlikely group of stakeholders all unanimously agreed that Article 4 of the SCC Decision placed the solution in the hands of the DPC. Only the DPC ignored that fact for 7.5 years.

The DPC is correct in highlighting that the Irish Courts have expressed support for its argument that if it does not wish to exercise Article 4 of the SCC Decision, the Irish Courts cannot force it to do so. This approach seems rooted in Irish legal culture, a limited standard of review, a reluctance to order independent bodies to take certain steps, and simply an error in the judgment by the High Court. However, the CJEU has clearly reversed these holdings, and held that the DPC was legally obliged to exercise its powers under Article 4 of the SCC Decision – just as was argued before the DPC in 2013 and again in 2015.

Overall, the DPC's legal strategy is painfully obvious: It pretended for five years that the solution in the law did not exist – just to send the case back to the CJEU. This strategy "paid off" when the aim was either to get further clarifications from the CJEU, or to kick the can down the road. Nevertheless, this approach did not get us an inch closer to a final decision – even 7.5 years after the original complaint that led to *Schrems I* and *Schrems II* were filed.

In further detail:

- Contrary to the DPC's "basic logic" on page 3 of the letter, there was no need to clarify the inadequacy of US law before the CJEU for a second time, as the DPC had already made the finding that US law is inadequate in a 2016 draft decision based on the *Schrems I* judgment. This finding on US law formed the basis of the reference procedure.
- As there was a clear solution to stop transfers under Article 4 of the SCC Decision, which was further clarified by the European Commission in Decision 2016/2297 after the *Schrems I* judgment, it was clear that the DPC was not "bound to bring" this case, contrary to the claims in the first bullet point on page 4 of its letter.

- Consequently, there was also no "structural deficiencies" as claimed in the second bullet point on page 4. These alleged "structural deficiencies" were a strategic Trojan horse to send the case back to Luxembourg for a number of years. None of the 16 other parties before the CJEU saw such "structural deficiencies", and neither did the CJEU.
- The DPC did not "invite" us to join the procedure, as claimed in the first bullet point on page 5, but instead named me as a defendant and sued me. The case was filed against the controller (Facebook Ireland Ltd) and the data subject (me), when a complaint before a Supervisory Authority should be free of charge for the data subject and a lawsuit by the Supervisory Authority against the data subject is not foreseen in the GDPR or in Irish law. The euphemism ("invite") is just further stretched to the absurd, when the DPC in other contexts argued that we "chose" to participate in this case, when we could have simply refrained from participating.
- In relation to the other arguments on page 5, it is important to note that the necessity of the reference was never fully reviewed by the Irish courts, as the following three approaches overlapped in this case:
    - First, the Irish High Court only checked if the view of the DPC was "well-founded", instead of whether the view was legally correct. The DPC argued that a "well-founded" view alone should allow it direct access to the CJEU (citing § 65 of *Schrems I*, instead of the requirements of "necessity" for a reference under Article 267 of the TFEU).
    - Second, the High Court reviewed if a reference was necessary to determine the case before the High Court and not if the reference was necessary to determine the underlying complaints procedure before the DPC.
    - Third, the CJEU usually relies on the national courts in determining that a reference is actually necessary and did not engage in a deeper analysis.

  The result of this was that there was no review at any stage, which fully assessed whether the reference was necessary within the meaning of Article 267 TFEU to determine the complaint before the DPC. Multiple parties before the CJEU have brought this up. As the rules of the CJEU procedure require keeping the submissions confidential, I would refer the LIBE Committee to the files that the Legal Service of the Parliament received during the procedure.
- Furthermore, it is deceptive to suggest that the invalidation of the Privacy Shield Decision by the CJEU "rested in large part, on facts established by the Irish High Court", as the DPC suggested in the first bullet point of page 6. In reality, most of these facts were provided by our witness (Mrs. Ashly Gorski of the ACLU) and further argued before the CJEU by my team. The DPC had no substantial role in bringing down the "Privacy Shield". On the contrary, it has tried to stay away from this topic wherever possible, just like other parties before the CJEU.

In summary I strongly disagree that the Draft Resolution by the LIBE Committee was in any way "inaccurate or incomplete", as the DPC suggests in its letter.

- **LACK OF ENFOCEMENT IN IRELAND**

Finally, I very much welcome the LIBE Committee's conclusions on the lack of enforcement by the Irish DPC. While the various (well chosen) numbers the DPC submitted to the LIBE Committee sounded impressive, they do nothing but camouflage the basic issue: The DPC has a comparably large budget, (which Ireland has continuously increased – in contrast to other Member States), but does not deliver results that match the resources it has or the requirements of the GDPR.

Some examples:

- In 2019 the Irish DPA (DPC) and Spanish DPA (AEPD) had similar budgets (around € 15.2 and € 14.2 million respectively). The DPC had a further increase in its budget since then (€16.9 million in 2020 and €19.1 million in 2021), but there are so far only three known GDPR decisions by the DPC against private entities (and eight against public institutions)[1] – the AEPD lists 600 decisions to date and usually publishes multiple binding decisions per day.[2]
- The DPC recently gave an interview with Reuters, where she took the view that the DPC is "*building momentum*" as it plans to issue just 6 or 7 decisions in 2021.[3]
- The Austrian DPA (DSB) reported more than 828 formal binding decisions on GDPR complaints by individuals under Article 77 GDPR in 2019[4] on a budget of € 2.3 million and about 30 employees, when the DPC issued not a single formal decision on individual complaints in 2019 despite having about 140 employees.[5]
- Even more relevant: The DPC does not investigate about 99 % of all formal complaints that it receives. While the Annual Report for 2020 stated that they received 4,660 GDPR complaints, the DPC conducted only 83 inquiries, many of which were from previous years. Moreover, the DPC lists 4,466 cases as "concluded" without an inquiry.[6] Usually the DPC claims that the other cases are "amicably resolved". However, in our experience, they are simply ignored or "closed" by the DPC. Data subjects regularly complain about the DPC simply "closing" complaints unter Article 77 GDPR without any decision or other solution.

In summary, the DPC has a crucial role in making the GDPR a success, including the "One Stop Shop" approach. This can only work if all other Member States, all EU citizens and all competing businesses in other Member States, can rely on the DPC and Ireland to comply with these obligations. The European instrument to ensure such compliance is typically an infringement procedure, which is clearly warranted.

In our view, the issue within Ireland seems to be less of a question about adapting national laws or providing more resources to the DPC, but instead a question of ensuring that the procedure applicable to the DPC is reformed and adapted to handle cases and complaints efficiently, to use up-to-date workflows, and to be better managed overall.

One first step in that direction could be filling the two seats that – in addition to Helen Dixon – are meant to lead the DPC. These seats have been vacant for years. We are certain that two additional independent experts in public management and data protection law could assist the current Commissioner in fulfilling her tasks, which would be in the joint European interest.

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[1] https://www.dataprotection.ie/en/dpc-guidance/law/decisions-exercising-corrective-powers-made-under-data-protection-act-2018

[2] https://www.aepd.es/es/informes-y-resoluciones/resoluciones?f%5B0%5D=ley_tipificacion_de_la_gravedad%3AReglamento%20General%20de%20Protecci%C3%B3n%20de%20Datos

[3] https://www.reuters.com/article/us-facebook-privacy-dixon-interview-idUSKBN2AP009?mkt_tok=MTM4LUVaTS0wNDIAAAF7eVvFcDo_fE1KKDFOteD0c2ytUut81GL7zxov8J1TDCCJNmVq3ButYPFNVQ7nMFGLgMKeE14lG8RUwVRJnM3ykJhLaQJByXIuATVX1n3WZIPK

[4] https://www.dsb.gv.at/dam/jcr:c9c2daf9-9746-4088-bced-dc8e296076e0/Datenschutzbericht_2019.pdf

[5] https://www.dataprotection.ie/en/dpc-guidance/law/decisions-exercising-corrective-powers-made-under-data-protection-act-2018

[6] https://www.dataprotection.ie/en/news-media/press-releases/data-protection-commission-publishes-2020-annual-report

Even if the Irish DPC is clearly in focus when it comes to EU-US data transfers, we would like to take this opportunity to highlight that we have similar issues in other Member States, ranging from a total denial of even just being a party to a GDPR complaints procedure as a citizen (e.g. in France and Sweden) to a lack of resources (e.g. in Austria or the Netherlands). We would therefore encourage the LIBE committee to take a broader look at the reasons for lack of enforcement of the GDPR and insufficient and non-effective handling of complaints. The current state of play within the Member States greatly undermines the access of EU citizens to profit from the GDPR and the European legislative success when passing it.

- **THE SUGGESTION TO HEAR THE DPC**

So far, the DPC did not participate in public debates that could help answer numerous criticisms addressed at its poor GDPR enforcement record. We are welcoming the DPC's change of attitude in this respect. Considering that the DPC seems keen to explain the situation to the LIBE Committee, we would very much encourage the Committee to have such an exchange during a public hearing. Such a hearing could of course include other DPAs, and individuals and organisations who have faced issues with the functioning of said DPAs.

I hope the above summary was helpful for your decision process and I am happy to assist you with any further details you may find relevant.

Mag. Maximilian Schrems

Honorary Chairman of noyb.eu