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AUSTRIA

Austrian Data Protection Authority (DPA)
Barichgasse 40-42
1030 Vienna Austria

By e-mail: dsb@dsb.gv.at

Vienna, 4 June 2024

noyb case number:

[REDACTED]

Complainant:

[REDACTED]
[REDACTED]
[REDACTED]

Represented in accordance with
Article 80(1) GDPR by:

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

Respondents:

[REDACTED]
[REDACTED]

Vienna Directorate of Education, Wipplingerstraße 28
1010 Vienna;

**Federal Ministry of Education, Science and Research
(BMBWF)**, Minoritenplatz 5, 1010 Vienna;

Microsoft Corporation, One Microsoft Way, Redmond, Wash-
ington 98052, USA.

because of:

Articles 12 to 14 GDPR
Article 15 GDPR
Article 5(1)(a) GDPR

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 envisaged 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 data subjects, 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 shifted their responsibility further 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 appears to be completely divorced from the realities on the ground and any objective assessment of genuine 'ends and means' decisions - 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 was [REDACTED] years old and a pupil at [REDACTED], a school in Vienna, Austria (hereinafter: "School"), when the facts of the case occurred.

9. The school uses Microsoft software for educational purposes, commonly known as "Microsoft 365" (hereinafter "Microsoft 365 Education"). Microsoft 365 Education includes several different Microsoft products and services, such as Microsoft Word, Microsoft Teams and Microsoft Sharepoint.
10. The complainant's father made requests for information on behalf of his daughter to both Microsoft and the school in order to obtain more information about the processing of his daughter's (the complainant's) personal data in connection with Microsoft 365 Education (Article 15 GDPR):
- On 31 August 2023, the complainant's father filed a complaint via www.microsoft.com/privacyrequest (**Annex 3; Annex 4**) a request for information to Microsoft.
 - On 2 September 2023, Microsoft replied by email that the school is the data controller in relation to Microsoft 365 Education and stated: "*Based on nature of the request, we suggest that you direct your request to the organisation who is the data controller in this case.*" ["Based on nature of the request, we suggest that you direct your request to the organisation who is the data controller in this case."] (**Annex 5**).
 - On 5 September 2023, the complainant's father replied to Microsoft's email and asked for clarification as to whether Microsoft was a controller with regard to the processing activities in connection with Microsoft 365 Education (**Annex 6**).
 - On 19 September 2023, Microsoft replied that the school is the data controller for the data collected through the use of Microsoft 365 Education: "*Based on the nature of the request, we suggest that you contact the [e]ntent organisation/school, which is the data controller in this case.*" (**Annex 7**).
 - On 3 October 2023, the complainant's father also submitted a request for information to the school regarding Microsoft 365 Education (**Annex 8; Annex 9**).
 - On 29 October 2023, the school replied that the head teacher is the data controller at the respective school, that the only personal data of the complainant processed by the school is the email address in Microsoft 365 Education and that it is only processed for the purposes of communication with the guardians and the provision of ICT-enabled education¹ (**Annex 10**).
11. On 31 July 2023, all data streams were recorded when the complainant used Microsoft 365 Education on an Apple computer with a macOS operating system via a browser (**Annexes 11 to 15**).

4. PARTIES INVOLVED

12. As far as the complainant can see, the respondents are all involved in the provision of Microsoft 365 Education for the school and for the complainant:

¹ §14; §14a; §17 and § 70a SchUG.

- Microsoft and the Federal Ministry of Education, Science and Research ("BMBWF") have signed a national framework agreement for the use of Microsoft 365 Education in Austrian schools;²
- Education authorities and schools in Austria can use Microsoft 365 Education for educational purposes under the terms of this national framework agreement;³
- The Vienna Department of Education offers Microsoft 365 Education licences free of charge to schools in Vienna via its website, using a link to the Microsoft website;⁴
- The complainant's school uses these free Microsoft 365 Education licences, which are offered via the website of the Vienna Education Directorate;⁵
- The Microsoft 365 Education licences are made available to the complainant's school directly via the Microsoft website.⁶

13. The complainant is a pupil at the school. The complainant must use Microsoft 365 Education every day during lessons and when doing her homework. The complainant's father has exercised the complainant's rights on behalf of his daughter, as she is a minor.

5. RESPONSIBILITY OF THE DATA PROTECTION AUTHORITY

14. This complaint is being submitted to the Austrian Data Protection Authority (DPA) because both the complainant's place of residence and the location of the infringement are in Vienna.

15. If and to the extent that the school, the Vienna Education Directorate and/or the BMBWF, is/are the controller(s) for the data processing in the present case and uses Microsoft as a processor, the DPO is responsible.⁷

16. According to Microsoft's privacy policy, both Microsoft Corporation (USA) and Microsoft Operations Ireland are responsible for Microsoft's data processing in the EEA (Article 4(7) GDPR):

*"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."*⁸
(emphasis added)

In German:

² e.g. BMBWF, *Rahmenbedingungen für den Einsatz privater Clouddiensteanbieter im IT-gestützten Unterricht*, https://www.bmbwf.gv.at/dam/jcr:609b6a2a-ce4d-455f-906e-dac14452461b/clouddienste_rahmenbedingungen.pdf; Microsoft, Microsoft Cloud Dienste für österreichische Schulen - FAQ, Question 4, https://www.bmbwf.gv.at/dam/jcr:a36ea170-e68f-4443-8498-d1f7a6e042c9/ms_dsi.pdf

https://www.bmbwf.gv.at/Themen/schule/zrp/dibi/itinf/it_angebote/microsoft.html; §4 Para. 2 Sentence 3 BilDokG; §4 Para. 3 Z 1 BilDokG in conjunction with §15 Z 2 IKT-SchulVO.

³ https://www.bmbwf.gv.at/dam/jcr:609b6a2a-ce4d-455f-906e-dac14452461b/clouddienste_rahmenbedingungen.pdf.

⁴ https://bildungshub.wien/office_365/office-365-anmeldung-und-download/ where you can visit the website: <https://www.microsoft.com/de-at/education/products/officeat/education/products/office> will be referred to.

⁵ https://bildungshub.wien/office_365/office-365-anmeldung-und-download/.

⁶ <https://www.microsoft.com/de-at/education/products/office>.

⁷ EDSA Guidelines 8/2022, Version 2.0, margin no. 41.

⁸ <https://privacy.microsoft.com/en-US/privacystatement#mainhowtocontactusmodule>

"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)

17. Therefore, to the extent that Microsoft can be considered responsible for the processing of the complainant's personal data in relation to Microsoft 365 Education, this means that both Microsoft Corporation and Microsoft Ireland Operations Limited are the (joint) controllers for the processing of the complainant's data (see **Annex 16, question A.1**).
18. This complaint is only directed against Microsoft Corporation and not against Microsoft Operations Ireland, as the complainant is free to choose which controller to contact. This also follows from Article 26(3) GDPR, because: "*Regardless of the details of the agreement*" between the controllers, "*the data subject may exercise his or her rights under this Regulation with and against any of the controllers.*" Article 82(4) GDPR also confirms this view.
19. Therefore, the DPO is also the competent authority if Microsoft is the (joint) controller. The complainant assumes that the complaint is therefore not to be forwarded to a lead authority.

6. GROUNDS FOR COMPLAINT

6.1 Violation of the right to information (Article 12(2); 15 GDPR)

20. The responses of the school and Microsoft to the complainant's requests for information, as described in paragraph 2 ("Facts"), did not provide any information as to which of them is responsible for which data processing activities in connection with the complainant's use of Microsoft 365 Education (**Annex 3 to 10**).
21. In Microsoft's response to the request for information, Microsoft referred the complainant to her school because, according to Microsoft, the school was the controller of the complainant's use of Microsoft 365 Education (**Annex 5; Annex 7**). This is despite the school stating that it is only responsible for processing the complainant's email address for the purposes of communicating with parents/guardians and providing ICT-enhanced education (**Annex 10**).
22. Since it is not even clear who is the data controller (or for which processing operations) and whether the school or Microsoft must respond to the request for information, and both the school and Microsoft refer to others instead of responding to the request for information in substance, the complainant is obviously not provided with the information under Article 15(1)(a) to (h), (2) and (3) GDPR.
23. If the respondents are categorised as joint controllers, they have breached Article 26(2) GDPR by failing to determine in advance who will serve as the contact point for the exercise of data subjects' rights:

"[...] For example, it must be completely clear to the data subject which controller serves as the point of contact for the exercise of data subjects' rights (notwithstanding the fact that they may exercise their rights with and against any of the joint controllers). The obligation to provide data subjects with

*the essence of the agreement is important in the case of joint controllership so that the data subject knows which of the controllers is responsible for what.*⁹ (emphasis added)

24. Several DPAs also found that Microsoft, schools and/or other entities involved in the use of Microsoft products - such as Microsoft 365 Education - failed to properly respond to requests for (access to) information about which processing activities took place and which party was or was not the controller for these processing activities. For example:

- In 2022, the German DSK stated:

*"The central and recurring question of the series of discussions was in which cases Microsoft is acting as a processor and in which as a controller. This could not be conclusively clarified."*¹⁰ (emphasis added)

- In 2021, the Baden-Württemberg Data Protection Authority (LfDI) stated (emphasis added):

*"As a result, the LfDI recommends refraining from using the trialled MS products in schools. Despite the special nature of the products used, a large number of problems and open questions remain which neither the Ministry of Education nor the individual schools can take responsibility for under data protection law. [...] It could not be clarified that Microsoft enables schools to sufficiently guarantee the rights of data subjects in accordance with Article 15 GDPR."*¹¹

*"On the other hand, there are massive, uncontrollable data flows to Microsoft, which could not be clarified even with Microsoft's help. Even a snapshot shows that it is almost impossible to know all data flows and to categorise the associated purpose: Only 58 out of 517 - a good 11% - of the servers (host names) were described in the DPIA including attachments, so for a large proportion it is not at all clear what purposes the respective communication serves."*¹²

*"Even before the pilot operation, the Ministry of Education's service provider carried out an information request in accordance with Article 15 GDPR ("Data Subjects Rights Request"). The data supplied was only a fraction of the data processed or transmitted to Microsoft for further processing."*¹³

25. As a result, the complainant's right to information pursuant to Article 15 GDPR and Article 12(2) GDPR was violated.

6.2 Breach of information obligations (Article 12(1); 13-14 GDPR)

(a) Information is not provided in an easily accessible form. (Article 12(1) GDPR)

⁹ EDSA Guidelines 07/2020, margin no. 179.

¹⁰ DSK, *Determination of the Conference of Independent Federal and State Data Protection Supervisory Authorities*, 24 November 2022, https://www.bfdi.bund.de/SharedDocs/Downloads/DE/DSK/DSKBeschluessePositionspapier/104DSK-Festlegung-Microsoft-Onlinedienste.pdf?__blob=publicationFile&v=2, §2.

¹¹ DSB Baden-Württemberg, *Pilot Nutzung MS an Schule: Empfehlungen des LfDI*, https://media.frag-den-staat.de/files/foi/626585/2021-04-23_Empfehlung_LfDI.pdf, p. 3 and p. 12.

¹² DSB Baden-Württemberg, *Pilot Nutzung MS an Schule: Empfehlungen des LfDI*, Anlage 7 - Technische Analyse, https://media.frag-den-staat.de/files/foi/639491/2021-04-23_Empfehlung_Anlage_07.pdf, p. 10.

¹³ DSB Baden-Württemberg, *Pilot Nutzung MS an Schule: Empfehlungen des LfDI*, Anlage 1 - Findings-MS365 - technisch, https://media.frag-den-staat.de/files/foi/639491/2021-04-23_Empfehlung_Anlage_01.pdf, §11.

26. Furthermore, the information pursuant to Article 15(1)(a) to (h), (2) GDPR is not made available to the complainant in any other way, as no comprehensible, precise and easily accessible information is available to the complainant. Even the exact data protection declarations and documents that are relevant for the use of Microsoft 365 Education by the complainant are unclear.
27. The BMBWF, the Vienna Education Directorate and the school provide some (general) data protection documents and declarations.¹⁴ Microsoft also provides several data protection documents and statements, but it was unclear exactly which data protection documents and statements applied to the complainant's use of Microsoft 365 Education.
28. Therefore, on 25 July 2023, *noyb* asked Microsoft by email to clarify which data protection documentation applies to the use of Microsoft 365 Education. Microsoft confirmed that the *Microsoft Products and Services Data Protection Addendum*, the Microsoft Product Terms and the Microsoft Privacy Statement apply (**Annex 16, question A.3**).
29. The (general) privacy statements of the school and the Vienna Directorate of Education do not contain any information about Microsoft 365 Education or data processing activities in relation to Microsoft 365 Education.¹⁵
30. The BMBWF offers a general website on data protection at Austrian schools.¹⁶ The school also referred the complainant to this website in its response to the complainant's request for information, but the school does not refer to this information in its privacy policy (**Annex 10**).
31. However, BMBWF's privacy policy does not contain any specific information on data processing activities in connection with Microsoft 365 Education, but merely refers to a Microsoft FAQ, a document entitled "Data protection and data security" and a link to Microsoft licensing documents.¹⁸ However, there does not appear to be a single privacy policy that provides the complainant with clear information on data processing in connection with Microsoft 365 Education.
32. Microsoft's answers to questions about the applicable data protection documents also confirm that there is no standardised privacy policy (**Annex 16**). As a result, the complainant would have to read through several documents and even contracts in order to obtain the information that controllers must provide to the complainant in accordance with Articles 12-14 GDPR.¹⁹

¹⁴ <https://www.bmbwf.gv.at/Themen/schule/schulrecht/ds.html#08>; the Vienna Directorate of Education does not have a privacy policy; [REDACTED]

¹⁵ [REDACTED]; the Vienna Directorate of Education does not have a privacy policy.

¹⁶ <https://www.bmbwf.gv.at/Themen/schule/schulrecht/ds.html#08>.

¹⁷ [REDACTED]

¹⁸ https://www.bmbwf.gv.at/dam/jcr:48f70bf3-9b09-43c4-b6eb-013f07df85ed/ms_eek.pdf;
https://www.bmbwf.gv.at/dam/jcr:a36ea170-e68f-4443-8498-d1f7a6e042c9/ms_dsi.pdf; <https://www.microsoft.com/de-de/licensing/product-licensing/products.aspx>.

¹⁹ See: "In the event of a conflict between this Microsoft Privacy Statement and the terms of any agreement(s) between a customer and Microsoft for Business and Developer Products, the terms of such agreement(s) will control. The product documentation will also provide you with information about the features and settings of our products for businesses and

33. Furthermore, Microsoft and the BMBWF do not refer to the same Microsoft data protection documentation to inform data subjects. Microsoft refers to the Microsoft *Products and Services Data Protection Addendum*, the Microsoft Product Terms and the Microsoft Privacy Statement (**Annex 16, question A.3**), but not to the FAQ, while BMBWF does not refer to the Microsoft Privacy Statement at all.²⁰
34. In addition, Microsoft provides further data protection documents on its website - to which none of the other respondents refer - that also appear to apply to the use of Microsoft 365 Education or at least contain information about it.²¹ These documents also contain various information, e.g. on the purposes of processing (see **Appendix 17**).
35. It should be recalled that the complainant is a child. As the scattered information of the parties involved is not available in an "easily accessible form" for adults, this is even less clear for a minor like the complainant. In fact, none of the information seems to be available "in a *concise, transparent, intelligible and easily accessible form, using clear and plain language [...] in particular for information specifically addressed to children*", as required by Article 12(1) GDPR.
36. As a result, the information obligations under Article 12(1) and Articles 13-14 GDPR were violated, as the data protection information on Microsoft 365 Education was not available to the complainant in an "easily accessible form" and no "appropriate measures were taken to provide the data subject with all the information referred to in Articles 13 and 14", in particular since the complainant is a child (Article 12(1) GDPR).

(b) Existing information is not precise, transparent and comprehensible (Article 5(1)(a); 12(1); 13-14 GDPR)

37. In addition, the available privacy information, which is mainly Microsoft's privacy documents, is not "*accurate, transparent, understandable*" and does not contain "*clear and plain language [...] in particular for information specifically addressed to children*" (Article 5(1)(a); 12 GDPR).
38. It is also not made clear (among other things) who of the respondents is responsible for what, what the exact purposes of the processing are or what the legal basis for these processing activities is (Articles 13-14 GDPR) (see **Annex 17**).
39. As mentioned above, the data protection statements of the school and the Directorate of Education do not provide any information about Microsoft 365 Education and the BMBWF only refers to the general (data protection) documentation of Microsoft.²²

developers, including options that affect your privacy or the privacy of our end users." <https://privacy.microsoft.com/de-de/privacystatement> under "Products for companies and developers".

²⁰ <https://www.bmbwf.gv.at/Themen/schule/schulrecht/ds.html#08>.

²¹ e.g.: <https://learn.microsoft.com/en-us/compliance/regulatory/gdpr-dsr-office365>.

²² <https://www.bmbwf.gv.at/Themen/schule/schulrecht/ds.html#08>, where the BMBWF refers to https://www.bmbwf.gv.at/dam/jcr:48f70bf3-9b09-43c4-b6eb-013f07df85ed/ms_eek.pdf; https://www.bmbwf.gv.at/dam/jcr:a36ea170-e68f-4443-8498-d1f7a6e042c9/ms_dsi.pdf; <https://www.microsoft.com/de-de/licensing/product-licensing/products.aspx>.

40. Microsoft's general data protection documentation explicitly states that Microsoft, as the controller, also processes the complainant's personal data for its own purposes, although these purposes are described in very broad and general terms, e.g. to improve Microsoft's services, to develop new products and to conduct studies (**Annex 17**; cf. Section 5.4).
41. This makes it impossible for the complainant, a child, to understand exactly what data processing activities are taking place, let alone what personal data are being processed for Microsoft's purposes and on what legal basis these processing activities are taking place (Article 5(1)(a); 12-14 GDPR).

6.3 Necessity of a substantive examination (Article 58 GDPR)

42. It follows from the foregoing that it is unclear to the complainant which exact data processing activities take place in relation to Microsoft 365 Education, which of the respondents is a (joint) controller and/or processor for (which of) these data processing activities and which of the respondents must take the appropriate measures to inform the complainant and facilitate the exercise of her rights as a data subject. The available data protection information and the requests for information do not provide an answer to this *diffusion of responsibility* either.
43. In several cases, the CJEU has stated that the objective of EU data protection legislation is to ensure a high level of data protection and that the aim of Article 4(7) GDPR (Article 2(d) Data Protection Directive) is "*to ensure effective and comprehensive protection of data subjects by means of a broad definition of the concept of 'controller'.*"²³ Therefore, an entity that exercises influence over the processing of personal data for its own purposes and that is involved in determining the purposes and means of that processing can be categorised as a controller and must therefore comply with the obligations of the GDPR for controllers.²⁴
44. The degree of responsibility of those (jointly) responsible requires a factual assessment of all relevant circumstances.²⁵ The EDPB has also confirmed that contracts are not decisive in this respect, but that an actual investigation of the facts is required.²⁶ This also means that the respondents may have different roles in relation to each specific data processing activity.²⁷
45. In addition, in relation to education technology (edtech) providers - such as Microsoft when it offers Microsoft 365 Education - the ICO notes that:

"[a]n edtech provider may describe itself as a processor in a contract but, in fact, processes children's personal information outside the school's instructions (unless where required to do so under UK law). The provider will act as a controller in relation to that processing. [...] Whether or not you act as a processor or controller depends on the extent to which you determine the purposes and means of any

²³ ECJ 19 December 2018, C-40/17 (*Fashion ID*), para. 65-66; ECJ 13 May 2014, C-131/12 (*Google Spain*), para. 34; ECJ 5 June 2018, C-210/16 (*Wirtschaftsakademie*), para. 26-28.

²⁴ ECJ 19 December 2018, C-40/17 (*Fashion ID*), para. 68; ECJ 10 July 2018, C-25/17 (*Jehovan todistajat*), para. 68.

²⁵ Cf ECJ 5 June 2018, C-210/16 (*Wirtschaftsakademie*), para. 43.

²⁶ EDPB Guidelines 07/2020, para. 23, 26, 31 and 33; Opinion of AG Bot, C- 210/16 (*Wirtschaftsakademie*), para. 46.

²⁷ EDPB Guidelines 07/2020, para. 24; see ECJ 19 December 2018, C-40/17 (*Fashion ID*), paras. 71-74; Opinion of Advocate General Bobek, C-40/17 (*Fashion ID*), para. 101.

processing. This is regardless of how your processing role is described in the contract."²⁸ (emphasis added)

"[a]n educational technology provider may describe itself as a processor in a contract but actually process children's personal data outside of the school's instructions (unless it is required to do so under UK law). In this case, the provider acts as a controller for this processing. [...] Whether you are acting as a processor or a controller depends on the extent to which you determine the purposes and means of the processing. This applies regardless of how your role in the processing is described in the contract." (machine translation)

46. In the ICO's view, education technology providers are no longer a processor and become a controller if, for example:

- *"determine or influence the purposes for which personal information will be processed (eg by setting parameters of how the information can and will be processed);*
- *process children's personal information for research purposes, where the research is not the core service procured by the school;*
- *process children's personal information for marketing and advertising; and*
- *process children's personal information for your own commercial purposes, which includes product development."²⁹ (emphasis added)*

In German:

- *"determine or influence the purposes for which personal data are processed (e.g. by setting parameters for how the data can and will be processed);*
- *the processing of children's personal data for research purposes where research is not the main service commissioned by the school;*
- *the processing of children's personal data for marketing and advertising purposes; and*
- *the processing of children's personal data for own commercial purposes, including product development." (machine translation)*

47. The Danish Data Protection Agency also confirmed that cloud providers providing services to schools are solely responsible for the processing if they process personal data of pupils for "derived purposes" that go beyond the "original purpose" of providing the service. According to the Danish Data Protection Agency, the derived purposes for the processing of personal data by cloud service providers include maintaining and improving their services, measuring the performance of their services and developing new features and services, and these purposes also serve the market position of their products and the cloud service provider in the broadest sense.³⁰

48. Article 58 GDPR grants supervisory authorities numerous powers to carry out an appropriate substantive examination of data processing activities in connection with the use of Microsoft

²⁸ <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/childrens-information/childrens-code-guidance-and-resources/the-children-s-code-and-education-technologies-edtech/>.

²⁹ <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/childrens-information/childrens-code-guidance-and-resources/the-children-s-code-and-education-technologies-edtech/>; see EDPB Guidelines 02/2019, para. 28 and 48-50; WP29, Opinion 06/2014, p. 16-17.

³⁰ *Datatilsynet giver påbud i Chromebook-sag*, journal number 2023-431-0001, <https://www.datatilsynet.dk/afgoerelser/afgoerelser/2024/jan/datatilsynet-giver-paabud-i-chromebook-sag30/01/2024>, section 4.2.5; see EDPB Guidelines 07/2020, p. 47.

365 Education in Austrian schools in order to determine which of the respondents is a (joint) controller for which data processing activities (see Article 58(1)(a), (b), (e), (f) GDPR).

6.4 Suggestions for factual checks to clarify data processing activities and responsibilities (Article 58 GDPR)

49. The competent supervisory authority may refer to **Annex 17** in addition to the information already mentioned above on the available information in the data protection documentation and the responses to the data subject's requests for information. This appendix contains a table prepared by *noyb* with information that can be used as a starting point for the factual assessment to clarify the roles and responsibilities of the respondents in relation to Microsoft 365 Education.
50. The table in **Annex 17** lists several processing activities that take place in connection with Microsoft 365 Education and which result, among other things, from Microsoft's data protection documentation, reports from data protection authorities on Microsoft 365 Education and *noyb's* analysis of the data flows of the complainant's use of Microsoft 365 Education. The last column contains references to these sources. For each category of data processing, the purposes and means of this processing activity and who decides on these purposes and means are indicated, and which respondent is therefore the controller.
51. The processing activities are divided into processing activities that are necessary for the provision of the service ("initial purposes") and processing activities for Microsoft's own business purposes ("derived purposes").³¹ Microsoft also uses this subdivision in its Data Protection Addendum, but³² - as further explained in **Annex 17** - significantly expands the concept of what is necessary for the provision of the service.
52. The table in **Annex 17** is only an indication of the processing activities that take place when the complainant uses Microsoft 365 Education, as the available documents and responses to the requests for information could not clarify the exact data processing activities that take place (see points 5.1 and 5.2). However, the table provides clear indications that all respondents can (probably) be categorised as (joint) controllers for some data processing activities in relation to Microsoft 365 Education. It also provides clear indications that Microsoft can be categorised as a controller for many data processing activities related to the use of Microsoft 365 Education by the complainant and others, as these are carried out for Microsoft's own (commercial) purposes. This is despite the fact that Microsoft denied that it was responsible for responding to the complainant's request for information (**Annex 5; Annex 7**).
53. These clear indications are also evidenced by the fact that in its privacy policy, Microsoft makes only an incidental commitment not to sell or use personal data of Microsoft 365 Edu-

³¹ See *Datatilsynet giver påbud i Chromebook-sag*, journal number 2023-431-0001, <https://www.datatilsynet.dk/afgoerelser/afgoerelser/2024/jan/datatilsynet-giver-paabud-i-chromebook-sag>, 30 January 2024, p. 23.

³² See Microsoft, *Microsoft Products and Services Privacy Addendum*, 1 January 2024, <https://www.microsoft.com/licensing/docs/view/Microsoft-Products-and-Services-Data-Protection-Addendum-DPA?lang=1>, p. 6: "*Microsoft will use and otherwise process Customer Data, Professional Services Data and Personal Data only as described and limited below (a) to provide the Products and Services to Customer in accordance with Customer's documented instructions and (b) for the business activities prompted by the provision of the Products and Services to Customer.*"

cation users for advertising or profiling purposes. This means that all other purposes described in Appendix 17 - such as improving its own products, product strategy, developing new products or conducting research - are clearly not excluded with regard to Microsoft 365 Education.³³ Apart from these limited exceptions, "[t]he data protection terms in the DPA are equal for both Microsoft 365 and Microsoft 365 Education." ["[t]he data protection terms in the DPA are equal for both Microsoft 365 and Microsoft 365 Education."] (**Annex 16, question A.3**)

54. This also indicates that Microsoft, as the controller, has not taken appropriate measures to provide the complainant with the information referred to in Articles 13 and 14 GDPR (Article 12(1) GDPR; Article 5(1)(a) GDPR) and has not facilitated the exercise of the complainant's right of access under Article 15 GDPR (Article 12(2) GDPR).

7. APPLICATIONS AND REQUESTS

7.1 Request for comprehensive investigation

55. The complainant requests the competent supervisory authority to conduct a comprehensive investigation by means of a factual assessment and technical analysis:

- (a) The exact data processing activities carried out by the respondents in relation to Microsoft 365 Education and in relation to the complainant's personal data;
- (b) Which of the Respondents is the controller for each of these data processing activities in relation to Microsoft 365 Education;
- (c) Whether the controller(s) has/have complied with Article 15 GDPR (Article 12(2) GDPR) and Articles 13 and 14 GDPR (Article 12(2) GDPR; Article 5(1)(a) GDPR) in relation to Microsoft 365 Education and the complainant;
- (d) Whether the respondents or some of the respondents colluded with regard to the lack of information on data processing in relation to Microsoft 365 Education.

7.2 Request for a declaratory judgement

56. The complainant requests that the competent supervisory authority finds that the controller(s) of the data processing activities relating to Microsoft 365 Education concerning the complainant have infringed Article 15 GDPR and Articles 12, 13 and 14 GDPR and Article 5(1)(a) GDPR.

³³ "For Microsoft products provided by your K-12 school, including Microsoft 365 Education, Microsoft: Not collect or use student personal data other than as necessary for authorised educational or school purposes, not sell or lend student personal data, not use or share student personal data for advertising or similar commercial purposes such as behavioural targeting of student advertising, not create a personal profile of a student except in support of authorised educational or school purposes or as authorised by the parent, guardian or student of appropriate age, and its providers to whom student personal information may be shared to provide the educational service. for the provision of the educational service to fulfil the same obligations for personal data of pupils/students." <https://privacy.microsoft.com/de-de/privacystatement> under "Products provided by your organisation - Notice to end users"; see Microsoft, *Microsoft Cloud Services for Austrian Schools - FAQ*, https://www.bmbwf.gv.at/dam/jcr:a36ea170-e68f-4443-8498-d1f7a6e042c9/ms_dsi.pdf, p. 2.

7.3 Request for services

57. The complainant requests that the competent supervisory authority instruct the person(s) responsible:
- (a) to respond fully to the complainant's request for information pursuant to Article 15 GDPR in relation to Microsoft 365 Education (Article 58(2)(c) GDPR);
 - (b) to inform the complainant comprehensively about the processing of her personal data in relation to Microsoft 365 Education in accordance with Articles 12, 13 and 14 GDPR and Article 5(1)(a) GDPR (Article 58(2)(d) GDPR);
 - (c) to erase the complainant's personal data if unlawful processing takes place in relation to Microsoft 365 Education (Article 58(2)(g) GDPR).

7.4 Suggestion of general remedial measures

58. The complainant suggests that the competent supervisory authority instruct the respondent(s):
- (a) to bring the processing operations relating to Microsoft 365 Education into compliance with Articles 12(1), 13, 14 and 5(1)(a) GDPR by taking appropriate measures to provide data subjects with all the information referred to in Articles 13 and 14 GDPR (Article 58(2)(d) GDPR);
 - (b) to bring the processing operations in relation to Microsoft 365 Education in line with Articles 15 and 12(2) GDPR by facilitating the exercise of the right of access under Article 15 GDPR and by providing data subjects with the information requested under Article 15 GDPR (Article 58(2)(d) GDPR);
 - (c) to refrain from unlawful data processing, insofar as this takes place (processing prohibition) (Article 58(2)(f) GDPR).

7.5 Suggestion of a fine or warning

59. The complainant suggests that the competent supervisory authority:
- (a) imposes a fine pursuant to Article 58(2)(i) and Article 83 GDPR if Microsoft, as controller, infringes Article 15 GDPR and/or Articles 12 to 14 GDPR and/or Article 5(1)(a) GDPR, taking into account that these infringements affect all students and teachers using Microsoft 365 Education licences in Austria, including a large number of minors (Article 58(2)(i) and Article 83 GDPR);
 - (b) issues a warning or reprimand if (a) public organisation(s) is/are the controller(s) in breach of Article 15 GDPR and/or Articles 12 to 14 GDPR and/or Article 5(1)(a) GDPR (Article 58(2)(a) and Article 58(2)(b) GDPR).

8. CONTACT

60. 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].

Attachments:

Annex 1 - *noyb* statutes

Annex 2 - Power of attorney

Appendix 3 - Request for information submitted to Microsoft (Video)

Annex 4 - Acknowledgement of receipt of the request by Microsoft

Appendix 5 - Microsoft's initial response to requests for information

Annex 6 - Follow-up questions from the complainant to Microsoft

Annex 7 - Microsoft's reply to the complainant's follow-up questions

Annex 8 - Request for information to the school

Annex 9 - Acknowledgement of receipt of the request by the school

Annex 10 - Response of the school to request for information

Appendix 11 - HAR file V3

Appendix 12 - HAR file V4

Appendix 13 - HAR file V5

Appendix 14 - Attached Excel file for the HAR files

Appendix 15 - Analysis of the HAR files

Appendix 16 - Email with questions from *noyb* to Microsoft, including Microsoft's response

Appendix 17 - Table with processing activities for Microsoft 365 Education