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

Below the answers the DPC gave, in response to the various journalist's requests for comments. It seems to be a "Question & Answer" type of style, even when these questions seem not be asked by the relevant journalists, but probably by the DPC. We have added *noyb* background in *noyb* pink below:

1. There seems to be a standoff between the original Austrian complainant and the DPC over confidentiality of documents. In the one-stop shop arrangements for GDPR, in a dispute like this, which jurisdiction has primacy: where the case was filed, or where it is being processed?

Note by noyb: There is nothing in the answers below that answers the question in the headline about applicable procedural laws. In fact each "relationship" between a regulator and a local party falls under the local law. So an Austrian complainant engages with the Austrian DPA under Austrian law. The Irish Facebook subsidiary engages with the Irish DPC under Irish law. See "procedural autonomy of the EU member states". Both DPAs then have to engage with each other under the principles in Article 60 to 66 GDPR.

Under the GDPR, because the relevant data controller (in this case, Facebook Ireland) has its main establishment in Ireland, the Irish DPC is what is called the "lead supervisory authority" and so has the obligation to investigate and make a preliminary decision about the issues raised in the complaint. The Austrian data protection supervisory authority referred the complaint to the Irish DPC on this basis.

Note from noyb: This is in principle correct, but what is left out, is that the DPAs have to "coordinate" under Article 60(1) GDPR and that each DPA applies its own procedural law in such a case. So there is a "One Stop Shop" for the controller and the complainant, in their local language and under the local procedure.

Once we have reached a "draft decision" (which is how our proposed decision is referred to under Article 60 of the GDPR), it is then sent to and considered by our colleagues in the data protection authorities in the other EU member states as part of a co-decision-making procedure. Following this process, the Irish DPC reaches a final decision on the complaint reflecting either the consensus achieved amongst data protection authorities or, where differences arise between them which cannot be reconciled, a decision of the European Data Protection Board following a dispute resolution procedure.

The Irish DPC is obliged to follow Irish fair procedures law as part of our decision-making process. These fair procedures obligations have been confirmed on several occasions by the Irish courts, including the Supreme Court.

Note from noyb: This is in principle correct, but there is no mention about what "fair procedure obligations" exactly were confirmed by what court case. In fact there is not a single case that would

provide for confidentiality before the DPC. We have asked for a legal basis in the law or in case law, but the DPC is silent on this. Just saying "some court said something about fair procedures" is not a basis to demand NDAs from parties or kick them out of the procedure (in fact it's the opposite of a "fair procedure").

One of the considerations here is that, as a matter of fairness to all parties, the integrity of the inquiry process should be respected and the confidentiality of information exchanged between the parties upheld. What we mean by this is that it would be unfair to any party under investigation by a regulator (not just the DPC) if the materials that they provide to that regulator, and the regulator's queries to and correspondence with them, should be made public before any decision is reached in relation to the matters that are under investigation. This would effectively mean an investigation against anybody would be turned into an open, public process before any decision is reached against them, and this is not fair nor has it ever been a feature of regulation in Ireland up to now.

Note from noyb: This is a 1:1 copy of Facebook's position, but in fact public debate and criticism (especially when it comes to the data protection right of millions) in a democratic society cannot be limited to after a decision is made. In fact, it is crucial that parties and the public can form an opinion during a decision process. As a default political, regulatory or court procedures are therefore open to the public – unless there are serious grounds to limit information. The DPC take the view that by default the public and the parties may not voice concerns or just get informed about a procedure before it is too late. What comes in addition to that, is that the DPC is extremely complicated and slow in the decision process. The pending case lasts for about 3.5 years by now. Usually such decisions are shorter and the room for public debate is therefore more limited. In the "EU-US data transfer" case, the investigation is ongoing for more than 8 years. The public would never have been informed about the background of two CJEU decisions, if such "fairness" rules had applied since 2013.

Reflecting these sorts of considerations, Section 26 provides that the DPC may designate information as being confidential so that it must be kept confidential while the inquiry is ongoing. The reasons why information is designated as confidential include the following:

Note from noyb: This is incorrect. Section 26 does not have the word "designate" in it. It does not allow the DPC to (one-sidedly) just decide what is "confidential" or not. Instead there is an objective test to be applied, which may be contested by the parties, because the DPC's view may go too far or not far enough. It is not an absolute right by the DPC to just "declare" things to be confidential.

- to preserve/maintain free and frank exchanges between the DPC 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 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 which, if disclosed prior to the conclusion of the decision-making process, may reasonably be considered likely to compromise the 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.

Note from noyb: This is incorrect. Section 26 does not name any of these elements. They are completely made up by the DPC.

It is of note here that both the Irish and Austrian data protection authorities agree that neither the complainant nor the controller have a right to participate in the consultation process that forms a key part of the co-decision-making procedure described above. From there, the Austrian DPA held that Mr Schrems was not entitled to sight of documents exchanged between the DPC and its fellow data protection authorities.

Note from noyb: This is misleading - the Austrian DPA in fact only takes the view that the cooperation process under Article 60(3) to (5) GDRP is not open the (both) parties. The DPC instead explicitly says that both parties have a right to be heard in its letters. We urged both DPAs to come to consensus, but it seems they were unable to reach such a consensus. There is now a situation where the Irish DPA takes the view that there is a role for the parties, but that documents are secret and the Austrian DPA takes the view that there is no role for the parties, but if there would be a role, § 17 AVG make the documents useable for anyone. Bottom line is: Facebook will be heard and noyb will not.

For its part, the DPC believes that the parties should be given sight of such materials, provided only that they agree to treat them as confidential within the decision-making process

Note from noyb: There is no basis for such a conclusion. In fact, the DPC itself may violate Section 26 if it shares "confidential" documents with the parties, as Section 26 is absolute in the consequences. The reality is that Section 26 is binary: If it is "confidential" it has to stay within the DPC, if it is not "confidential" it may be shared with external parties, who are themselves not subject to Section 26.

2. According to noyb/Schrems, the Austrian DPA says there is no confidentiality clause covering such procedural documents. You say in your letters to noyb that there is a confidentiality clause.

As noted, the Austrian SA has made it clear on two separate occasions now that it did not consider that Mr Schrems was entitled to sight of documents exchanged between the DPC and its fellow data protection authorities in the course of the co-decision-making procedure.

It has also expressed the view to the DPC that Mr Schrems would not have been entitled to the draft decision and accordingly its publication on foot of the equivalent Austrian process could not arise.

Note from noyb: This is incorrect and/or misleading. The Austrian DPA took the view that this entire process is not open to the parties (neither the complainant nor Facebook), so it does not fall under the right to access to documents (independent of the documents being confidential or not). The DPC take the opposite view, that the process is open to the parties, but the documents are confidential. The DPAs were unable to agree on a joint position. Mr Schrems is also not party to the procedure. In fact,

noyb (a non-profit where Mr Schrems is the pro bono chairperson and that has about 4,000 supporting members and 20 staff) is representing an Austrian complainant living in Innsbruck. It seems DPC staff is very much seeing this as a personal fight, not as a factual dispute.

Note from noyb: This is absolutely incorrect. The Austrian DPA never said that. They even provided us with a USB drive with all the documents of the procedure. § 17 AVG is binary: Once you get the documents, they are free. See for example the Austrian Supreme Administrative Court (VwGH 22. 10. 2013, 2012/10/0002; VwGH 21. 2. 2005, 2004/17/0173; Rz 5).

The DPC's position is as outlined under point 1.

a. Does the DPC draw on legislation outside the 2018 data protection act regarding confidentiality of procedures? And, if so, where?

The Irish DPC draws on its obligations under the GDPR, the Irish Data Protection Act 2018 and its Constitutional obligation to apply fair procedures (as set out above).

Note from noyb: The GDPR has 99 Articles, the Irish Data Protection Act has hundreds of Sections and "Constitutional obligations" are not any clear framework for such a specific question. In fact the DPC cannot point to any specific provision, because there are none.

b. NOYB says the paragraphs of the 2018 act the DPC cites apply only to a "relevant person" which includes DPC employees and contractors. Is this correct, or is there another section of the act that applies to parties in a complaint, too?

One of the legal obligations on the Irish DPC is under Section 26 of the Data Protection Act 2018. This requires that "relevant persons" (which include officers of the DPC) must not disclose confidential information, unless this is required (for example, by fair procedures obligations, as explained above) or is permitted by law.

Even then, however, the DPC must balance its obligations to protect confidential information against the complainant's and the data controller's rights to fair procedures.

Note from noyb: This is not in the law or any case law and just made up.

In practical terms, the DPC is bound to take all reasonable steps to ensure that the confidentiality of such material is upheld in its own hands but also when it passes to the hands of a third party.

Note from noyb: This is not in the law or any case law and just made up.

To put it another way, the DPC can't comply with its obligation to protect the confidentiality of material in its own hands, if it then passes that same material to a third party, without restriction, knowing or reasonably believing there is a strong likelihood the third party will publish it

Note from noyb: This "conflict" is not really existing. The DPC has in fact blackened any documents that it considered "sensitive" or somehow protected. The rest is simply not falling under Section 26

and therefore there is no need to “balance”. The conflict that the DPC tries to generate here, is just because it declares even the most trivial email as “confidential”.

3. What happens to the case if Mr Schrems declines to give an undertaking - actionable in the Irish courts - that there will be no more publication of documents? Can the objections phase and the final decision proceed without him/NOYB/the complainant receiving documents

As flagged above, neither the complainant nor the controller are afforded an active role in the co-decision-making procedure described briefly above, save to the extent that, for reasons derived from Irish procedural law, the DPC takes steps to afford the complainant and controller a right to see the objections and to make written observations if any adjustments are proposed to the current iteration of the draft decision. As such, the objections phase at least will proceed as planned. What happens at any later stage will depend on a number of factors to include the outcome of the consultation process as between the DPC and the other data protection authorities, but also on whether Mr Schrems’ maintains his present position that he must be given access to all materials on the basis that it will be for Mr Schrems alone to decide what (if anything) he may publish or use, and retaining the right to change his position at his sole election and at any time of his choosing.

Ultimately, NOYB will also have a right of appeal against the final decision delivered at the end of the co-decision-making procedure.

Note from noyb: It seems the DPC misses that Mr Schrems is not a party here, but the head of a non-profit (noyb) that represents a complainant under Article 80 GDPR. The response shows that the DPC is seeing this more as a personal fight, than with a neutral eye.