

Mr Juan Fernando LÓPEZ AGUILAR,
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

16 March 2020

Dear Sir

I acknowledge receipt of your email of last night, requesting my participation in an exercise scheduled for Thursday next, 18 March, involving a limited number of your colleagues, as well as two other parties, both external to the Committee.

Whilst, in principle, the Committee's wish to engage with my office is welcome, however belated, I am compelled to record my deep concerns in relation to the circumstances in which that engagement has come about, and the format proposed for Thursday's exchanges.

On the question of the timing of the meeting, you will recall that I first sought to engage with the Committee as early as 9 February last, details of the Committee's Draft Motion for a Resolution in relation to the ruling of the CJEU of 16 July 2020 (Resolution 2020/2789(RSP)) having come to my attention through media reports.

At least in part, the contents of that draft resolution reflected a prior round of discussions on the CJEU's ruling at an earlier (public) meeting of the Committee, held on 3 September 2020. On that occasion, the Committee heard from Commissioner Reynders, EDPB Chair Andrea Jelenik, and from Maximilian Schrems. My office was not invited to participate; nor did the Committee seek to engage with my office thereafter.

Likewise, no response was received to my letter of 9 February – or my follow-on communications of 3 March 2021 and 12 March 2021 - until your email of last night.

In the intervening period, however, it is clear that the Committee has continued to progress its negotiations in relation to Resolution 2020/2789(RSP), and a parallel resolution relating to the European Commission's review of the GDPR, two years after its implementation (Resolution 2020/2717(RSP)).

I understand that lists of proposed amendments to those resolutions were circulated on 3 February 2021 (in relation to Resolution 2020/2717(RSP)) and 3 March 2021 (in relation to Resolution 2020/2789(RSP)).

I also understand that the Shadow Rapporteurs' negotiations on the text of Resolution 2020/2717(RSP) were in fact completed on Friday last, 12 March. Media reports indicate that the compromise position agreed between the Shadow Rapporteurs was in turn adopted by the Committee on yesterday's date, before being presented for formal adoption by the Committee today.

I understand that the resolution will next be forwarded for consideration at the Parliament's Plenary Session scheduled for Thursday, 25 March.

Media reports published shortly after last Friday's deliberations – which included references to the text of the compromise position agreed between the Shadow Rapporteurs – indicate that my office is to be singled out for direct criticism in the Resolution.

The current state of play in relation to Resolution 2020/2789(RSP) is unclear, save that, as noted above, I am aware – again from media reportage - that a list of amendments was circulated on 3 March 2021. (My position in relation to certain of the amendments proposed by members was set out in my letter to you of Friday last, 12 March).

In the circumstances, it is a matter of great concern to me that the Committee has sought to engage with my office at a point when it has already *completed* its assessment in respect of the issues addressed in Resolution 2020/2717(RSP), and where that resolution – and its recording of views already formed by Committee members - will have been adopted even before I am afforded an opportunity to be heard in response to the criticisms levelled against my office.

My concerns are deepened by the omission of any reference in your email of yesterday to the current state of play in relation to either of the two resolutions, with the result that the (limited) information available to me in relation to the context in which Thursday's exchanges are to take place is informed exclusively by media reports. That I would be asked to participate in an exercise in an information vacuum is very disappointing.

Against this backdrop, the purpose of Thursday's session is entirely unclear. What is very clear, however, is that, in circumstances where at least one of the resolutions in issue has already been adopted, Thursday's exercise cannot, on any objective view of it, be said to carry any meaning.

So far as the proposed format of the session is concerned, it is extremely surprising that, having singled out my office for direct criticism through Resolution 2020/2717(RSP), informed, at least in part, by prior contributions from Mr Schrems, it appears that, rather than engaging directly with my office in relation to the subject matter of such criticisms, the Committee considers it necessary to afford Mr Schrems a further opportunity to put his particular criticisms of my office – already well-rehearsed - to the

Committee, this time as part of what would amount, in practice and in substance, to some sort of adversarial exchange. If there was any doubt about that, such doubts will have been dispelled by the contents of the correspondence recently received by the Committee from Mr Schrems, my letter to the Committee of 9 February 2021 having been shared with Mr Schrems in the meantime. (For completeness, I wish to note that, whilst my letter to the Committee was shared with Mr Schrems, I was not afforded the same courtesy, so that I saw his response for the first time when it was forwarded to me under cover of your email of last night).

The format now proposed is entirely inappropriate for several reasons.

As a preliminary matter, the Committee will of course be aware that, as matters stand, Mr Schrems remains engaged in litigation with my office in proceedings that bear directly on the subject matter of both resolutions. Such litigation includes proceedings by which a regulatory enforcement procedure commenced by my office following the delivery of the CJEU judgment of 16 July 2020 is being challenged by Facebook, with Facebook and Mr Schrems in turn having agreed that Mr Schrems should be joined to those proceedings, as Notice Party. (As noted in my letter to the Committee of Friday last, 12 March, the enforcement procedure in question is presently the subject of a stay, albeit that Mr Schrems agreed to lift his – separate - objections to the procedure some weeks ago).

Pending the delivery of the Court's judgment, it is not open to me – and, indeed, it would be wholly inappropriate - to enter into some form of debate with Mr Schrems, in an alternative forum, in connection with proceedings that remain live.

More fundamentally, it is difficult to understand how or why the Committee would consider it necessary or appropriate to exercise its oversight functions through the particular mechanism now proposed. In that regard, I acknowledged in my letter of Friday last that, individually and collectively, data protection supervisory authorities - including my office – are properly the subject of scrutiny by the Committee, reflecting our position as independent regulatory agencies established under the EU's legal order, charged with specific responsibilities under EU law. Equally, I noted that DPAs must be accountable for their respective records on issues relating to enforcement. It was precisely to facilitate such scrutiny and accountability by the Committee that I offered to engage, directly, with the Committee's members.

What has now been proposed, however, is something entirely different.

Instead of facilitating direct and meaningful engagement between the Committee, on the one hand, and my office, as an independent regulatory authority established under EU law, on the other, it appears that the exercise is to be turned into some sort of quasi-adversarial process, with no regard to the fact that, of the data protection authorities established across the Union, my office alone has been singled out for direct criticism by the Committee. In that regard, the Committee appears to consider it appropriate that positions advanced by my office will be subject to examination, not solely by members of the Committee, but also by one or more third parties. Equally, it appears that answers I may deliver

to questions posed by Committee members will be received by the Committee, having first been filtered, in real time, through the known prejudices of one of those third parties.

Such a procedure is deeply objectionable, particularly in circumstances where, by means of Resolution 2020/2727(RSP), the Committee has already taken it upon itself to unfairly and unreasonably single out my office for explicit criticism without first hearing from me, and where such criticisms must, logically, be intended to be the subject of our exchanges. In that regard, it seems to be suggested that, on the first - and belated - occasion afforded to me to answer the Committee's criticisms, my engagement with the Committee is immediately to be circumscribed.

To the extent that Thursday's exchanges are intended to operate as a means of holding this office to account, and bearing in mind the points made above in relation to issues of timing, the particular model of accountability now proposed by the Committee is, respectfully, perverse.

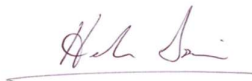
In the circumstances, I cannot agree to the particular format proposed in your email of last night. For the avoidance of doubt, however, I remain available to engage with the Committee, and, notwithstanding the short notice, to do so on Thursday of this week. To that end, and mindful that it is a matter for the Committee to fix upon an appropriate structure for our engagement, I would respectfully suggest that I would appear before the Committee (or at least the Chair and Shadow Rapporteurs) on Thursday, but without the participation of any other external party.

To be clear, I have no objection if the Committee wishes to hear, separately, on Thursday, from other parties. If the purpose of my office's role in the exercise is to facilitate meaningful accountability, however, I cannot agree to participate in a joint session with third parties in the manner now proposed.

For completeness, I would also request that, if the Committee ultimately elects to hear from third parties as well as this office, that it would hear from those other parties first in sequence, i.e. before it engages with my office. That will ensure that, if Committee members wish to put points to me arising from their exchanges with the third parties, they will have the opportunity to do so. This is a point of some considerable importance having regard to the history of the Committee's engagement with the parties and, in particular, the fact that it has previously heard from Mr Schrems, but not my office.

I will await receipt of your reply.

Yours sincerely



Helen Dixon
Commissioner for Data Protection

