An Coimisiún um Chosaint Sonraí
Data Protection Commission

Maximillian Schrems,
NOYB – European Centre for Digital Rights

By email only to:
[redacted]

17 November 2021

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

Dear Sir,

I refer to your letter of Monday, 15 November 2021, in reply to ours of Friday last, 12 November.

I also refer to the various emails exchanged between us in the intervening period, to include my email of Monday of this week, extending the time period for your response to our letter of 12 November.

We disagree with the positions set out in your letter of Monday, and the various allegations contained therein. In particular, we reject your allegations as to motive. It is unclear to us how, why, or on what basis such allegations are made.

Standing back from the detail of your letter (little of which bears on the matters at hand), it seems to us that the following points are of some importance:

1. As noted at the bottom of page 3 of your letter, the Austrian Data Protection Authority, takes the view that the Article 60 procedure "is not open to the parties." As a result, we understand that the Austrian DPA declined your earlier request for access to the Objections.

2. It is not clear to us, if, bearing in mind what you say about the application of Austrian procedural law, you intend to contest the position of the Austrian DPA and its refusal to share the Objections with you.[1]

[1] We note that, at an earlier point in this inquiry, you brought an application to the Austrian Courts, under Austrian administrative law, arising from your rejection of a particular position adopted by the Austrian DPA.

3. We agree with our colleagues in the Austrian DPA insofar as they have observed that Article 60.4 GDPR does not envisage that the parties would participate in the consultation exercise between the Lead Supervisory Authority (LSA) and the Concerned Supervisory Authorities (CSAs). It is nonetheless the case that the DPC is bound to act at all times in a manner consistent with Irish procedural law and to take all such steps as are necessary to ensure that the parties' right to fair procedures is respected. In principle, therefore, we consider that the Complainant and the Controller should be given access to the Objections the subject of the consultation exercise. Moreover, if and to the extent that adjustments are proposed to the existing draft decision in the course of that exercise, details of those adjustments should be made available to the Complainant and the Controller and those parties afforded an opportunity to make written observations. Likewise, the parties should be notified of any points of difference referred by the DPC to the dispute resolution procedure and invited to state their respective positions in relation thereto.

4. In order to preserve the integrity of the co-decision-making procedure (to include the consultation exercise as between the LSA and the CSAs), the DPC's position is that the parties must respect the confidentiality of any materials shared with them in this particular context. As such, those materials may not be disseminated by the parties outside the confines of the regulatory procedure at hand, whether directly or indirectly.

5. In most cases, requirements as to confidentiality will not present any difficulty. A particular difficulty arises in this case, however, because you recently – and unilaterally - took the step of publishing the draft decision (and certain other inquiry materials likewise referable to this present case) in circumstances where it is the position of the DPC that those materials were confidential within the inquiry procedure. It is also of note in this context that the materials in question were published in circumstances where commitments had previously been given by you that the confidentiality of such materials would be respected.

6. This is the context in which we wrote to you last Friday to say that, as matters stood, we would not be in a position to share the Objections with you. As indicated, this position reflected our concern, based on your prior actions in the present inquiry, that you would disseminate some or all of the materials shared with you outside the confines of the co-decision-making process.

7. Our position was not presented in absolute terms, however. Rather, reflecting our duty to apply fair procedures, we made it clear that if you wished to secure access to the Objections, you could write to us setting out the terms on which it was proposed that the materials would be received by you, it being understood that such arrangements would need to ensure that the confidentiality of the materials would be respected upon their release to you, and that the materials would not be disseminated by you, directly or indirectly, outside of the co-decision-making procedure. Equally, the arrangements you proposed would need to be amenable to enforcement in the Irish courts.

8. Much of your letter of Monday of this week is concerned with the reasons why you say you reject the basis on which confidentiality has been asserted over the Objections. The letter is also replete with speculative references to our motive in asserting confidentiality over the Objections.

9. As flagged at the outset, we disagree with your views as to whether or not the Objections and associated materials are confidential and we certainly have no intention of engaging with ill-informed speculation as to motive.

10. Ultimately, it seems to us that two core points need to be addressed if the Objections and associated materials are to be released to you, one of which already appears to have been accepted by you. The two points in question are:

    a. Whether you are prepared to state, without qualification, that if furnished with copies of the Objections and associated materials, neither you nor NOYB will disseminate those materials (or any part of them) outside the confines of the co-decision-making process, directly or indirectly.

    b. Whether you accept that a commitment given in these terms would be amenable to enforcement in the Irish courts.

11. It appears to us that, in substance, the first point should not present a difficulty given what you say at the bottom of page 2 of your letter:

    " … we reiterate that we neither planned nor intend to publish or share these documents."

12. The key point of difference that remains between us, therefore, is whether you accept that the commitment you would give would be amenable to enforcement in the Irish courts.

13. Here, you have made a series of contentions on points of jurisdiction and such like. Additionally, you contend that the Data Protection Act 2018 has no application whatsoever to the matters at hand. Respectfully, the positions contended for are not sustainable. In the circumstances, we would ask you to reflect on your position and to revert to confirm whether the acknowledgement you appear to be willing to give can be supplemented by an undertaking acknowledging that any breach of confidence on your part or that of NOYB would be actionable in the Irish courts. If, as you say, you do not intend "to publish or share" the Objections and associated materials, it is difficult to see how the provision of such an acknowledgment would present any difficulty.

We will await hearing from you.

Yours sincerely,

[Sent electronically; bears no signature]

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Data Protection Commission