

Von: FBIRLSP [REDACTED]
An: dsb@dsb.gv.at <dsb@dsb.gv.at>
Gesendet am: 23.04.2021 16:52:06
Betreff: Private and Confidential: Your Ref: [REDACTED]

Private and confidential

Dear [REDACTED]

Please find attached correspondence from Facebook Ireland Limited.

Yours sincerely
Facebook Ireland Limited

23 April 2021

Austrian Data Protection Authority

EMAIL: dsb@dsb.gv.at

Your ref: [REDACTED]

Matter: NOYB/Marco Blocher Complaint under Article 77(1) GDPR against oe24 GmbH, Facebook Ireland Limited and Facebook, Inc. ("**Complaint**")

Dear [REDACTED]

We refer to the letter dated 1 April 2021 (received by email on 9 April 2021) from the Austrian Data Protection Authority ("**DSB**") to Facebook Ireland Limited ("**FIL**") in relation to the Complaint ("**DSB's 2nd Letter**") and in response to FIL's letter to the DSB dated 18 March 2021 ("**FIL's 1st Letter**").

We have set out in this letter FIL's response.

As explained in FIL's 1st Letter, we understand that the Complaint, which names FIL, is one of a number of complaints filed by NOYB on behalf of complainants with the DSB and other supervisory authorities across the European Union (the "**NOYB Complaints**").¹ All of the NOYB Complaints are essentially identical and share the same common subject matter; namely the operation of a FIL business tool specifically with regard to data transfers from the EEA.

Consistent with this, FIL has received almost identical correspondence to the DSB's original letter dated 22 February 2021 and the DSB's 2nd Letter from [REDACTED] data protection supervisory authorities. FIL has also now received a letter from [REDACTED] which contain near identical questions (except for certain excluded questions in the case of the DPC) to those set out in the DSB's original letter (and the original letters from the [REDACTED] supervisory authorities).

1. DPC competent as lead supervisory authority

As set out in FIL's 1st Letter, the DPC, as the supervisory authority of the main establishment of FIL as controller and processor, is the lead supervisory authority for cross-border processing carried out by FIL as controller and processor.

Article 56(1) GDPR sets out that:

"Without prejudice to Article 55, 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 in accordance with the procedure provided in Article 60."

¹ As publicised on the NOYB website: <https://noyb.eu/en/eu-us-transfers-complaint-overview>

In deference to FIL's main establishment in Ireland, the DSB has previously referred an Article 77(1) GDPR complaint it received from NOYB in 2018 concerning FIL to the DPC (and the DPC opened a statutory inquiry under the Irish Data Protection Act 2018 to investigate that complaint), as well as other Article 77(1) GDPR complaints concerning FIL. This consistent course of conduct recognises that the DPC is the lead supervisory authority for cross-border processing carried out by FIL.

Despite this, the DSB asserts in the DSB's 2nd Letter that the DSB "*need to investigate further and we require more elements for clarifying the cross-border nature of the concerned processing and the role of each entity involved to be able to confirm this assessment*".

We have carefully reviewed the questionnaire but it does not include any question asking FIL about the location of its single or main establishment, nor whether it is carrying out cross-border processing. Notwithstanding this, in order to assist, we have provided relevant information in this regard in the schedule to this letter. This information shows that FIL's main establishment is in Ireland, outlines the cross-border nature of the processing concerned and confirms that the DPC is the lead supervisory authority of FIL as controller and processor.

In order to be of further assistance, whilst we do not think it is necessary in order to determine the question of competence, we have also provided some information in the schedule to this letter to confirm FIL's role (given that the DSB mentions this in the DSB's 2nd Letter in relation to confirming the DPC's competency as lead supervisory authority).

We trust that it is clear from the information provided above and in the schedule to this letter, and indeed the DSB's consistent course of conduct regarding FIL to date, that the DPC is competent to act as the lead supervisory authority for the cross-border processing carried out by FIL as controller and processor under Article 56(1) GDPR.

2. No applicable derogation

In circumstances where, as in this case, Article 56(1) applies, the GDPR provides for another supervisory authority to be competent, by derogation, only in exhaustively prescribed circumstances. Article 56(2) GDPR provides in this regard:

"By derogation from paragraph 1, each supervisory authority shall be competent to handle a complaint lodged with it or a possible infringement of this Regulation, if the subject matter relates only to an establishment in its Member State or substantially affects data subjects only in its Member State."

The subject matter of the NOYB Complaints is the use by FIL's customers across the EU of a FIL business tool specifically with regard to data transfers from the EEA. The pan-European nature of the NOYB Complaints demonstrates that this is not a circumstance where Article 56(2) is capable of applying; they are clearly cross-border in nature and not limited to any one Member State. FIL's business tool is designed for and used by customers throughout the EU and involves the processing of personal data relating to data subjects from across the EU. This is far removed from the example given in Recital 127 GDPR of "*processing of employees' personal data in the specific employment context of a Member State*" as being a case where Article 56(2) may apply.

Finally, the DSB's 2nd Letter indicates that the DSB considers an excerpt from Recital 36 GDPR to be relevant. However, the excerpt referred to cannot and does not override Article 56(1) and provide a supervisory authority with competency by derogation from Article 56(1) based upon the location of FIL's customer's lead supervisory authority where FIL acts as a processor. Consequently, this excerpt from Recital 36 is of no import in the current case given FIL's main establishment as controller and processor is Ireland further to Article 56(1).

In summary, therefore, in view of the fact that essentially identical complaints appear to have been submitted in many EU Member States, and having regard to the importance of consistent

and homogenous application of the GDPR across the Union,² we again respectfully submit that any investigation of the NOYB Complaints should be carried out by the DPC as sole interlocutor of FIL in the first instance. We would expect that the DPC could then coordinate any engagement with other concerned supervisory authorities, including the DSB, as appropriate and in accordance with the GDPR.

We will provide a copy of this letter to the DPC for its awareness.

Yours sincerely

Sent by email, no signature

Facebook Ireland Limited

² As emphasised by, inter alia , Recital 10 GDPR