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Austrian Data Protection Authority (DPA) Barichgasse
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By e-mail: dsb@dsb.gv.at

Vienna, 4 June 2024

noyb case no:C079-02

Complainant:

[REDACTED]

Represented according to
Article 80(1) GDPR by:

noyb - European Centre for Digital Rights
Goldschlagstraße 172/4/3/2, 1140 Vienna

Respondent:

Microsoft Corporation
One Microsoft Way
Redmond, Washington 98052
USA

(The complaint is not directed against Microsoft Ireland
Operations Limited)

because of:

Article 6 GDPR
Installation of tracking cookies and subsequent data
processing without a legal basis

COMPLAINT UNDER ARTICLE 77 GDPR

1. REPRESENTATION

1. *noyb* - European Centre for Digital Rights is a non-profit organisation active in the protection of the rights and freedoms of data subjects with regard to the protection of their personal data, with its registered office at Goldschlagstraße 172/4/3/2, 1140 Vienna, Austria, and with registration number ZVR: 1354838270 (hereinafter: "*noyb*") (**Annex 1**).
2. The complainant is represented by *noyb* pursuant to Article 80(1) GDPR (**Annex 2**).

2. BACKGROUND

3. Especially since the pandemic, many schools are gradually switching to digital services. Whilst this is generally a very welcome move, a few international software providers have been aggressively trying to corner the market for these services - often with the intention of locking students into their systems to ensure that their software will be the standard later in students' lives.
4. In reality, these software providers have enormous market power and can *de facto* dictate the contracts and GDPR compliance documents of these software products. As a rule, these software providers insist that they are only "processors" and that all responsibility lies with the local authorities under whose supervision the schools are. In reality, neither the EU Member States, the competent authorities, nor the schools can assume the legally intended role of an accountable "controller" who instructs the "processor" to carry out the processing operations in a certain way in accordance with Article 28 GDPR. Market realities lead to a "take it or leave it" approach, where all decisions and profits lie with the "processor" and the "controller" is liable for most of the risks, despite only formally acting as a controller.
5. For the people concerned, this leads to situations in which the supposed "processor" (here: Microsoft) does not respond to the exercise of rights under the GDPR, while the supposed "controller" (here: the school) is unable to comply with such requests.
6. In the Austrian context, it is noticeable that the federal and provincial governments have further shifted their responsibility to the respective school, where a local head teacher is supposedly appointed to determine the "purposes and means" in accordance with Article 4(7) GDPR, to ensure compliance with the GDPR and to enforce the provisions of the GDPR against large international software providers.
7. Overall, a system of "paper compliance" has been created that is completely detached from the realities on the ground and any objective assessment of real decisions about "purposes and means" - leading to an unjustified shift of responsibility to local schools and the denial of even the most basic GDPR rights to data subjects.

3. PROPERTY

8. The complainant is a pupil at a school in Austria.
9. The school uses software from Microsoft called "Microsoft 365 Education".
10. The student has a school account linked to Microsoft with the following e-mail address: [REDACTED] (hereinafter: "Microsoft school account").
11. During the use of her Microsoft school account and the creation of a Word document in the online version (browser version) of "Microsoft 365 Education" on 31 July 2023, the following cookies, among others, were installed on the complainant's device

Domain	Name	Value
.microsoft.com	MC1	[REDACTED]
log-in.microsoftonline.com	fpc	[REDACTED]
oauth.online.office.com	ai-session	[REDACTED]
oauth.online.office.com	MicrosoftApplicationsTelemetryDeviceId	[REDACTED]
oauth.online.office.com	MSFPC	[REDACTED]

12. During the creation of the Word document, 20 requests were made to two different domains, each containing the word "telemetry" in the domain or file name:
 - (i) euc-word-telemetry.officeapps.live.com
 - (ii) euc-word-edit.officeapps.live.com
13. During use by the complainant, a recording of the network connections was made (**Annex 3**).
14. A video recording of the relevant moment was also made (**Appendix 4**).
15. The complainant has not given her consent to the use of cookies or similar trackers and technologies.
16. The complainant has deactivated all optional data processing in the data protection settings available in "Microsoft 365 Education" (**Annex 4**).

17. According to the respondent's documentation, the cookies installed on the complainant's end device are used for the following purposes:
- i. **MC1**: "*Identify unique web browsers that visit Microsoft websites. These cookies are used for advertising, site analytics and other operational purposes.*"¹ (**Appendix 5**)
 - ii. **FPC**: "*Tracks browser-related information. Used for tracking requests and throttling.*"² (**Appendix 6**)
 - iii. **ai-session**: "*Recognises how many sessions with user activity have contained certain pages and functions of the app.*"³ (**Appendix 7**)
 - iv. **MSFPC**: "*Identify unique web browsers that visit Microsoft websites. These cookies are used for advertising, site analytics and other operational purposes.*"⁴ (**Appendix 5**)
18. The **MicrosoftApplicationsTelemetryDeviceID** cookie is not described in the respondent's documentation. However, other controllers classify this cookie as a tracking or marketing cookie.⁵ (**Annexes 8, 9**)
19. The Respondent does not provide complete information or a list of the cookie and tracking technologies it uses in the context of "Microsoft 365 Education". Various cookie information can be found on the Respondent's websites, but it is unclear which are applicable to "Microsoft 365 Education". A transparent overview is not available.
20. The complainant _____ was at the time _____ of these in question _____ years old at _____ the time of use.

4. MORE RESPONSIBLE

21. According to the respondent's privacy policy (**Annex 10**), the respondent is the controller within the meaning of Article 4(7) GDPR for various data processing operations:

"When Microsoft is a controller, unless otherwise stated, Microsoft Corporation and, for those in the European Economic Area, the United Kingdom, and Switzerland, Microsoft Ireland Operations Limited are the data controllers for personal data we collect through the products subject to this statement." (emphasis added)

"Where Microsoft is a controller, unless otherwise stated, Microsoft Corporation and, for individuals in the European Economic Area, the United Kingdom and Switzerland, Microsoft Ireland Operations Limited are the controllers of personal data that we collect through the products that are the subject of this Statement." (machine translation)

22. As is clear from the plural used, both the respondent and Microsoft Ireland Operations Limited are to be regarded as responsible parties.

¹ <https://privacy.microsoft.com/de-de/privacystatement>

² <https://learn.microsoft.com/de-at/azure/active-directory/authentication/concept-authentication-web-browser-cookies>

³ <https://learn.microsoft.com/de-at/dynamics365/commerce/cookie-compliance>

⁴ <https://privacy.microsoft.com/de-de/privacystatement>

⁵ For example: <https://www.swissaid.ch/de/>, <https://web.ub.edu/politica-de-galetes/>;

23. How the specific internal relationship between the two controllers is to be assessed is irrelevant for the exercise of the complainant's right of appeal (see Article 26(3) GDPR, Article 82(4) GDPR).
24. The data processing in question took place for purposes and by means within the meaning of Article 4(7) GDPR, which were determined by the respondent:
- i. These purposes are set out in the publicly available information of the respondent (see **Annexes 5-7**), insofar as information is provided at all. In the context of the use of tracking cookies, this is not done on the instructions of other bodies. In particular, it is clear from the school's response to the complainant's request for information (**Annex 11**) that the school had neither access to the tracking data nor to the evaluation or results thereof. The school is not aware of such tracking at all. The school simply has no interest in such tracking and, as far as can be seen, has not instructed it to do so.
 - ii. Similarly, the respondent specifies the cookies to be set when using the product "Microsoft 365 Education". This also results from the fact that the respondent provides detailed (but not complete) information regarding these cookies (see **Annexes 5-7**), but the complainant's school is not in the least aware of these cookies (**Annex 11**). The complainant's school has no technical knowledge of the means used and, in particular, has not chosen it. However, the cookies represent the means of data processing determined by the respondent.
 - iii. In light of the Respondent's well-known market power, it seems downright absurd to assume that tracking technologies, which the Respondent also uses in very similar products such as "Microsoft 365" (see **Annex 5**), would now be encouraged by the schools themselves when used by schools and that they would also determine the means and purposes of tracking. Rather, the cookies were imposed on the school as part of the software used, as there is *de facto* no negotiating power vis-à-vis the respondent.
25. The respondent is therefore the controller for the processing of personal data that is the subject of the complaint in accordance with Article 4(7) GDPR.

5. RESPONSIBILITY OF THE DATA PROTECTION AUTHORITY

26. Since the respondent, as the controller for the data processing in question, is established outside the EEA, the DPO is responsible pursuant to Article 55(1) in conjunction with recital 122 GDPR (see Eichler/Matzke in BeckOK DatenschutzR, 45th ed. 1.8.2023, GDPR Art. 55 para. 7; Selmayr in Ehmann/Selmayr, 2nd ed. 2018, GDPR Art. 55 para. 6).

6. GROUNDS FOR COMPLAINT

6.1. Scope of complaint

27. The present complaint relates to the processing of personal data within the meaning of the GDPR, which results from the installation of the cookies mentioned in the facts (as technical "carriers" of personal data).
28. The mere technical installation of cookies or the use of comparable technologies in accordance with Section 165(3) TKG is not the subject of the complaint.

6.2. Infringements

29. The complainant is of the opinion that the respondent has violated the following data protection provisions:
 - (a) Article 6(1) in conjunction with Article 5(1)(a) GDPR, as there is no legal basis for the data processing.
 - (b) Article 28 GDPR, as the alleged order processing was exceeded.

6.3. No legal basis

6.3.1. Consent required for tracking

30. According to the respondent's documentation (**Annex 5, 6, 7**, cf. also **Annex 8, 9**), the cookies in question are used for "tracking".
31. Tracking cookies require consent within the meaning of Article 5(3) of the ePrivacy Directive or the § Section 165(3) TKG (Art. 29 Data Protection Group, Opinion 04/2012 on the exemption of cookies from the consent requirement, WP 29, WP194, points 4.2 and 4.3, pp. 9-11; [ruling of the Federal Administrative Court of 12 March 2019, W214 2223400-1](#)).
32. This consent also forms the legal basis for any downstream data processing, which is the subject of the complaint here. Anything else would lead to circumvention of the narrow protection provisions of the ePrivacy Directive or the TKG, which require consent (in this sense: [EDPB-EDSB Joint Opinion 2/2022 on the Proposal of the European Parliament and of the Council on harmonised rules for fair data access and use \(Data Protection Act\)](#), para. 44; EDPB, [Report of the work undertaken by the Cookie Banner Taskforce](#), para. 24).
33. The respondent has not provided any information on data processing, either via a consent banner or in any other way that can be accessed quickly and easily. Instead, the available information on cookies is divided between various channels (see **Annex 5, 6, 7**). It is also repeatedly pointed out in these channels that the lists provided are not necessarily complete. It remains unclear whether other cookies (or comparable technologies) are used for tracking purposes (see EDPS, Public document on the outcome of the ex officio inquiry into the use of cookies).

[Public Paper on Outcome of own-initiative investigation into EU institutions' use of Microsoft products and services](#)], para. 138).

6.3.2. No consent obtained

34. The respondent did not obtain consent for the processing of personal data that is the subject of the complaint from the complainant herself (which is impossible in any case due to Section 4(4) DPA).

35. The respondent has also not obtained legally valid consent from a holder of parental responsibility (i.e. the complainant's legal guardian) for the processing of personal data that is the subject of the complaint.

36. Consequently, there is no legal basis for data processing.

37. According to Article 5(2) in conjunction with Article 7(1) GDPR, it is the respondent's responsibility to prove that legally valid consent has been obtained (on the reversal of the burden of proof, see also ECJ judgment of 4 July 2023, C-252/21, para. 152; ECJ judgment of 11 January 2024, C-231/22, para. 41 & 43; ECJ judgment of 24 February 2022, C-175/20, para. 77 & 81).

6.3.3. "Tracking by default"

38. Although the respondent did not give consent, various options had to be deactivated in order to create a data protection-friendly situation (**Annex 4**).

39. Contrary to the idea of "privacy by default" standardised in Article 25(2) GDPR, the impression of "tracking by default" is conveyed here and, in particular, no "unequivocal declaration of intent" (opt-in) is obtained.

40. All the more so as the tracking took place after the above options were deactivated.

6.3.4. Impossible consent by the complainant

41. The conditions for legally valid consent are set out in Articles 4(11), 6(1)(a), 7 and 8 GDPR, among others.

42. Consent pursuant to Section 165(3) TKG must also fulfil all requirements of the GDPR and relevant national legal standards (Article 2(f) ePrivacy Directive).

43. Consent within the meaning of Article 8(1) GDPR is only lawful in Austria if a person has reached the age of fourteen (Section 4(4) DSG in conjunction with Article 8(1) GDPR). According to Article 8(1) GDPR, the minimum age, which is to be determined by member states, may not be less than 13 years.

44. The complainant was younger at (and therefore also before) the time in question and was therefore unable to give legally valid consent.

45. Even the respondent assumes that consent would probably have to be obtained from the parents (see Microsoft Products and Services Data Protection Addendum, version of 1 January 2023, p. ¹⁴⁶ (**Annex 12**)).
46. Since "Microsoft 365 Education" is a product that is regularly aimed at minors, it should be clear to the person responsible that parental consent must be obtained in most cases. It could therefore come as no surprise to the person responsible that the complainant is a minor.
47. The respondent is therefore in breach of Article 6(1) and Article 5(1) (a) GDPR.

6.4. Illegal processing for the respondent's own purposes

48. The data processing by the respondent that is the subject of the complaint takes place within the framework of a relationship in which the respondent claims that it is merely a processor (**Annex 13** - response to the complainant's request for information). This is in any case not the case for the data processing that is the subject of the complaint, as evidenced by its own documentation.
49. The respondent also processes personal data for its own purposes in other cases (see the overview in **Annex 14**). In doing so, it regularly exceeds the data processing relationship within the meaning of Article 28(3)(a) GDPR. In particular, it also lacks a valid legal basis under Article 6(1) GDPR for the processing of personal data for various purposes.
50. An example of this is the processing "Developing and improving products" (**Annex 5**). This is also mentioned in the FAQs for Microsoft cloud services for Austrian schools (**Annex 15**), whereby Microsoft apparently distinguishes between "continuous improvement" from "improvement of core functionality":
- The former would be carried out as a processor and involves "installing the latest updates and improvements in terms of user productivity, reliability, effectiveness and security".
 - The second would take place as the responsible party "in terms of accessibility, data protection or energy efficiency".
51. For example, it is not clear why the processing of personal data is necessary for the "improvement of the core functionality in relation to [...] data protection" is required in any way (see Article 5(1)(c) GDPR). Data protection-friendly options and settings should generally already be integrated into the software offered in accordance with "Privacy by Design and by Default" and Article 25 GDPR. Furthermore, the processing of personal data of all users is disproportionate, as internal testing by the respondent could also fulfil these functions. A consideration under Article 6(1)(f) GDPR would therefore be negative. Further legal bases

⁶ <https://www.microsoft.com/licensing/docs/view/Microsoft-Products-and-Services-Data-Protection-Addendum-DPA?lang=14&year=2023>

are ruled out: Users have not concluded a direct contract with Microsoft, have not given their consent, and there is no legal obligation or vital interest in such processing.

52. It is also not clear why personal data must be processed on behalf of (!) for "updates and improvements in relation to user productivity". Pupils do not have to be "more productive", nor is personal data necessary for the installation of improvements in (Saas) cloud software. This can simply take place on the server side. There is no logical reason why a controller, in the context of school education, would issue an order within the meaning of Article 28(1) GDPR for such processing. Rather, this appears to be an evaluation of the use of the software for the purpose of maximising the respondent's profits.
53. Finally, it should also be noted in the example chosen that the terminology used by the respondent, as in many other cases, does not clearly and unambiguously describe the purpose (the EDPS investigation [into](#) the use of Microsoft 365 [by the](#) European Commission, decision of 8 March 2024, case 2021-0518 [[EDPS Investigation into Use of Microsoft 365 by the European Commission](#)], para. 90-97, comes to the same conclusion).
54. Insofar as the respondent claims to process personal data as a processor within the meaning of Article 4(8) GDPR, it exceeds the scope of commissioned processing and determines the purposes and means of processing itself (see also **Annex 14**). In accordance with Article 28(10) GDPR, it must therefore be categorised as a controller. As a result, it lacks a legal basis within the meaning of Article 6(1) GDPR.
55. In particular, it should be noted that the respondent obtains access to personal data in connection with the use of its software in the school sector and thus illegally processes data of minors in particular for its own purposes.

7. APPLICATIONS AND REQUESTS

7.1. Request for comprehensive investigation

56. In view of the above, the complainant requests the competent authority to carry out comprehensive investigations and, in particular, to convince itself of the respondent's actions in breach of data protection law by carrying out a technical analysis of the systems and of "Microsoft 365 Education".

7.2. Request for a declaratory judgement

57. The complainant requests that the complaint be upheld and that the respondent be declared to have infringed Article 6(1) GDPR, as it has processed the complainant's personal data without a valid legal basis.

58. The complainant requests that the complaint be upheld and that the respondent be declared to have infringed Article 5(1)(a) GDPR, as it has processed the complainant's personal data unlawfully and in bad faith.
59. The complainant requests that the complaint be upheld and that the respondent be declared to have violated Article 28(3)(a) GDPR, as it processed the complainant's personal data in excess of the order processing.

7.3. Request for services

60. The complainant requests that the respondent be prohibited from further processing the complainant's data processed without a legal basis pursuant to Article 58(2)(f) GDPR and that the deletion of these data be ordered pursuant to Article 58(2)(g) GDPR.
61. In addition, the complainant requests that the respondent, pursuant to Article 58(2)(f) GDPR, in the foreseeable future use of the product "Microsoft 365 Education" to prohibit the processing of personal data concerning them for purposes requiring consent without their respective legally valid consent.

7.4. Suggestion of general remedial measures

62. The complainant, as one of many affected parties, suggests that the respondent
- (a) pursuant to Article 58(2)(d) GDPR, to bring all processing of personal data in connection with the installation of cookies or similar technologies in the context of the product "Microsoft 365 Education" into compliance with Article 5(1)(a), Article 6(1) GDPR and, where applicable, Article 8(1) GDPR;
 - (b) in accordance with Article 58(2)(f) GDPR, to prohibit the processing of all personal data processed without a legal basis in connection with the installation of cookies or similar technologies as part of the "Microsoft 365 Education" product.

7.5. Proposal to impose a fine

63. The complainant proposes the imposition of an effective, proportionate and dissuasive fine for the infringements found. In particular, it must be taken into account that the data processing complained of
- (a) concerns not only the complainant, but also other minors,
 - (b) the minors (or their parents) have no choice regarding the software used and they must use this software and the respondent exploits this privileged situation in its favour,
 - (c) is common and widespread, as a large number of schools use the same software,

and that for this reason general preventive measures appear more than appropriate and necessary.

8. CONTACT

64. We will be happy to assist you if you require further factual or legal details regarding the handling of this complaint. Please contact us at [REDACTED] or at [REDACTED].