



noyb – European Center for Digital Rights  
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1140 Vienna  
AUSTRIA

To the:  
Data Protection Commission  
21 Fitzwilliam Square South  
Dublin, IRELAND

Vienna, 15. 11. 2021

**Subject: Your Attempt of “Procedural Coercion”**

Dear [REDACTED],

We have received your letter from 12.11.2021, which was delivered after the close of business, giving us one working day to respond. We note that the DPC is asking for an agreement between the DPC and *noyb*, which is not only legally impossible, but that the DPC also seems to have no actual interest in, given the intended deadline of one working day and the fact that you did not follow our invitation to discuss the matter in a direct call.

We note that the DPC intends to deny the complainant (Dr. [REDACTED]) the right to a fair hearing based on absolutely legitimate actions by her representative (*noyb*), while it continues to provide all relevant documents to Facebook and even plans to provide Facebook the right to redact the submissions of the CSAs. This is nothing but procedural coercion, which seems to be unlawful on so many levels that we can only mention some in this letter.

**(A) Factual Background**

**(1) *noyb* has acted lawful at all times**

The DPC is again raising serious allegations against *noyb*, claiming that *noyb* has unlawfully disclosed documents. This allegation is fully rejected and based on wholly unsustainable legal views of the DPC. Our position on these allegations was outlined before and we refer to the relevant correspondence, outlining the legal basis we relied upon when publishing documents. We want to highlight that:

- Documents provided under § 17 AVG are free to use, as confirmed by the Courts.
- Section 26 of the Irish Data Protection Act 2018 (“DPA 2018”) are binding on “relevant officers” as defined in Section 26(4) only, and is not binding for the parties to the procedure.
- We have never given any legally binding assurance that would go beyond the law, but instead highlighted at every occasion that we voluntarily limit the use of such documents, to avoid further debates and conflicts with the DPC.

In fact, *noyb* has voluntarily kept the vast majority of documents confidential to limit any friction caused by the DPC and Facebook Ireland Ltd. Contrary to the allegations by the DPC, *noyb* has therefore gone far beyond any legal duty to keep documents confidential and limited publications to documents that were of utmost public interest. The following documents seems to be the cause of baseless accusations against *noyb*:

- The publication of the draft decision, which in our view is of great public interest, given that the DPC has clearly colluded with Facebook to bypass the GDPR and wants to greenlight this bypass. The decision is final as far as it concerns the Irish procedure and concerns millions of European users. We have received these documents under § 17 AVG and are entitled to use them under Austrian (and indeed Irish and European) law.
- The DPC seems to take further issues with the fact that we have provided other relevant documents to the CSAs, which in fact would be the duty of the DPC. We cannot agree that there is anything unlawful or improper, when the DPC deliberately holds back documents from its colleagues and *noyb* ensures that such unlawful behaviour is remedied.
- Finally, the DPC confuses matters in this case with a private case of Mr Schrems, where there is a dispute if the “Transfer Impact Assessment” of Facebook Ireland Ltd (which is the legal basis under which the data of millions of users continuous to be illegally transferred to the US, eight years into a complaints procedure) is covered by the rights under Article 13, 14 and 15 GDPR. No documents were so far published in relation to this dispute.

In summary, *noyb* has so far taken utmost consideration of the DPC’s (incorrect) views in the interest of avoiding a conflict and to move on with these procedures. We note that the DPC has not taken any legal actions over the alleged breached of alleged agreements, which further indicates that the DPC is fully aware that *noyb* was acting in full compliance with the law at all times. To the contrary, your attempt to force us to sign some form of additional agreement that goes beyond the existing legal framework, is proof that you are aware that *noyb* acts lawfully under the existing legal framework.

## **(2) Obvious strategy of the DPC to hinder criticism**

We have serious doubts about the true reasons the DPC is demanding such an agreement. We are not aware that CSAs have demanded any form of confidentiality and the DPC is obviously sharing the same documents with Facebook Ireland Ltd. without such an agreement. The DPC seems to even intend that Facebook Ireland Ltd. may redact the objections of the CSAs for sensitive information, when in fact it does not allow the Complainant to redact information that may be sensitive to her.

Given the overall approach by the DPC we are confident that the DPC has been in no way hindered to conduct this procedure in a more transparent way, but instead is serving the interest of Facebook Ireland Ltd. and indeed its own interests, by trying to limit transparency and public oversight. Especially in relation to the reasons you have given, there is no doubt that:

- The exchanges under Article 60 to 66 GDPR are by their very nature a procedure that deals with conflicting views. The other CSAs have already had free and frank discussions about the flawed approaches of the DPC very public fora, including in media interviews and via published guidelines. We understand that the DPC has every interest in limiting negative responses by colleagues, but do not see that this would make documents itself “confidential”. The DPC was also not able to point to any law or case law that would allow the DPC to limit access to documents and the right to be heard on the basis of concepts like the “*integrity of the procedure*” or “*frank discussions*”.
- We understand that the DPC is trying to monopolize information and tries to limit “parallel exchanges” but given that the DPC in fact unlawfully withholds documents, we cannot see how this would be a legitimate basis to demand confidentiality from parties.
- We do not see how the knowledge of conflicting views would undermine the decision process. Indeed in many jurisdictions “dissenting opinions” are published as a matter of transparency.

We therefore contest that the documents are confidential in any way. That being the case, we reiterate that we neither planned nor intend to publish or share these documents.

## **(B) Lack of Jurisdiction and Cooperation**

First and foremost, the DPC has simply no jurisdiction and acts *ultra vires*:

### **(1) Lack of Jurisdiction of the Irish DPC in Austria**

The complainant is engaged in a procedure before the Austrian DSB under Austrian Procedural Law. Therefore, Austrian Procedural Law and the GDPR apply to the complaint. The GDPR foresees that the authority in the Member State of the complainant engages with the complainant in the local language and under the local procedural law.

The Data Protection Act 2018 (“DPA 2018”) does not apply in relation to the Complainant. We have no duty to engage with the DPC directly and the DPC has no right to issue orders or demands outside of Ireland. The GDPR foresees that the DPC cooperates with and provides documents to the Austrian DSB, who in turn provides the relevant documents to the Complainant under Austrian law.

Given the lack of cooperation between the DPC and the DSB *noyb* has informally and voluntarily accepted documents provided by the DPC in English, but has at all times made submissions with the DSB and the DPC in parallel, respecting the Austrian jurisdiction.

We therefore kindly request that any demands by the DPC are made via the Austrian DSB under Articles 60 and 61 GDPR, being the relevant authority that has jurisdiction over the complainant.

### **(2) Attempt to extend the DPC’s Jurisdiction outside of Ireland**

It seems to us that the DPC, realizing it has no jurisdiction in Austria, is in fact demanding that an Austrian citizen and their representatives submit to Irish jurisdiction in an attempt of the DPC to expand its jurisdiction beyond the national boundaries of Ireland. In essence, the DPC seeks extra-jurisdictional application of its flawed legal views. This is an unheard of attempt that is not just *ultra vires* the Irish Data Protection Act 2018, but also a violation of the GDPR and international law.

To our understanding, this happens without the agreement or even information of the Austrian DSB.

### **(3) Lack of a legal basis under Irish Law**

The DPC’s demand that *noyb* would make itself subject to Irish jurisdiction and engage in some form of administrative “agreement” has no basis in the Irish Data Protection Act 2018 or indeed in any other national law. The DPC is unable to identify any legal basis for such an “agreement” and clearly acts *ultra vires* when making such demands.

We are not aware of any such “agreements” over procedures before any other DPA or indeed any other Irish authority.

### **(4) Disagreement between the Austrian DSB and the Irish DPC**

Finally, it seems to us, that the Austrian DSB takes the view that the procedure under Article 60 to 66 GDPR is not open to the parties. The DPC now seems to take the opposite view. We note that the DPAs have failed to “cooperate” as required under Article 60(1) GDPR, to come to a joint view on the roles of the parties at this stage, leading to an unacceptable situation where the DPC wants to hear the parties and the DSB does not. We have informed the DSB about this situation today and urge the DPC and the DSB to come to a joint view as to the roles of the parties in the procedure under Article 60 to 66 GDPR. While we take the view that the parties have to be heard, and insofar agree with the DPC, we cannot accept that only one of two parties will be heard.

### (C) Legal Obstacles to Forming an Agreement

Finally, we are very much surprised that the DPC does not provide an agreement that it wishes *noyb* and/or the Complainant to sign. We assume this is because the DPC may know that such an agreement is legally impossible and would likely be found void by any court. We therefore have to assume that the DPC has in fact no interest in coming to an agreement, but instead uses this suggestion as a ruse to justify the removal of *noyb* / Dr. [REDACTED] from the procedure.

#### (1) Relevant parties to an agreement

The DPC seems to forget, that it is in fact denying the complainant (Dr. [REDACTED] her right to access to documents, to retaliate against *noyb*.

We fail to see how the DPC can deny the complainant her rights on such a basis, but we are more than happy to inform the DPC that we have clarified with Dr. [REDACTED] that you can provide all documents to Dr. [REDACTED] directly at [REDACTED][hotmail.com](mailto:[REDACTED]@hotmail.com), which may overcome your fears.

#### (2) Lack of a legal basis under Irish Law

§ 17(2) of the Austrian Procedural Act (AVG) clearly states that parties must at all times be provided with all documents equally. There is no exception to this principle, which is based on the Austrian Constitution (Art 2 StGG and Art 7 B-VG) and implements a basic concept of fair procedures. There is no element of European or Irish law that would override the applicable procedural law.

#### (3) Lack of any legal procedure

We note that the DPC is now intending to shift towards factual retaliation, instead of clarifying the legal views of the DPC in a court of law. This is an attempt to factually force *noyb* into accepting the DPC's flawed views outside of any proper settlement of disagreements within the legal system. We will at no time engage in such extra-judicial horse-trading.

As we have noted before, the DPC has every right to declare documents confidential and every right to take legal actions if it feels that a party has unlawfully used documents. However, it has no right to retaliate against complainants and demand that organisations that represent the complainant have to accept that the DPC's views are correct as a pre-condition to exercise their rights to a fair procedure.

#### (4) Demanded agreement is impossible

Finally, your demand to have an agreement between a representative of a complainant and the DPC that is (1) subject to Irish jurisdiction and (2) enforceable against *noyb* is simply impossible:

- First of all, such an agreement would be void, as it would be based on coercion and it seems to us that public law on procedural rules is not open to agreements between a party and a regulator. The DPC was not able to point at any legal basis for such an agreement.
- Further to that, even when Irish jurisdiction would be accepted by both parties, would not be enforceable outside of Ireland as there is (as confirmed by the international office of the Austrian government) no bilateral agreement between Ireland and Austria or any EU law instrument that would allow any administrative judgement to be enforced in Austria.

Given that the intended agreement is neither possible nor enforceable and the deadline of only one working day to come up with such an agreement, we understand that the DPC has in fact no real interest in overcoming the matter and is in fact using this proposal as a ruse to somehow justify the denial of access to documents.

## **(5) Request to propose a legally valid agreement**

Should the DPC have a proposal for any legally valid agreement, we would kindly request the DPC to send this to *noyb* by 17 November 2021 17:00 CET, otherwise we must assume that the DPC does not actually intend to engage in such an agreement.

## **(6) Potential violation of Irish Law**

We note that the DPC now takes the view that the relevant documents are “confidential” under Section 26 of the DPA 2018. We disagree with this assessment and do not think that “confidentiality” is a tool to regulate the sharing and use of documents by the parties.

Nevertheless, we note that under Section 26 DPA 2018 confidential documents may not be shared with anyone outside of the DPC. We therefore fail to see how these documents could be on the one hand be declared “confidential” and at the same time be shared with Facebook Ireland Ltd. We want to highlight that the relevant decision maker commits an offence and is liable on summary conviction to a class A fine under the DPA 2018 in such a case.

## **(D) Immediate Requests**

### **We therefore demand:**

- that the DPC immediately cooperates with the DSB to find a common understanding about the involvement of the parties in the procedures under Article 60 to 66 GDPR.
- that the DPC
  - fully discloses all documents to Dr. [REDACTED] and/or *noyb* via the Austrian DPA, as foreseen under the GDPR and/or
  - provides these documents directly to Dr. [REDACTED] and/or *noyb* and/or
  - provides *noyb* with an agreement that would overcome the issues highlighted in this letter, by Wednesday 17 November 2021 1:00 pm Irish time and
- that DPC immediately confirms that it will not engage in one-sided disclosures with Facebook Ireland Ltd in the meantime, as this would pre-empt all options to come to a fair solution that respects the equality of arms of the parties.

## **(E) Further Actions**

As said before, we will rely on the lack of a fair procedure in any appeal that may come from any final decision in this case. We regret that the behaviour of the DPC makes the outcome of this procedure likely void and risks that any decision will (again) be successfully challenged.

Finally, we regret to inform the DPC that we are currently reviewing to file criminal cases under § 304 StGB for abuse of office and/or under the Irish Criminal Justice (Corruption Offences) Act 2018, given that [REDACTED] [REDACTED] [REDACTED] [REDACTED] seem to make the performance of their public duties conditional on the signing of a “non-disclosure agreement” for the advantage of Facebook Ireland Ltd. and the DPC. Just like requesting a monetary benefit, demanding any other advantage for the performance of public duties, constitutes corruption under Austrian and Irish law, as well as the underlying European criminal law framework.

The existing exchanges and any further exchanges may consequently be provided to the relevant public prosecutor’s offices and made available publicly within the next days on *noyb.eu*.