

To: Enrique Broenstein - ask+request-10624-73095616@asktheeu.org

Brussels, 15 March 2022

Subject: Your confirmatory application for access to documents – Ref No 2022-11-C

Dear Mr Broenstein,

I refer to your email dated 20/02/2022 in which you made a confirmatory request, which was registered on 22/02/2022 under reference number 2022-11-C. The deadline to reply is therefore 15/03/2022.

In your initial request, you requested access to *“The model decision/uniform template for a decision jointly prepared by the EDPB's Cookie Banner Task Force for the 101 NOYB complaints, which, according to the Bavarian State Office for Data Protection, did not reach the majority required to be adopted as a uniform model decision Source: Minutes of the 102nd German Conference of the Data Protection Supervisory Authorities of the Federation and the Länder on 24 and 25 November 2021, available in German, https://www.datenschutzkonferenz-online.de/media/pr/20211124_protokoll_102_DSK.pdf”*.

In the initial reply, we have clarified that we understand that you are referring to a document which was discussed under point 3.2 at the EDPB 57th Plenary, and that this document was prepared by the taskforce established in September 2020 (“101 Taskforce”) which was set up to look into complaints filed by NOYB with national supervisory authorities in the aftermath of the CJEU judgment in case C-311/18. We have also clarified that the EDPB’s Cookie Banner Taskforce, which is separate from the 101 Taskforce, was not involved in the preparation of the document you refer to in your request.

In the initial response, it was considered that disclosure of the document in scope of your request would undermine the purpose and result of investigations which are currently ongoing in several Member States, as discussions regarding this document are still continuing. Furthermore, it was considered that the document contains information that could lead to the identification of companies / individuals subject to investigation(s), which could result, in cases where such information is not foreseen for public disclosure, in an additional sanction to said elements.

In your confirmatory application, you have argued that “it does not seem comprehensible which particular “commercial interests of a natural or legal person (which, according to the relevant Regulation 1049/2001, should in particular include “intellectual property”) are affected”, and that “by its very nature, this type of document should not identify any natural or legal person as a website operator as a respondent”. You also argue that “the tools challenged in the 101 complaints are Google Analytics and Facebook Connect integrations in webpages” that have “already been published from the very beginning, namely by NOYB”.

Furthermore, you argue that the exception related to the protection of ongoing investigations does not seem to be applicable for this reason, and since the first decisions of the 101 complaints (of the Austrian and French SAs) have already been fully published. In your view, the initial reply does not provide any justification as to how the publication of the draft decision template would undermine “the purpose and result of such investigations, and also of future investigations carried out by the EDPB members”. You also state that scope of decision-making left to the SAs in the 101 complaints is rather small, due to the already published decisions of the Austrian and French SAs. You state that as both decisions show clear similarities in their line of argumentation, this suggests that the draft decision template was at least partly used as a basis for drafting.

Finally, you argue that media representatives have a legitimate and, due to the widespread use of the aforementioned tools, overriding public interest in disclosure. In this context you state that the approach of the 101 Taskforce is unprecedented in the history of SAs in the EU and for this reason alone requires a high level of public visibility and transparency.

As regards your first argument, that it is not comprehensible which particular “commercial interests of a natural or legal person” would be affected by disclosure, and that in your view, according to the relevant Regulation 1049/2001, this should in particular include “intellectual property”, the EDPB does not consider that Regulation 1049/2001 limits “commercial interests” to intellectual property. Nevertheless, following a reassessment of the document, I consider that this exception applies only to those parts of the document which could lead to the identification of companies/individuals, which are mentioned in this template as examples.

As regards your argument that the exception related to the protection of ongoing investigations does not seem to be applicable, as the tools which are challenged, as well as the concerned webpages have already been published by NOYB, and because two SAs have published their first decisions, as mentioned in the initial reply, several SAs still have ongoing investigations. These SAs must be able to complete their investigations independently and without undue external pressure. Disclosing the draft template - which has not been adopted by the EDPB plenary, and therefore does not reflect the view of the EDPB as a whole - would lead to confusion, and would create expectations on those SAs which still have ongoing investigations to conclude these in the same manner. I must underline that no SA is bound to following a specific template when drafting their own decision and that the facts may differ from case to case, and take consideration of applicable national procedural laws. Finally, this template will also constitute a basis for future work within the taskforce. Following a reassessment of this document, and in light of the above, I have concluded that disclosing this draft template would seriously undermine the investigations which are still ongoing.

After having examined again whether there is an overriding public interest in disclosing the documents, I have reached the same conclusion as in the initial reply, as I consider the harm to these ongoing investigations, which would result from the disclosure of this document, outweighs the public concern you refer to in your confirmatory, namely that there is an overriding public interest for the media representatives to have access to this document.

Therefore, since disclosure of the document would seriously undermine several ongoing national investigations, and the existence of an overriding public interest in disclosure has not been demonstrated, the exception enshrined in Article 4(2) 3rd indent of Regulation 1049/2001 applies. Accordingly, I maintain the initial assessment with regard to the document.

In accordance with Article 8(1) of Regulation 1049/2001, you are entitled to institute court proceedings against the EDPB and/or make a complaint to the Ombudsman, under the conditions laid down in Articles 263 and 228 of the TFEU, respectively.

Yours sincerely,



Andrea Jelinek
Chair of the EDPB