

Von: Facebook Inc Regulatory Mail
[REDACTED]
An: dsb@dsb.gv.at <dsb@dsb.gv.at>
Gesendet am: 23.06.2021 00:08:35
Betreff: Private and Confidential: Response to [REDACTED]

Private and Confidential

Hello,
Please see the attached correspondence in response to [REDACTED]

A German translation will follow as soon as possible.

Thank you.

Facebook, Inc.
1601 Willow Road
Menlo Park, CA 94025

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Facebook, Inc.
1601 Willow Road
Menlo Park, CA 94025
USA

Austrian Data Protection Authority
BY EMAIL: dsb@dsb.gv.at

June 22, 2021

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]

Thank you for your letter dated June 1, 2021 from the Austrian Data Protection Authority ("**DSB**") to Facebook, Inc. as subprocessor for Facebook Ireland Limited ("**FINC**") in respect of the Complaint.

The Complaint specifically relates to data transfers from the EU by Facebook Ireland Limited ("**FIL**") to FINC (as FIL's subprocessor). The data in question is controlled by oe24 GmbH. FIL processes such data as oe24 GmbH's processor in relation to the provision of a business tool under FIL's Business Tool Terms and Data Processing Terms.¹ The transfers which are the subject of the Complaint (the "**Relevant Processing**") are made pursuant to the European Commission approved controller to processor standard contractual clauses put in place by FIL between oe24 GmbH and FIL's subprocessor FINC pursuant to FIL's EU Data Transfer Addendum.²

FINC understands that the DSB is considering whether it is competent to engage with FINC. FINC considers that the DSB does not have such competence. FINC as subprocessor is not within the territorial scope of the GDPR under Article 3 GDPR, and, as such, the GDPR does not apply to FINC as subprocessor in relation to the Relevant Processing.

Further, as explained in FINC's previous correspondence with the DSB, these issues should not fall for consideration by the DSB as it is clear that the Relevant Processing the subject of the Complaint is not undertaken by FINC as subprocessor, given FINC as subprocessor is the *recipient* of the data. An order requiring FINC as subprocessor not to export the data would be of no practical effect. Consequently, even if the DSB was to disagree with FINC's position regarding the applicability of the GDPR, FINC's view remains that the DSB is not competent to engage with FINC as subprocessor in relation to the Complaint and that the matters outlined in this letter cannot

¹ These are available at https://m.facebook.com/legal/technology_terms and <https://www.facebook.com/legal/terms/dataprocessing>.

² This is available at https://www.facebook.com/legal/EU_data_transfer_addendum for review. Clause 1(d) of the Data Transfer Addendum confirms that "You [the customer] and Facebook, Inc. are taken to have executed the Clauses when you agree to this Data Transfer Addendum or the Applicable Product Terms..." The "Clauses" are defined in clause 8(a) of the Data Transfer Addendum as "the standard data protection clauses for the transfer of personal data to processors established in third countries which do not ensure an adequate level of data protection, as described in Article 46 of the GDPR and approved by the European Commission decision 2010/87/EC, dated 5 February 2010 (but excluding the optional illustrative clauses)." Clause 1 of the Data Transfer Addendum specifies the content of Appendices 1 and 2 of the "Clauses".

be determined by the DSB in the context of the Complaint.³ FINC understands in this regard that FIL has explained to the DSB its view that the Irish Data Protection Commission (“IDPC”), as FIL’s lead supervisory and sole interlocutor as processor, is the appropriate and competent supervisory authority under the GDPR to investigate the Complaint. Indeed, given the nature of the cross-border processing and the multi-jurisdictional NOYB complaints of which the Complaint forms part, the IDPC, as the lead supervisory authority of FIL as processor, is the only supervisory authority that can make a “single decision” in respect of the cross-border processing concerned, as required under Articles 56 and 60 GDPR.⁴

Without prejudice to the above, FINC as subprocessor has responded to the DSB’s letter and continues to cooperate with the DSB on a voluntary basis.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Pages 3-9 (with lengthy legal
submissions why the GDPR does not
apply to a US recipient of personal data)
removed by *noyb*

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

As set out in FINC's letter dated 26 May 2021 to the DSB, FINC understands (without prejudice to issues addressed above) that correspondence between the DSB and FINC regarding these issues should not be shared (whether in full or by way of summary) with NOYB or the complainant or form part of the DSB's file for the purposes of section 17 of the Austrian Administrative Procedural Act. FINC also notes that the DSB has confidentiality obligations under Article 54(2) GDPR.

FINC, therefore, kindly requests that the DSB will accordingly treat this response as confidential and will not disclose it outside the DSB save where the DSB is legally required to do so.

FINC would like to point out that investigations to determine the DSB's jurisdictional competency are *ex officio* investigations and, as such, beyond the complainant's legal entitlement to file access. Although the complainant certainly is entitled to receive a decision about whether the DSB deems itself competent vis a vis FINC, the complainant is neither entitled to access the file in its current *ex officio* investigation stage and nor does the Complainant need to be heard on *ex officio* investigations. Unlike FINC, the complainant cannot meaningfully contribute to these investigations.

Arising from that, it comes from Section 17 under the Austrian Procedural Act that the current correspondence must not be disclosed to the complainant and that the complainant must not be granted a right to be heard in this respect.

FINC again confirms, however, that it has no objection to this letter being shared with the IDPC or, if applicable, any other concerned supervisory authority in accordance with the GDPR. In the event that the DSB intends to share any of the correspondence between it and FINC with a third party in any other circumstances, we request that the DSB consults with FINC before doing so.

Finally, as requested, FINC is providing a copy of this letter in German, alongside the English version. In the event of a conflict or ambiguity between the two, the English version takes priority.

FINC will pass a copy of this letter to FIL, who may in turn pass a copy to the IDPC, as the lead supervisory authority and sole interlocutor of FIL as processor, the IDPC.

Yours sincerely

Sent by email, no signature.

Facebook, Inc.