

SCHEDULE

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1 CHRONOLOGY, PROCEDURAL AND SCOPE MATTERS PERTAINING TO INQUIRY PROVISIONALLY DECIDED

- 1.1 The Complaint was lodged with the Austrian DPA on 25 May 2018 (the date on which the GDPR became applicable) by the Complainant's representative: "noyb – European Center for Digital Rights" ("NOYB"). The legal framework for the Complaint as lodged with the Commission is set out below. In brief, the Complaint concerns the lawfulness of Facebook's processing of personal data, specifically data processing on foot of the Complainant's acceptance of Facebook's Terms of Service, and the transparency of information provided by Facebook to the Complainant about that processing.
- 1.2 The Commission began the Inquiry by designating an investigator ("the **Investigator**"), who produced a draft of an inquiry report ("the **Draft Report**") and, following submissions from the Parties, a final inquiry report ("the **Final Report**"). In considering this Inquiry, I have relied on the facts as set out in the Final Report. I have also had regard to the views set out by the Investigator in the Final Report, as well as to the entirety of the file, in preparing this Schedule.
- 1.3 The preliminary draft decision ("the **Preliminary Draft Decision**") set out my provisional findings, as the decision-maker in this matter, in relation to (i) whether or not an infringement of the GDPR has occurred/is occurring; and (ii) the envisaged action to be taken by the Commission in respect of same.
- 1.4 The submissions of Facebook and NOYB (collectively "the **Parties**") were received and taken into account by me. I have finalised this Schedule and a draft decision ("the **Draft Decision**"), to be submitted by the Commission to other concerned supervisory authorities ("the **CSAs**") (within the meaning of Article 4(22) GDPR), pursuant to Article 60 GDPR. The Preliminary Draft Decision and this Schedule were provided to the Parties for the purpose of allowing them to make submissions in relation to my provisional findings. I have considered the submissions so made by the Parties and, where necessary, made amendments to take account of these. The Schedule and Draft Decision are for circulation to CSAs in accordance with the procedure set out in Article 60 GDPR and as explained in, *inter alia*, my letters sent to Facebook and the Complainant respectively on 17 April 2020 ("the **Article 60 Process**").
- 1.5 For the avoidance of doubt, this Schedule is an integral and operative part of the Draft Decision for the purposes of Article 60 GDPR, and therefore of the decision I am proposing to make. The division of material into two documents is entirely a structural choice, so as to enable a more exclusive focus on the substantive Complaint in the main document, while dealing with matters of a more procedural nature herein.

LEGAL BASIS FOR THE INQUIRY

- 1.6 The Inquiry in this case was conducted by the Investigator under Section 110 of the 2018 Act.
- 1.7 The decision-making process for the Inquiry which applies to this case is provided for under Section 113(2)(a) of the 2018 Act. Additionally, Section 113(3)(a) of the Act requires that the

Commission must consider the information obtained during the Inquiry; decide whether an infringement is occurring or has occurred; and if so, decide on the envisaged action (if any) to be taken in relation to the data controller. This function is performed by me in my role as the decision-maker. In so doing, I have carried out an independent assessment of all of the materials provided to me by the Investigator.

- 1.8 As stated above, the Inquiry was commenced pursuant to Section 110 of the 2018 Act. By way of background in this regard, under Part 6 of the 2018 Act, the Commission has the power to commence an inquiry on several bases, including on foot of a complaint, or of its own volition.
- 1.9 The table below sets out, in summary form, a chronology of the process of the Inquiry so far, leading up to the decision-making stage, in this particular case. The finalised version of this Draft Decision will include the details of the issuing of this preliminary version to the Parties and the making of any submissions, as applicable, by the Parties to the Commission.

25 May 2018	Complaint lodged with Austrian DPA
30 May 2018	Complaint passed to the Commission by the Austrian DPA
20 August 2018	Inquiry Commenced
27 September 2018; 22 February 2019	Submissions from Facebook on the Complaint
28 June 2019	Parties were furnished with Draft Inquiry Report
29 July 2019	Facebook Submissions on Draft Inquiry Report
3 September 2019	Complainant Submissions on Draft Inquiry Report
15 April 2020	Copy of Final Inquiry Report issued to the parties and commencement of decision-making stage
17 April 2020	Letter issued to parties confirming commencement of decision-making stage.
14 May 2021	Preliminary Draft Decision with Schedule issued to the Parties
11 June 2021	Complainant makes Submissions on Preliminary Draft Decision and Schedule
16 June 2021	Facebook makes Submissions on Preliminary Draft Decision and Schedule
6 October 2021	Draft Decision Submitted to Article 60 Process

- 1.10 In his consideration of the material, the Investigator was satisfied that Facebook constitutes a data controller and that the processing referred to in the Complaint constitutes cross-border processing, such that the Commission is the lead supervisory authority as set out in the GDPR. I make my decision in this regard below.

REFERRAL BY AUSTRIAN DPA

- 1.11 The Complaint was referred to the Commission by the Austrian DPA on the basis that (i) the Complaint concerns cross-border processing and (ii) Facebook, as the data controller, has its main establishment in Ireland. In this regard, the Austrian DPA forwarded the Complaint to the Commission on 30 May 2018. The Commission assessed the Complaint as lead supervisory authority, commenced the Inquiry under Section 110 of the 2018 Act on 20 August 2018. The Parties were also notified of the commencement of the Inquiry on 20 August 2018.

STATUS OF NOYB

- 1.12 NOYB is acting as a representative of a named individual in accordance with Article 80 GDPR, which states that:

“The data subject shall have the right to mandate a not-for-profit body, organisation or association which has been properly constituted in accordance with the law of a Member State, has statutory objectives which are in the public interest, and is active in the field of the protection of data subjects’ rights and freedoms with regard to the protection of their personal data to lodge the complaint on his or her behalf...”

- 1.13 For the purposes of assessing compliance with Article 80 GDPR, it is necessary to assess whether NOYB was a properly constituted not-for-profit body with objectives in the public interest and that was actively engaged in “the field of the protection of data subject rights”. In this regard, the Investigator consulted NOYB’s website, and NOYB’s articles of association, which explain that it is a “*verein*” (association) under Austrian law. Having reviewed paragraphs 91-96 of the Final Report and Appendix 4 of the Final Report (NOYB’s articles of association), I am satisfied that NOYB meets the definition set out in Article 80 GDPR. NOYB is a not-for-profit body that appears on its face (although the Commission has no specific competence to rule in this regard) to be validly constituted in accordance with Austrian law, with objectives which are in the public interest. From having reviewed this information, I am also satisfied that NOYB is active in the field of the protection of data subject rights. On this basis, I am satisfied that these all meet the definition in Article 80 GDPR.
- 1.14 Moreover, it is necessary to determine the validity of the data subject’s mandate in order to decide whether NOYB may represent them. I am satisfied, having reviewed paragraphs 98-101 of the Final Report and Appendix 3 of the Final Report (the data subject’s “mandate”) that the mandate provided to NOYB by the data subject was lawful, and that therefore NOYB has the right to represent the data subject in this matter. The mandate includes the name, address and signature of the data subject being represented by NOYB. I note, as was noted by the Investigator, that the mandate specifically refers to “*forced consent to the update privacy policy that I clicked on to in May 2018*”. On an objective reading of this mandate, NOYB was given

authority to represent the data subject in relation to alleged infringements of the GDPR concerning agreement to the Terms of Service and Data Policy.

- 1.15 I have also considered “Attachment F” to the Complainant’s submissions on the Draft Report i.e. an affidavit (sworn statement). This affidavit, sworn on 3 September 2019, states that, in the data subject’s view, NOYB has the authority to represent them *“in all matters and in all arguments and legal claims against Facebook according to Article 80 GDPR”*. My view is that this cannot alter, *post hoc*, the nature of the data subject mandate that was provided to NOYB in accordance with Article 80 GDPR to launch a complaint on its behalf. The nature of the Complaint was specified and detailed in the mandate. However, as the scope of the Complaint as I propose to find below does not, in my view, conflict with the mandate, the question of whether “Attachment F” can broaden the scope of NOYB’s mandate is moot.
- 1.16 Facebook expressed no particular view on NOYB’s status under Article 80 GDPR, or on the data subject’s mandate.

PROCEDURAL CONDUCT OF INQUIRY

- 1.17 As set out above, the Inquiry was commenced on 20 August 2018 for the purposes of examining and assessing the circumstances surrounding the Complaint as referred to the Commission by the Austrian DPA, with a view to ultimately facilitating a decision under Section 113(2)(a) of the Act.
- 1.18 The Commission commenced the Inquiry as it was *“of the opinion that one or more provisions of the [2018] Act and/or the GDPR may have been contravened in relation to the personal data of the data subject who is represented by the Complainant pursuant to Art. 80(1) GDPR...”*¹ The Commission formed this view on the basis of the contents of the Complaint and the arguments it sets out. The Parties were informed of the commencement of the Inquiry by letters dated 20 August 2018. The letter to Facebook set out that the scope of the Inquiry would encompass the contents of the Complaint. The letter also set out a number of queries for Facebook.
- 1.19 Facebook responded to these queries by way of correspondence, with an attached schedule and appendices, on 27 September 2018.
- 1.20 Following this, the Investigator wrote to the Complainant on 23 November 2018 to set out his views on the scope of the Complaint. In this context, a number of procedural issues were raised by the Complainant in correspondence dated 3 December 2018. These issues consisted of an allegation of delay on the part of the Commission, and an allegation of bias on the part of the Commission, and a rejection of the interpretation of the Complaint’s scope proposed by the Investigator. The Investigator responded to the Complainant on 16 January 2019 refuting the allegations in strong terms. A further phone call took place between the Investigator and Mr. Maximilian Schrems, a representative of the Complainant, on 26 January 2019, in this regard.

¹ Letter of the Commission to Facebook, 20 August 2018.

- 1.21 The Investigator wrote to Facebook on 25 January 2019 to set out his views on the scope of the Complaint, in the same manner as set out in the letter to the Complainant on 23 November 2018. Facebook raised a number of preliminary procedural queries with the Investigator by letter dated 5 February 2019. Facebook enquired as to whether its submissions of 27 September 2018 would be taken into account in circumstances where it was of the view that these submissions extended beyond the scope as set out by the Investigator in the letter of 25 January 2019. Facebook also sought assurances in respect of the confidentiality of information provided in submissions to the Commission, and queried how information would be shared with concerned supervisory authorities pursuant to Article 60 GDPR.
- 1.22 The Investigator responded to Facebook's query on 8 February 2019, and confirmed that Facebook's submission of 27 September 2018 would be taken into account. Furthermore, the Investigator informed Facebook that it would consider the matter of confidentiality of material in the context of the Article 60 Process by way of separate correspondence. The Investigator also asked Facebook to set out clearly any material that it regarded as confidential and/or commercially sensitive in any submissions to the Commission, including the submissions of 27 September 2018 in this Inquiry.
- 1.23 Facebook corresponded further with the Commission on 13 February 2019 seeking confirmation that aspects of the submission of 27 September 2018 that did not fall within the scope of the Complaint as set out the Investigator's letter of 25 January 2019 would not be taken into account. Facebook also sought an extension to the deadline (which was 15 February 2019) that had been set for submissions in the Investigator's letter of 25 January 2019. The Investigator wrote to Facebook on 15 February 2019 confirming that the extension would be granted and asking Facebook to specify any part of the submission of 27 September 2018 that it argued should not be taken into account.
- 1.24 In response to the letter of 25 January 2019, Facebook sent its submissions on 22 February 2019, in accordance with the extension of time provided by the Investigator. The Complainant was informed of same. On 23 March 2019, the Complainant wrote to the Commission to request an update as to progress, which was provided by the Investigator on 28 March 2019. That letter set out the procedure that would be followed in terms of the preparation of a Draft Report, the Final Report, and the decision-making process.
- 1.25 Mr Schrems raised a number of concerns with the Investigator in a phone conversation on 1 April 2019. Further to this, the Complainant wrote to the Investigator on 19 April 2019 to set out the concerns in writing. These concerns related to dealing directly with the Commission in circumstances where the Complaint was lodged with the Austrian DPA, as well as concerns surrounding the applicability of Irish procedural law as opposed to Austrian procedural law, and conflicts between Irish procedural law and Austrian procedural law. These concerns were also raised by the Complainant in its submissions on the Draft Report and were addressed in the Final Report. I address these concerns and procedural issues below.

- 1.26 Having completed the Draft Report, the Investigator furnished the parties with a copy of the Draft Report on 28 June 2019. Facebook's submissions on the Draft Report were received by the Investigator on 28 July 2019, and the Complainant's submissions on same were received by the Investigator on 9 September 2019. The Investigator proceeded to prepare the Final Report.
- 1.27 As has already been outlined, Facebook asserted confidentiality over some material sent to the Commission in the context of its submissions during the course of the Inquiry. The Complainant argued that it was entitled to view the material, and also formally requested access to the entire investigation file. Facebook subsequently expressed its willingness to share all relevant material with the Complainant on a voluntary basis. I have considered the issues surrounding the confidentiality dispute in the correspondence between the parties. I am satisfied that no additional issues of confidentiality arise in circumstances where no specific issues of commercial sensitivity have been identified by Facebook in response to such requests, aside from Facebook's position that the ongoing Inquiry is, in general, a confidential process.
- 1.28 The Parties were furnished with each other's submissions on the Draft Report, for their information. The Final Report was provided to me as decision-maker on 4 April 2020.
- 1.29 In terms of its contents, the Final Report sets out the factual background, and the scope and legal basis, for the Inquiry. It also provides an outline of the facts as established during the course of the Inquiry, an outline of the dispute about the scope of the Inquiry and the Investigator's view on same, and an outline of the procedural disputes that arose during the Inquiry and the Investigator's view on same. The Final Report further sets out the Investigator's views as to whether, in respect of these matters, Facebook complied with its obligations under GDPR and the 2018 Act.
- 1.30 A draft of this Schedule and the Preliminary Draft Decision, i.e. a draft of this decision prepared to enable to parties to make submissions, were sent to the parties on 14 May 2021. The parties furnished the Commission with submissions on that Preliminary Draft Decision and the draft of the Schedule, which I have taken account of in preparing this Schedule and the Draft Decision. The Complainant was not furnished with the section of the Preliminary Draft Decision that addressed the envisaged action i.e. what corrective powers would be imposed, as this is a matter for the Commission and not something that falls within the framework of a complaint pursuant to Article 77 GDPR.
- 1.31 As for any alleged failure to hear the complainant on the question of corrective powers, my view is that this is simply not a matter for a complainant. A complaint consists of an allegation that unlawful processing is taking place, and therefore is an allegation of an infringement. The question of a corrective power e.g. an administrative fine is solely within the competence of the Commission.

- 1.32 The Complainant, in this regard, provided the example of a ban on unlawful processing as something a Complainant should be heard in relation to.² In making this argument, the Complainant points out that the Complaint in fact seeks a specific “remedy”, i.e. the ending of all processing that the Complainant believes to be unlawful.³
- 1.33 It must be acknowledged, however, that the position adopted in the Preliminary Draft Decision was that no unlawful processing had been identified by the Complainant, and the proposed infringements related to transparency rather than to the processing of data. As such, it must logically follow that the Commission was not proposing a ban on any processing, given that the Preliminary Draft Decision did not propose to find that any unlawful processing was actually taking place. In this regard, even if there were merit to this argument in some particular circumstances, it is clearly not applicable in the context in which it was made.
- 1.34 Furthermore, in circumstances where the Commission was minded to find that unlawful processing was taking place, the position of the Complainant in this regard is abundantly clear. Were the Commission not minded to ban any such processing, the Complainant’s position is clearly that it should. If the Commission were minded to ban it, the Complainant has made it clear that it would agree with the decision. In that sense, the Complainant has in fact been heard in no uncertain terms in relation to the question of whether any processing (the processing in question being considered in detail in the accompanying Draft Decision) should be banned.
- 1.35 What has happened is that the Complainant has not been furnished with, and given the opportunity to make submissions on, the section of the Draft Decision that proposed an administrative fine, something which is not a matter for the Complainant in any event. As I have set out, the Preliminary Draft Decision did not propose to find that any unlawful processing was taking place. This leads to the inevitable conclusion that the section of the Preliminary Draft Decision the Complainant was not provided with would not (and indeed could not) propose banning processing. Therefore even taking this particular argument of the Complainant at its height, it is not applicable in these circumstances.
- 1.36 Moreover, the Complainant was afforded a right to be heard on the impact any alleged unlawful processing had on her, which is a factor to be considered in the imposition of an administrative fine under Article 83(2)(a) GDPR. This provided the Complainant with an opportunity to speak to the only factor in my consideration of which the Complainant has direct experience.
- 1.37 For the above reasons, these suggestions on the part of the Complainant’s representative to the effect that it was not afforded a full right to be heard in relation to this inquiry are either ill-founded or based on mischaracterisations of fact and law.

2 Procedural Issues to be Decided

² *Ibid*, paragraph 3.4.5.

³ *Ibid*.

2.1 As set out above, this is the Schedule to a Draft Decision proposed to be made by the Commission, (at this point, I note that I am the sole member of the Commission) in accordance with Section 113 of the 2018 Act. Section 113 of the 2018 Act provides as follows:

(2) Where section 109 (4)(a) applies, the Commission shall—

(a) in accordance with subsection (3), make a draft decision in respect of the complaint (or, as the case may be, part of the complaint) and, where applicable, as to the envisaged action to be taken in relation to the controller or processor concerned, and

(b) in accordance with Article 60 and, where appropriate, Article 65, adopt its decision in respect of the complaint or, as the case may be, part of the complaint.

(3) In making a draft decision under subsection (2)(a), the Commission shall, where applicable, have regard to—

(a) the information obtained by the Commission in its examination of the complaint, including, where an inquiry has been conducted in respect of the complaint, the information obtained in the inquiry, and

(b) any draft for a decision that is submitted to the Commission by a supervisory authority in accordance with Article 56(4).

(4) Where the Commission adopts a decision under subsection (2)(b) to the effect that an infringement by the controller or processor concerned has occurred or is occurring, it shall, in addition, make a decision—

(a) where an inquiry has been conducted in respect of the complaint—

(i) as to whether a corrective power should be exercised in respect of the controller or processor concerned, and

(ii) where it decides to so exercise a corrective power, the corrective power that is to be exercised,

- 2.2 In accordance with Section 113, it is for me, as the sole member of the Commission, to consider the information obtained in the course of the Inquiry; to decide whether an infringement is occurring or has occurred; and if so, to decide on the envisaged action in respect of the controller (if any). In so doing, I will carry out an independent assessment of all of the materials provided to me by the Investigator.
- 2.3 Given that the Commission is the lead supervisory authority under Article 56(1) GDPR for the purposes of the data processing operations at issue, I am obliged under Section 113(2) and Article 60(3) GDPR to complete a draft decision to be provided to any supervisory authorities concerned, as defined in Article 4(22).
- 2.4 As set out above at paragraph 1.1, this concerns my Draft Decision under Article 60(3) GDPR being submitted to the supervisory authorities concerned. The purpose of the Draft Schedule and the Preliminary Draft Decision were to allow the parties to make any submissions in respect of my provisional findings set out. This is the finalised version of the Schedule and Draft Decision.

DECISION-MAKING PROCESS – MATERIALS CONSIDERED

- 2.5 The Final Report was transmitted to me on 4 April 2020, together with the Investigator's file, containing copies of all correspondence exchanged between the Investigator and the Parties; and copies of any submissions made by the Parties, including the submissions made by the Parties in respect of the Investigator's Draft Report. A letter then issued to the Parties on 17 April 2020 to confirm the commencement of the decision-making process.
- 2.6 As decision-maker, I must be satisfied that Facebook is a controller within the meaning of the GDPR, that the Commission has competence in respect of this Inquiry, and that fair procedures have been followed throughout the Inquiry. As I have set out above, a number of procedural complaints were made by NOYB throughout the Inquiry process. These issues are addressed in this Schedule.
- 2.7 The Complainant's submissions on the Preliminary Draft Decision took issue with this approach. It was argued that this breached the Complainant's right to be heard.⁴ It was also argued that the use of the term "materials considered" suggested that there must be some materials that the Commission did not consider.⁵ For the avoidance of doubt, I have considered all material submitted to me by the Parties, and the entire file in general. There is no question of any breach of the Complainant's right to be heard.

FACEBOOK AS CONTROLLER

- 2.8 In commencing the Inquiry, Investigator was satisfied that Facebook is the controller, within the meaning of Article 4(7) of the GDPR, in respect of the personal data that was the subject of the

⁴ Complainant Submissions on Preliminary Draft Decision, paragraph 2.2.

⁵ *Ibid*, paragraph 3.1.

Complaint. In this regard, Facebook confirmed that it was the controller for data processing in the European Union in a letter to the Commission dated 25 May 2018, appended to the Investigator's Final Report ("the **Final Report**") at Appendix 8.

2.9 The concept of controllership is defined in Article 4(7) GDPR which states that a controller is

"the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law".

2.10 In considering whether Facebook is a controller within the EU for the purposes of the GDPR, I note that Facebook's Dublin office constitutes Facebook's International Headquarters, and that Facebook has approximately 1,300 direct employees and several thousand further indirect employees working for their Dublin office.⁶ Amongst these employees are key data protection personnel, including Facebook's Head of Data Protection and Associate General Counsel. In the context of the Commission's work as Ireland's data protection regulator, it has become clear that Facebook determines the purposes and means of data processing through its role as a global centre of decision-making within Facebook companies generally, and particularly in relation to the processing of personal data. I am therefore satisfied that it is a data controller for European (and, indeed, EMEA) users as defined by Article 4(7) GDPR.

2.11 In relation to the work of the Commission, and my work as Commissioner, it is clear to me based on direct experience that decisions in relation to the purposes and means of data processing for European data subjects are made by Facebook Ireland. I note the submissions made by Facebook on 27 September 2018, in which it stated that it *"...is both responsible for, and has the power to make, decisions about the purposes and means of processing of personal data from EU data subjects..."*.⁷ Moreover, the submission stated that:

"Facebook Ireland is the service provider of the Service in the EU and also determines the purposes and means of processing EU users' data. It is the only entity with decision-making power regarding:

- *Setting policies governing how EU user data is processed;*
- *Deciding whether and how our products that involve processing of user data will be offered in the EU;*
- *Controlling the access to and use of EU user data; and*
- *Handling and resolving data-related inquiries and complaints from European users of the Service whether directly or indirectly via regulators."*⁸

⁶ <https://www.irishtimes.com/business/technology/facebook-ireland-staff-log-some-of-the-highest-salaries-in-the-state-1.4096130>; <https://www.thejournal.ie/facebook-jobs-sheryl-sandberg-4451174-Jan2019/>.

⁷ Facebook Ireland Submissions 27 September 2018, paragraph 2.2.

⁸ *Ibid*, paragraph 2.4

2.12 By way of a specific recent example, the Commission attended Facebook Ireland's Dublin office in order to inspect documents relating to the roll-out of a dating feature. This roll-out was delayed as a result of concerns expressed by the Commission about the compliance of the feature with data protection law. In the context of this inspection, it was clear that decisions in relation to this data processing were made by Facebook Ireland, just as other such decisions have been made in the past, and are made on a daily basis. For these reasons, I am in agreement with the Investigator, and find that Facebook Ireland is a data controller as defined by Article 4(7) GDPR. Specifically, I am satisfied that Facebook Ireland is the data controller for users in the European Union.

COMPETENCE OF THE COMMISSION

2.13 Pursuant to Article 56(1) GDPR, *"the supervisory authority of the main establishment or of the single establishment of the controller or processor shall be competent to act as lead supervisory authority for the cross-border processing carried out by that controller or processor"*. It follows that the Commission is only competent to act as the lead supervisory authority if (i) Facebook's main or single establishment in the Union is located in Ireland, and (ii) there is cross-border processing as defined in the GDPR.

2.14 I will first consider whether Facebook Ireland is the main or single establishment of the Facebook group within the Union. The term "main establishment" in respect of a controller, is defined in Article 4(16) GDPR as *"...the place of its central administration in the Union" where "decisions on the purposes and means of the processing of personal data are taken."*

2.15 Facebook confirmed to the Commission, in a letter of 25 May 2018 at Appendix 8 of the Final Report: *"...we wish to formally confirm that the following controllers will have their main establishment in the European Union in Ireland: Facebook Ireland Limited..."*. Furthermore, having reviewed the Directors' Report and Financial Statements most recently filed on behalf of Facebook Ireland with the Companies Registration Office (in respect of the financial year ended 31 December 2018), I note that page 3 of the Directors' Report confirms that:

"Facebook Ireland Limited ("the company") is a wholly-owned subsidiary of Facebook International Operations Limited, which is its immediate parent and controlling party. Facebook International Operations is incorporated in the Republic of Ireland and its ultimate parent is Facebook, Inc. ("Facebook"), a company incorporated in Wilmington, Delaware, United States of America."

2.16 In their submissions of 27 September 2018, Facebook submitted that:

"Facebook Ireland has more than 4000 personnel at its headquarters in Dublin who manage, among other things, the operations and data processing relating to EU users, including the analysis and exercise of those users' rights, information security including user information security, engineering, user support, law enforcement response, data protection and privacy operations and policy and legal teams including, critically, the data protection teams. Facebook Ireland's senior decision makers operate in cross-functional teams,

which include representatives from its Legal, Policy, Law Enforcement Response, Community Operations, Information Security, and Privacy Operations. The DPO and his office provide oversight of these teams and their work. These decision makers formulate user data processing policies and oversee the implementation of these policies in respect of users of the Service in the EU. On a daily basis, Facebook Ireland's personnel are responsible for managing the personal data of EU users and determining the means and purposes of processing this personal data.”⁹

2.17 In this regard, I further note that the Investigator, and the Commission generally, was satisfied, in commencing the Inquiry, that Facebook Ireland was the main establishment in the European Union within the meaning of Article 56(1) GDPR.

2.18 As I have already observed, Facebook Ireland's headquarters in Dublin constitutes Facebook's International Headquarters. Moreover, I have already found, for the reasons set out above, that decisions on the purposes and means of the processing of personal data are taken by Facebook Ireland. For these reasons and the reasons already set out above, I am satisfied that Facebook Ireland is Facebook's place of central administration in the Union. I am also satisfied, on the information available to me, that decisions which relate to the means and purposes of data processing are made by Facebook Ireland.

2.19 To turn to cross-border processing, cross-border processing is defined in Article 4(23) GDPR as either:

“(a) processing of personal data which takes place in the context of the activities of establishments in more than one Member State of a controller or processor in the Union where the controller or processor is established in more than one Member State; or

(b) processing of personal data which takes place in the context of the activities of a single establishment of a controller or processor in the Union but which substantially affects or is likely to substantially affect data subjects in more than one Member State.”

2.20 In its submissions dated 27 September 2018, Facebook confirmed that *“Facebook Ireland provides the Service to hundreds of millions of users across the EU and in doing so is engaged in cross-border processing pursuant to Article 4(23) GDPR.”¹⁰*

2.21 I also note that the Investigator was satisfied that there was cross-border processing carried out by Facebook (within the meaning of Article 4(23) GDPR), in relation to the personal data that was the subject of the Complaint.¹¹ Given the scale of Facebook's operations across the European Union outlined above, I am satisfied that there is cross-border processing as defined in the GDPR for the purposes of this Complaint.

⁹ *Ibid*, paragraph 2.9.

¹⁰ Facebook Ireland Submissions 27 September 2018 paragraph, 2.7.

¹¹ Final Report, page 19-20.

2.22 I am satisfied based on the above evidence secured through publicly available sources, information voluntarily provided by Facebook Ireland, and information acquired by the Commission in the course of conducting investigations, that Facebook Ireland is the data controller for EU users and is the organisation's place of central administration in the Union. I am also satisfied, for the reasons set out above, that this Complaint concerns cross-border processing. I therefore agree with the Investigator that Facebook Ireland meets the definition of "main establishment" in Article 4(16) GDPR, and that therefore the Commission is competent to act as lead supervisory authority in accordance with Article 56 GDPR.

ISSUES OF AUSTRIAN LAW

2.23 The next procedural issue is an overarching point that is relevant to each of the other individual points raised by the Complainant, and so I will consider this point before considering the other points in turn. This Complaint was lodged with the Austrian DPA, who then transferred the Complaint to the Commission as lead supervisory authority in accordance with Article 56 GDPR. The Commission then launched a statutory inquiry in accordance with Irish law. The Complainant, however, argues that because the Complaint itself was lodged with the Austrian DPA in Austria, the Complaint must be handled in accordance with the procedural laws of both Austria and Ireland. The Complainant has initiated legal proceedings in Austria against the Austrian DPA in this regard ("the **Austrian Proceedings**").

2.24 Briefly, and by way of background, the Austrian Proceedings arise out of a formal complaint made by the Complainant to the Austrian DPA ("the **Austrian Complaint**"). The Austrian Complaint argues that the Commission has contravened Austrian law by not adhering to the relevant procedural rules and not applying Austrian contract law to this Complaint. The Complainant also argues that the Commission has contravened Austrian law by not considering certain matters that the Complainant deems to be within the scope of the Complaint. On this basis and others (which are not directly relevant for these purposes), the Complainant asks that the Austrian DPA lift a suspension currently in operation on its handling of the Complaint so that it can also deal with that same Complaint. The Austrian DPA rejected these arguments for a number of reasons, including that it cannot act while the Commission's procedures are ongoing. The Complainant has appealed this decision of the Austrian DPA in the Austrian courts, resulting in the Austrian Proceedings.

2.25 The Complainant made similar arguments in its submissions to the Investigator,¹² and specifically argues that the applicable procedural law is the *Allgemeines Verwaltungsverfahrensgesetz* ("the **AVG**"), Austria's code of administrative procedure. It is the Complainant's view that the AVG permits the alteration of the scope of a procedure in particular circumstances, and seeks to rely on this in order to dispute the Investigator's view of the scope of the Complaint, and to alter that scope. My decision on scope of the Complaint is considered in detail below, and at this point I

¹² Complainant Submissions of 9 September 2019, paragraph 1.1.

am solely considering the applicability or otherwise of the AVG to the actions of the Commission in general.

- 2.26 As the decision-maker at the Commission, I take no view on the Complainant's characterisation of the AVG or of any other questions of Austrian law. The Commission was established in Ireland by the 2018 Act, thereby meeting Ireland's obligations to establish such an authority under Article 51 (and Chapter VI generally) GDPR, given it is directly applicable in Ireland pursuant to Article 288 of the Treaty on the Functioning of the European Union. Section 12 of the 2018 Act provides a number of functions for the Commission "*in addition to the functions assigned to the Commission by virtue of its being the supervisory authority for the purposes of the Data Protection Regulation*".
- 2.27 Chapter VI of the GDPR set out in detail the responsibilities and powers of supervisory authorities. While it is not necessary to set out Chapter VI here, it is noteworthy that Article 51(1) GDPR states that "[e]ach Member States shall provide for one or more independent public authorities to be responsible for monitoring the application of this Regulation" [my emphasis]. Moreover, Section 12 of the 2018 Act does not confer any powers on the Commission in respect to the laws of any other jurisdiction.
- 2.28 The powers of the Commission must be limited to those conferred on it by law. The Commission is tasked with encouraging, monitoring and enforcing compliance with the GDPR. In that context it is, like all other public authorities in the State, bound by the administrative law of Ireland and EU law, including EU law on fair procedures and the European Charter of Fundamental Rights and Freedoms. Further, as I stated above, Article 56(1) GDPR sets out that "*the supervisory authority of the main establishment or of the single establishment of the controller or processor shall be competent to act as lead supervisory authority*".
- 2.29 The Commission therefore derives its legal authority to handle the Complaint from the GDPR and the 2018 Act, and is, in that regard, bound by the legal order set out above. The Commission is not bound, nor must it have regard to, the administrative law of Austria, or of any other jurisdiction. Moreover, it seems to me that not only does the administrative law of Austria not bind the Commission, but that any attempt by the Commission to apply such law would be plainly *ultra vires* the powers conferred on the Commission by law.
- 2.30 The parties were afforded an opportunity to address the provisional conclusions reached in the Schedule to the Preliminary Draft Decision. In making the argument that this position was "*an archaic and purely nationalistic idea of international law*", the Complainant's submissions advance the position that, while the Commission operates under Irish and EU law, it must at times interpret the AVG. This is said to include interpreting and applying Austrian law in order to determine the scope of the complaint.¹³ It is also argued that the Commission has failed to cooperate with the Austrian DPA by asking for clarifications on the nature of the law.

¹³ Complainant submissions on Preliminary Draft Decision, page 7.

- 2.31 To address the latter issue first, the Commission has cooperated in full with the Austrian DPA throughout this Inquiry.
- 2.32 In relation to the possible application of Austrian procedural law, at no point do the Complainant's submissions point to any legal authority for the proposition that the Commission must interpret and apply aspects of Austrian procedural law to this Complaint, beyond the citation of the provisions of Austrian law themselves which are said to be relevant. The Commission has not sought clarifications on Austrian procedural law given the Commission does not accept, and has not been presented with any legal authority for, the suggestion that it must apply, interpret, or in any way consider the procedural law of Austria.
- 2.33 No further distinct argument was made to elaborate on why Austrian law would be applicable to any procedure being conducted by an Irish supervisory authority in Ireland. The Commission is established under Irish law, specifically the Data Protection Act 2018, and must exercise its functions under and in accordance with the 2018 Act and applicable EU law, including, in particular, the GDPR. This being so, I find that I am not obliged to apply Austrian procedural law in the exercise of my functions in this Inquiry. Indeed, it must be open to doubt whether the Commission would ever have jurisdiction or competence to do so.

ALLEGATION OF BIAS

- 2.34 As has been set out above, the Complainant wrote to the Investigator on 3 December 2018 raising a number of procedural issues, including an allegation of bias on the part of the Commission, which I will address here. I will subsequently address the Complainant's allegation that the manner in which the Commission dealt with the scope of the Complaint was contrary to its right to fair procedures, before considering the substantive question of the scope of the Complaint in the subsequent section.
- 2.35 In the letter dated 3 December 2018, the Complainant alleged that there had been prior "approval" by the Commission of the legal bases used by Facebook Ireland for processing personal data. This was based in part on a statement made in Vienna's *Landesgericht* (Regional Court) that 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*".¹⁴ In the letter, the Complainant stated that "[t]his does not just raise questions about your claim that you have to 'investigate' and 'inquire' [sic.] this matter – when in fact you have already negotiated with the Facebook Group about these legal and factual questions between 2017 and 2018, but raises issues about an obvious bias of a decision maker that has previously approved the criticized mechanism."¹⁵
- 2.36 In the same letter, the Complainant referred to the existence of a rule against bias in both Ireland and in Austria, but did not elaborate on its legal views of the nature of the test in either

¹⁴ Case 3Cg52/14k at the LGfZRS Wien, paragraph 209.

¹⁵ Letter from Complainant to Commission 3 December 2018.

jurisdiction, and did not present any arguments explaining why, in its view, the Commission had acted in a manner that contravened any such test. Moreover, the Complainant offered no evidence to substantiate the factually inaccurate claim that the Commission “previously approved” the “mechanism” in question or to substantiate the allegation that the consultation process gave rise to the apprehension of bias.

2.37 The Investigator responded to this and other allegations in a letter dated 16 January 2019. The Investigator correctly observed that the allegations of bias were unsubstantiated, and confirmed that “[the Commission] *does not and never has, endorsed, jointly developed, approved or in any other way assented or consented to a controller’s or processor’s policies or position in relation to compliance with its data protection obligations.*” It was clarified that the interactions referred to by the Complainant were for the purpose of “*being updated...and being providing high level feedback*” to both Facebook and to a large number of other private and public sector organisations with which the Commission interacts as part of its “*consultation and engagement with regulatory stakeholders.*” I agree with the Investigator’s view just set out, for the reasons which I have set out above.

2.38 I also note and agree with the Investigator’s statement in the same letter that outlined the Commission’s statutory obligations under the Data Protection Acts 1988 and 2003, which were in force at the time. This also applies, as was pointed out by the Investigator, under Article 57 GDPR. The Commission implements these obligations to promote awareness of data protection law by maintaining an active consultation function. The Investigator also clarified that the Commission “*makes it abundantly clear to any organisation that seeks to consult with it that this is the premise upon which consultation takes place and that it is entirely a matter for that organisation to ensure that it is in compliance with data protection law.*” This is, in my view, an accurate characterisation of the position. In a subsequent telephone call with staff of the Commission on 25 January 2019, Mr. Schrems, raised the matter of bias once again. At this point, Mr. Dale Sunderland, Deputy Commissioner, reiterated the DPC’s position, in this regard, to Mr. Schrems.¹⁶

2.39 This issue of bias was not raised again until the Complainant furnished the Investigator with submissions on the Draft Report dated 9 September 2019. For the sake of completeness, the entirety of the Complainant’s submission, in this regard, is set out below:

“Since it follows from Facebook’s submission (e.g. page 2 of the submissions of 27. 9. 2018) that the Irish DPC even worked out (!) the procedure criticised in the complaint together with Facebook in ten sessions, the problem of bias is once again drawn to attention.

It seems difficult to imagine, for example, that the authority could make use of its power to issue penalties if it had worked on the punishable conduct with Facebook in advance. This also gives rise to a potential conflict with the GDPR, which provides in Article 83(1) for “effective, proportionate and dissuasive” penalties.

¹⁶ Memorandum of phone call, 25 January 2019.

We do not yet know how the Irish authority intends to take case [sic.] of this problem and we expressly reserve the right to appeal any decision on this basis.”¹⁷

2.40 As is evident from this quotation, the Complainant offered no specific evidence in respect of this unsubstantiated allegation that *“the Irish DPC even worked out(!) the procedure criticised in the complaint together with Facebook”*. Moreover, no reference is made to the Commission’s clarification that no approval or authorisation for the Terms of Service was provided to Facebook Ireland by the Commission. The premise of the Complainant’s argument, as had already been pointed out by the Investigator, is incorrect. The reference to “meetings” in Facebook’s submissions cited by the Complainant in the above quotation is the only reference to the Commission’s consultation function in any submissions made by Facebook in relation to this Inquiry. The reference is as follows:

“We have drafted this response against the background of our detailed direct engagement with the Commission prior to the implementation of the recent update to our terms, spanning 10 meetings, which covered many of the issues responded to herein. Facebook Ireland has not materially changed its compliance approach since these meetings.”

2.41 It is clear that this is a reference to a consultative process, and at no point does Facebook assert that the Terms of Service were approved or endorsed by the DPC; it is merely asserted that these Terms of Service have not changed since a consultation process took place. Facebook would of course not be entitled to rely on remarks made in such meetings. In addition, it is not clear to me how Facebook can be said to be using the above statement to support its legal position, or indeed any argument, in relation to the Inquiry. For the purpose of providing additional context, I also emphasise that this quotation is taken from a two-page covering letter preceding submissions to the Commission in the context of the Inquiry as opposed to being extracted from such submissions to the Commission.

2.42 Finally, this matter was raised, indirectly, in the form of an “open letter” published by NOYB and sent to other European Data Protection Authorities and to the European Data Protection Board (“the **EDPB**”). In this letter, public allegations were made about the Commission’s cooperation with what the Complainant calls Facebook’s “consent bypass”.¹⁸ To the extent that this letter directly addresses the allegation of bias at all, it once again proceeds on the false factual premise that that Facebook *“simply followed the [Commission]’s advice.”* It is further alleged that this renders the Commission’s processes *“structurally biased because it is essentially reviewing its own legal advice”*. It has already been clarified above that, contrary to this assertion, the Commission did not approve any such mechanism, nor did it provide legal advice to Facebook. It has also been clarified that Facebook Ireland has in fact not sought to rely on such consultations in this Inquiry.

2.43 In the open letter, it was alleged that *“[k]eeping these meetings confidential is only adding to the impression that the [Commission] and Facebook have engaged in a relationship that is inappropriate for a neutral and independent oversight authority.”¹⁹* Aside from the fact that the

¹⁷ Submissions of Complainant 9 September 2019, pages 6-7, paragraph 1.8.

¹⁸ Open letter of NOYB, page 3, https://noyb.eu/sites/default/files/2020-05/Open%20Letter_noyb_GDPR.pdf.

¹⁹ *Ibid.*

Commission's consultation function is widely publicised, such an allegation has no basis in law. The relevant facts have been provided to the Complainant by the Commission on multiple occasions, and a reasonable and objective explanation of those facts has been provided to the Complainant by the Commission on multiple occasions.

2.44 It is factually not the case that the Commission endorsed or approved of the Terms of Service and Data Policy of Facebook or indeed of any other organisation. Moreover, irrespective of any feedback that may or may not have been provided to Facebook or any other organisation, the Commission always emphasises that the consultation function is entirely distinct from any statutory inquiries, investigations, or decisions of the Commission. I also emphasise that this decision-making process is also functionally independent of the procedure conducted by the Investigator that led to the Final Report, just as the statutory inquiries are functionally independent from any and all consultations with the Commission. The factual premise of the allegation is incorrect, and the test for bias has not been met.

2.45 The parties were afforded an opportunity to address the provisional conclusions reached in the Schedule to the Preliminary Draft Decision. The Complainant disagrees that no evidence of bias has been provided, and points to a statement made in an Austrian court by a representative of Facebook. That statement consists of the quotation in paragraph 2.32 above. I have set out my views on that statement. The Complainant goes on to argue that "[t]he 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".²⁰ This does not in any way substantiate the serious allegation of bias made by the Complainant.

2.46 Firstly it has not been denied by the Commission or Facebook that "*these meetings did not have the substance that Facebook alleged*". The presence of engagement and consultation does not of course, in and of itself, suggest approval of any kind. Any decision by Facebook, or an individual employee of Facebook, to reference such meetings in the context of defending particular practices is a matter for Facebook. In this regard, it is relevant to note that the Commission is not party to the Austrian proceedings referred to by the Complainant. To the extent that Facebook seeks to rely on or has ever relied on any consultative process with the Commission in order to defend the lawfulness of a particular practice, this has been in error. More pertinently, for present purposes, Facebook makes no such argument in the context of this Complaint. This is because the Commission never provided any such approval in this case nor does it do so in the context of its engagement and consultation role more generally. Unfortunately the Complainant and/or her representative has chosen to rely on one specific isolated statement – in proceedings to which the Commission is not a party - and to make assumptions on the basis of that statement which do not correspond to the factual position. In circumstances where the allegation of bias has not been substantiated, I must reject that allegation.

2.47 I am therefore satisfied that fair procedures have been followed in this and every regard thus far throughout the Inquiry.

²⁰ Complainant Submissions on Preliminary Draft Decision, page 8.

3. THE SCOPE OF THE COMPLAINT AND INQUIRY

PROCEDURAL ISSUES SURROUNDING THE SCOPE OF THE COMPLAINT

3.1. The question of scope is also considered in the main body Draft Decision, and therefore this section is to be read in conjunction with Section 2 of the Draft. The Complainant also alleged that in determining the scope of the Complaint and in not allowing the Complainant to revise the scope of that Complaint, the Commission was acting contrary to the Complainant's right to fair procedures. In the letter dated 3 December 2018, the Complainant specifically articulated its view that it objected to a "one shot" approach, and instead argued it should be afforded the opportunity to respond to Facebook's views on the Complaint. These arguments were necessarily linked to the Complainant's assertion of a right of access to all of Facebook's submissions to the Commission in respect of this Complaint, an issue which has now been disposed as these submissions have been shared with the Complainant on a voluntary basis, as described above. The Complainant sought to advance the argument that the Commission should engage in an open-ended inquiry into each individual processing operation carried out by Facebook.

3.2. In response, in the letter dated 16 January 2019, the Investigator informed the Complainant that:

"the DPC has identified two main issues (each with associated sub-issues for consideration, as detailed in our most recent communication to you) which are the primary focus of that statutory inquiry. The DPC considers that all data protection matters raised in your complaint fall within these two main issues, as set out in detail in our letter dated 23 November 2018. As such the DPC's position is that the scope of the current inquiry captures all elements of the Facebook complaint."

3.3. This matter was not raised again until the Complainant contacted the Investigator by email on 23 March 2019 seeking an update on the status of the Complaint. The Investigator responded by letter dated 28 March 2019. This letter outlined the procedure that would be followed going forward, and the Investigator also reaffirmed that *"the DPC notified NOYB of its view concerning the scope of inquiry C-18-5-5."*

3.4. The Complainant wrote to the Investigator by letter dated 19 April 2019, and addressed the issue of the scope of the Complaint further. The Complainant stated that *"we reserve the right to amend our arguments should one of the controllers seek to depart from the factual or legal premises our complaints were based on."* It was also emphasised, in that regard, that *"the complaints explicitly states that the complaints are based on our knowledge at the time of submission"*. Contrastingly, Facebook argued that the Complaint's scope should be strictly limited to processing that was Facebook Ireland processed on foot of consent.

3.5. In the Draft Report, the Investigator relied on a statement in the Complaint which read:

*"For practical reasons, the scope of this complaint is explicitly limited to any processing operations that are wholly or partly based on Article 6(1)(a) and/or Article 9(2)(a) of the GDPR. Our current understanding is, that these are used as bases for all processing operations described in the controller's privacy policy..."*²¹

3.6. The Investigator went on to consider in detail the contents of the Complaint, including its focus on the Complainant's view that all data processing pursuant to the data subject's acceptance of the Terms of Service was based on consent.²² The Investigator also set out that, in the words of the Complainant, the Complaint rested on a *"preliminary assumption"* that all processing carried out pursuant to the Terms of Service was based on consent or, alternatively, that all processing based on these documents *"simply has no legal basis"*.²³ The Investigator observed that the legal analysis in the Complaint was confined to the issue of consent.²⁴

3.7. Having outlined the scope, the Complaint then states that "[n]evertheless, nothing in this complaint shall indicate that other legal bases the controller may rely on are not equally invalid or may not be equally the subject of subsequent legal actions."²⁵ This qualifying remark, while alluding to the fact that the Complainant may have other views in relation to other legal bases for data processing carried out by Facebook, is evidently not one that describes the character of the Complaint in question. While such a remark clearly refers to hypothetical positions the Complainant may have or take in the future, it cannot alter the limiting character of the preceding statement in and of itself. It instead clarifies that the Complainant reserves its position in respect of any other legal bases on which Facebook may or may not rely.

3.8. Having taken an objective reading of the Complaint, the Investigator concluded that the issues that arose were:

- **Issue (a):** the acceptance of the Terms of Service and/or Data Policy was an act of consent;
- **Issue (b):** Facebook cannot lawfully rely on necessity for the performance of a contract to process data arising out of the data subject's acceptance of those same documents;
- **Issue (c):** Facebook misrepresented the legal basis for processing this data; and
- **Issue (d):** Facebook failed to provide the necessary information regarding its legal basis for processing this data.

3.9. In its submissions on the Draft Report, the Complainant argued that *"the DPC believes it can exclude certain questions from the proceedings and arbitrarily determine a scope of procedure based on the hypothetical or guessed will of the complainant"*.²⁶ The assertion was made that "[i]t is also not alien

²¹ Complaint, paragraph 1.6.

²² Draft Report, Page 5.

²³ *Ibid*, page 6.

²⁴ *Ibid*, page 7.

²⁵ Complaint, Paragraph 1.6.

²⁶ Submissions of 9 September 2019, page 5, paragraph 1.3.

to Irish procedural law that a request may be amended if, based on the defendant's submissions, another alleged legal basis for data processing arises.”²⁷

- 3.10. The Investigator gave consideration to these submissions and ultimately did not revise his view.²⁸ Facebook also remained of the view that, contrary to both the view of the Investigator and the Complainant, the Complaint should be strictly limited to data processing carried out, as a matter of fact, on the basis of consent.²⁹ The Investigator found that it was not necessary to engage in a factual “*trawl*” of each one of Facebook Ireland’s processing operations, but instead to carry out a legal and factual analysis based on the objective content of the Complaint itself.³⁰ This was not based on an assessment of the “will” of the Complainant, hypothetical or otherwise, but simply on an assessment of the content of the Complaint.
- 3.11. In submissions on the Schedule to the Preliminary Draft Decision, the Complainant maintained this position. Not only were further arguments made in support of the argument that the Commission has breached the Complainant’s right to fair procedures by misinterpreting the scope of the Complaint, but the Complainant’s submissions also accuse the Commission of either “*simply not understand[ing] or read[ing] large parts of – or, as it seems to us wilfully mischaracterises the submissions of the Complainant*”.³¹ These most serious accusations are refuted by the Commission in the strongest of terms. For the avoidance of doubt, the Commission has given full consideration to all relevant material, including, but not limited to, all submissions made by the Complainant. The Commission also rejects the unfounded accusations of *mala fides* that are made in the alternative in this regard.
- 3.12. The Complainant also relies on Austrian procedural law in the submissions on the Preliminary Draft Decision in order to argue that the Complaint should be interpreted in a particular manner. In this regard I reiterate that there is no legal authority for the proposition that the Commission is bound to interpret and apply Austrian procedural law to the Complaint, and further note that the Complainant has been unable to produce such authority despite having ample opportunity to do so. In particular the Complainant argues that the core of the Complaint’s scope is the “remedy” being sought, i.e. a ban on all processing carried out on foot of the “consent bypass”.³² It goes without saying that in order for such a ban to become relevant to any procedure, there must be a finding of a breach of the GDPR on the basis alleged in the first instance. This is why the first step in any such analysis involves considering the infringement in advance of this proposed “remedy”.
- 3.13. The Commission, in the Preliminary Draft Decision, considered the allegation that an infringement is taking place in the form of unlawful processing arising from the alleged consent bypass. The Commission has considered further submissions from the Parties in this regard, and has formed a view in the Draft Decision. It is difficult to see how the absence of the exercise of a particular corrective power, which necessarily can only be imposed if the Commission finds that an

²⁷ *Ibid.*

²⁸ Final Report, page 18.

²⁹ *Ibid*, page 11.

³⁰ *Ibid*, page 13.

³¹ Complainant Submissions on Preliminary Draft Decision, page 5.

³² *Ibid*, page 8.

alleged infringement has made out, can be characterised as a failure to deal with the entire scope of a Complaint.

- 3.14. The Complainant also alleges that it has been unable to respond to Facebook's "defence". The Complainant submits that there has been no opportunity to respond to Facebook's argument that it actually relies on a different legal basis for processing personal data to the one the Complainant thought it relied on.³³ On the contrary, the Complainant has made extensive submissions on this argument that has been put forward by Facebook, both in its submissions on the Draft Report and in its submissions on the Preliminary Draft Decision. Contrary to what is argued on the Complainant's behalf, no dispute has been "removed" from scope. Both legal bases that have arisen over the course of this Inquiry are fully considered in the Draft Decision, as they were considered in the Preliminary Draft Decision.
- 3.15. I must make an assessment as to whether the Complainant's specific allegations of procedural unfairness in how this was addressed by the Commission thus far have merit. In the "open letter" to which I have already referred, the Complainant alleged that *"the Investigator departed from the applications that were made in accordance with Austrian procedural law and decided to investigate only certain elements of our complaint and to reinterpret our requests."*³⁴
- 3.16. It does not seem to me that the above quotation is an accurate characterisation of what has taken place. I have already (as had the Investigator) set out views on why Austrian procedural law does not apply to the activities of the Commission. The merits or otherwise of the Investigator's objective analysis of the content of the Complaint is addressed later in this section. I do not accept, however, that there is, in principle, a procedural defect in limiting the scope of a complaint-based inquiry to the objective contents of the very Complaint that led the Commission to conduct an Inquiry. As well as conforming to Section 113 of the 2018 Act (set out earlier in this Section of the Schedule), this approach is perfectly logical.
- 3.17. The Complainant's arguments in relation to any alleged procedural defects in the manner in which the scope of the Complaint is to be determined, i.e. by the objective content of the Complaint, are based on Austrian Administrative law, and particularly on the AVG. Insofar as that those arguments are based on Austrian law, for reasons already set out, the Commission cannot consider those arguments, save to the extent that they raise issues of either Irish or EU law. I note that Facebook did not make submissions on the issue of the applicability or otherwise of the AVG during this Inquiry.
- 3.18. Moreover, as I have set out, the decision to conduct a complaint-based Inquiry arising out of the contents of a Complaint seems to me to be a perfectly logical approach. The alternative would be an open-ended procedure, where the content of a "complaint" would crystallise at some unspecified future date. The inherent problem with such an approach is that it would not amount to an inquiry based on the Complaint which was lodged with the Commission, but would instead be an inquiry directed by the Complainant, with its subject matter and steps dictated on an evolving

³³ *Ibid*, paragraph 3.4.1.

³⁴ Open letter, page 6 https://noyb.eu/sites/default/files/2020-05/Open%20Letter_noyb_GDPR.pdf.

and ongoing basis by the Complainant. Furthermore, it is unclear how it could be said that such an approach constitutes a complaint that concerns personal data relating to the complainant. This would presumably only occur once a complainant is satisfied of receipt of all information they might require, and has been afforded the opportunity to amend the complaint itself based on the submissions of the other party.

3.19. The unfairness that could arise from such an approach stems from the fact that it would, in effect, enable a form of *post-hoc* amendment to an existing complaint over the course of an indefinite period of time, which could only come to an end at a time and in a manner of the Complainant's choosing. This would not only amount to a fundamentally one-sided approach, but would also alter the character of the inquiry to the extent that it could no longer be described as "complaint-based", but rather "complainant-led".

3.20. This also applies to aspects of the Complaint that either reserve the Complainant's position or express views on hypothetical investigative and/or corrective powers that, in the Complainant's personal view, the Commission should exercise. I see no breach of fair procedures in considering the Complaint as a whole in order to determine the exact infringements being alleged. There is no procedural right to make generalised requests to the Commission to either conduct broad-based investigations or exercise particular corrective powers in the context of a complaint. In any case, as I have also set out above, the question of a "remedy", here a ban on processing (which now is said by the Complainant to be at the core of the Complaint), can only arise when a particular infringement involving unlawful processing has been made out.

3.21. The Complainant, having lodged the Complaint via the Austrian DPA, responded to the Draft Report, which set out clearly the submissions of Facebook and the Investigator's views on same. The Complainant will also be afforded the opportunity to make submissions on the Preliminary Draft Decision. No suggestion has been made that the alternative procedure proposed by the Complainant is a requirement of Irish law, nor that the procedure that has been followed in relation to the scope breaches any rules of fair procedures in Irish law. Moreover, I am unaware of any case law or statutory provisions in Irish law or EU law that suggests that such an approach is contrary to the Complainant's right to fair procedures, and the Complainant has not referred to any such law in its submissions.

SUBSTANTIVE SCOPE OF THE COMPLAINT

3.22. Put in high-level terms, this complaint-based Inquiry concerns the requirement under EU data protection law for any entity collecting and processing personal data to establish "a lawful basis" for the processing under Articles 6 GDPR. This particular Complaint was lodged by reference to Facebook and its lawful basis for processing user personal data and "special category" personal data. I have set out, in summary form, the contents of the Complaint and arguments contained in it at Section 2 of this document.

3.23. "Personal data" is defined under Article 4(1) GDPR as:

“any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person”.

3.24. Moreover, Article 4(13) GDPR defines the “genetic data” referred to above as:

“personal data relating to the inherited or acquired genetic characteristics of a natural person which give unique information about the physiology or the health of that natural person and which result, in particular, from an analysis of a biological sample from the natural person in question”.

3.25. Article 4(14) GDPR defines “biometric data” as:

“personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data”.

3.26. Finally, “data concerning health” is defined by Article 4(15) GDPR as:

“personal data related to the physical or mental health of a natural person, including the provision of health care services, which reveal information about his or her health status”.

3.27. The other special categories or personal data referred to in Article 9 GDPR are not defined in the GDPR.

3.28. As set out above, Article 6 GDPR sets out the lawful bases for the processing of personal data. The provisions of Article 6 that arise in this complaint-based Inquiry are the first two lawful basis listed in the Article, in Articles 6(1)(a) and 6(1)(b) GDPR. Article 6(1) GDPR states:

“6. 1 Processing shall be lawful only if and to the extent that at least one of the following applies:

(a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;

(b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;

(c) processing is necessary for compliance with a legal obligation to which the controller is subject;

(d) processing is necessary in order to protect the vital interests of the data subject or of another natural person;

(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;

(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

Point (f) the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks."

3.29. A number of conditions for consent are enumerated in Article 7 GDPR:

"1. Where processing is based on consent, the controller shall be able to demonstrate that the data subject has consented to processing of his or her personal data.

2. If the data subject's consent is given in the context of a written declaration which also concerns other matters, the request for consent shall be presented in a manner which is clearly distinguishable from the other matters, in an intelligible and easily accessible form, using clear and plain language. Any part of such a declaration which constitutes an infringement of this Regulation shall not be binding.

3. The data subject shall have the right to withdraw his or her consent at any time. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal. Prior to giving consent, the data subject shall be informed thereof. It shall be as easy to withdraw as to give consent.

4. When assessing whether consent is freely given, utmost account shall be taken of whether, inter alia, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract."

3.30. Article 13(c) GDPR requires data controllers to provide information to data subjects on *"the purposes of the processing for which the personal data are intended as well as the legal basis for the processing"*.

3.31. Article 12(1) GDPR requires that *"[t]he controller shall take appropriate measures to provide any information referred to in Articles 13 and 14...to the data subject in a concise, transparent, intelligible and easily accessible form, using clear and plain language..."*.

3.32. Unusual circumstances arise in relation to this Complaint because of its very starting-point, namely, the assertion that clicking on Facebook's Terms of Service purported to bring all personal data processing under the lawful basis of consent for the purposes of Article 6(1)(a) GDPR. This

starting point was rejected in Facebook's submissions. While the Investigator did not agree with the entirety of Facebook's submissions by any means, he also rejected this premise. I also reject it. This rejection of the foundational premise of the Complaint has inevitably rendered the overall subject-matter of the Complaint effectively less cohesive.

- 3.33. The Complaint also refers to processing of special category data covered by Article 9 GDPR. The Complainant's submissions on the Draft Report make further arguments in this regard, particularly in relation to medical data and in relation to special category data processed by Facebook on the consent of the user (such as facial recognition data). Facebook's position is that it does not process any special category data arising out of the acceptance of the Terms of Service, but only arising from data for which consent is specifically sought.
- 3.34. My view is that, for the reasons set out above and the additional reasons set out below where I make conclusions on the scope of the Complaint, the Complaint even taken at its height quite clearly only concerns data processing arising out of accepting the Terms of Service. The Complainant's central arguments on "forced consent" are predicated on the assertion by the Complainant that accepting the Terms of Service is forcing a consent to personal data processing for the purposes of the GDPR. Moreover, the Complainant's representative has made clear that it views the core of the Complaint as asking for a ban on the processing of data being processed on foot of the "consent bypass". In order to establish an entitlement to such a remedy, it must be established that accepting the Terms of Service results in unlawful data processing. Whether one focuses on the acceptance of the Terms of Service or on the remedy sought, the lawfulness of the processing arising from this acceptance, either pursuant to consent under Article 6(1)(a) GDPR or necessity for the performance of a contract under Article 6(1)(b) GDPR, is clearly at the heart of this Complaint.
- 3.35. I do not however accept that the processing of sensitive categories of personal data on the basis of Article 9 GDPR consent falls within the scope of this Inquiry. Facebook undoubtedly does process special category data on the basis of explicit consent under Article 9 GDPR on its platform including in terms of the separate consent collected for its facial recognition feature. The Complaint is one about whether the Terms of Service (which is the contract with the user) are a deliberately veiled and inadequate means of forcing consent under GDPR, or whether they are, as Facebook contends, a contract with the user for which certain data processing is necessary in order to perform that contract.
- 3.36. The Complaint considered Article 9 GDPR in circumstances where the Complainant was of the view that consent was being sought to process personal data (including special category data). It has now come to light that Facebook relies on Article 6(1)(b) GDPR for the processing complained of. The Complainant has presented no evidence to suggest that any of this processing carried out on foot of Article 6(1)(b) GDPR involves processing special category data. As this legal basis is not contained within Article 9 GDPR, such processing would obviously be unlawful if it were taking place. It is denied by the controller that such processing is taking place, no evidence has been presented that it is taking place, and no allegation has been made that it is taking place (aside from in the context of the Complainant's initial mistaken view that the processing complained of is based

on consent). I therefore cannot see how Article 9 GDPR properly remains within the scope of this Complaint as it is now understood by the Parties.

3.37. Having reviewed and considered all of the material submitted by the Complainant, I conclude that the core of the issues raised by the Complainant are as follows:

- a. Accepting the Terms of Service offered by Facebook in April 2018 specifically constituted an act of consent to personal data processing under the GDPR. The precise extent of the processing complained of is unclear in the Complaint. A particular focus is, however, placed on both processing in order to deliver behavioural advertising, and on special category data. The Complainant takes issue with any unlawful processing based on this agreement, whatever that agreement's legal character might be.³⁵
- b. The Complainant argues that 6(1)(a) GDPR, i.e. consent, is the mandatory, default lawful basis for personal data processing where there is a contract or agreement **primarily** concerned with personal data processing.³⁶
- c. Consent under the GDPR is simply an indication of agreement by the data subject according to the Complainant. The necessary attributes of freely given, specific, informed and unambiguous are merely "conditions for its validity", but not features of objective "consent".
- d. As an alternative to point (a), Facebook is not entitled to rely on the "necessary for the performance of a contract" legal basis under Article 6(1)(b) GDPR other than for very limited processing such as friends lists, photo albums, profiles and news. It therefore cannot rely on this as an alternative legal basis to consent for the acceptance of the Terms of Service as a whole. In this regard, the Complainant argues that the "purpose" of the contract (here, to deliver a social media service) must be considered.
- e. On the basis of all of the above, the Complainant contends that clicking accept on Facebook's Terms of Service was an attempt by Facebook to seek consent under the GDPR - just not **valid** consent. The Complainant describes this as "forced consent", in that the only choice a user had in April 2018 was to delete their Facebook account, and "hidden consent", in that some of the description of the Facebook service in the Terms of Service (such as personalisation) implicitly relies on processing of personal data.

³⁵ Complainant Submissions on Preliminary Draft Decision, paragraph 3.4.3.

³⁶ The Complainant characterises this as a "straw man argument" in the paragraph cited *ibid*. It is instead argued that the 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.*" The Commission sees this as arguing precisely what is contained in the above paragraph i.e. where there is an agreement primarily concerned with processing data, that agreement must be interpreted as consent. On that basis this characterisation of the Complaint is retained herein.

- f. The Complainant contends that Facebook leads data subjects to believe that it relies on consent as lawful basis for personal data processing and/or is not transparent about its lawful bases for processing personal data.

3.38. On the counter side to this, Facebook argues that it forms a contract with its users for the use of its free service. The Commission observes that this is delivered in the form of a “Click Wrap” agreement that the user signs up to when clicking “Accept” on the Terms of Service and it looks similar to an industry standard format for such agreements. Its intention was, Facebook says, to rely on the legal basis of Article 6(1)(b) GDPR (necessary for the performance of a contract) for processing carried out on foot of the acceptance of the Terms of Service (and, for other separate processing, it would rely on legitimate interest and consent).

3.39. In this regard, it claims that the processing is necessary for the performance of the contract with the user and that the Data Policy further sets out, in more detail, the other legal bases that would be relied upon for other data processing operations. These bases, as I have said, included a reliance on consent for certain operations (such as facial recognition, where special category data is processed). Facebook rejects the idea that it sought to persuade users that consent was the legal basis for all personal data processing. It further accordingly rejected the Investigator’s analysis of whether valid consent was collected at the point of acceptance of the Terms of Service, on the basis that Facebook never sought to rely on consent.

3.40. The Investigator, for his part, took the Complaint at face value and on its literal terms and analyses each of the arguments made by the Complainant in the original Complaint submitted. This seems to me to have been a sensible and correct approach. This was not an “own volition” Inquiry where the Commission was entitled to scope matters of risk which it decided warranted investigation. While it is normally the role of the Investigator to focus on the establishment of facts, to set out what elements of the GDPR are engaged against those facts, to come to a preliminary view on whether there are likely infringements identified which will then be the subject of further legal analysis and ultimately decision-making by the Commission, this case is somewhat different.

3.41. The facts to be established are fairly limited and are largely relating to the wording of Facebook’s Terms of Service and its Data Policy, and the design of its User Engagement Flow introduced in April 2018 to guide users through the process of accepting the updated Terms of Service. In fact, it appears to me that the Investigator ended up devoting time responding to legal and theoretical assertions of the Complainant, such as the argument that consent is a *lex specialis* and therefore the mandatory legal basis where a contract primarily concerns personal data processing. Consequently, the Final Report contains more legal analysis and argument than might otherwise have been the case (relative to a draft decision). I have considered all of the analysis of the Investigator carefully and, in some instances, I adopt it and concur with it. In other instances I reject it, replace it, and explain why.

3.42. Another feature of the Complaint is a section entitled “*Applications*”. In this section, the Complainant requests an investigation of a very specific nature, and sets out the corrective powers that the Complainant believes should be imposed i.e. an administrative fine and a prohibition on the “relevant processing operations”. This section asks the Commission to:

*“fully investigate this complaint, by especially using its powers under Article 58(1)(a), (e) and (f) of the GDPR, to particularly determine the following facts:
(i.) which processing operations the controller engages in, in relation to the personal data of the data subject,
(ii.) for which purpose they are performed,
(iii.) on which legal basis for each specific processing operation the controller relies on and
(iv.) he/she additionally requests that a copy of any records of processing activities (Article 30 of the GDPR) are acquired.”*

3.43. The right to lodge a complaint with a supervisory authority is governed by Article 77 GDPR. Article 77(1) states how a complaint may be made: *“every data subject shall have the right to lodge a complaint with a supervisory authority...if the data subject considers that the processing of personal data relating to him or her infringes this Regulation”* [emphasis added]. Neither the request above, nor a request to impose specified corrective powers, can be considered to constitute part of a complaint made in accordance with Article 77(1) GDPR. The Complainant does not specify any processing operations or any alleged infringements of the GDPR in the above request, but simply asks the Commission to gather information on its behalf. Neither the GDPR nor the 2018 Act confer a particular right on a Complainant to make such a request, nor to specify what corrective powers should be imposed in circumstances where the supervisory authority is of the view that an infringement has occurred/is occurring. The Complainant, as I have already set out, also argues the right to demand such “applications” is part of Austrian procedural law. I have already set out in detail why I do not accept that Austrian procedural law is applicable to the exercise of my functions.

3.44. In those circumstances, it was for the Investigator, and ultimately for me as decision-maker, to carry out an objective reading of the Complaint. In so doing, I must consider not only the content of the Complaint, but also the legal framework by which the Commission is bound. It is also necessary that an inquiry conducted on foot of a complaint must be feasible and workable. According to Article 77(1) GDPR, a complaint should relate to data processing that, in a complainant’s view, infringes the GDPR. There is a lack of reasonable specificity in the above request in relation to processing operations or alleged infringements.

3.45. Any request to investigate all processing, or hypothetical processing, particularly a request of such an indefinite nature, does not, in my view, conform to the requirements of Article 77 GDPR. Such a request does not specify any data processing or any alleged infringement, and would result in a practically unworkable inquiry. Rather than being a complaint about specific processing operations, the Complaint in this matter has, at times, strayed into the territory of instructing the Commission to conduct an open-ended inquiry, and to direct that inquiry and the Commission’s resources in a manner determined by the Complainant. It is instead for the Commission to decide on the manner in which a reasonably specific Complaint is to be investigated.

3.46. Moving to Facebook’s views on the scope of the Complaint, when the scope set out at paragraph 3.32 above was put to Facebook in the Preliminary Draft Decision, it argued that

“[i]f the Complaint had intended to raise concerns about Facebook Ireland's compliance with Articles 5, 12 and 13 GDPR, it would not have said “the scope of this complaint is explicitly limited to any processing operations that are wholly or partly based on Article 6(1)(a) and/or Article 9(2)(a) of the GDPR.”³⁷

3.47. Facebook's position is therefore that the issues of transparency fall outside the scope of the Complaint and by extension this Inquiry, and requested that the Commission reconsider the scope as set out in the Preliminary Draft Decision.³⁸ In its submissions, Facebook simply stated that it did not accept that there was, as has been found by the Commission, an *“inherent allegation in this Complaint that the legal basis relied on by Facebook for processing personal data in accordance with the acceptance of the Terms of Service is unclear”*.³⁹ Facebook has not provided more detailed submissions on this issue.

3.48. The Complaint, as Facebook correctly points out, concerns what the Complainant refers to as *“forced consent”*.⁴⁰ In making this Complaint, it is argued that there has been an attempt to mislead on Facebook's part. Indeed, the Complaint rests on the allegation that Facebook attempted to mislead the Complainant and users generally by informing them that they were required to consent to certain processing in order to remain a Facebook user. Following submissions from Facebook to the effect that it was not relying on consent but instead the performance of the contract as a legal basis, the Complainant went on to argue that the agreement had the appearance of consent, and that this in itself was misleading. The Complainant has repeated this argument in the submissions on the Preliminary Draft Decision.⁴¹

3.49. The Complainant also argues that the Terms of Service themselves are vague, and that this has some bearing on either the nature of the agreement or on how to determine with any precision what processing operations are necessary in order to perform that contract. The Complainant has referred to a lack of an awareness, based on the information provided, of precisely what data is actually processed. These concerns go to the very heart of the principles of transparency and accountability in the GDPR. While the Complaint stated that it is *“limited to any processing operations that are wholly or partly based on Article 6(1)(a) and/or Article 9(2)(a) of the GDPR”*, this does not exclude the transparency of those processing operations. The processing operations being considered remain the same even where the transparency of the information provided on those processing operations is had regard to.

3.50. The Complaint has a clear focus on an alleged lack of transparency on Facebook's part. Having considered the submissions of both the Complainant and Facebook on this issue, I find that the Complaint does indeed raise issues of transparency. As I have set out at paragraph 3.1, this final decision as to scope is to be read in conjunction with Section 2 of the Preliminary Draft Decision.

³⁷ Facebook Submissions on Preliminary Draft Decision, paragraph 2.1.

³⁸ *Ibid*, paragraph 2.3.

³⁹ Preliminary Draft Decision, paragraph 5.9 [cited in Facebook Submissions on the Preliminary Draft Decision, paragraph 6.1].

⁴⁰ Facebook Submissions on Preliminary Draft Decision, paragraph 2.1.

⁴¹ Complainant Submissions on Preliminary Draft Decision, pages 15-19.

NOTE: Compare the DPC's summaries of the submissions by the complainant against the relevant documents, as arguments are partly missing, not accurately reflected or taken out of context.