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Chair,
Committee on Civil Liberties, Justice and Home Affairs,
European Parliament

By email only for the attention the Chair: libe-secretariat@ep.europa.eu

cc : *Committee Shadow Rapporteurs*

12 March 2020

Dear Sir

I refer to my letter to you of 09 February 2021, in relation to the Committee's consideration of the Judgment of the Court of Justice of the European Union in Case C-311/18, *Data Protection Commission v. Facebook Ireland Limited & Maximillian Schrems*, as reflected in the Committee's Draft Motion for a Resolution, Reference No. 2020/2789(RSP).

Whilst I have not received a reply to my letter, I understand that the process by which the Resolution will be finalised for adoption by the Committee is continuing. In that regard, I note that a List of Proposed Amendments was published on 3 March 2021.

Relatedly, I note that the Committee is separately preparing to finalise a Draft Motion for a Resolution in relation to its consideration of the European Commission's evaluation report on the implementation of the General Data Protection Regulation, two years after its implementation (Draft Motion Reference No. 2020/2717(RSP). It is my understanding that this latter resolution will be finalised and adopted at the Committee's meeting scheduled for Monday, 15 March 2021 and Tuesday, 16 March 2021, a List of Proposed Amendments having been published on 3 February 2021.

Accepting, without question, the right of elected members of the Committee to give full expression to the views they hold, and likewise fully respecting the right (and, indeed, duty) of Committee members to articulate, freely, the concerns of the citizens they represent, I wish to record my disappointment that (as now appears), both Draft Resolutions will be finalised and adopted without the Committee taking up my offer to engage with the Committee. In that regard, you will recall that, in my letter of 09 February last, I expressed concern that, in certain respects, positions advanced by or on behalf of the Committee in Draft Resolution 2020/2789(RSP) appear to be grounded on facts that are inaccurate and incomplete, and on assumptions that are both wrong, and remain untested.

Whilst my letter was directed solely to the contents of Draft Resolution 2020/2789(RSP), I note that particular elements of that resolution are also reflected in amendments proposed to Draft Resolution 2020/2717(RSP). In that regard, I note, for example, that some Committee members have proposed amendments to paragraph 11 of the resolution, concerning the length of time taken by some DPAs to investigate individual cases. The purpose of the amendments now proposed is to identify this office as a DPA deserving of particular criticism in that connection.

Emphasising that my office in no sense seeks to shield itself from criticism, and recognising (and fully accepting) the critical importance of the Committee's work in shining a light on those elements of the GDPR that are not working well in practice, I nonetheless take issue with an approach to such matters that proceeds, not on the basis of a complete set of facts, properly established, but on untested assumptions, at least some of which are informed, it appears, by views expressed by parties external to the Committee.

To be clear, I believe there is considerable force to observations made by members of the Committee in relation to the uneven levels of enforcement evident amongst the supervisory authorities of Member States across the Union. Equally, the absence of uniform procedures, applicable to all cases involving cross-border processing wherever they may be handled, presents significant challenges for effective enforcement; the same can be said of differences in approach amongst DPAs in relation to the levels at which administrative fines should properly be levied. The emphasis on administrative fines, to the exclusion of other remedies - such as the imposition of bans on processing - presents another example of the adoption of practices by DPAs collectively that rightly attract fair criticism.

It is my view that the position of DPAs across the Union on these issues, both individually and collectively, is properly the subject of scrutiny by the Committee. Equally, DPAs must be accountable for their respective records on issues relating to enforcement.

It was precisely to facilitate such levels of scrutiny, and such accountability, that I offered to engage with the Committee in such manner and in such forum as it considers appropriate.

I did so because I recognise, and accept, that, by holding DPAs to account, barriers to the proper and effective protection of the rights of data subjects may be identified and addressed, whether those barriers are the product of structural or systemic problems within the systems of enforcement laid down by the GDPR, or whether they reflect inadequate resourcing of DPAs by individual Member States, or whether they are simply the result of poor performance on the part of DPAs, either at an individual level, or, collectively, in the context of the operation of the co-operation and consistency mechanisms set out in Chapter VII of the GDPR.

Critically, however, the Committee's capacity to achieve these ends is contingent upon it securing access to accurate and complete information, sufficient to ensure that it:

- develops a fulsome understanding of the issues at hand, reflective of the experience of all relevant stakeholders and not just some of them;
- is equipped to test (and does in fact test) all of the views presented to it;
- identifies and strips away the kinds of assumptions that would otherwise undermine its analysis; and,
- ultimately achieves a reasonable level of depth in its analysis.

As outlined in my letter of 09 February last, I am concerned that the Committee, or some of its members, have formed judgments that are not the product of any kind of rigorous and informed analysis, as evidenced by the inclusion, in the context of a resolution nominally directed to the Committee's consideration of the CJEU judgment of 16 July 2020, of statements to the effect that the Commission should bring infringement proceedings against Ireland on the basis that, by reference to unparticularised assertions relating to the performance of my office, Ireland is "not properly enforcing the GDPR."

Without repeating specific points addressed in my earlier letter in this connection, the Committee may wish to examine and consider the following select matters when formulating their respective positions on such matters:

- Some two hundred thousand multi-national companies – including large insurance and financial services firms, publishing houses, media corporations and data brokers, operate within the member states of the EU, a small fraction of whom are based in Ireland. All of those organisations engage in cross-border processing; many, if not most, also transfer data to third countries. We can say with some certainty, therefore, that personal data relating to citizens throughout the Union are routinely the subject of cross-border processing on a systemic basis, with all of the risks attendant upon such activities. While it is of course true that many (but not by any means all) social media platforms are headquartered in Ireland, **it is surely worthy of examination as to why Article 60 decisions are not being presented by DPAs across the Union on systemic areas of risk relating to the cross-border processing for which those DPAs bear supervisory responsibilities.** To be clear, the DPC does not raise this question by way of criticism of its colleagues. To the contrary, it is raised because it is necessary to test casual assumptions to the effect that the only controllers to be considered in the context of a debate around enforcement, and the only controllers to be considered when assessing the nature and extent of the risks to which the personal data of EU citizens are exposed, are those limited number of internet/social media companies headquartered in Ireland. On any assessment, an entirely selective approach of this nature cannot be said to be rational, not least because it discloses far too narrow a view of the problems at hand, the result of which would be to permit substantial amounts of unlawful processing to continue, unchecked.

- In my previous letter, I noted that, following the delivery of the CJEU’s judgment of 16 July 2020, the DPC alone amongst its colleagues has taken regulatory action to ensure the proper application of the Court’s findings in practice. Consistent with the views expressed by some members of the Committee in the context of their exchanges around the draft resolutions presently the subject of debate, the DPC has identified that, if, at the conclusion of its regulatory process, preliminary views expressed by the DPC on the application of the CJEU’s findings to transfers by Facebook are upheld, the appropriate regulatory response should include provision for the imposition of a ban on processing. Against that backdrop, it is not without irony that the regulatory process in question (in which the data protection rights of millions of EU citizens are engaged) was stayed (frozen) in the context of legal proceedings brought by the only person, external to the Committee and the institutions of the EU, from whom the Committee elected to hear in open session in connection with its examination of the CJEU judgment.
- On the question of sanctions, the DPC notes that one of the amendments tabled to the Committee’s draft resolution on the two-year review of the GDPR lauds the German authorities for adopting a uniform methodology to the application and calculation of administrative fines. The Committee should, however, be aware that the methodology in question has in fact been overruled by the German Courts. It is equally of note that several fines levied by supervisory authorities in Germany have been reduced or set aside by the Courts of that jurisdiction in recent months.¹ Again, to be clear, none of this is intended as criticism of the approaches adopted by German supervisory authorities to issues around sanction. It does, however, illustrate that challenges are being experienced by *all* DPAs in their dealings with a new legal framework, and that national courts are not always interpreting the law in the same way as DPAs.
- To the extent that some members of the Committee – and some commentators external to the Committee - may wish to frame the debate solely by reference to a particular, and narrow, sub-group of controllers, it should also be noted that, in December 2020, the DPC transmitted a draft decision to the EDPB (under the Article 60 procedure) in relation to WhatsApp. That procedure remains ongoing at “Concerned Supervisory Authority” level, with the DPC presently assessing the (frequently conflicting) objections received from other DPAs. It is anticipated that

¹ <https://blogs.dlapiper.com/privacymatters/germany-bonn-regional-court-overrules-gdpr-fining-guidelines-by-german-data-protection-authorities/>
[https://www.dataprotectionreport.com/2021/02/deutsche-wohnen-fine-now-declared-invalid-by-a-german-court/#:~:text=Deutsche%20Wohnen%20fine%20now%20declared%20invalid%20by%20a%20German%20court,-y%20Christoph%20Ritzer&text=There%20has%20been%20a%20big,has%20just%20been%20declared%20invalid.&text=The%20Regional%20Court%20\(Landgericht\)%20of,invalid%20and%20closed%20the%20proceedings.](https://www.dataprotectionreport.com/2021/02/deutsche-wohnen-fine-now-declared-invalid-by-a-german-court/#:~:text=Deutsche%20Wohnen%20fine%20now%20declared%20invalid%20by%20a%20German%20court,-y%20Christoph%20Ritzer&text=There%20has%20been%20a%20big,has%20just%20been%20declared%20invalid.&text=The%20Regional%20Court%20(Landgericht)%20of,invalid%20and%20closed%20the%20proceedings.)

a further group of cases, again directed to the sub-group of controllers on whom some commentators are fixed, will be submitted to the Article 60 proceedings as 2021 progresses.

- The DPC's experience of the application of the procedures laid down in Articles 60 and 65 of the GDPR in relation to its decision on Twitter may be of interest to Committee members. Those members of the Committee who have read the published Article 60 and Article 65 decisions will get a better sense of some of the challenges associated with the operation, in practice, of the "One-Stop-Shop" concept. The process is undoubtedly cumbersome, and slow, albeit that, at least in part, that is the product of failure on the part of some DPAs to understanding key concepts, including, most obviously, the purpose and role of the "Relevant and Reasoned Objection" procedure. As well as adding to the duration of the process, the submission of conflicting objections by multiple DPAs also belies the suggestion that the application of GDPR principles in individual cases is always easy and straightforward, and that the answers to the questions posed by data subject complainants are obvious. For completeness, the Committee will observe that the EDPB rejected most of the objections received in relation to the DPC's draft decision.
- Whilst the Committee has focused its attention on the GDPR, it is of course the case that a new Law Enforcement Directive also came into force on 25 May 2018. The DPC notes that several EU Member States are now the subject of infringement proceedings for their failure to transpose that directive into national law. For its part, the DPC has already made several decisions of significance under this particular framework, details of which can be found on the DPC's website.

Against the backdrop of these points – presented on an illustrative basis only – it will readily be understood that, in truth, the debate around issues of enforcement, at least as conducted to date, lacks any real depth and will ultimately contribute little to the protection of EU citizens' interests in the area of data protection. In the rush to adopt positions critical of individual DPAs (most obviously the DPC), an objective, evidence-based approach has all too quickly been abandoned in favour of assumption and sound-bites. This is regrettable. Equally regrettable is the fact that such positions are being adopted, without first affording my office any opportunity to be heard in relation to the matter. On any objective view, that cannot be said to be consistent with basic requirements of fairness.

The concerns I sought to outline in my letter of 09 February are deepened by certain of the amendments now proposed to Draft Resolutions 2020/2789(RSP) and 2020/2717(RSP), respectively, and by the fact that, rather than engaging with – or even acknowledging - my earlier letter, it appears the Committee is intent on proceeding along its existing course. Moreover, it appears that some Committee members are willing to compound matters by seeking, even at this late stage, to introduce new criticisms. By way of single example, it appears from Amendment #91 (relating to Draft Resolution 2020/2717(RSP)), that, without any examination of the operation of the cooperation procedures laid down at Article 60 GDPR, my office – and my office alone - is to be held accountable for the "great

concerns” it is said must be expressed over the functioning of the “one stop shop”. The Committee is also invited – by means of the same amendment – to endorse an assertion to the effect that the Irish DPA “closes by far most cases with a settlement instead of a sanction.” Quite apart from the inaccuracy of this most bald and unparticularised of assertions, the text of the proposed amendment reveals a fundamental misunderstanding of the complaint-handling task assigned by the GDPR to each individual DPA.

For completeness, it would be remiss to allow Proposed Amendment #94 (also relating to Draft Resolution 2020/2717(RSP)), to pass without remark. My office deplores the prejudice so casually expressed by the elected member and invites the Committee to reflect upon the obvious disconnect between the kind of leadership expected – and required - of all those operating in the political sphere, and the invocation of offensive stereotypes of this type.

Conclusion

I remain at the disposal of the Committee if it considers that it would be helpful to hear directly from my office and/or to test some or all of the views expressed by the Committee or individual members by examining, first-hand, those responsible for the discharge by the Irish DPA of its regulatory enforcement functions. Pending such engagement, and in the interests of basic fairness, I must again ask the Committee, through your good offices, as Chair, to reflect on the observations I have made on the draft resolutions referred to.

Yours sincerely



Helen Dixon

Commissioner for Data Protection (Ireland)