noyb – European Center for Digital Rights
Goldschlagstraße 172/4/3/2
1140 Vienna
AUSTRIA

To:
Data Protection Commission
21 Fitzwilliam Square South
Dublin 2, D02 RD28
IRELAND

Vienna, 11.06.2020

Dear Helen Dixon,

We hereby respond to the *partly* provided Preliminary Draft Decision ("PDD"), which *partly* deals with the submitted complaint. You will not be surprised that we take fundamental issue with major parts of the procedure and outcome and maintain our fierce protest to the unlawful approach of the DPC.

It is painfully obvious that the DPC is engaging in a vicious strategy to avoid a determination of the "*consent bypass*" that the DPC previously agreed to with Facebook in spring of 2018.

The PPD seems to engage in a grotesque procedural dance, to arrive at a desired outcome that is not supported by facts or law. It is painful to see how the DPC systematically omits or re-frames our submissions and omits large parts of the relevant facts, while producing pages upon pages of absurd debates on the alleged limited scope of the complaint. In the PDD, the DPC engages in an explicit departure from the EDPB guidelines, produces fully inconsistent legal analysis on the nature of the agreement between Facebook and the Complainant, while continuing to cover-up meetings with Facebook. It does all this just to arrive at the most tangential transparency issue, which is obviously intended to serve as a "face saving" pseudo-finding by the DPC. This would leads to little more than changing the some paragraphs in the privacy policy, instead of fixing the problem that the complaint is concerned with.

We will not accept this charade and will continue to be utmost vocal about the DPC's denial of justice in an absolutely straightforward case. We will especially not allow any draft decision to be submitted to the EDPB that does not contain a full and accurate summary of all legal and factual submissions that were made on behalf of the Complainant.

We invite you, *with the best intentions*, to get back to a fair and realistic approach on this case when submitting a draft decision to the EDPB, as we do not see how the PPD could in any way sustain European or (in a second stage) judicial scrutiny. I sincerely hope that the DPC can open itself up for a fact-based and neutral analysis during the last stretch of this case in Ireland. If the DPC is in any way interested in being seen as a professional and neutral decision-making body or just have the PPD accepted on the European level or survive later judicial scrutiny, these submissions will surely be a good starting point for a thorough reexamination of the PPD.

Mag. Maximilian Schrems

Table of Contents

1. SUMMARY OF THE MOST FUNDAMENTAL MISUNDERSTANDINGS IN THE PDD

In a short overview, the PDD suffers from the following fundamental misunderstandings. These misunderstandings make the PDD so inherently incorrect that it is hard to make meaningful submissions on it. We therefor feel that a high-level summary may be the most useful for the DPC.

First, a short overview of the most fundamental procedural misunderstandings in the PPD:

(A) While we fully agree that the DPC must operate under EU and Irish law, this does not mean that it would not have a duty to apply foreign law (see e.g. EU Regulation 593/2008).
Nothing in Irish law prevents the DPC from researching and applying foreign law (as the DPC gladly did in the "*Schrems II*" litigation on US surveillance laws) or from cooperating with the Austrian DSB—e.g. by providing documents to all parties, seeking clarification from the parties, or contacting to the Austrian DSB to get information on Austrian procedural and contract law so that it can properly interpret the complaint, which by its very nature is a creature of Austrian law.
The PDD and the schedule do not only fail to cite any Irish law provision that would prohibit these (necessary) procedural steps, but they also ignore that the DPC and the Austrian DSB have a duty under the GDPR to "*cooperate*" on cases (Article 66(1) GDPR). It is mind-blowing that the PDD continues to ignore all foreign law elements—in a pan-European procedure—and thereby willfully arrives at fully incomprehensible and unsustainable results.

(B) From the outset, the PDD fundamentally misunderstands the legal meaning of the original complaint, which was submitted under Austrian procedural law ("*AVG*") as legally required.
For example, the scope of a complaint under Austrian law is determined by the "*requests*" ("*Anträge*"), similar to the "*reliefs*" in Irish lawsuits, which constitute the ultimate aim of any initiated procedure and are not at all foreign to Irish procedures. All legal and factual arguments in a complaint are optional under Austrian law and only in support of these reliefs. It is, by law, the responsibility of an authority to investigate the law and facts that could lead to the requested outcomes or reliefs (*Iura novit curia*). If there are uncertainties, the authority must not apply a literal interpretation, but give the party a chance to clarify any elements of a complaint.
Instead of interpreting the complaint under the law that applies to it (just like interpreting a contract under the applicable contract law), the DPC at best second-guessed the meaning of the complaint, but mostly re-framed them as the DPC wished these arguments to be, while ignoring explicit clarifications from *noyb*. In so doing, the DPC violated explicit requests by the Austrian DSB and violated the applicable law. Cumulatively, these errors have caused the PPD to arrive as a wholly at a wholly incorrect view of the scope, arguments and subject matter of the complaint.

(C) The purely nationalistic approach in a joint European procedure must ultimately fail: If the PDD were ever to withstand European scrutiny before the EDPB (which we do not expect), the final decision on issues 1 and 2 would have to be adopted by the Austrian DSB under the Austrian AVG (Article 61(9) GDPR). The two authorities arrived at this result in gross violation of the applicable AVG. The case has different scopes, arguments and subject matters before the Austrian DSB and the Irish DPC. Rightfully submitted applications were never dealt with. Only a final decision on issue 3 may have to be (partly) adopted by the DPC under Irish procedural law. As our rights were continuously violated under Irish and Austrian law. We therefore want to highlight that, as things stand, the Austrian DSB seems to be legally bound to forcefully object to the PDD under Article 60(4) GDPR. The DPC is (again) maneuvering a case towards an unavoidable procedural cliff.

Second, a short overview of the most fundamental material misunderstandings in the PPD:

(D) On the material level, the PDD simply fails to engage with a determination of the nature of the legal relationship between the Complainant and Facebook.

> In simple terms: At the core, this case is just like two parties disagreeing if they signed a rental agreement or booked a hotel room (which comes with different legal regimes). In this analogy, the PPD argues basically, that the property owner can one-sidedly "*rely*" on the agreement being a hotel booking to avoid renter protection, with no need to analyse the agreement itself – frankly an absurd proposition.

Determining the true nature and meaning of an agreement is a logical precondition for any assessment under Article 6(1)(a) or (b) GDPR and must be properly interpreted in the PPD.

(E) In a wholly inconsistent an unlawful approach, the PPD rejects all of the Complainant's arguments as to the true meaning and nature of the agreement being "*outside the remit of a supervisory authority*", and then, just pages later, engages in such an interpretation of the agreement that leads it the view that the processing is "*necessary*" for providing the contract.
This meant that the PPD systematically rejects all arguments made by the Complainant on the nature of the agreement, but accepts all arguments made by Facebook on the same agreement, which it—miraculously—treats as being within the powers of the DPC. This is nothing but a pure abuse of office and arbitrary decision making.

(F) The PPD fails to accept that conflicts about the true nature and meaning of an agreement are neither novel nor exceptional in law. Instead of applying the correct legal rules of interpretation (see Section 3 of the submissions of 9.9.2019, which have largely existed since Roman times), the PPD limits its analysis to the claim that Facebook "*never sought to obtain consent*".
In plain English, this would mean that the legal nature of the agreement between two parties (the crucial point of this procedure) does not require interpretation, but it is solely left to the controller to determine. Consequently, the controller could freely choose whether an agreement falls under Article 6(1)(a) or (b) GDPR and thereby bypass Article 6(1)(a) GDPR, as done by Facebook.
In this respect, the PPD seems to confuse the undisputed right of the controller to choose among *existing* legal bases under Article 6(1) GDPR, with a non-existent right to determine the nature of an agreement between the controller and the data subject. The nature of an agreement requires proper legal analysis under the applicable law, not one-line arguments.

(G) Even when the PPD analyses the agreement, it engages in superficial pseudo-analysis that continues to fail to engage with our submissions of 9.9.2019 in any meaningful way. None of the points raised therein are even remotely addressed. The analysis seems to mostly end at the headline of the so-called "Terms of Service" to determine that everything mentioned in the document is a "contract". There is also no determination of which processing activities are "*necessary*" under Article 6(1)(b), as § 5.45 of the PPD explicitly states that not even the DPC understood Facebook's approach.

(H) On a factual level, the PPD conveniently omits almost all factual submissions by the Complainant, like the impression of the Complainant and the context that lead to the switch between Article 6(1)(a) to 6(1)(b) GDPR—a switch which clearly indicates Facebook's intent to bypass the GDPR's consent requirements. It surprisingly also ignores the only independent evidence on the objective understanding by data subjects in a study with more than 1.000 data subjects.

(I) Maybe most notably, the PDD seems to agree with the underlying analysis of the Complainant that the documents provided by Facebook cannot form either valid "consent" or "contract" as both require a declaration in "*plain and intelligible language*".
While the PDD correctly applies that test in Article 12(1) GDPR at the very end of the analysis, the PDD seems to miss, that this very test is taken from Directive 93/13/EEA (see recital 42 of the GDPR) which applies to any civil law contract just as well and is featured in Article 7(2) GDPR.
In other words: Consent under Article 6(1)(a) GDPR and contracts under Article 6(1)(b) GDPR require the same test to be fulfilled, as the PDD claims not be fulfilled under Article 12(1) GDPR. Deciding differently on issues 1, 2 and 3 therefore seems to be irreconcilable.

Third, the consistent mischaracterization of the Complainant's position and the omission of large parts of the submissions and facts cannot be the basis of a "draft decision" to the EDPB:

(J) The PPD either simply did not understand or read large parts of the submissions—or, as it seems to us, willfully mischaracterizes the submissions of the Complainant.

(K) It is obvious that the PPD excessively engages in re-framing of the Complainant's argument, and even creates its own straw man arguments—i.e. claiming that we would request the DPC to operate under Austrian procedural law, that we would argue for a "*hierarchy*" within Article 6(1) GDPR,[1] or that we would have argued that processing "*must be entirely based on consent.*"[2] In fact, we explicitly submitted that necessary processing under the social media contract must be separated from auxiliary processing.
It would require hundreds of pages to compare these mischaracterizations with our actual submissions and explain why the PPD is largely wrong in summarizing our position.
As the DPC has a clear role in presenting a correct and full summary of the facts and position of the parties to the EDPB, we request the DPC to engage in a full review of any characterization of the Complainant's position, citing the source of the alleged positions of the Complainant, as the PPD insinuates wholly false positions of the Complainant. In addition, we demand a clear positive or negative determination by the DPC on all omitted factual and legal submissions.

The DPC has so far been unable (or unwilling) to understand our position in writing and we see no opportunity for the Complainant to have a fair hearing when a decision-maker engages in conduct like that of the PPD. As the only way to clarify these issues, we explicitly request an oral hearing before the DSB and DPC in section 0 of this submission.

[1] PPD, § 3.1.
[2] PPD, § 4.1.

2. GENERAL OBSERVATIONS

There are some horizontal elements, we would like to address upfront:

2.1. Reliance on previous submissions

For the sake of clarity, we fully and explicitly maintain to our previous material and procedural submissions. We reject the numerous mischaracterizations of our position in the PPD and invite the DPC to review our submissions, and/or to engage in an open dialogue to ensure that our position is properly reflected.

2.2. Access to documents and the right to be heard

We want to highlight that the DPC continues to withhold memos of the Spring 2018 meetings with Facebook on this very subject matter and explicitly refuses to provide us with the a full version of the PDD and does not even explain to us which parts of the PDD were left out.

We will have to rely on these breaches of the procedural rights of the Complainant in any appeals situation.

2.3. Lack of the right to be heard before the EDPB decision process

The DPC should be aware that some members of the EDPB take the view that the parties may not be heard before the EDPB, as the parties should be fully heard before the national supervisory authority.

The DPC has confirmed that we were neither provided with all documents of the case nor heard on all aspects. If the DPC chooses to refer a "*draft decision*" without giving the complaint a full right to be heard on all elements of the PDD and all other materials before the DPC, we would have to raise a breach of the Complainant's rights under Article 41 CFR before the EDPB and request the EDPB to take appropriate action in this case.

3. ON THE "SCHEDULE"

We are unsure about the legal status of what the DPC calls a "*schedule*", but assume it is an integral part of the PDD and will be delivered to the EDPB.

For the sake of clarity, we do not accept any element of the schedule that we do not respond to hereunder. We limit this submission to the most relevant inaccuracies on the "schedule":

3.1. Materials considered

We note that the DPC continues to follow the idea that there are documents, which were "*considered*" and other documents which were not considered. This is, however, not an objective determination.

Anything that is before a decisions maker must be made available to all parties. The current approach allows the DPC to (conveniently) not "*consider*" any submissions or evidence that may not support its findings. Allowing a decision maker to choose the evidence it wants to rely on is not an approach that is in line with European, Irish, and Austrian procedural requirements.

We will rely on this breach of the Complainant 's procedural rights in any appeal.

3.2. Cooperation & Austrian procedural law

The DPC seems to follow an archaic and purely nationalistic idea of international law that has no place in the European Union. In a joint Union, local authorities and courts have to regularly apply the law of other Member States and every lawyer is trained in the relevant conflict of law provisions.

The narrative of the DPC, suggesting that we would have requested the DPC to apply Austrian procedural law, is fully rejected. While we absolutely agree that the DPC must operate under European and Irish law, this does not mean that it must not interpret complaints, contracts or other legally relevant matters under the applicable law of another Member State. While regulations (EC) 593/2008 or (EC) 864/2007 determine the applicable contractual or non-contractual law within the EU, the administrative procedure is determined by the authority that the citizens interacts with. In this case, we filed before the local Austrian DSB, as foreseen by Article 77(1) GDPR.

It is undeniable that the Complainant had to follow Austrian procedural law when making the submissions in Austria and when communicating with the DSB. The complaint therefore has to be interpreted under the Austrian Administrative Procedural Act ("*AVG*"). This means for example the following (see *Hengstschläger/Leeb,* AVG § 13, Rz 38):

1) complaints or other applications are not to be determined by a literal interpretation,[3] but by the overall meaning of the complaint when taking the aim of the submission (the "*applications*") into account (see e.g. VwGH 18. 9. 2002, 2000/07/0086 and VwGH 26. 2. 2003, 2002/17/0279).
2) It is explicitly prohibited to give an application a meaning that the applicant explicitly rejected during the procedure (VwSlg 10.179 A/1980).
3) If an application is unclear, the authority has to request a clarification (VwSlg 11.625 A/1984).

There is now disagreement between the Austrian DSB and the Complainant on the one hand and the Irish DPC as to the meaning of the complaint. The Irish DPC seems to have engaged in its own interpretation of an Austrian complaint in a way that fundamentally violates the applicable law. The Irish DPC even explicitly refuses to interpret the complaint under the applicable law.[4]

Instead of cooperating with the Austrian DSB (as required under Article 60 GDPR), and, for example, requesting a clarification from the Complainant or from the Austrian DSB, the DPC did not just openly violate Chapter 5 of the GDPR by not cooperating with the Austrian DSB, but also openly rejected the explicit communication of the Austrian DSB to properly interpret the complaint.[5]

The rights of the Complainant were therefore were violated to such a gross extent that a final decision could not legally be issued by the Austrian DSB.

We regret the total disregard of the DPC of international law and the GDPR's cooperation mechanism and we will rely on these points in any appeal.

[3] Exactly oppsite to the approach of the DPC in § 3.35 of the Schedule.
[4] See e.g. § 3.12 of the Schedule.
[5] Letter by the Austrian DSB of 10.7.2020 on the scope of the procedure.

3.3. Prior agreement with Facebook and potential bias of the DPC

§ 2.32 of the schedule alleges that we would have not provided any evidence of bias and would have made false allegations. This is wholly incorrect.

We have repeatedly provided the DPC with Facebook's statement before the Austrian courts on, that the "bypassing" of Article 6(1)(a) GDPR via Article 6(1)(b) GDPR was agreed upon with the DPC (the "*used legal basis for the processing of data under GDPR was developed under extended regulatory involvement by the [Commission] in multiple personal meetings between November 2017 and July 2018"* see citation in § 2.27 of the schedule). Facebook has itself relied on these meetings in its letter to the DPC as acknowledged in § 2.33 of the Schedule. It is incomprehensible that the DPC nevertheless claims in the next paragraphs of the schedule that there was no evidence for substantial engagement.

This total denial of obvious facts makes the DPC's claims about the lack of bias more questionable. The fact that the DPC continues to avoid a clear determination on the core issue of the complaint (the "consent bypass") in the PPD but instead tries to rely on the less relevant violations of transparency principle, further supports the assumption that the DPC has come to an agreement with Facebook on the "consent bypass" ahead of our complaints and is therefore conflicted.

The DPC has also never provided any evidence, memo or other evidence to substantiate its claims that these meetings did not have the substance that Facebook alleged before the Austrian courts. It would have been logical to openly call out such false statements and demand a correction by Facebook. Equally, it would have been easy for the DPC to, for example, provide a sworn affidavit regarding the true content of these meetings or to create a joint declaration by the DPC and Facebook regarding the content of these meetings. No such evidence was presented.

As Facebook explicitly claims that there was an agreement and there is no objective evidence that suggests otherwise, we will continue to rely on the bias of the DPC in any appeal.

3.4. Scope of the procedure

As outlined under 3.2, we take the view that the complaint was rightfully submitted before the Austrian DSB under Austrian procedural law and must therefore be interpreted under Austrian law.

It is especially relevant to determine the scope of the procedure. We refer to our submission of 9.9.2019 in this respect and especially our applications in section 3 of the complaint and section 4 of the submission of 9.9.2019.

In short and without prejudice to the other submissions:

- The Complainant's core application was to stop any processing that is based on the "*consent bypass*". This—in the proper interpretation—defines the scope of the complaint.
- The legal avenue to that result, be it Article 6(1) GDPR or, as now suggested by the DPC, a violation of Article 5(1) GDPR, is irrelevant from the Complainant's perspective.

We fail to see how this could be constantly misunderstood by the DPC. It seems to require intentional misinterpretations on behalf of the DPC for the debate about the meaning of the complaint, and the scope of this case, to have gotten so fundamentally out of hand.

3.4.1. Defense by Facebook held against the Complainant

The DPC further seems to confuse, that it was not the Complainant, but Facebook, that introduced Article 6(1)(b) GDPR into the procedure as a new defense, just like any defendant can introduce new defenses in any case as well.

It is however wholly absurd that the Article 6(1)(b) defense by Facebook is now held against the Complainant and that the DPC argues that a response to that newly submitted defense would amount to "*unfairness*"[6] against Facebook. In the logic of the DPC, this would mean that the Complainant could not respond to any defense by a controller that was not predicted in a complaint.

The DPC's logic amounts to as follows; Any dispute could easily be removed from the scope of a complaints procedure by simply raising another legal basis under Article 6(1) GDPR, and the Complainant cannot respond to the new defense, because this response would be "*out of scope*".

This kind of "logic" is beyond grotesque and makes the PPD an insult to the intelligence of any reader.

3.4.2. Explicit mention of the option to not see the relevant agreement as "consent"

The PPD and schedule also omit that the complaint explicitly made submissions on the possibility that the authority may take a view that the relevant agreements do not constitute consent:

> *"In the alternative and should the Supervisory Authorities not interpret these elements as consent, we take the position that the controller simply has no legal basis for these processing operations, since these elements are clearly not a relevant contractual obligation and no other option under Article 6 of the GDPR seems to apply in this situation."*

It would then be upon Facebook to make submissions to the contrary, and on the DPC and DSB to investigate the web of different agreements, legal bases and processing operations that Facebook may rely on (see below), but it cannot be the role of a Complainant to foresee all possible arguments that may arise in a procedure when filing a complaint.

3.4.3. Specific inaccuracies in § 3.32 of the schedule

In particular, § 3.32 of the schedule is incorrect on the following elements:

Ad a.) The scope of the processing that is within the scope of the complaint is simple: anything Facebook unlawfully based on the "agreement" (whatever the nature or the violation of the GDPR) when the Complainant clicked the described button. It is upon the DPC to determine the relevant processing activities.

Ad b.) The schedule incorrectly suggests that we argued that there is a "mandatory" lawful basis where there is a contract or agreement that is concerned with the processing of personal data (a straw man argument). In fact, our position is that when interpreting an agreement that is primarily concerned with one party agreeing to allow the processing of personal data, such an abandoning of the Complainant's right to data protection must logically be interpreted as being a "consent" in nature. This is independent from where a declaration can be found, be it in the "terms or service" or in a "data policy."

Ad c.) Correct.

[6] Schedule, § 3.15.

Ad d.) Correct, but not reflected in the PPD.

Ad e.) This alleged "issue" is incorrect insofar as the Complainant did not take an issue with the entire "terms of service" but with the clauses that are properly interpreted as consent. There are other provisions of these terms that form a valid contract and allow for processing under Article 6(1)(b) GDPR. We refer to our previous submissions on more details how this determination is to be made.

Ad f.) Correct.

Given that the PPD did not determine the relevant matters but instead removed them from the scope of the procedure—including the nature of the agreement, the legal meaning of the agreement, and any consent to the processing of special categories of personal data under Article 9 GDPR[7]—we fail to see how the PPD, with its narrow scope, could possible resolve the full scope of the complaint that is rightfully before the Austrian DSB.[8]

3.4.4. Procedural applications

On the confusion on behalf of the DPC over the applications listed in § 3.37 of the schedule, we refer to the Austrian Administrative Procedure Act, which grants the Complainant the right to request specific actions by the authority. We have every right to make these requests and the Austrian DSB will have to decide on these applications. We fail to see how the DPC would be able to deny us these rights. To the contrary, the DSB may have to use the options under Articles 60, 61 and 66 GDPR to ensure that these applications are fulfilled.

Any lack of a proper investigation would clearly be uses against a final decision on appeal.

3.4.5. Corrective powers

Finally, § 3.38 of the schedule (as well as the denial to share the outcome of the PPD in the DPC's letter of 31.5.2021) shows another fundamental misunderstanding of the complaint and the rights under Article 77 GDPR:

The complaint has the sole aim of ensuring that the fundamental rights of the data subject are not further violated in this case by stopping certain processing operations ("*remedy*"), which is reflected in the "*applications*" ("*Anträge*") to the Austrian DSB and/or the Irish DPC.

While there may be discretion in other cases, the only fitting power for the remedy that was sought by the complaint (see above at 3.4) is to our understanding a prohibition of purposes that go beyond the core product of "social networking" under Article 58(2)(f) GDPR. As the entire reason for a complaint is to remedy a violation of the GDPR, the Complainant clearly has a right to request the exercise of such a corrective power that remedies the violation.

The CJEU has explicitly held, that "*the competent supervisory authority is required to*" (see C-311/18 Schreme II, § 121) stop the relevant processing operation. In the cited case the Complainant asked to "*suspend or prohibit a transfer*", in this case the Complainant request to have all processing without a proper legal basis to be stopped. As the DPC is no stranger to the case law of the CJEU, we are surprised to read that the DPC again ignores the clear case law and takes the view that "*a request to impose specified corrective powers, can [not] be considered to constitute a part of a complaint*". The requested

[7] Schedule, § 3.31.

[8] Letter of the Austrian DSB of 10.7.2020 on the scope of the complaint.

remedy (which is nothing but the exercise of the corrective power) is not just a "*part*" but the core reason the complaint was filed in the first place.

In plain English: We do not file complaints to have a (frankly endless and nerve-wrecking) discussion about the GDPR with the Irish DPC, but to ensure that the rights of the Complainant are not further violated, which in this case means that her personal data is not processed beyond what is legal under a proper application of Article 6(1) GDPR.

4. ON THE "PRELIMINARY DRAFT DECISION"

For the sake of clarity, we do not accept any element of the PPD that we do not respond to, even when we limit these submissions on the most relevant inaccuracies in the PPD.

4.1. Lack of factual investigation and omitted facts

On the section entitled "*factual background*" (§§ 2.1 to 2.11 of the PPD) we have to observe that the Investigator has wasted about 2.5 years by mainly engaging in producing legal theories and reports that are now taken over by the PPD, but failed to actually investigate the relevant facts - which is usually the reason for having an investigation at all. The DPC has neither requested to investigate all relevant facts, nor undertaken an investigation herself.

Consequently, the PPD has by no means provided a summary of facts that would enable the EDPB or the Austrian DSB to make a final determination in this case.

In addition, the PPD omits countless relevant facts that were rightfully put before the DPC. Not surprisingly, these omitted facts paint a very different picture than the PPD. To give just some examples:

- The PPD fails to mention that Facebook based all its processing operations on consent until 25 May 2018, which is crucial to understand the arrangement the controller tried to replace.
- The PPD omits that there are at least four cases in which Facebook clearly relies on consent, as outlined on page 2 of the original complaint.
- It failed to investigate or even ask for the motives of Facebook to switch from Article 6(1)(a) to 6(1)(b) GDPR exactly on 25 May 2018, which is maybe the most crucial element to show that Facebook intended nothing but to bypass the GDPR when adding additional text in front of the existing terms of service.
- The PPD fails to provide any of the facts in this regard that are available to the DPC from the infamous ten meetings it had with Facebook when preparing this "*consent bypass*".
- The PPD fails to translate the entire text of the relevant consent page, by omitting the headline that reads "Terms of Service, Privacy Policy and Cookie Directive". It further omits to translate the button which reads "Ich stimme zu", which was exactly the word used for consent in Austrian law (see § 4(14) DSG 2000, "Zustimmung") at the time.
- The PPD fails to explain that the so-called user engagement flow had a number of undisputed consent requests in a row, where only the nature of the last request is disputed, which further confuses and data subject in distinguishing between requests under Article 6(1)(a) and (b) GDPR.

- The PPD fails to analyse the rest of the "terms of service", which would show that the sections cited in § 2.11 of the PPD use a fundamentally descriptive, promotional and non-binding wording compared to the rest of the terms (which were largely already in use before 25 May 2018).
- The PPD conveniently fails to even mention the study conducted by the independent Gallup Institute of 1.000 Facebook users that overwhelmingly saw the relevant agreement as being a consent, while only 1.6% took the view that they entered into a contract that provides them with a contractual right to personalized advertisement.
- The PPD fails to highlight that there is no indication as to the legal basis that was relied upon in the four page (!) record of processing actives that was provided by Facebook.
- The DPC failed to investigate which processing activities are conducted by Facebook and on what basis (see below). Consequently, the PPD fails to provide any facts on the relationship between processing activities and elements of the agreement between the parties, which makes any further legal analysis impossible.

It is a basic principle of a fair procedure that a decision maker presents and deals with all relevant facts, not just the ones that support the view of the decision maker. This is even more relevant when the DPC is tasked with – in essence – providing a fair summary to the EDPB.

The Complainant has the right for a decision to be made only where all the relevant facts have been determined (§ 56 AVG), which is the role of the authorities as far as the Complainant is concerned (§ 39(2) AVG and Article 57(1)(f) GDPR). The PPD is in no way fit to be a basis for a determination by the EDPB. We will forcefully resist any decision that is not based on full and accurate facts and will especially rely on the Complainant's rights under Article 41 CFR in this respect.

4.2. Scope of the complaint

On the section entitled "scope of complaint" (§§ 2.12 to 2.18 of the PPD) we refer to our submissions under 3.4. The PPD does not adequately deal with the issues that were rightfully brought before the Austrian DSB and is explicitly limiting any review of the scope of the complaint to the preliminary assessment of the Complainant,[9] without having regard to the applications[10] of the complaint or any clarifications.

Some concrete examples:

- We explicitly highlight that e.g. § 2.16 of the PPD even quotes the processing under Article 9(2)(a) GDPR, but the issues in § 2.18, just two paragraphs later, fail to consider this element.
- Processing under Article 9 GDPR also features prominently in the complaint (being explicitly cited ten times). § 3.32 (a) of the Schedule even explicitly says "*a particular focus is … placed on ... special category data*". Nevertheless, processing under Article 9 GDPR is not mentioned anywhere in the PPD. In § 3.29 of the schedule the DPC is (in a circular manner) arguing that Facebook would only process special categories of personal data under consent, which is impossible, as the Complainant has clearly not given such consent and her sensitive data is nevertheless processed.
- Page 2 of the complaint lists three other cases where Facebook explicitly relies on consent, which are omitted in the PPD.

[9] PPD, § 2.12.
[10] Schedule, §§ 3.37 and 3.38

We therefore have to reject the notion that the three issues in § 2.18 of the PPD would cover all aspects of the complaint – it does not even come close. Consequently, the Complaint cannot possibly be fully decided by the PPD. For this reason, we equally assume that the Austrian DSB would be bound to reject the PPD in the process under Article 60 and 63 GDPR.

4.3. On Issues 1 and 2 – Lack of an initial analysis as to the nature of the agreement

4.3.1. Proper order of any meaningful legal analysis

As mentioned before, a core element of this procedure is that the two parties disagree about the nature of the agreement between them. The Complainant sees the request by Facebook and her agreement as (at best camouflaged) "consent", when Facebook sees the agreement as being a civil law "contract".

The acts by two parties which are necessary for forming "consent" are strikingly similar to those which are necessary for forming a "contract":

- Party A says "Can I process your data?"
- Party B says "I agree" ("Ich stimme zu")

From this, there are two sub-threads of any legal analysis:

- Even Facebook agrees that if the controversial agreement is to be analysed under Article 6(1)(a) GDPR Facebook would have relied on invalid consent (as it was not freely given, bundled, not specific, not unambiguous and alike).
- Facebook and the DPC take the view that if this exchange is to be analysed under Article 6(1)(b) GDPR and Facebook would have formed a contract with the user, while the Complainant takes the vies that *even if* the agreement would be seen as a contract, it would largely be an invalid contract.

The logical first step is therefore to gather all relevant evidence before the DPC to determine the nature of the agreement. Only once the nature of the agreement is determined can it be analysed under Article 6(1)(a) *or* (b) GDPR as a second step. The PPD however lacks any analysis as to why the exchange should be treated as "*consent*" or as a "*contract*" but engages in the second step right away.

In many cases, the PPD even confuses arguments that were made on the nature of the agreement (step 1) as being made on Article 6(1)(a) or (b) GDPR (step 2).

4.3.2. Proper analysis of the nature of an agreement

We reiterate our submissions of 9.9.2019 as to the proper analysis that the PPD would have to conduct to identify the nature of the agreement and the scientific study by the Gallup Institute as to the understanding of average Facebook users. The PPD fails to deal with them entirely.

We just want to add these observations in relation to the PPD:

4.3.2.1. PPD correctly identifies the mess created by Facebook, but does not resolve it

We note that the PPD correctly identifies that Facebook presented the Complainant with a mess of different documents that are all repeating, referring and linking to each other.

§ 5.45 of the PPD holds that the Complainant "*must view the Terms of Service and also review the sections of the Data Policy to which they are directed*" while § 5.41 holds that a link in the legal basis document "*directs users to the relatively lengthy Terms of Service which includes several other hyperlinks, including a hyperlink to the Data Policy. Users are also directed to the "Our Services" section of the Terms of Service*".

When any agreement refers to another document, it must be considered and cannot simply be ignored. A proper analysis of the agreement between the parties would have to sift through this mess and also differentiate the content of each clause, as a "*consent clause*" could well be included in civil law terms, or in a privacy policy. Equally, a privacy policy must be seen as an element of the contract under the applicable civil law, just like other declarations about a product (e.g. technical specifications).

This mess is highlighted in the PPD, as it holds in §§ 5.45 to 5.51 that "*the user is left to guess as to what processing is carried out on what data, on foot of the specified lawful bases, in order to fulfill these objectives"* and that there is (also) a violation of Articles 5(1)(a), 12(1) and 13(1)(c) GDPR. However, crucially, the PPD or the procedure does attempt to resolve this mess.

Any resolution would be required a proper determination as to the different agreements between the Complainant and Facebook. Article 58(1)(a), (e) and (f) GDPR provide the DPC with the powers to demand a clarification by Facebook on the "trinity of the GDPR" (purpose, data, legal basis) that is well-described in § 5.36 of the PPD, but the DPC failed to engage in this necessary fact-finding despite the explicit request under 3.1 of the complaint.

4.3.2.2. The position in the PPD under Issue 1 and 2 and under Issue 3 need to be reconciled

This leaves us with a situation whereby the PPD agrees that the documents the Complainant has agreed to are absolutely unclear under the heading of "issue 3", while at the same time claiming under "issue 1 and 2" that the agreement is clearly of a "contractual" nature, that said contract is valid and that any processing by Facebook is "necessary" for that contract.

In this respect, it is important that §§ 5.48 and 5.53 of the PPD hold that there is a violation of Article 12(1) GDPR as the "Data Policy and Terms of Service" would be required to provide information "*in a concise, transparent, intelligible and easily accessible form, using clear and plain language"* while they are "*disjointed, and requires users to move in and out of various sections*".

What the PPD fails to see is that Articles 6(1)(a) and 6(1)(b) GDPR require the application of exactly same test for the "informed" element of any civil law contract or consent:

The test in Article 12(1) GDPR was taken from Article 5 of Directive 93/13/ECC on unfair terms. It sets a European standard that civil law terms must (among other things) use "*plain, intelligible language*". Any "contract" that Article 6(1)(b) GDPR could possibly refer to, would therefore have to pass the very same test that the PPD claims was failed by the "Data Policy and Terms of Service" that were provided

by Facebook. We have explicitly referred to the implementation of Directive 93/13/EEC in § 6(3) KSchG in section 3.6.6.6 of our submission of 9.9.2019 and kindly ask the DPC to revisit this issue.

To make the picture complete, Recital 42 of the GDPR refers exactly to Directive 93/13/ECC when "importing" that very same test to Article 7(2) GDPR which equally requires an "*intelligible and easily accessible form, using clear and plain language*" for valid consent under Article 6(1)(a) GDPR.

In summary, it is not sustainable that the PPD applies the very same test differently under Article 6(1)(a) or (b) and under Article 12(1) GDPR. We urge the DPC to consistently apply the tests of "plain", "intelligible" language under all provisions of the GDPR.

Obviously, either Facebook or the Complainant would rely on this inconsistency in any appeals situation. We therefore sincerely hope that the DPC applies the (correct) findings under "Issue 3" also to "Issue 1" or "Issue 2" – whatever it may feel is the true nature of the agreement between the parties.

4.3.2.3. There may simply be no agreement – neither "consent" nor a valid "contract"

Finally, we submit that if there is irresolvable disagreement between the parties on the entire agreement or parts of it (e.g. because one party thought that they were executing a contract, whilst the other party thought that they were providing their consent), then the answer may not be found in Article 6(1)(a) nor (b) GDPR, as there would simply be neither a valid contract nor consent. This option is equally not explored by the PPD, but would lead to the lack of any legal basis under Article 6(1) GDPR.

4.4. "Issue 1" – Consent

4.4.1. "*Facebook never sought to obtain consent*"

In relation to §§ 3.1 to 3.8 of the PPD we want to highlight that the Complainant agrees that Facebook never openly "*sought to rely on consent*" – it is undisputed by now that they did not.

The question that the PPD raises is therefore totally beside the point of the procedure: that is that Facebook has falsely claimed that typical consent clauses would be in fact a "contract" ("*consent bypass*"). The PPD fails to address that question entirely.

A discrepancy between the true intentions of a party and the actual statement by a person is a legal phenomenon that was established in Roman times (taught in the first year of law school as "*falsa demonstratio"*). Contrary to the approach of the PPD, Roman case law interpreted an agreement as what is truly intended to be, not at what it is labeled as.

The PPD departs from more than 2000 years of European legal tradition, when it holds in § 3.7 of the PPD that the "*key point*" would be that a one-sided "label" ("*we did not seek consent*") would automatically prevail over the true intentions of the parties.

While the headline of the section raises the correct question ("*Whether the Acceptance is Consent*") the PPD never embarks on any meaningful analysis, which would require an analysis of elements like:

- The intent of the parties (e.g. the intent to bypass Article 6(1)(a) on the side of Facebook and the clear intent by the Complainant – and most other data subjects - to not form a contract over alleged services like "personalized advertisement"),
- the economic background and the common understanding of the agreement (which is again leading to consent, as the common basis for auxiliary processing), or
- the historic development (e.g., the fact that Facebook "added" the relevant provisions just at the time when the GDPR became applicable).

The PPD fails to embark on any of these matters and simply plays dumb, when the intent of Facebook to bypass the need for specific, informed, unambiguous and freely given consent is painfully obvious.

4.4.2. "*Whether the Controller must rely on Consent*"

The second element of the shallow analysis of Issue 1 in §§ 3.9 to 3.19 mainly deals with either misunderstood, misrepresented or purposefully re-framed alleged arguments by the Complainant.

To (again) clarify the position of the Complainant: There is obviously no hierarchy within Article 6(1)(a) GDPR or any mandatory duty to use Article 6(1)(a) – these are nothing but straw man arguments.

The correct position is simply, when reviewed, that all other legal bases simply do not "fit" the types of processing in the dispute. There is simply no contract under Article 6(1)(b) (see below) or legal obligation under Article 6(1)(c) GDPR. So as a matter of logic, Article 6(1)(a) GDPR is simply the remaining option for auxiliary processing.

The fact that auxiliary processing requires consent is an intentional choice by the legislator: Crucially necessary processing is legal by default, the rest requires a choice by the data subject. This design is also reflective of the underlying system of Article 8 and 52 CFR.

As the PPD (for 3.5 pages) only deals with imaginary arguments of the Complainant, we feel that there is a need to embark on the (incorrect) views in the PPD that are based on these imaginary arguments.

4.5. "Issue 2" – Contract

4.5.1. Illegal omission of civil law arguments

We refer to our remarks under 0.0 as to the perversion of justice that the DPC engages in, when it ignores all submissions by the Complainant regarding the way the "Terms of Service" would have to be interpreted under applicable Austrian law, *if* they would be in fact a contract as being "*outside the remit of a supervisory authority*" (§ 4.18 of the PPD), whilst at the same time uses exactly such an interpretation of the "*particular contract*" (§§ 4.23, 4.27, 4.28 and 4.40) in the next paragraphs. It is an insult to any informed reader to think that this cheap "trick" would not be understood and called out.

It is also simply a lie that matters of foreign law or contract law would be in any way "*outside the remit of a supervisory authority*" (§ 4.18 of the PPD), or that the DPC is "*not competent to rule directly on matters of national contract law*" (§ 4.11 of the PPD) when the DPC has, for example, paid US legal experts to investigate US surveillance laws and serve as expert witnesses to arrive at a "draft decision" in *Data Protection Commission v. Facebook and Schrems*.

Consequently, the DPC is (at best) too lazy to engage in any substantive review of the alleged contractual relationships, but more likely using this alleged lack of jurisdiction to simply refuse to engage with the submissions by the Complainant. Such an approach is nothing but a willful abuse of office on behalf of the DPC that we will not tolerate.

In reality, determining the true nature and meaning of an agreement is a logical precondition ("*Vorfrage*") for any assessment under Article 6(1)(a) or (b) GDPR and must be properly interpreted in the PPD. It is nothing but a denial of justice and an insult when the DPC holds that the civil courts or the Bundeskartellamt "*would be a more appropriate avenue for the Complainant to ventilate the issues surrounding contract law*" (§ 4.12 of the PPD). Under the explicit § 38 AVG these issues would have to be determined by the Austrian DSB before arriving at any decision.

We again have to highlight that the Austrian DSB would have no option but to object to a draft decision that has not dealt with this essential preliminary question, especially if it wished to conclude that all processing activities were "*necessary*" for a contract that was not even reviewed.

4.5.2. Lack of differentiation within the alleged "contract"

As already highlighted under 0 the DPC has in no way investigated which specific clauses of the "Terms of Service" are used by Facebook to justify the specific purpose of its processing, the type of data processed, and the applicable legal basis. In fact, that lack of information is the core point that is made under "issue 3" of the PPD.

Nevertheless the PPD follows a binary approach that inaccurately claims the Complainant would "*argue that Facebook is not entitled to rely on Article 6(1)(b) GDPR, i.e. personal data processing that is necessary for the performance of a contract, as a legal basis*." In fact, the Complainant agrees that parts of Facebook's processing may legitimately be based on the existing contract that – in the view of the Complainant – starts in essence at the headline "*3. Your commitments to Facebook and our community*", while the introduction and first two sections are nothing but advertisement or a factual description of the service, but do not form a contract under the applicable civil law ("ABGB"),

Lacking any specific differentiation, investigation and fact-finding makes it logically impossible for the Austrian DSB or indeed the EDPB to make any informed decision as to where Article 6(1)(b) GDPR may rightfully apply and where not. It would be simple to request Facebook to provide such a list – but this was so far done neither by the investigator, nor by the DPC.

4.5.3. Most important inaccurate "facts" under "Issue 2"

We further want to highlight that there is no evidence for the speculation as to the view of an average data subject on the "*bargain*" (as the PPD now calls the alleged "*contract*") especially in §§ 4.35 and 4.37 to 4.39 of the PPD. There is not a shred of evidence, for claims such as, "*advertising is part of the substance and fundamental object of the contract*" (§ 4.39 of the PPD) or "*a reasonable user would be well-informed … that this is precisely the nature of the service*" (§ 4.35 of the PPD). The PPD partly correctly labels this as "*my view*" (§ 4.35 of the PPD).

However, legal decisions must not be based on personal "*views*", but on hard evidence. The allegations are in fact contrary to exactly such evidence before the DPC, as we have provided a detailed study as to the understanding of the "*bargain*" between users and Facebook, which shows that the contested

page where the "contract" is allegedly signed with Facebook was understood by 64% as "consent", 16% as a mere information, 10% could not ascribe a meaning to the page and 10% took the view they formed a new contract. Only 1.6% were taking the view that that contract would be over personalized advertisement in the way described by Facebook. We equally refer to the affidavit of the Complainant as to the actual views of her and offer to produce any other evidence that may be necessary.

We further reject the inaccurate description of the value exchange between the Complainant and Facebook in § 4.39 of the PPD:

- In reality, Facebook is for example a platform that can only generate visitors and sell advertisements, because users – like the Complainant – provide relevant content to the other users, with no remuneration. The Terms of Service explicitly includes a "*permission to use content you create and share*" that grants Facebook a right to freely use content that is otherwise protected by copyrights.
- Users equally spend the most important online currency on Facebook: their time. Companies spend insane amounts to get users to a page. Every visit is therefore not a loss, but a profit for Facebook – even when it can only show non-personalized advertisement, that may make more profits than personalized advertisements.[11]

In summary, the old "data for service" narrative is not just economically inaccurate, but clearly way too simplistic. It is deeply alarming to see this ancient industry lobbyist narrative made it into an official document of a European DPA, as a finding of "fact".

We insist, in summary, that the DPC should base its final draft decision on the actual evidence before it, not on personal "*views*". Otherwise, we might as well ask the Oracle of Delphi what data subjects really know or think and what economics really play out in a contractual relationship.

4.5.4. The alleged application of the freedom to conduct a business

We fundamentally object to the inaccurate interpretation in § 4.41 of the PPD that the enforcement of the GDPR and of Article 8 CFR would in any way "*compete*" with the freedom to conduct a business in Article 16 CFR. The right to conduct a business is explicitly conditional on conducting a business only "*in accordance with Union law and national law*".

The right further only generally guarantees the freedom to "*exercise an economic or commercial activity*". This right does not extend to the right to conduct any business in any way, share or form, but to conduct a business at all. The right can be for example infringed if certain industry sectors are exempt from the free market (e.g. a law would make social media would a state monopoly), but not if Facebook is limited in exploiting the personal data of the Complainant under the GDPR.

We were aware that industry lobbyists are spreading the idea of "balancing" Article 8 and 16 CFR, which is based on a totally ridiculous understanding of Article 16 CFR – but we are extremely worried to see that this lobby talking point made it into an official document of a supervisory authority. We therefore highly recommend to revisit the relevant CJEU case law.

[11] See for example: https://techcrunch.com/2020/07/24/data-from-dutch-public-broadcaster-shows-the-value-of-ditching-creepy-ads/

4.5.5. Departure from the EDPB guidelines

We note that at its core the PPD largely and *explicitly* departs from the EDPB guidelines on Article 6(1)(b) GDPR and indeed Articles 8 and 52(1) of the Charter of Fundamental Rights when taking the view that there must be a broad interpretation of the (well-defined) requirement that processing must be "*necessary*" for the performance of a contract.

We are looking forward to the debate at the EDPB on this point and trust that the EDPB will (once again) reiterate its view in a form that is legally binding for the DPC.

4.5.6. *"Simply not persuaded"*

Finally, we would like to thank the DPC for the honest words at the end of the section on "issue 2" when it is said that the DPC is "*simply not persuaded that anything in the GDPR precludes Facebook from relying on Article 6(1)(b) GDPR*".

We would very much welcome the DPC to overcome a state of mere "*persuasions*" and use the last stretch of this procedure within Ireland to engage in neutral and fact based decision-making.

4.5.7. Reference to the previous submission

As the DPC has unlawfully refused to engage with most of the submissions made on behalf of the Complainant, we refer to said submissions and urge the DPC to take full account of them in and draft decision that it may submit to the EDPB.

4.6. "Issue 3" – Lack of Information

We welcome the findings on "issue 3" in the PPD, even when this is not the core issue of our complaint, but merely a tangential matter. Simply explaining to the Complainant how her rights under the GDPR were violated through Facebook's "*consent bypass*" is not remedying the violation that this complaint is about.

In short, we would like to highlight the following elements on "issue 3":

- We do not think that the matter of the right assessment of various layers is relevant for the remedies that the Complainant is seeking, but want to note that a "layered approach" may not be used to hide the most crucial information. For the alleged switch on 25.5.2018 the most relevant change in Facebook's position was that of relying on Article 6(1)(b) instead 6(1)(a) GDPR. The procedure has not brought to light any other substantial change. However, exactly this information is found on the "last layer" in the "legal basis document" instead of prominently displaying it on the first layer as the "major change".
- We echo the remarks (for example in § 5.27 of the PPD) that the purpose is indeed what may be best described as the "backbone of the GDPR" as almost all core provisions of the GDPR rely on a properly defined purpose. Without such a properly defined purpose, most of the core rules in the GDPR would instantly collapse.

- We very much welcome the clear findings for example in § 5.36 of the PPD on what we call the "trinity of the GDPR" (purpose, data, legal basis) and the need to link them to provide the data subject with any meaningful information. Without such linking, we would simply see generic lists of all data, all purposes and all legal bases under Article 6(1) GDPR without any indication of the relationships between them.

5. PREVIOUS APPLICATIONS AND QUESTION ON THE IMPACT ON THE COMPLAINANT

5.1. Previous application of the Complainant

We note that the DPC apparently takes the view that the Complainant did not have any specific aim when filing this complaint and/or that she does not have a right to a remedy when filing a complaint (see letter of 31.5.2021). As mentioned before, we fundamentally disagree and urge the DPC to talk to the Austrian DSB to get better informed about the explicit applications in the complaint, that explicitly demand to stop all illegal processing that is based on the "consent bypass" and/or the other violations that we relied upon in the complaint and in our further submissions.

5.2. Impact on the Complainant under Article 83(2)(a) GDPR

As requested by the DPC in its letter of 14.5.2021 and further explained in the letter of 31.5.2021, we would like to inform you that the Complainant has described the following impact to us:

- There is a general loss of control over her personal data given that the "consent bypass" would not give her the right to withdraw her consent at any time in a specific way (like only for tracking, tracking on external pages, big data analytics of her network, ads and alike).
- She therefore limits her use of the platform to the bare minimum, which infringes on her right to data protection, but also the freedom of speech and the freedom of information, as the platform is a *de facto* monopoly for much of the possible informational exchange online.

We would however like to highlight that the relevant infringement is not specific to the Complainant and literally all customers of Facebook were exposed to the same violations.

5.3. Logical consequence of the findings in relation to "issue 3"

Finally, we would like to highlight that the finding in the PPD that Facebook has violated Article 5(1)(a) GDPR by allegedly not providing the relevant information under Article 13(1)(c) GDPR, would at least for the time being lead to the same result, as the intended finding that Facebook violated Article 6(1) GDPR. Both provisions lead to the relevant processing being unlawful.

6. NEW APPLICATIONS OF THE COMPLAINANT

Finally, we make the following new applications in response to the PPD with the Austrian DSB and the Irish DPC. Insofar as the Austrian DSB or Irish DPC is not able to conduct these steps itself, we refer to the duty to cooperate in Article 60(1) and the other duties and powers under Article 60 to 62 GDPR.

1) Given that most of our submissions or arguments were either not understood, ignored or were maybe lost in translation and we are otherwise unable to respond to any new submissions by Facebook, we formally apply for an oral hearing before the draft decision is issued (§ 39(2) AVG).

Explanation: There seems to be no other option to ensure that the position of the Complainant and of Facebook is properly discussed. We equally expect a fundamental acceleration of the procedure, compared to having these matters dealt with in the procedures under Article 60 and 63 GDPR – or even having to repeat the procedure, when the PPD cannot overcome the EDPB or later judicial scrutiny.

2) We further apply (§ 43(2) and (4) AVG) for the following evidence to be gathered:

a) We apply for to hear a representative of Facebook as a witness (§ 48 AVG and Article 58(1)(a) GDPR) as to the personal data and purposes that are processed on each element of the "Terms of Service" or other legal basis.

Explanation: We do not see how the DPC, DSB or EDPB could come to a conclusion on the core element of the "consent bypass" in the complaint, without even knowing which processing activities are based on which legal basis. The clarification of this question seems to be an inevitable element of the investigation procedure.

b) To the extent that Facebook relies on the "Terms of Service" we apply to hear a representative of Facebook as a witness (§ 48 AVG and Article 58(1)(a) GDPR) as to the intent and reasons for switching from "consent" to "contract" on 25 May 2018 at midnight, as well as Facebook's understanding of the alleged contractual rights that the introductory sections and sections 1 and 2 of the Terms of Service entail.

Explanation: We do not see how the DPC, DSB or EDPB could come to a conclusion on the core element of the "consent bypass" in the complaint, without investigating the actual intent of this arrangement and the true meaning of the underlying alleged "contract". The clarification of this question seems to be an inevitable element of the investigation procedure.

3) For the avoidance of doubt, we apply (§ 43(2) and (4) AVG) for all other evidence that was included or referenced in previous submissions to the DSB and DPC to be properly included in any decision, since the DPC did not understand these documents to be "evidence".