



noyb – European Center for Digital Rights
Goldschlagstraße 172/4/3/2
1140 Vienna
AUSTRIA

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

Vienna, 17. 11. 2021

Subject: Your Letter of Today

Dear [REDACTED]

We received your letter of earlier today.

- (1) We again note that the proper way of communication is via the IMI and the DSB instead of further direct letters and emails to *noyb*.
- (2) We note that the DPC accepts that *noyb* has no plans to publish the relevant documents. This is position is purely voluntary and to allow the parties to move forward. Given this factual alignment of our positions, we do not see the need for any “agreement” that is neither factually possible, not supported by any law. On this basis, we assume you are able to provide the documents by return.
- (3) We regret that the DPC refuses to get on the phone to clarify these matters in an efficient way and continues to send more letters with repetitive content. We do not intend to engage in this form of an exchange further, as it does not seem to lead to any results, but wastes everyone’s time. I again invite you to call me at [REDACTED] at any time.
- (4) We note that the DPC has obviously not engaged with the Austrian DSB to agree on the role of the parties in the Article 60 GDPR procedure, despite the legal duty to cooperate.
We happen to agree with the DPC’s view in respect of the role of the parties in the Article 60 GDPR procedure, but we are subject to the procedural decisions of the Austrian DSB, which (in this case) is only subject to appeal once a final decision is delivered. There is no general option for a “judicial review” during the procedure under the applicable Austrian law, but only an option for an appeal of a final decision. We may therefore rely on the denial procedural rights at this time.
In the event that [REDACTED] did not succeed on any element of the complaint, these serious procedural errors may lead to an invalidation of the decision by the appeals court. Given the previous errors in the procedure, we currently assume that this would only be one of many grounds of appeal in case of a negative decision.
However, the latest dispute about the rights of the party during the Article 60 procedure is entirely up to the DPC and the DSB to clarify. We recommend (again) contacting the DSB on this matter and not us and/or [REDACTED]. The relevant case manager ([REDACTED]) is available at [REDACTED] and/or his office mobile phone at [REDACTED].
We have made our position clear to the DPC and the DSB and will rely on any violations of the right to access to documents and the right to be heard in an appeal procedure, as foreseen by law.

- (5) We note that the DPC has not responded to the option to deliver documents as foreseen (via the DSB and the IMI) or to ██████████ directly, if the DPC has some fears over *noyb*'s involvement. For the avoidance of doubt, we highlight again, that there is no duty of the DPC or DSB to deliver documents via *noyb* to ██████████ as the complainant.
- (6) You did not address or clarify any of the issues we have tried to raise on the proposed agreement:
- (a) The DPC has failed to name any provision, case law or other legal basis to demand that *noyb* must sign some form of an agreement under the GDPR or relevant national law. The cited Section 26 DPA 2018 clearly only applies to "relevant officers" and creates a duty of the DPC to keep "confidential" documents confidential, but does not create a duty on the parties whatsoever. There is especially no legal basis to allow Facebook Ireland Ltd full access and a right to redact the objections before ██████████ is allowed to review them.
 - (b) The DPC did not provide any text for an agreement that it would be satisfied with, despite being explicitly asked to do so. Even if the law would foresee or allow for asking a party or a party's representative to sign a confidentiality agreement with a public authority (which it does not), it appears very unusual for a public authority to request the party or their representative to provide such agreement. If the DPC would be acting within well-established procedural practices, we would assume that the DPC would have templates for such agreements.
 - (c) Finally, the DPC has failed to identify any international agreement or EU law instrument that would make it possible that a decision by an Irish Court would be enforceable in Austria.
- (7) Given that the DPC agrees in its letter of 12 November 2021 that it has a legal duty to involve both parties in the procedure and that there is no legal basis to demand an agreement from *noyb*, but yet continues to demand such a favour in exchange for the DPC to perform its legal duties, we have reverted to our legal counsel again.
- Our council confirmed that the DPC's demand for an agreement in direct exchange with the performance of its duties constitutes a violation of the Austrian corruption law (§ 305 StGB) which also applies to foreign officers when asking for such favours of an Austrian entity.
- We were further informed that the signing of such an agreement without any legal basis (or just agreeing to waive any rights) in direct exchange for DPC officers performing its legal duties to grant a party their right to access to documents and the right to be heard, would also make *noyb* and *noyb* staff liable under § 307a StGB. Austrian law does not allow granting even the slightest benefit to a regulator or a third party in exchange for the performance of legal duties of a public office or a public officer, no matter if these are just even small favours or non-material favours.
- It may be that Irish laws and practices may be more open to such "transactions" between parties and authorities and we are aware that the DPC seems to have entered into such "deals". However, *noyb* categorically rejects any attempt of a regulator performing public duties in direct exchange for some form of agreement, benefit or a pledge of silence.
- (8) In light of the issue raised in (7) we will submit this exchange and a criminal complaint against ██████████ as the acting officer with the Austrian public prosecution office, to ensure that *noyb* and *noyb* staff is fully compliant with reporting duties. We will serve you with a copy after filing so that ██████████ or his legal representatives can submit a defence.

In summary, we categorically reject your attempt to make the participation of ██████████ in the Article 60 GDPR procedure conditional on the signing of any agreements by *noyb*. We will at no time engage in such an agreement and will not respond to these suggestions further.

It is our position that the signing of such agreements are not only unlawful but also totally unnecessary in light of the contents of (2) above. In those circumstances, we again call on you to furnish us and/or [REDACTED] with the relevant documentation in order to vindicate her right to fair procedure and right to be heard. Should you fail to do so, your failure to vindicate [REDACTED] rights will form a ground of any appeal or other legal action. As always we are available for any other questions or clarifications, that do not concern further suggestions that may fall under § 305 and/or § 307a StGB.

Max Schrems