

Executive Vice President Margrethe Vestager, European Commission
Dr Andrea Jelinek, Chair, European Data Protection Board
Dr Wojciech Wiewiórowski, European Data Protection Supervisor
Helen Dixon, Commissioner, Irish Data Protection Commission

cc.

Olivier Guersent, Director General, European Commission

DG Competition

Guillaume Lorient, Director of C Directorate, European Commission

DG Competition

25 February 2021

Facebook acquisition of Kustomer, and concerns about data protection

Dear EVP Vestager, Dr Jelinek, Mrs Dixon, and Dr Wiewiórowski,

1. I write on behalf of the Irish Council for Civil Liberties (ICCL), a human and data rights organisation that has worked on human rights issues, including data protection, for decades.
2. It has come to our attention that Facebook is acquiring a company called Kustomer. We write to urge cooperation between relevant supervisory authorities, and due scrutiny of this acquisition, and of its data processing consequences.
3. Many companies that people will recognise in their daily lives use Kustomer's products, which include a "chat bot". We note that Kustomer is used by organisations in healthcare, government, education, and retail. As a result, Kustomer may have gathered a large amount of data, including special category personal data,ⁱ about people.
4. Kustomer says that it processes the data it collects or is given for "improving our Services", among other things.ⁱⁱ
5. Facebook is acquiring this company. The scope of "improving our Services" is already broad, but is likely to grow broader after Kustomer is acquired. "Our Services" may, for example, be taken to mean any Facebook services or systems or projects. The settled caselaw of the European Court of Justice,ⁱⁱⁱ

and the European data protection board,^{iv} that “improving our services” and similarly vague statements do not qualify as a “processing purpose”.

6. We have written to Michael Protti, Chief Privacy Officer of Facebook, and Brad Birnbaum, CEO of Kustomer, to ask the following questions:
 - i. What are, and what will be post-acquisition, the processing purposes for which people’s data will be used?
 - ii. Will personal data currently held by Kustomer for any purpose, from any source, in any context, the combined or otherwise processed by any Facebook entity other than Kustomer after acquisition?

7. We request that you as the competent authorities to i) assess this acquisition thoroughly, and ii) assess the data processing consequences that will result from this acquisition. Will DG Competition work with the EDPB and EDPS to examine these issues?

Sincerely

A handwritten signature in black ink, appearing to read 'Johnny Ryan', with a long, sweeping horizontal line extending to the right above the signature.

Dr Johnny Ryan FRHistS

Senior Fellow
ICCL

ⁱ Defined in GDPR, Article 9(1) as “personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person’s sex life or sexual orientation”.

ⁱⁱ “Kustomer Product Privacy Statement”, 15 January 2020, (URL: <https://www.kustomer.com/privacy/statement/>).

ⁱⁱⁱ See for example European Court of Justice, Judgement Court (Grand Chamber) in Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV v Planet 49 GmbH, 1 October 2019, Case C-673/17, paragraph 74; and “Österreichischer Rundfunk and Others”, Judgement of the European Court of Justice, C-465/00, 20 May 2003, paragraph 77.

^{iv} In fact it is included among the examples of poor practice in “Guidelines on transparency under Regulation 2016/679”, revised and adopted by the European Data Protection Board, 11 April 2018, p. 9.