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To:
Joint Committee on Justice
Leinster House
Dublin 2
IRELAND

Vienna, 26. 3. 2020

Subject: Written submission in relation to the "General Data Protection Regulation"

To the Members of the Joint Committee on Justice,

I want to express my deeply felt gratitude that your Committee is examining the implementation of the GDPR, which is truly a great concern for citizens in Ireland and throughout the European Union.

It goes without saying that Ireland is in the European and global focus when it comes to the implementation of this European instrument, that is intended to bring the fundamental right to Privacy and Data Protection (Article 7 and 8 of the Charter of Fundamental Rights) to all devices and services that we daily entrust with our most confidential information. When passing the GDPR, the European Legislator took the strong view that innovation can only succeed if users trust new technology – and when abuse of this trust is remedied. Therefore, enforcement is a key pillar of GDPR.

In our practice at *noyb*, we however see that companies, particularly "Big Tech" companies, violate the law on a daily basis. They are public about "balancing" the risk of enforcement with the costs of full compliance with their user's fundamental rights. While the slogan "*move fast and break things*" became legendary, it must be added that in many cases what is broken nowadays, is the law and users' fundamental rights.

When regulations are perceived to be "*dead law*", it not only undermines the rule of law, the trust in our democratic processes and the trust in digital services, but also generates an unfair competitive advantage between those players that follow the rules and those who choose to ignore them. It is this basic truth, which usually makes the matter of enforcement of the existing law a common objective of in the political process.

Max Schrems
Director of noyb.eu

Preliminary Remarks:

At the outset, I would like to make the following preliminary remarks:

- Given the jurisdiction of the Oireachtas, my remarks will primarily focus on our experiences in Ireland and how issues could be overcome within Ireland. This is not to suggest that we have not experienced similar issues in other Member States.
- In circumstances where some of the questions raised appear to involve political rather than legal issue, we have limited our submissions to the legal and factual issues that we have encountered or such elements where we had first hand experiences.
- As these issues involve the experiences of both *noyb* and Max Schrems personally, Mr Schrems has prepared the submissions. Therefore, the submissions reflect both his experiences and *noyb*'s experiences over the past ten years.
- Should there be any further questions or any need for clarification, please do not hesitate to contact Mr Schrems at ms@noyb.eu.

Individual Issues identified by the Joint Committee:

1. Matters of Enforcement

noyb has filed about 150 GDPR complaints so far and is therefore actively engaging with many Data Protection Authorities (DPAs) throughout Europe. On our GDPRhub.eu platform, we also monitor the decisions by all DPAs and have a good understanding of the enforcement landscape in Europe.

We have various cases before the Data Protection Commission (DPC). While naturally a party and the regulator may disagree on certain elements, we must say that we faced problems on procedural and practical issues at the DPC, which reached partly Kafkaesque levels. It seems to us that the procedures adopted by the DPC are extremely complex, overly cumbersome and often self-destructive.

This has left us, and many European experts, wondering if the DPC is either unwilling or unable to conduct its statutory function. Furthermore, the procedures adopted by the DPC have led to unnecessary litigation, where the DPC is regularly exposed to well-founded, but entirely avoidable criticism by the Courts. This led to extreme legal bills that have to be picked up by the Irish taxpayer.

1.1. Enforcement – Deterrent versus "Engagement"

The GDPR gives DPAs vast powers under Article 58 GDPR that reach all the way to raids, prohibitions of processing and substantial fines under Article 83 GDPR of up to 4% of the worldwide turnover. The European Legislator clearly saw these fines as a deterrent and requires DPAs to issue "*dissuasive*" fines (Aricle 83(1) GDPR). Deterrence is the most common theory for change of behavior in law and the only approach that can ensure widespread compliance without constant monitoring and enforcement. A DPA is in charge of almost every business in its jurisdiction and cannot possible monitor and engage with each company individually that falls under the GDPR. Therefore, fines are an essential weapon in the arsenal of powers bestowed on the DPC.

The DPC is however on public record as expressing a preference to an approach of individual informal engagement with companies instead of focusing on enforcement.[1] This would mean that the DPC would have to engage with about 300,000 businesses and other entities that fall under its jurisdiction.

The DPC's approach of "engagement" instead of enforcement is also reflected by the fact that it received 4,660 complaints in 2020[2] but only issued 10 decisions, of which only three concerned private entities and only one contained a fine against a private entity.[3] In other words: when citizens file a complaint because of a violation of their fundamental rights with the DPC, there is no formal decision, let alone a fine, in 99,99% of the cases.

While many European DPAs try to find amicable resolutions and data subjects regularly take back complaints, it appears that the DPC more often than not closes cases, without a legally required formal decision. We have received numerous complaints about this approach, which amounts to nothing less than a denial of justice by the DPC.

In such a systems, companies have little motivation to comply with the GDPR out of their own motion, as there is no consequence in non-compliance. Controllers can rest assured that the DPC will "engage" in each individual case and in 99.99% of the cases, it will informally "close" the case without a Decision.

> A simple example: If the Police were to "engage" with anyone that commits a parking violation, but only issue a ticket in 0.01% of cases, most streets would turn into car parks overnight. We would need thousands of police officers to talk people into not parking in the wrong spot to clear the streets and would likely face the same problem the next day.

Article 58 GDPR gives DPAs many powers that span from raids, prohibitions of processing to fines. Nevertheless, these powers are rarely used in practice. While some DPAs have used these powers to fine e.g. Google € 60 Mio[4] (which usually leads to special attention and quick reaction by the entire industry) other DPAs, such as the DPC, notoriously avoid handing out fines.

The only substantial fine of the DPC in the private sector was € 450.000 on Twitter,[5] which is trivial compared to Twitter's revenue. In fact, appealing that fine may cost more than paying it.

- ➔ **We further want to highlight that every data subject has the right to file a complaint (Article 77 GDPR) and have their case handled (Article 78 GDPR).**
- ➔ **We therefore, want to highlight that Article 83(1) GDPR requires ("*shall*") the DPC to issues "*effective, proportionate and dissuasive*" fines, that the legislator requires deterrence and that the DPC does not seem to meet this requirement.**

[1] https://www.youtube.com/watch?v=sxAgwKQhJxc as well as many other public forums.
[2] https://www.dataprotection.ie/en/news-media/press-releases/data-protection-commission-publishes-2020-annual-report
[3] https://www.dataprotection.ie/en/dpc-guidance/law/decisions-exercising-corrective-powers-made-under-data-protection-act-2018
[4] https://www.cnil.fr/en/cookies-financial-penalties-60-million-euros-against-company-google-llc-and-40-million-euros-google-ireland
[5] https://www.dataprotection.ie/en/news-media/press-releases/data-protection-commission-announces-decision-twitter-inquiry

1.2. Enforcement - Lack of Procedural Rules before the DPC

In countless direct talks to other European DPAs and the European Commission, we hear that the DPC regularly blames "Irish procedure" on an international stage, for enforcement problems.

To our knowledge this at odds with reality. In fact, there is no general Irish administrative procedural act (as common in many other Member States) and the procedural rules in the Irish Data Protection Act 2018 are rather general and do not limit or guide the DPC on many questions.

In recent litigation between Facebook and the DPC[6] the lack of procedural rules became a central element, when Facebook took the view that there is an expectation that the DPC would follow a procedure described in its Annual Report, while the DPC took the view that it is not obliged to follow any specific procedure when issuing a decision, but may shorten procedures to a single submission within three weeks if it chooses to do so. The High Court will determine this matter, but the proceedings disclosed a basic problem: Nobody knows how the procedure before the DPC must be conducted and the DPC avoids any clarification.

While other DPAs in other jurisdictions follow a clear procedure, the lack of such a procedure leads to fundamental uncertainty for the DPC and the parties before it. Any procedure can be frozen by a Judicial Review that claims unlawful steps by the DPC, as demonstrated by the most recent Facebook litigation. Final decisions by the DPC are under threat to be overturned on procedural grounds.

On a European level, the uncertainty of the procedural rules in Ireland leads to conflicts with the procedural rules of other Member States (which apply e.g. when a foreign data subject has submitted a complaint in another Member State against a controller in Ireland). Matters like access to documents, languages or just the scope of the procedure are ill-defined and lead to endless debates.

- ➔ **We therefore suggest that the DPC is heard in what way "Irish procedure" is responsible for the lack of progress, as well as to possibly clarify or amend such laws that forms an unnecessary roadblock for conducting its procedures.**
- ➔ **We further suggest requiring the DPC to issue clear and transparent procedural rules, ideally after conduction a multi-stakeholder process that involves feedback from its European partners, legal experts, controllers and data subjects. Such a process could ensure that problems are identified before procedures are conducted – limiting the need for litigation.**

1.3. Enforcement – Problematic Procedural Practice of the DPC

Once the DPC actually investigates a case, it currently operates under a very complex procedure that requires (depending on the DPC's description) six to twelve steps. Many steps are repetitive (e.g. two draft decisions and two final decisions) and organized in an illogical order.

In our experience the DPC "investigates" cases without substantial direct engagement with and between the parties, who are only heard when they are asked to comment on the first "draft report", which can reach up to 100 pages. When the DPC receives a complaint under this archaic procedure, it sends it to the respondent and requests the respondent to make submissions in respect of the complaint. The investigator then analyses the complaint and the respondent's submissions and then issues a draft Inquiry Report. This procedure does not allow the complainant and respondent an opportunity to engage with each other's arguments until after the "draft report" has issued.

[6] Facebook v. DPC, High Court, Record N° 2020/617JR

This leads to a number of issues. For example:

- The respondent may mischaracterize an argument made by the complainant.
- The investigator may rely on that mischaracterization in the Report.
- Furthermore, there is no opportunity for the parties to "narrow" the dispute between the parties. If there was engagement between each parties arguments at an early stage, a number of issues could be resolved or accepted by either party without the need for the investigator to consider them. In the absence of this engagement, the investigator must consider all issues that may include many superfluous issues. This leads to a massive waste of resources. This causes huge delay and, in our view, restricts the complainants' right to fair procedures and their right to be heard.
- The massive "draft" reports further leave the parties with the feeling that the DPC has made a decision, already before hearing all arguments by the parties.
- Finally, if the DPC were to depart from its views in the "draft report", the other party could rely on this change of opinions to attack the final decision in Courts. We are not aware of any such approach by other DPAs in Europe.

Contrary to an open hearing with open exchanges between the parties (as usual before other DPAs) the DPC also operates as a "black box" where it often gets sidetracked or misunderstands the positions of the parties, because it does not engage adequately with them. This would be easily avoidable by having an open dialogue with and between the parties. Other European DPAs usually allow the parties to exchange multiple submissions, which ensures that all arguments are before the DPA before it takes a position. Only thereafter, possibly missing elements are investigated by the DPA.

In our experience, the DPC's "investigation" alone can take two to three years, which the DPC does not apparently consider as being too long.[7] In practice, this means that many of the ever-changing digital services that a data subject may complain about are not even on the market anymore, once the DPC completed its investigation. In comparison: The Austrian DPA must decide within six months.[8]

Each case must then undergo another draft decision and a final decision. To our understanding, each draft and final decision currently needs to be issued by Helen Dixon, which seems almost impossible when considering that 4,660 data subjects had the right to a decision in 2020 alone. Ms Dixon would have to issue about 18 decisions per working day, if she would actually want to decide about each complaint she receives. In our experience, most other DPAs either have a specific decision body, or allow each case manager to issue final decisions on behalf of the DPA.

We are not aware of any DPA that does not have a modern and simple two-step procedure (usually intensive engagement during an investigation, plus a one-sided final decision). Which is then subject to an internal review within the DPA and/or an external appeal before a Court.

➔ **The current procedure is extremely slow, repetitive and error-prone. Largely this seems to be based on a lack of engagement with and between the parties. The current procedure seems to be extremely labor intensive on the side of the DPC and hardly manageable by the parties.**

➔ **It is likely that parties before the DPC will be able to successfully appeal the DPC's final decisions based on the lack of fair engagement.**

[7] Submissions in noyb v. DCP, High Court, Record N° 2020 437JR.

[8] § 73 Austrian Administrative Procedural Act (AVG)

1.4. Enforcement – Training & Personal

The GDPR is a rather complex piece of legislation and experts in this field of law are rare and in high demand. Many DPAs in Europe saw their experts leave for the private sector. In this situation, the DPC has grown from about 20 to about 140 staff in the matter of a couple of years – clearly rapid growth that may not have been met by a pool of personnel that have all of the necessary qualifications.

The approaches to training in the EU seem to be very different. Each Member State has different systems for legal training. While, for example, Germany or Austria produce high numbers of lawyers and a good proportion of the staff of DPAs holds a law degree in addition to going through specialized training to become a public servant, other countries rely on ad-hoc hires. In many Member States DPAs conduct proceedings themselves and have trained legal personnel that not only manages cases before the DPA itself but also defends the DPA in appeals before Courts.

While we do not have any hard numbers or evidence, in our experience, the engagement by the DPC indicates that relevant staff have little to no experience in conducting adversarial GDPR procedures. Preliminary research also shows that even most senior members of the DPC largely do not hold a relevant law degree and do not have any background in privacy law.

In our experience, this leads to countless procedural and material law mistakes by the DPC. The lack of quality opens the DPC's decisions to the threat of successful legal reviews, which is used by Big Tech to delay and derail procedures and may be another reason why the DPC is reluctant to engage in enforcement against big tech.

Despite Irish Courts have afforded curial deference to the regulator in the exercise of its function (compared to our experience in other jurisdictions), the DPC has nevertheless ultimately lost each case we were engaged in – mostly for entirely avoidable reasons. This lead to cases like the "*Schrems II*" litigation that is now pending for approximately 7.5 years, without any decision by the DPC in sight, but two judgements by the highest Court in Europe that clearly rejected the DPC's legal views.

In turn, the lack of success before the Courts seem to have nourished the DPC's view that enforcement is not a viable approach, which leads to a spiral of non-enforcement and even less experience in building and defending cases.

We are convinced that training and consequently a higher quality of the procedures and material decisions could easily close that gap and ensure that the DPC's decisions are mostly airtight when they are scrutinized by Irish and European Courts.

➔ **We do not have special knowledge of the Irish job market and the existing training structure of the DPC. Nevertheless, our previous engagements would indicate that there is a strong need to train staff on procedural and material law issues.**

1.5. Enforcement – Conflict with Giving Legal Advice to Controllers

An additional problem of the DPC's strategy to "engage" with controllers arises when the DPC on the one hand negotiates a solution with the controllers behind closed doors, but then on the other hand has to decide on a complaint that focuses on the exact same issue.

In these situations, the DPC becomes a judge in its own matter, as the controller will (rightfully) rely on previous engagements with the DPC and the DPC has to decide about a challenge in relation to the subject matter of this engagement.

> For example: It has been alleged by Facebook that they engaged with the DPC on at least 10 occasions before the implementation of GDPR in respect of the legal basis that Facebook rely on to process users data. Facebook have alleged in litigation in Austria that the DPC approved the legal basis that they purport to rely on pre implementation of GDPR. On 25 May 2018, *noyb* filed a complaint alleging that any legal basis purported to be relied on by Facebook is invalid. The DPC are now investigating this complaint having allegedly previously approved the legal basis that is under challenge. Despite repeated requests, the DPC has failed to disclose the content of its engagement with Facebook.

This problem was identified by the European Legislator, who has explicitly required the DPAs to give "advice" to the national parliament and government (Article 57(1)(c) GDPR) but only "promote awareness" when it comes to engagement with controllers (Article 57(1)(d) GDPR). Section 101 of the Irish Data Protection Act 2018 mirrors this approach.

Nevertheless, the DPC regularly engages in legal advice and "negotiations" with big tech companies, which happen *ultra vires* of the tasks that the DPC may fulfil under European and Irish law.

It is especially troubling that these negotiations happen behind closed doors and without any form of transparency or publication of the results, even when this concerns the rights of millions of European users. While the DPC is largely exempt from the Irish Freedom of Information Act, the DPC so far also refused to disclose details of these meetings, even when a controller later relied on them in a complaints procedure. This opaque backroom approach to regulation, where law is not enforced but negotiated reminded many of so-called "*tax rulings*" and other forms of questionable administrative negotiations with multinational companies.

The DPC so far explained that this is done by different departments, but it will nevertheless be hard to explain how different departments of the same organization and under the same Commissioner reached different conclusions and the concerned data subjects, who's Fundamental Rights were on the line, cannot review the result of such dealings.

➔ **We want to highlight that the "engagement" with controllers falls outside of the tasks of the DPC under the law and risks that the DPC becomes a judge over its own legal advice.**

➔ **We further want to highlight that these form of negotiations concern the rights of millions of European users, who are left in the dark about the contest or results of such dealings.**

1.6. Enforcement – Statistics

The issues identified above become obvious and undeniable when the performance of the DPC is compared with its European counterparts. The DPC has a tendency to camouflage these statistics by e.g. reporting cases as "concluded" that did not see any final decision, but when such statistical tricks are left aside, the numbers speak a clear language.

Some examples:

- In 2019 the Irish DPA (DPC) and Spanish DPA (AEPD) had similar budgets (around € 15.2 and € 14.2 million respectively).[9] 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[10] by the DPC against private entities (and eight against public institutions) – the AEPD lists 650 decisions

[9] https://brave.com/wp-content/uploads/2020/04/Brave-2020-DPA-Report.pdf
[10] https://www.dataprotection.ie/en/dpc-guidance/law/decisions-exercising-corrective-powers-made-under-data-protection-act-2018

to date and usually publishes multiple binding decisions per day.[11]

- 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.[12] This indicates that the DPC is not planning to get anywhere close to its European counterparts.
- The Austrian DPA (DSB) reported more than 828 formal binding decisions[13] on GDPR complaints by individuals under Article 77 GDPR in 2019 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.
- The German DPA recently mentioned that it has forwarded 50 complaints to the DPC on WhatsApp alone. So far, not a single complaint was decided.[14] *noyb* is representing the complainant in one of these cases, which has only seen the second of six procedural steps after 2 years and 10 months.

While the legal systems of each Member State and the markets that a DPA has to regulate are clearly not easy to compare, the DPC's numbers deviate from its European colleagues on such a fundamental level, that it is painfully obvious that the DPC's track record is fundamentally at odds with its mission.

➔ **When the objective numbers are compared, the DPC does not produce the same results as other European counterparts, despite having substantially more resources.**

2. Resourcing of the Data Protection Commission

While almost all DPAs in Europe struggle with limited budgets and staff, we welcome that the Irish government has increased the resources of the DPC dramatically over the past years. The DPC now has a budget that surpasses that of the French CNIL or the Spanish AEPD.[15] This budget reflects the number of large multinational tech companies in Ireland.

We therefore have serious doubts as to whether the DPC's deflection of any criticism towards its limited budget is accurate. The statistic under 1.6 above shows that the DPC does not suffer from a lack of input, but from a lack of output. When the input/output ratio of an institution is objectively low, this can only hint at an efficiency and management problem.

There is however one issue that seems to separate Ireland from other EU Member States: The cost of litigation. The litigation in "*Schrems II*" cost the DPC about € 3 Mio itself. It will have to reimburse my costs as well. Facebook has (surprisingly) not sought costs from the DPC. Overall, the costs of such litigation can easily amount to € 10 Mio and more, which is far outside of the DPC's budget. A situation where losing a single case could make up about half of the DPC's budged may be in conflict with the requirement under European law that the DPC must be independent and adequately resourced.

[11] 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
[12] https://www.reuters.com/article/us-facebook-privacy-dixon-interview-idUSKBN2AP009
[13] https://www.dsb.gv.at/dam/jcr:c9c2daf9-9746-4088-bced-dc8e296076e0/Datenschutzbericht_2019.pdf
[14] https://noyb.eu/sites/default/files/2021-03/Letter%20BfDI%20-%20LIBE%20on%20Irish%20DPC_EN.pdf
[15] https://brave.com/wp-content/uploads/2020/04/Brave-2020-DPA-Report.pdf

It therefore seems that the Irish legislator has to find ways to limit costs, to ensure that big tech cannot use costs to intimidate the DPC (and data subjects) that seek to enforce the law.

➔ **When compared to other DPAs in Europe, the DPC does not seem to primarily have a resource problem, but an efficiency and management problem.**
➔ **We would encourage the Committee to review the matter of litigation costs, as they may be a chilling factor for enforcement and may be at odds with European law.**

3. Wider Political Issues

The questions cover a wide area of rather political questions, which we are not competent to comment on in all aspects. Nevertheless, we would like to point the Committee to the recent Letter of the German DPA,[16] where the German DPA openly called many of the DPC's claims "wrong" and says:

> *"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."*

This view is to our knowledge shared by many other DPAs, which are openly frustrated when we communicate with them about the status of ongoing cases before the DPC. It is regularly reported that DPC staff does not respond to its colleagues, the Commissioner herself does not participate in European Meetings (but only sends substitutes) and DPC staff have has something between an ignorant and arrogant attitude towards their European colleagues.

The recent Resolution of the European Parliament[17] goes even further and asks the European Commission to start infringement procedures against Ireland, noting that the European Parliament…

> *"…is concerned that the whole "Schrems II" case was started by the Irish Data Protection Commissioner, instead taking a decision within its powers pursuant to Article 58 GDPR; shows deep concern that several complaints against breaches of the GDPR filed on 25th May 2018, have not yet been decided by the Irish Data Protection Commissioner, which is the lead authority for these cases; strongly condemns the attempt of the Irish Data Protection Authority to shift the costs of the judicial procedure to Maximilian Schrems, which would have created a massive chilling effect; calls on the Commission to start infringement procedures against Ireland for not properly enforcing the GDPR;"*

The same sentiment is reflected in countless direct talks on the European and Global level, where the DPC is generally not taken seriously among experts, the media and in the wider public.

There is also widespread suggestions that the DPC deliberately delays procedures or even produces mistakes, to protect multinational companies in Ireland. We usually highlight that there is no evidence for these suggestions, but it is hard to see how these suggestions can be avoided when the DPC e.g. refuses to decide on the "*Schrems II*" complaints for more than 7.5 years.

➔ ***While the DPC may characterize international criticism as "unfair", the reality seems to be that its actions (or inactions) has built a reputation that can only be overcome through radical reforms and visible signs of actual enforcement of the law.***
➔ ***In addition to existing reputational damage, the continuous lack of enforcement will likely lead to actions by the European Union, which currently risks that its flagship legislation is undermined by a lack of enforcement by Member States.***

[16] https://noyb.eu/sites/default/files/2021-03/Letter%20BfDI%20-%20LIBE%20on%20Irish%20DPC_EN.pdf
[17] https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/LIBE/RE/2021/02-04/1222135EN.pdf

4. The "*Schrems II*" litigation

All of the issues above maybe accumulated in the now famous "*Schrems II*" litigation that the Committee was seeking input on:

From the very first complaint in 2013 onwards, we took the view that the DPC alone can take the relevant action. This was repeated in a 2015 reformulated complaint and finally upheld by the CJEU in its 2020 judgement dubbed "*Schrems II*". The CJEU has also highlighted that the DPC has duty to act. Despite this explicit duty and an Undertaking the DPC gave to Hogan J in 2015, the DPC has taken legal routes that brought this complaint before seven Courts (four times the Irish High Court, once the Irish Supreme Court and twice the European Court of Justice) over the course of 7.5 years. Instead of swiftly deciding, the DPC "paused" the procedure again in autumn 2020.

From the Oireachtas' role to supervise the executive branch, it seems to us that, in particular, the vast costs of the "*Schrems II*" litigation of about € 5 to 6 million warrants review, as this litigation was in our view wholly unnecessary and was in fact fabricated by the DPC to avoid taking a decision herself.

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 Article 267 of the TFEU is (A) if EU law requires interpretation or (B) matters of validity of EU law.

The proceedings were brought by DPC in order to challenge the validity of the SCC Decision (to argue the second element of Article 267). 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 years.

The DPC often highlights that the High Court has expressed support for its argument that if it simply did not wish to exercise Article 4 of the SCC Decision, the Courts cannot force it to do so. This approach seems rooted in a limited standard of review, a reluctance to order independent bodies to take certain steps, and simply an error in the judgment of 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 was 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" if 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 more detail:

- Contrary to the DPC's common claims, 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.
- Consequently, there was also no "structural deficiencies" as claimed by the DPC in the litigation. 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.

- 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 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 procedure require keeping the submissions confidential, we can unfortunately not disclose exact details.

➔ ***In summary, we understood this litigation as an attempt to kick the matter back to Luxembourg and to delay the obvious outcome of the complaint for more than 7.5 years. This unwillingness of the DPC to comply with its statutory duty alone cost the Irish taxpayer likely € 5 to 6 million.***

5. Summary

In summary, we welcome that the Joint Committee is attempting to review the implementation of the GDPR. While we have no doubt that many people within the DPC are working every day to make the GDPR a success, we have serious doubts that the procedures adopted by it are fit for purpose. This skepticism is shared across Europe and will be unlikely to be overcome unless there are serious reforms.

We take the view that the legislator should use the option to appoint two additional, well-respected experts as Commissioners, to ensure that the DPC receives the expertise and management that it deserves. In some Member States, public hearings are conducted to ensure that only highly qualified persons become a Commissioner.

We would recommend following such best practice, to ensure that any suggestion of a political appointment are clearly without merit.

➔ ***We see fundamental mismanagement at the DPC that became the subject matter of wider European concern. It seems advisable that neutral experts with deep understanding of material data protection and procedural law aid the DPC in fulfilling its obligations.***

➔ ***We see Section 15(1) of the Data Protection Act 2018 as an opportunity to appoint two additional Commissioners to aid the existing Commissioner as such experts.***