

Maximillian Schrems,
NOYB – European Centre for Digital Rights

By email only to: [REDACTED]

12 November 2021

Our Reference: Inquiry C-[REDACTED] (Facebook)

Dear Sir,

I write in relation to the above-referenced inquiry.

You will be aware that the draft decision circulated by the DPC to the parties on 7 October last is presently the subject of consultation between the DPC, as the Lead Supervisory Authority or “LSA”, and the Concerned Supervisory Authorities (“CSAs”). That consultation process is being undertaken as part of the co-decision-making procedure provided for under Article 60 of the GDPR.

In the course of the co-decision-making procedure, certain of the CSAs have communicated views to the DPC in relation to the draft decision, to include views presented as constituting “relevant and reasoned objections” within the meaning of that term as referred to in Article 60(4) GDPR.

For ease of reference, the various categories of views expressed by the CSAs are together referred to in this letter as “the Objections”.

As a general proposition, the DPC considers it both necessary and appropriate that the Objections should be shared with the Controller and Complainant at this point, so that those parties may see and understand the issues under discussion in the consultation process.

Additionally, the DPC considers that, if, in the course of the consultation, the DPC, in its capacity as LSA, agrees to revise the draft decision, any such revisions should be put to the parties and the parties invited to make written observations. The parties’ observations would in turn be shared by the DPC with the CSAs so that they may be considered before any of the revisions is adopted.

Separately, the DPC considers that, if, following completion of the consultation process, differences remain between it and the CSAs, with the result that such differences are referred by the DPC to dispute resolution under Article 65 GDPR, the parties should be notified of the issues so referred and provided with access to the respective positions of the DPC and the relevant CSAs. Any observations the parties may wish to make

in relation to those positions would also be received by the DPC (as LSA) and submitted to the EDPB for its consideration.

In adopting the positions just outlined, the DPC is bound to act in a manner consistent with Irish procedural law and to take any and all steps as are necessary to ensure that the parties' right to fair procedures is respected at all material times.

Confidentiality & Integrity of the Regulatory Process

It is the position of the DPC that, in order to preserve the integrity of the regulatory process now in train, and to ensure the parties' right to fair procedures is respected, information shared in the particular contexts outlined above by and/or between any one or more of the DPC, the CSAs, the Complainant and the Controller must properly be treated as confidential within the inquiry process.

In that regard, the purpose of this letter is to notify you of a decision by the DPC to exercise its statutory power to designate the following information as constituting "confidential information" for the purposes of Section 26(4) of the 2018 Act and by reference to Sections 12(5) and 12(8) of that Act:

- All information contained in the Objections;
- The draft decision, to include any revisions that may be proposed thereto;
- Any/all written observations made by the Controller and/or Complainant in relation to the Objections;
- Any/all written observations made by the DPC in response to the Objections, together with any further response(s) by the CSAs;
- Any/all materials submitted to the EPDB in the context or for the purposes of the dispute resolution procedure provided for at Article 65 GDPR.

The DPC considers that such material (together with such other material as may be exchanged between the DPC and/or the CSAs and/or the Complainant/Controller and/or the EDPB in the course of the present co-decision-making procedure) may properly be designated as being confidential on the grounds that such arrangements are necessary:

- to preserve/maintain free and frank exchanges between the DPC, the CSAs and each of the Complainant and the Controller, facilitating the kind of dialogue (and associated information flows) necessary to ensure that all of the issues under examination can be fully and effectively explored, and positions advanced by relevant parties fully and properly tested;

- to ensure that the issues under examination can be addressed within the confines of the co-decision-making process itself, and to reduce the scope for parallel exchanges taking place outside that process; and,
- to avoid the publication (or other disclosure to third parties) of exchanges identifying interim views and/or positions that remain under consideration by the DPC and/or the CSAs and/or the EDPB and which, if disclosed prior to the conclusion of the co-decision-making process, may reasonably be considered likely to compromise the co-decision-making process and/or give rise to procedural unfairness and/or cause harm to the interests of the Complainant and/or Controller, as the case may be.

Accordingly, our position (and our decision, being a decision deemed to have been made on today's date) is that, in order to preserve the confidentiality and integrity of the co-decision-making procedure (and the regulatory processes of which the co-decision-making procedure forms part), material designated by this office as confidential, received by the Complainant and/or Controller within and for the purposes of the present regulatory processes, may not be disseminated by them outside of that process while the process remains ongoing.

For the avoidance of doubt, it is acknowledged that it would be open to you to disclose inquiry materials to a third party in the following circumstances:

1. Where the disclosure is made to your legal advisors on terms which preserve the confidentiality of the material so disclosed;
2. Pursuant to an order of a court of competent jurisdiction, or pursuant to any order or demand properly made by any competent authority where you are under a legal or regulatory obligation to make such a disclosure;
3. Where the information in issue is information which the Controller is obliged, as a matter of law, to make available to its users; and/or,
4. Where the information has already come into the public domain or comes into the public domain other than as a result of a disclosure by you/NOYB.

For clarity, it is accepted that the first and second such categories of permitted disclosures would not require prior notification to this office. In contrast, we would require you to notify this office prior to making any disclosure under the third and fourth categories so that we may properly consider (for example) whether material can properly be said to have come into the public domain (and, if so, the scope of that

material), and inquire, as necessary and/or appropriate, into the circumstances in which such material is said to have come into the public domain.

Additionally, we acknowledge that, if any further circumstances arise in which you consider that, for reasons consistent with the public interest, you ought to be permitted to disclose inquiry materials to an identified third party while the co-decision-making process remains ongoing, you would be at liberty to write to this office to request that you be permitted to do so, provided that you identify the party to whom the disclosure would be made, the nature and extent of the material it is proposed to disclose, and the circumstances in which you say that such a disclosure should be permitted for identified reasons in the public interest. This office will undertake to consider any such request on its merits and in good faith.

Confidentiality and/or commercial sensitivity asserted by the Controller

Subject to what we say below, any and all material identified for release to you will be assessed, prior to its release, to determine whether it contains information that is confidential and/or commercially sensitive to the Controller. In the first instance, the Controller will be invited to identify any such confidential and/or commercially sensitive material and to set out the legal and factual basis on which it is said that such information is indeed confidential and/or commercially sensitive to the Controller. Each such claim will be assessed by this office on its own merits and a view taken as to whether the claim is to be upheld, or not.

Where a claim is upheld, we will also consider what measures (if any) should be adopted to protect such material upon its release to you. Additionally, a balancing exercise will be undertaken in which we will consider whether, notwithstanding the acknowledged confidentiality of the information in question, the material should nonetheless be released to you without restrict so that you may understand the position of the CSAs and/or DPC and/or Controller, as the case may be.

Special circumstances

In the course of recent exchanges between us, both in the context of this present regulatory process, and another regulatory process, you have disputed the right of the DPC to designate information as constituting “confidential information” in the manner outlined above. Additionally, you took the step of publishing the draft decision shared by the DPC with you on 7 October 2021 on NOYB’s website, without our prior agreement. Copies of certain of the submissions made by NOYB to this office prior to the delivery of the draft decision were also published.

The material in question was published in circumstances where you were on notice of the position of this office in relation to the confidentiality of material exchanged in the course of its regulatory processes, and where – in the context of this very inquiry - you had previously given an express and binding commitment to the effect that you would respect the confidentiality of information received by you from the DPC.

We wrote to you on 14 October 2021 in relation to these matters, reiterating the position of this office in relation to the confidentiality of its processes, and setting out details of the commitments previously given by you. In the event, you refused to remove the draft decision from NOYB's website despite being asked to do so.

Our letter of 14 October also specifically noted that the deliberate and calculated breach by you of your confidentiality obligations represented an unlawful and improper interference in the GDPR-mandated processes by which the draft decision is being examined and considered by the CSAs.

Subsequent to the exchanges just outlined, we have also had cause to write to you recently in the context of a separate regulatory process in which you communicated an explicit threat to a Controller to publish, without notifying this office or obtaining its prior consent, certain of the materials that had been submitted by the Controller to this office – and then shared by this office with you - in the context of the regulatory process in question. Whilst you did not ultimately publish the material in question, at no time did you acknowledge that the information contained in the materials in question was confidential within the regulatory process in which it was shared with you, such that it was not open to you to use and/or disseminate its contents outside the confines of that process.

In all of these circumstances, we are concerned that, if you are provided with copies of the materials identified in the second page of this letter, you will disseminate some or all of those materials directly or indirectly outside the confines of the co-decision-making process, notwithstanding the fact that you are on notice of a decision by this office to the effect that the materials in question have been designated as confidential.

In the circumstances, we are not in a position to share the Objections and/or associated materials with you at this juncture.

If you do wish to secure access to the materials in question, you should write to us setting out the terms on which it is proposed that the materials would be received by you. For the avoidance of doubt, however, such arrangements must be such as to ensure that the confidentiality of the materials will be respected and that they will not be disseminated by you directly or indirectly outside of the co-decision-making procedure. Equally, the arrangements you propose must be amenable to enforcement in the Irish courts.

In circumstances where the consultation process provided for at Article 60(4) GDPR is underway, any proposals you wish to make should be made no later than **4pm on Monday, 15 November 2021**. In that regard, you should note that the time period for the bringing of judicial review proceedings has now commenced.

Upon receipt and consideration of your proposals, we will revert as soon as practicable with our response.

Yours sincerely,

[Sent electronically; bears no signature]

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Data Protection Commission