

Serious criticism and injunction to Boligportal for using Facebook Business Tools

Date: 20-04-2023

Decision

Private companies

Serious criticism

Injunction

Complaint

Clarification of data responsibility

Transfer to third countries

The Norwegian Data Protection Authority has expressed serious criticism of Boligportal for not being able to demonstrate that their processing of information about people who visit their website has taken place in accordance with the GDPR. The Authority has also issued orders to Boligportal to bring the processing in line with the rules.

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Summary

At the end of 2020, the Danish Data Protection Authority received one of a total of 101 complaints that the organization 'None of Your Business' (NOYB) had sent to several European data supervisory authorities. The complaints related to various data controllers' use of either Google Analytics or the so-called Facebook Business Tools on their websites. In the Data Protection Authority's case, the complaint concerned Boligportal's processing of the complainant's (represented by NOYB) personal data through the company's use of Facebook Business Tools on its website.

What are Facebook Business Tools?

Facebook Business Tools are offered by Meta and are tools that can be embedded on a website. When a person visits the website, the tools collect information about e.g. the person's IP address, that the person has visited the website, time of the visit, other information about e.g. browser and operating system as well as information about other online identifiers that have been collected via cookies.

Boligportal could not demonstrate compliance with the GDPR

The Norwegian Data Protection Authority found that, on the basis of the information collected, the authority could not make a

decision about the possible transfer of personal data to the United States, as there has been disagreement between the parties as to whether personal data about complaints has actually been transferred to the United States.

However, this gave the Danish Data Protection Agency occasion to investigate whether Boligportal had complied with its obligations under the data protection regulation, in particular the company's obligation to be able to demonstrate that it complies with the rules.

The Norwegian Data Protection Authority concluded that the parties must be considered joint data controllers for the processing of the complainant's personal data. In this connection, the Danish Data Protection Authority found grounds for expressing serious criticism that Boligportal has not been able to demonstrate a sufficient distribution of roles and responsibilities between Boligportal and Meta Ireland Limited (Meta Ireland) in light of the processing of personal data that took place, i.e. . knows that there was no arrangement on the distribution of roles and responsibilities at the time of the complainant's visit to Boligportal's website, which is otherwise required by shared data responsibility.

Furthermore, it does not appear from the current arrangement entered into between Boligportal and Meta Ireland as joint data controllers, whether personal data about website visitors is processed using aids or data processors located outside the EU/EEA, and who, if applicable, is responsible for ensure that the rules on transfers to unsafe third countries are complied with.

Order to bring processing in line with GDPR

Based on the above, the Danish Data Protection Authority found grounds to issue Boligportal with an order to bring the processing of personal data into compliance with the GDPR. In the opinion of the Danish Data Protection Authority, this can i.e. happen by clarifying the distribution of roles and responsibilities between Boligportal and Meta Ireland, so that it is clear from the arrangement between the parties whether personal data about website visitors is processed using aids or data processors located outside the EU/EEA. Furthermore, it must be stated how the rules on third-country transfers are observed with regard to the processing for which the parties are joint data controllers, and which party must in practice ensure that these rules are observed. Alternatively, it can be done by stopping the processing activity in question.

However, the solutions mentioned above are only suggestions and not the only options for complying with the Danish Data Protection Authority's order. As the data controller, Boligportal has full freedom of choice in relation to demonstrating its compliance with the data protection rules.

The case has been dealt with in collaboration with the other European data supervisors in the so-called Taskforce 101.

Decision

The Danish Data Protection Authority hereby returns to the case where the organization None of Your Business, on behalf of complainants, complained to the Danish Authority on 17 August 2020 that BoligPortal.dk ApS (hereinafter Boligportal) has transferred personal data about complaints to the USA in connection with the complainant's visit to Boligportal's website on 12 August 2020.

At the outset, the Data Protection Authority notes that with this decision the authority has only taken a position on Boligportal's processing of personal data through the use of "Facebook Business Tools". The Norwegian Data Protection Authority has thus not taken a position on the company's possible processing of personal data using other third-party tools.

The Danish Data Protection Authority also notes that the Danish Data Protection Authority has only taken a position on Boligportal's processing of the complainant's personal data through the company's use of "Facebook Business Tools". The Danish Data Protection Authority has therefore not taken a position on either Meta Platforms Ireland Limited (hereafter Meta Ireland, formerly Facebook Ireland Limited) or Meta Platforms, Inc. (hereinafter Meta Platforms, formerly Facebook, Inc.) processing of personal data.

Finally, the Danish Data Protection Authority notes that Boligportal has provided additional documentation since the complaint was lodged to demonstrate that the processing activity has taken place in accordance with the data protection regulation, just as Meta Ireland has changed the terms under which the company supplies its "Facebook Business Tools".

Against this background, with this decision, the Danish Data Protection Authority has taken a position on, on the one hand, whether the processing of personal data on complaints on 12 August 2020 was in accordance with the data protection regulation, and on the other hand, whether Boligportal's current processing of personal data on website visitors takes place within the framework of the data protection regulation.

1. Decision

After a review of the case, the Danish Data Protection Authority finds that there are grounds for expressing serious criticism that Boligportal has not demonstrated that the processing of the complainant's personal data on 12 August 2020 took place in accordance with the data protection regulation^[1], and that Boligportal has not proven that the company's current processing of personal data about website visitors takes place in accordance with the data protection regulation, cf. the data protection

regulation's article 26, cf. the regulation's article 5, subsection 1, letter a, cf. Article 5, subsection 2 and Article 24, subsection 1.

The Danish Data Protection Authority initially finds that the Danish Data Protection Authority cannot make a decision regarding the possible transfer of personal data on complaints to the USA, as there is disagreement between the parties as to whether personal data on complaints has actually been transferred to the USA.

The fact that the Norwegian Data Protection Authority cannot make a decision on a possible transfer of personal data about complaints to the USA, however, gives the authority the opportunity to investigate whether Boligportal has complied with its obligations under the data protection regulation, including the company's obligation to demonstrate its compliance with the data protection regulation, cf. article 5, subsection 1, letter a, article 5, subsection 2, as well as Article 24, subsection 1.

In this connection, the Data Protection Authority finds that at the time of the complainant's visit to boligportal.dk on 12 August 2020, there was an insufficient distribution of roles and responsibilities between Boligportal and Meta Ireland in light of the processing of personal data that took place.

Considering the processing activities and the purposes for which Boligportal, according to its own statements, which are described in more detail in section 3.3 below, has processed the complainant's personal data, the parties must be considered joint data controllers for the processing of the complainant's personal data.

In light of this, and the fact that at the time of the complainant's visit to boligportal.dk there was no arrangement in accordance with Article 26 of the regulation, which in a transparent manner determined the distribution of roles and responsibilities between the parties, the Data Protection Authority finds that Boligportal has not demonstrated that their processing of the complainant's personal data has taken place in accordance with Article 26 of the Data Protection Regulation, cf. Article 5, subsection 1, letter a, article 5, subsection 2 and Article 24, subsection 1.

The Danish Data Protection Authority also finds that it does not appear from the current arrangement entered into between Boligportal and Meta Ireland as joint data controllers pursuant to Article 26 of the Data Protection Regulation, whether personal data about website visitors is processed using aids located outside the EU/EEA, and in if applicable where, including possibly using data processors outside the EU/EEA, as regards the processing activities for which the parties are joint data controllers, and consequently which party is responsible for ensuring compliance with Article 44.

Based on this, the Danish Data Protection Authority finds that Boligportal has generally not demonstrated that the company's

current processing of personal data is in accordance with Article 26, cf. Article 5, subsection 1, letter a, article 5, subsection 2, as well as Article 24, subsection 1, i.a. by not having clarified whether personal data about website visitors is processed using aids located outside the EU/EEA, and if so where, including possibly using data processors outside the EU/EEA, as far as the processing activities are concerned, for which the parties are joint data controllers.

On this basis, the Danish Data Protection Authority finds grounds to issue an order to Boligportal to bring the company's processing of personal data in line with the data protection regulation's article 5, subsection 1, letter a, article 5, subsection 2, Article 24, subsection 1 and Article 26, as well as being able to demonstrate this.

The deadline for compliance with the order is 18 May 2023. The Danish Data Protection Authority must request to receive confirmation that the order has been complied with by the same date.

In the opinion of the Danish Data Protection Authority, it can i.a. happen by clarifying the distribution of roles and responsibilities between Boligportal and Meta Ireland, so that it is clear from the arrangement between the parties whether personal data about website visitors, for which the parties are joint data controllers, is processed using aids located outside the EU/EEA , and if applicable where, including possibly using data processors outside the EU/EEA, as well as consequently how Article 44 of the Data Protection Regulation is observed with regard to the processing activities for which the parties are joint data controllers, and which party(ies) , if applicable, must in practice ensure compliance with Article 44 of the Data Protection Regulation. Alternatively, this can be done by stopping the processing activity in question.

Datatilsynet bemærker, at ovennævnte løsningsforslag ikke udgør den eneste mulighed for måden, hvorpå tilsynets påbud kan efterleves og kan påvises efterlevet. Boligportal har – som den (ene) dataansvarlige – fuld valgfrihed, jf.

databeskyttelsesforordningens artikel 24, stk. 1, og artikel 5, stk. 2, med hensyn til, hvordan virksomheden påviser sin overholdelse af databeskyttelsesforordningen.

Påbuddet meddeles i medfør af databeskyttelsesforordningens artikel 58, stk. 2, litra d.

Ifølge databeskyttelseslovens § 41, stk. 2, nr. 4, straffes med bøde eller fængsel i op til 6 måneder den, der undlader at efterkomme et påbud meddelt af Datatilsynet i medfør af databeskyttelsesforordningens artikel 58, stk. 2, litra d.

Nedenfor følger en nærmere gennemgang af sagen og en begrundelse for Datatilsynets afgørelse.

2. Sagsfremstilling

Det fremgår af sagen, at klager den 12. august 2020 besøgte Boligportals hjemmeside. Under besøget var klager logget ind på

sin konto på Facebook, som er et socialt medie drevet af Meta Ireland.

Boligportal har på sin hjemmeside indlejret værktøjet "Facebook Connect", som er genstand for klagen. Datatilsynet forstår herunder, at der med "Facebook Connect" henvises til flere værktøjer, der leveres af Meta Ireland, herunder navnlig "Facebook Login" og "Facebook Pixel".

Værktøjerne stilles til rådighed af Meta Ireland for hjemmesideejere og leveres under vilkårene "Facebook Business Tools Terms" og "Facebook Data Processing Terms". Vilkårene er siden klagers besøg på Boligportals hjemmeside den 12. august 2020 blevet opdateret den 31. august 2020.

2.1. Meta Irelands vilkår

Af Meta Irelands vilkår "Facebook Business Terms" af 26. december 2019, som var gældende på tidspunktet for klagers besøg på Boligportals hjemmeside, fremgår bl.a. følgende:

"The Facebook Business Tools are a subset of Facebook Products that we provide to help website owners and publishers, developers, advertisers, business partners (and their customers) and others integrate, use and exchange information with Facebook. The Facebook Business Tools include APIs and SDKs, the Facebook Pixel, social plugins such as the Like and Share buttons, Facebook Login and Account Kit, as well as other platform integrations, plugins, code, specifications, documentation, technology and services. By clicking "Accept" or using any of the Facebook Business Tools, you agree to the following:

Sharing Personal Data with Facebook

You may use the Facebook Business Tools to send personal data to us about your customers and users ("Customer Data").

Depending on the Facebook Products you use, Customer Data may include:

"Contact Information" consists of information that personally identifies individuals, such as names, email addresses, and phone numbers that we use for matching purposes only. We will hash Contact Information that you send to us via a Facebook javascript pixel for matching purposes prior to transmission. When using a Facebook image pixel or other Facebook Business Tools, you or your service provider must hash Contact Information in a manner specified by us before transmission.

"Event Data" includes other information you share about your customers and the actions they take on your websites and apps or in your stores, such as visits to your sites, installations of your apps, and purchases of your products.

[...]

Use of Customer Data

We will use Customer Data for the following purposes depending on which Facebook Company Products you choose to use:

Contact Information for Matching

You instruct us to process the Contact Information solely to match the Contact Information against Facebook's or Instagram's user IDs ("Matched User IDs"), as well as to combine those user IDs with corresponding Event Data. We will delete Contact Information following the match process.

Event Data for Measurement and Analytics Services

You instruct us to process Event Data (a) to prepare reports on your behalf on the impact of your advertising campaigns and other online content ("Campaign Reports") and (b) to generate analytics and insights about your customers and their use of your apps, websites, products and services ("Analytics").

We grant to you a non-exclusive and non-transferable license to use the Campaign Reports and Analytics for your internal business purposes only and solely on an aggregated and anonymous basis for measurement purposes. You will not disclose the Campaign Reports or Analytics, or any portion thereof, to any third party, unless otherwise agreed to in writing by us. We will not disclose the Campaign Reports or Analytics, or any portion thereof, to any third party without your permission, unless (i) they have been combined with Campaigns Reports and Analytics from numerous other third parties and (ii) your identifying information is removed from the combined Campaign Reports and Analytics.

Event Data To Create Targetable Audiences

We may process the Event Data to create audiences (including Website Custom Audiences, Mobile App Custom Audiences and Offline Custom Audiences) that are grouped together by common Event Data, which you may use to target ad campaigns. In our sole discretion, we may also allow you to share these audiences with other advertisers.

Event Data To Deliver Commercial and Transactional Messages

We may use the Matched User IDs and associated Event Data to help you to reach people with transactional and other commercial messages on Messenger and other Facebook Company Products.

Event Data to Personalize Features and Content and to Improve and Secure the Facebook Products

We use Event Data to personalize the features and content (including ads and recommendations) we show people on and off our Facebook Company Products. In connection with ad targeting and delivery optimization, we will: (i) use your Event Data for

delivery optimization only after aggregating such Event Data with other data collected from other advertisers or otherwise collected on Facebook Products; and (ii) not allow other advertisers or third parties to target advertising solely on the basis of your Event Data.

We may also use Event Data to promote safety and security on and off the Facebook Company Products, for research and development purposes, and to maintain the integrity of and to improve the Facebook Company Products.

[...]

A note to EU and Swiss data controllers

To the extent the Customer Data contain personal data which you process subject to the General Data Protection Regulation (Regulation (EU) 2016/679) (the “GDPR”), the parties acknowledge and agree that for purposes of providing matching, measurement, and analytics services described in Paragraphs 2.a.i and 2.a.ii above, that you are the data controller in respect of such personal data, and you have instructed Facebook Ireland Limited to process such personal data on your behalf as your data processor pursuant to these terms and Facebook’s Data Processing Terms, which are incorporated herein by reference. “Personal data,” “data controller,” and “data processor” in this paragraph have the meanings set out in the Data Processing Terms.”

Af Meta Irelands vilkår “Data Processing Terms” (udateret)[2], som via henvisning hertil udgør en del af Meta Irelands vilkår, fremgår bl.a. følgende:

”2. You agree that Facebook may subcontract its data processing obligations under these Data Processing Terms to a subprocessor, but only by way of a written agreement with the sub-processor which imposes obligations on the sub-processor no less onerous than as are imposed on Facebook under these Data Processing Terms. Where the sub-processor fails to fulfil such obligations, Facebook shall remain fully liable to you for the performance of that sub-processor’s obligations. You hereby authorize Facebook to engage Facebook Inc. (and other Facebook Companies) as its sub-processor(s). Facebook shall notify you of any additional sub-processor(s) in advance. If you reasonably object to such additional sub-processor(s), you may inform Facebook in writing of the reasons for your objections. If you object to such additional subprocessor(s), you should stop using the Services and providing data to Facebook.”

Af Meta Irelands vilkår ”Facebook Business Terms” af 31. august 2020[3], som er de senest gældende vilkår, fremgår bl.a. følgende:

"When you use the Facebook Business Tools to send us or otherwise enable the collection of Business Tool Data (as defined in Section 1 below), these terms govern the use of that data.

Background: Ad Products and other Business Tools

We may receive Business Tool Data as a result of your use of Facebook ad products, in connection with advertising, matching, measurement and analytics. Those ad products include, but are not limited to, Facebook Pixel, Conversions API (formerly known as Server-Side API), Facebook SDK for App Events, Offline Conversions, App Events API and Offline Events API. We also receive Business Tools Data in the form of impression data sent by Facebook Social Plugins (for example the Like and Share buttons) and Facebook Login, and data from certain APIs such as Messenger Customer Match via the Send API. Facebook may also offer pilot, test, alpha, or beta programs from time to time through which you may provide Business Tool Data. Uses of Business Tools Data are described below.

By clicking "Accept" or using any of the Facebook Business Tools, you agree to the following:

Sharing Business Tool Data with Facebook

You may use the Facebook Business Tools to send us one or both of the following types of personal information ("Business Tool Data") for the purposes described in Section 2:

"Contact Information" is information that personally identifies individuals, such as names, email addresses, and phone numbers, that we use for matching purposes only. We will hash Contact Information that you send to us via a Facebook JavaScript pixel for matching purposes prior to transmission. When using a Facebook image pixel or other Facebook Business Tools, you or your service provider must hash Contact Information in a manner specified by us before transmission.

"Event Data" is other information that you share about people and the actions that they take on your websites and apps or in your shops, such as visits to your sites, installations of your apps, and purchases of your products. While Event Data does include information collected and transferred when people access a website or app with Facebook Login or Social Plugins (e.g. the Like button), it does not include information created when an individual interacts with our platform via Facebook Login, Social Plugins, or otherwise (e.g. by logging in, or liking or sharing an article or song). Information created when an individual interacts with our platform via Facebook Login, Social Plugins, or otherwise is governed by the Platform Terms.

Note: for purposes of these Business Tool Terms, references in existing terms or agreements to "Customer Data" will now mean "Business Tool Data."

[...]

Use of Business Tool Data

We will use Business Tool Data for the following purposes depending on which Facebook Business Tools you choose to use:

Contact Information for Matching

You instruct us to process the Contact Information solely to match the Contact Information against user IDs ("Matched User IDs"), as well as to combine those user IDs with corresponding Event Data. We will delete Contact Information following the match process.

Event Data for Measurement and Analytics Services

You may instruct us to process Event Data (a) to prepare reports on your behalf on the impact of your advertising campaigns and other online content ("Campaign Reports") and (b) to generate analytics and insights about people and their use of your apps, websites, products and services ("Analytics").

We grant to you a non-exclusive and non-transferable license to use the Campaign Reports and Analytics for your internal business purposes only and solely on an aggregated and anonymous basis for measurement purposes. You will not disclose the Campaign Reports or Analytics, or any portion thereof, to any third party, unless otherwise agreed to in writing by us. We will not disclose the Campaign Reports or Analytics, or any portion thereof, to any third party without your permission, unless (i) they have been combined with Campaigns Reports and Analytics from numerous other third parties and (ii) your identifying information is removed from the combined Campaign Reports and Analytics.

Event Data for Targeting Your Ads

You may provide Event Data to target your ad campaigns to people who interact with your business. You may direct us to create custom audiences, which are groups of Facebook users based on Event Data, to target ad campaigns (including Website Custom Audiences, Mobile App Custom Audiences, and Offline Custom Audiences). Facebook will process Event Data to create such audiences for you. You may not sell or transfer these audiences, or authorize any third party to sell or transfer these audiences. Facebook will not provide such audiences to other advertisers unless you or your service providers share audiences with other advertisers through tools we make available for that purpose, subject to the restrictions and requirements of those tools and our terms.

These terms apply to the use of Website Custom Audiences, Mobile App Custom Audiences, and Offline Custom Audiences

created through Facebook's Business Tools. Customer List Custom Audiences provided through our separate custom audience feature are subject to the Customer List Custom Audience Terms.

Event Data To Deliver Commercial and Transactional Messages

We may use the Matched User IDs and associated Event Data to help you reach people with transactional and other commercial messages on Messenger and other Facebook Company Products.

Event Data to Improve Ad Delivery, Personalize Features and Content and to Improve and Secure the Facebook Products

You may provide Event Data to improve ad targeting and delivery optimization of your ad campaigns. We may correlate that Event Data to people who use Facebook Company Products to support the objectives of your ad campaign, improve the effectiveness of ad delivery models, and determine the relevance of ads to people. We may use Event Data to personalize the features and content (including ads and recommendations) that we show people on and off our Facebook Company Products. In connection with ad targeting and delivery optimization, we will: (i) use your Event Data for delivery optimization only after aggregating such Event Data with other data collected from other advertisers or otherwise collected on Facebook Products; and (ii) not allow other advertisers or third parties to target advertising solely on the basis of your Event Data.

To improve the experience for people who use Facebook Company Products, we may also use Event Data to promote safety and security on and off the Facebook Company Products, for research and development purposes and to maintain the integrity of and to improve the Facebook Company Products.

[...]

Additional Terms for Processing of Personal Information

To the extent the Business Tool Data contain Personal Information which you Process subject to the General Data Protection Regulation (Regulation (EU) 2016/679) (the "GDPR"), the following terms apply:

The parties acknowledge and agree that you are the Controller in respect of the Processing of Personal Information in Business Tool Data for purposes of providing matching, measurement and analytics services described in Sections 2.a.i and 2.a.ii above (e.g. to provide you with Analytics and Campaign Reports), and that you instruct Facebook Ireland Ltd., 4 Grand Canal Square, Grand Canal Harbour, Dublin 2 Ireland ("Facebook Ireland") to Process such Personal Information for those purposes on your behalf as your Processor pursuant to these Business Tools Terms and Facebook's Data Processing Terms. The Data Processing Terms are expressly incorporated herein by reference and apply between you and Facebook Ireland

together with these Business Tools Terms.

Regarding Personal Information in Event Data referring to people's actions on your websites and apps which integrate Facebook Business Tools for whose Processing you and Facebook Ireland jointly determine the means and purposes, you and Facebook Ireland acknowledge and agree to be Joint Controllers in accordance with Article 26 GDPR. The joint controllership extends to the collection of such Personal Information via the Facebook Business Tools and its subsequent transmission to Facebook Ireland in order to be used for the purposes set out above under Sections 2.a.iii to 2.a.v.1 ("Joint Processing"). For further information, click [here](#). The Joint Processing is subject to the Controller Addendum, which is expressly incorporated herein by reference and applies between you and Facebook Ireland together with these Business Tools Terms. Facebook Ireland remains an independent Controller in accordance with Article 4(7) GDPR for any Processing of such data that takes place after it has been transmitted to Facebook Ireland.

You, as the case may be, and Facebook Ireland remain independent Controllers in accordance with Article 4(7) GDPR for any Processing of Personal Information in Business Tool Data under GDPR not subject to Sections 5.a.i and 5.a.ii"

Af Meta Irelands "Controller Addendum" af 31. august 2020[4], som via henvisning hertil udgør en del af Meta Irelands vilkår, fremgår bl.a. følgende:

"This Controller Addendum applies when it is expressly incorporated by reference into terms for Facebook Products, such as the Facebook Business Tools Terms (any such terms, "Applicable Product Terms", any covered Facebook Products, "Applicable Products"). Capitalized terms used but not defined in this Controller Addendum have the meanings given in the Applicable Product Terms. In the event of any conflict between the Applicable Product Terms and this Controller Addendum, this Controller Addendum will govern solely to the extent of the conflict.

Facebook and you agree to the following:

Facebook Ireland Limited, 4 Grand Canal Square, Grand Canal Harbour, Dublin 2, Ireland ("Facebook Ireland" or "we") and you (each a "Party", together the "Parties") are Joint Controllers in accordance with Article 26 GDPR for the Joint Processing specified by the Applicable Product Terms. The scope of the Joint Processing and this Controller Addendum covers the collection of the Personal Data specified by the Applicable Product Terms and its transmission to Facebook Ireland; the subsequent processing of data by Facebook Ireland does not form part of the Joint Processing. More information on the Joint Processing can be found in the Applicable Product Terms.

This Controller Addendum determines Facebook Ireland's and your responsibilities for compliance with the obligations under the GDPR with regard to the Joint Processing. The Joint Processing is subject to the provisions of this Controller Addendum. They apply to all activities in which the Parties, their employees or their Processors are involved in the Joint Processing. You agree to follow the available documentation regarding the correct technical implementation of the Applicable Products into your websites or apps and their configuration.

Facebook Ireland's and your responsibilities for compliance with the obligations under the GDPR with regard to the Joint Processing are determined as follows:

No.

Obligation under GDPR

Facebook Ireland

You

1

Article 6: Requirement of legal basis for Joint Processing

X (regarding Facebook Ireland's processing)

X (regarding your own processing)

2

Articles 13,14: Providing information on Joint Processing of Personal Data

X

This includes as a minimum the provision of the following information in addition to your standard data policy or similar document:

That Facebook Ireland is a Joint Controller of the Joint Processing and that the information required by Article 13(1)(a) and (b) GDPR can be found in Facebook Ireland's Data Policy at <https://www.facebook.com/about/privacy>.

The information that you use Applicable Products as well as the purposes for which the collection and transmission of Personal Data that constitutes the Joint Processing takes place as set out in the Applicable Product Terms.

That further information on how Facebook Ireland processes Personal Data, including the legal basis Facebook Ireland relies on and the ways to exercise Data Subject rights against Facebook Ireland, can be found in Facebook Ireland's Data Policy at

<https://www.facebook.com/about/privacy>.

(please see Applicable Product Terms for further information on the Joint Processing)

3

Article 26(2): Making available the essence of this Controller Addendum

X

This includes as a minimum the provision of the following information:

That you and Facebook Ireland have:

entered into this Controller Addendum to determine the respective responsibilities for compliance with the obligations under the

GDPR with regard to the Joint Processing (as specified in the Applicable Product Terms);

agreed that you are responsible for providing Data Subjects as a minimum with the information listed under no. 2;

agreed that between the Parties, Facebook Ireland is responsible for enabling Data Subjects' rights under Articles 15-20 of the

GDPR with regard to the Personal Data stored by Facebook Ireland after the Joint Processing.

4

Articles 15-20: Rights of the Data Subject with regard to the Personal Data stored by Facebook after the Joint Processing

X

5

Article 21: Right to object insofar as the Joint Processing is based on Article 6(1)(f)

X (regarding Facebook Ireland's processing)

X

(regarding your own processing)

6

Article 32: Security of the Joint Processing

X (regarding the security of the Applicable Products)

X

(regarding the correct technical implementation and configuration of the Applicable Products)

7

Articles 33, 34: Personal Data Breaches concerning the Joint Processing

X (insofar as a Personal Data Breach concerns Facebook Ireland's obligation under this Controller Addendum)

X (insofar as a Personal Data Breach concerns your obligations under this Controller Addendum)

All other responsibilities for compliance with obligations under the GDPR regarding the Joint Processing remain with each Party individually. [...]

Under section 5.a.ii of its "Facebook Business Tools" terms, Meta Ireland refers to further information.^[5] This provides an overview of which personal data is collected and passed on to Meta Ireland as part of the processing activity(s) for which the parties are joint data controllers.

The overview shows, among other things, that when using the tools Facebook Login and Facebook Pixel, information is collected about "http header information, which includes information about the web browser or app used (e.g. user agent, locale country-level/language)" and "online identifiers including IP addresses and, insofar as provided, FB-related identifiers or device identifiers (such as mobile OS advertising IDs) as well as information on opt-out/limited ad tracking status".

2.2. Complainant's comments

The complainant has generally stated that, in connection with the complainant's visit to boligportal.dk, Boligportal has processed information about the complainant's IP address and information collected via cookies, and transferred (some of) this information to Meta Platforms in the USA.

In this connection, the complainant has submitted technical documentation for his visit to boligportal.dk on 12 August 2020.

The complainant has also stated that the transfer is illegal, as the EU Court of Justice in the so-called Schrems II case^[6] found that the EU Commission's adequacy decision regarding organizations that were covered by the American Privacy Shield scheme is invalid. There is thus no legal basis for transfer according to Article 45 of the Data Protection Regulation.

Furthermore, the complainant has stated that the transfer cannot take place on the basis of standard contract provisions in accordance with the data protection regulation's article 46, subsection 2, letters c and d, if an adequate level of protection cannot be ensured in the third country to which the information is transferred by means of the standard contract provisions.

Complainant has stated below that Meta Platforms must be considered an "electronic communications service provider" and is thereby covered by Foreign Intelligence Surveillance Act section 702 (FISA 702). The complainant has also stated that, according to the European Court of Justice, the transfer of personal data to companies covered by FISA 702 constitutes a

violation of Articles 7 and 8, as well as the essence of Article 47 of the Charter of Fundamental Rights of the European Union. Finally, the complainants refer to Meta Platforms, among others according to the company's own "Transparency Report", actively discloses personal data to US authorities under FISA 702.

In summary, the complainant states that, on this basis, Boligportal cannot ensure a sufficient level of protection for personal data about complaints that are transferred to Meta Platforms.

With regard to the distribution of roles and responsibilities between Boligportal and Meta Ireland, the complainants have generally stated that Boligportal has entered into a contract with Meta Ireland, according to which Meta Ireland acts as a data processor on behalf of Boligportal, and that Boligportal has approved the use of Meta Platforms as a sub-data processor for Housing portal. Complainant refers below to section 4 of the "Facebook Business Tools Terms" of 26 December 2019, as well as point 1.4 of the "Facebook Data Processing Terms". Complainant also refers to section 4 of the "Facebook Business Tool Terms" of 31 August 2020.

The complainant has stated below that Boligportal cannot accept Meta Ireland's standard terms and at the same time claim in good faith that no personal data is transferred to the USA. These transfers were the subject of the Irish Supreme Court's judgment "Data Protection Commission - v. Facebook and Schrems, no.2016 4809P", which led to the ECJ's Schrems II judgment. There is therefore a presumption that Meta Ireland transfers personal data to Meta Platforms in the USA. It is the complainant's view that it is Boligportal that must be able to prove that – despite the existing contractual conditions and the technical arrangement of Meta's platform – no personal data is transferred to the USA. It follows from the data protection regulation's provisions on responsibility in Article 5, subsection 2, and Article 24.

To the extent that Meta Ireland cannot be considered a data processor for Boligportal, the complainant has further stated that Meta Ireland and Boligportal are joint data controllers for the processing of personal data. The parties have made a joint decision on the purposes and aids for the processing of personal data by embedding Meta Ireland's tool on Boligportal's website, which involves the transfer of personal data to the USA.

Finally, the complainant has stated that, according to the principle of responsibility in the data protection regulation, Article 5, subsection 2, and Article 24, the data controller is responsible for demonstrating that the processing of personal data takes place in accordance with the data protection rules.

The complainant has also stated that she does not have the technical capabilities to provide reliable evidence that the transfer

has actually taken place, as it is unlikely that Meta Ireland will give the complainant the necessary access to demonstrate this. However, according to the complainant, it is the responsibility of Boligportal as the data controller to demonstrate that the complainant's personal data is not transferred to Meta Platforms, especially in light of the publicly known fact that Meta Ireland uses Meta Platforms' infrastructure. It is insufficient to refer to the complainant having to demonstrate that personal data has been transferred to the US, just as it is insufficient to refer to the IP addresses to which the data was transferred being registered with Meta Ireland.

2.3. Boligportal's comments

Boligportal has generally stated that, according to the technical information that is immediately available to the company, Boligportal has not transferred the complainant's personal data to the USA using the tools from Meta Ireland.

Boligportal has stated below that, based on a review of the documentation sent by the complainant, it is the company's opinion that the complainant has visited the front page of Boligportal's website, that the complainant has not used his Facebook account to create a profile on Boligportal's website, and that the complainant has not searched for homes or tenancies on the website.

Boligportal has also stated that in the above-mentioned documentation the company has identified three scripts that have been loaded from the domain "connect.facebook.com" and that these scripts have been loaded from the IP address 31.13.84.4. Based on these three scripts, a pixel is loaded from the facebook.com domain, which is retrieved from the IP address 31.13.84.36.

Boligportal has also stated that the company can ascertain via postings in the Réseaux IP Européens Network Coordination Center (RIPE NCC)[7] that the two IP addresses are part of a pool of IP addresses belonging to "Facebook Ireland Ltd", and that the IP addresses belong to "IE", i.e. Ireland. Boligportal has stated that the company has no reason to assume that the same should not have been the case on 12 August 2020, when the complainant visited the website.

Boligportal has also stated that, by embedding the scripts and pixels in question, the company has accepted the standard terms for their use. However, it is Boligportal's assessment that the terms' regulation of transfer to third countries is irrelevant for complaints, as Boligportal has neither transferred nor contributed to the transfer of personal data about complaints to the USA. Personal data is only transferred to Ireland.

With regard to the distribution of roles and responsibilities between Boligportal and Meta Ireland, Boligportal has generally

stated that none of the services for which Boligportal has used the tools from Meta Ireland implies that Meta Ireland has been a data processor, including for the processing of the complainant's personal data in connection with the complainant's visit to Boligportal's website on 12 August 2020.

Boligportal has stated below that the company subsequently carried out a general update of the company's privacy policy on 19 February 2021, from which the correct context emerges. From this it appears that there is joint data responsibility for the given processing, which does not involve the transfer of personal data to third countries.

Furthermore, Boligportal has stated that Meta Ireland's terms embrace a large variety of Meta Ireland's services, and that Boligportal uses tools from Meta Ireland for limited activities, but none of the services for which Boligportal has used tools from Meta Ireland implies that Meta Ireland is a data processor for Boligportal.

Boligportal has also stated that the company is not aware of whether the transfer of personal data takes place between Meta Ireland and Meta Platforms, but according to the company, this is also subordinate, as Boligportal's data responsibility and responsibility according to Chapter V of the Data Protection Regulation has ceased when the company passes it on to personal data to Meta Ireland as an independent data controller.

Boligportal has stated below that there has been no evidence that the company should have transferred personal data to the USA, and that the facts in a case from 2016 from the Irish data inspectorate are not relevant to the present case.

Finally, Boligportal has stated the following about the limits of the joint data responsibility with Meta Ireland:

"[Boligportal] collects information on both its own and Facebook Ireland Ltd.'s behalf, and subsequently [Boligportal] and Facebook Ireland Ltd. each data controller for the respective further use of the personal data. This is also apparent from [Boligportal's] privacy policy at www.boligportal.dk/personda-tapolitik under the section "Social media" ([Boligportal's highlights]):

"For some of our business partners, we have joint data responsibility, i.e. BoligPortal collects information both on its own behalf and on behalf of a business partner. Subsequently, BoligPortal and the business partners are each data responsible for the respective further use of the information. Below you can see which business partners we have joint data responsibility with and how the responsibility is distributed.

Login using your Facebook profile on BoligPortal

Facebook Ireland, 4 Grand Canal Square, Grand Canal Harbour, Dublin 2, Ireland.

You can read about

the data processing here - Facebook Login, which is event data in section 2.a.ii and point 5.a.ii on shared data responsibility:

<https://www.facebook.com/legal/terms/businessstools>

distribution of responsibility here: https://www.facebook.com/legal/controller_addendum

information about Facebook's privacy information here: <https://www.facebook.com/about/privacy>, including the basis for Facebook's processing and exercise of rights at Facebook"

Despite [Bolgportal's] unambiguous indication of the distribution of data responsibility, which has been available on [Bolgportal's] website since the update on 19 February 2021, [complainant] writes in the letter of 29 November 2021:

"... in any case there is a joint controllership of Facebook Ireland Ltd. and the [respondent]. The two companies jointly made the decision on the purposes and means of data processing by integrating Facebook tools, which involve the transfer of data to Facebook Inc. into the www.bolgportal.dk website."

This point of view is contested in relation to the time after the transfer to Facebook Ireland Ltd., as [Bolgportal] is no longer part of the joint data responsibility when the processing no longer relates to the use of Facebook Connect, as described in the privacy policy.

The use of Facebook Connect does not involve a transfer to the USA. The processing consists of the collection and passing on of the information via a cookie and the execution of scripts from Facebook's domain in Ireland. The function is used solely to support website visitors' login options and to enable Facebook Ireland Ltd. to identify that the complainant has visited the website.

In the EDPB's guidance 07/2020 on joint data controllers it appears ([Bolgportal's] highlights):

"Joint participation may take the form of a joint decision made by two or more entities or as a result of convergent decisions by two or more entities, where the decisions complement each other and are necessary for the processing to take place in such a way that they have a noticeable impact on the determination of the purposes of and aids to the treatment. An important criterion is that the treatment would not be possible without the participation of both parties in the sense that the treatment of the individual parties is inseparable, i.e. inextricably linked. The joint participation must include the determination of ends on the one hand and on the other the determination of aids."

[Bolgportal], as previously mentioned, has no influence over the processing that Facebook Ireland Ltd. carried out as an independent data controller after the transfer from [Bolgportal]. A transfer from Facebook Ireland Ltd. to a recipient in the USA

will thus be possible without [Bolidportal's] participation in determining the purpose or the aids.

[Bolidportal] also refers to the EU Court's decisions C-210/16 ("Wirtschaftsakademie decision") and C-40/17 ("Fashion ID decision") as well as to the Data Protection Authority's decision in j.nr. 2018-32-0357 (the "DMI Decision").

In the Wirtschaftsakademie decision, the Court of Justice of the European Union specified in paragraph 43 that:

"(...) the presence of joint responsibility does not necessarily imply that the different operators who are subject to the processing of personal data have the same responsibility. On the contrary, the different operators may be responsible for the processing of personal data at different levels and in different extent, so that the individual's level of responsibility must be assessed taking into account all relevant circumstances in the case."

In the later Fashion ID decision, paragraph 70, the EU Court adopted an identical interpretation of the scope of the joint data responsibility. The European Court of Justice also expressly stated in the Fashion ID decision, paragraph 74, that a [legal] person cannot be considered to be a joint data controller for processing, another data controller carries out processing before or after this legal person, when the person concerned neither determines the purpose with or aids for the other data controller's processing. Therefore, in the specific case, the European Court of Justice did not consider Fashion ID to be the data controller in relation to Facebook's processing of personal data after it was transferred to Facebook.

The Danish Data Protection Authority has applied the same interpretation in the DMI decision, where the Danish Data Protection Authority, in accordance with the practice of the European Court of Justice, expressed that it is excluded that the joint data responsibility includes subsequent processing for which a company does not determine the purpose or means for:

"In light of this, the Danish Data Protection Authority finds that it can be established that the processing operations for which DMI together with Google can determine the purposes and means are the collection and disclosure of personal data relating to the visitors of dmi.dk. With regard to the information in question, on the other hand, it is immediately excluded that DMI determines for which purposes and with which aids processing operations regarding personal data are subsequently carried out by Google after their transmission to it, which is why DMI cannot be considered to be the data controller for these operations."

The [complainant's] plea made in the letter of 16 March 2021 that [Bolidportal] is the data controller because there is a "chain of processing" is in direct contradiction to the EU Court of Justice's and the Data Protection Authority's interpretation of joint data responsibility and the limits of the actors' responsibility hereby connected.

As [Bolgportal] has already explained, [Bolgportal] is not aware of whether Facebook Ireland Ltd. has transferred personal data to Facebook Inc. in USA. Consequently, it is obvious that [Bolgportal] could in no way have participated in determining the purpose or determining the aids in connection with the alleged, but still undocumented, transfer.

[Bolgportal] is therefore also not responsible for this specific processing, which may involve a transfer to the USA. [Bolgportal] has not carried out the specific processing to which the complaint relates. Should Facebook Ireland Ltd. having made the alleged transfer, it is thus outside of [Bolgportal's] data responsibility, cf. Article 26 of the GDPR, as [Bolgportal] cannot be considered the data controller for processing after the transfer to Facebook Ireland Ltd. No documentation has even been presented that Facebook, after receiving the information from the Irish subsidiary via the decommissioned script on [Bolgportal's] website, has at all transferred personal data about complaints to the USA.

It can never harm [Bolgportal] that [Bolgportal] cannot demonstrate whether a later data controller (Facebook) has transferred personal data to the United States or not. [Bolgportal] is simply not responsible for any transfer and is also not obliged to prove anything in this regard to complaints or the Danish Data Protection Authority. The fundamental question is whether a first data controller is obliged under the GDPR or other legal rules to demonstrate whether a subsequent data controller has or has not transferred information about a complainant to the US when the trail of the first data controller's processing of personal data stops in Ireland. The question must necessarily be answered in the negative."

3. Reason for the Data Protection Authority's decision

3.1. Is it processing personal data?

On the basis of the documentation submitted by the complainant, the Danish Data Protection Authority assumes that during the complainant's visit to Bolgportal's website, information has been collected and passed on about e.g. the complainant's IP address, the complainant's visit to bolgportal.dk, the time of the visit, and other information about the complainant's browser, operating system, etc., as well as information about online identifiers that have been collected via cookies that have been stored in the complainant's browser.

It appears from the "Facebook Business Tools Terms" of both 26 December 2019 and 31 August 2020 that the information defined as "Event Data", i.a. is used to prepare target groups on Facebook, which can be used for targeted marketing, and to personalize functions and content on e.g. Facebook.

In its decision of 11 February 2020, the Danish Data Protection Authority has in the case with reference no. 2018-32-0357

regarding DMI's processing of personal data about website visitors stated that such information is personal data about a person when the information makes it possible to designate the person concerned.

It is then the Danish Data Protection Authority's assessment that the relevant information about complaints, which is collected and transmitted to Meta Ireland, constitutes personal data about complaints.

The Danish Data Protection Authority has emphasized that the information relates to the complainant's characteristics and behavior and is used to treat the person in question in a specific way in relation to which functions and content are shown to the complainant on Facebook.

3.2. Has personal information about complaints been transferred to the United States?

The complainant has stated that her personal data has been collected and transferred to Meta Platforms in the USA as part of the complainant's visit to boligportal.dk.

Boligportal has also stated that, according to the technical information that is immediately available to the company, the company has not transferred the complainant's personal data to the USA, and that the IP addresses to which the information has been transferred when the complainant visits boligportal.dk are registered to Meta Ireland, domiciled in Ireland.

The Complainant has stated that she does not have the technical capabilities to provide reliable evidence that the transfer actually took place, as it is unlikely that Meta Ireland will provide the Complainant with the necessary access to demonstrate this. However, according to the complainant, it is the responsibility of Boligportal as the data controller to demonstrate that her personal data is not transferred to Meta Platforms, especially in light of the publicly known fact that Meta Ireland uses Meta Platforms' infrastructure. In this connection, it is not sufficient that Boligportal only refers to the fact that the IP addresses to which the complainant's information has been transferred are registered with Meta Ireland.

Boligportal has also stated that the company has only transferred information to Ireland, and that no documentation has been presented that Meta Ireland, after receiving the information from Meta Ireland via the executed scripts on boligportal.dk, has at all transferred the complainant's personal data to the USA.

Based on this, the Danish Data Protection Authority finds that there is disagreement between the parties as to whether the complainant's personal data has concretely been transferred to the USA.

The Danish Data Protection Authority notes that, as a rule, the Danish Data Protection Authority processes cases on a written basis. In cases where there is disagreement between the parties to the case about the actual circumstances, the Danish Data

Protection Authority alone takes a position on such a disagreement if it can be supported by the case's additional material. The final assessment of such evidentiary issues will be made by the courts, which, unlike the Data Protection Authority, have the opportunity to clarify the situation in more detail, including by questioning witnesses.

As a result, the Danish Data Protection Authority cannot determine unequivocally whether, in the specific case, there has been a transfer of personal data about complaints to third countries, and if so which(s), and the Danish Data Protection Authority cannot therefore make a decision specifically regarding Boligportal's transfer of personal data about complaints to USA. However, the fact that the Data Protection Authority cannot make a decision on the possible transfer of personal data on complaints to the USA gives the authority the opportunity to assess whether Boligportal has observed its obligations under the data protection regulation, in particular the obligation to be able to demonstrate its compliance with the regulation, cf. article 24 and article 5, subsection 1, letter a, cf. Article 5, subsection 2.

3.3. Distribution of roles and responsibilities

The question then is what role and responsibility distribution exists between Boligportal and Meta Ireland, when processing the personal data in question.

At the time of the complainant's visit to boligportal.dk on 12 August 2020

By integrating tools from Meta Ireland on its website, Boligportal has given Meta Ireland the opportunity to obtain personal data regarding the website's visitors, including complaints, as this opportunity arises from the time the persons in question visit the website.

In view of this, the Danish Data Protection Authority finds that it can be established that the processing operations for which Boligportal together with Meta Ireland determine the purposes and aids are the collection and transmission of personal data about the visitors to boligportal.dk, including complaints.

In its decision of 11 February 2020, the Danish Data Protection Authority has in the case with reference no. 2018-32-0357 regarding DMI's processing of personal data about website visitors stated that the embedding of plug-ins on its website, which triggers the collection of personal data, implies that the website owner becomes joint data controller with the provider of the plug-in in question for the collection and transmission of these personal data.

With regard to the aids used for the collection and transmission of personal data about the visitors to boligportal.dk, including complaints, it appears from sections 2 and 2.3 that Boligportal has embedded tools from Meta Ireland, which Meta Ireland

makes available to website owners, at boligportal.dk, and that Boligportal is aware that this tool, in addition to making it possible to create an account on the website via the visitor's Facebook account, also collects and transmits personal data about website visitors, including complaints.

By integrating this tool on boligportal.dk, Boligportal has a decisive influence on the collection and transmission of personal data about website visitors, including complaints, to Meta Ireland, as this processing would not have taken place if the tool had not been integrated on the website. [8]

Against this background, the Danish Data Protection Authority assumes that Boligportal and Meta Ireland together determine which aids are used for the collection and transmission of personal data about visitors to boligportal.dk, including complaints.

As far as the purpose of processing the personal data in question is concerned, it can be assumed that Boligportal's embedding of the Facebook Login tool takes place i.a. in order to be able to target marketing on Facebook.

The Danish Data Protection Authority notes below that Boligportal has stated (as described above in section 2.3) that the company, at the time of the complainant's visit to boligportal.dk, has not used tools from Meta Ireland for functions where Meta Ireland is a data processor. The Danish Data Protection Authority therefore assumes that Boligportal has used the tools for one or more of the functions that appear in section 2.a.iii-v in Meta Ireland's "Facebook Business Tools Terms" of 26 December 2019.

The Danish Data Protection Authority then finds that Boligportal, by integrating these tools on boligportal.dk, has enabled the collection and transmission of personal data about complaints, as this processing activity takes place in the financial interests of both Boligportal and Meta Ireland. The latter's availability of this information for the purpose of evaluating and determining the complainant's preferences and behavior contributes to the efficiency of Meta Ireland's advertising platform, which also benefits Boligportal in the form of improved marketing opportunities on Facebook.[9]

Against this background, in the opinion of the Danish Data Protection Authority, it can be assumed that Boligportal and Meta Ireland together determine the purposes for which personal data on complaints has been collected and transmitted, and that the parties are therefore joint data controllers for these processing operations.

From Meta Ireland's terms changes on 31 August 2020

As Boligportal has continued to embed the tools from Meta Ireland on boligportal.dk, Boligportal has continued to have a decisive influence on the collection and transmission of personal data about website visitors to Meta Ireland.

Likewise, Meta Ireland's change of terms of 31 August 2020 has not brought about significant changes in the purposes for which the personal data that is collected and transmitted to Meta Ireland via collaboration partners such as Boligportal is processed. The personal data will thus continue to be processed so that Boligportal can target marketing on Facebook as well as improving and streamlining Meta Ireland's advertising platform.

The Danish Data Protection Authority thus finds that this processing activity takes place in the financial interests of both Boligportal and Meta Ireland, and that Boligportal and Meta Ireland continue to jointly determine the purposes for which the collection and transmission of personal data on complaints has taken place, which is why the parties are joint data controllers for these processing operations .

The Danish Data Protection Authority has also emphasized that the terms have been clarified, particularly with regard to the division of roles and responsibilities, so that it now appears from section 5.a.ii in the terms that there is joint data responsibility between website owners and Meta Ireland for the personal data relating to website visitors' actions on the websites where tools from Meta Ireland are embedded. The parties are joint data controllers for the collection and transmission of the personal data in question to Meta Ireland.

3.4. Who is responsible and for what?

Of the data protection regulation, article 26, subsection 1, it appears that joint data controllers must determine their respective responsibilities for compliance with the obligations under this regulation in a transparent manner.

In its guidelines 7/2020 on data controllers and data processors, the European Data Protection Board has elaborated^[10] what this obligation, in the council's view, entails in practice:

"Joint controllers thus need to see "who does what" by deciding between themselves who will have to carry out which tasks in order to make sure that the processing complies with the applicable obligations under the GDPR in relation to the joint processing at stake. In other words, a distribution of responsibilities for compliance is to be made as resulting from the use of the term "respective" in Article 26(1). [...]"

The objective of these rules is to ensure that where multiple actors are involved, especially in complex data processing environments, responsibility for compliance with data protection rules is clearly allocated in order to avoid that the protection of personal data is reduced, or that a negative conflict of competence lead to loopholes whereby some obligations are not complied with by any of the parties involved in the processing. It should be made clear here that all responsibilities have to be

allocated according to the factual circumstances in order to achieve an operative agreement. The EDPB observes that there are situations occurring in which the influence of one joint controller and its factual influence complicate the achievement of an agreement. However, those circumstances do not negate the joint controllership and cannot serve to exempt either party from its obligations under the GDPR. [...]

However, the use of the terms "in particular" indicates that the obligations subject to the allocation of responsibilities for compliance by each party involved as referred to in this provision are non-exhaustive. It follows that the distribution of the responsibilities for compliance among joint controllers is not limited to the topics referred to in Article 26(1) but extends to other controller's obligations under the GDPR. Indeed, joint controllers need to ensure that the entire joint processing fully complies with the GDPR.

In this perspective, the compliance measures and related obligations joint controllers should consider when determining their respective responsibilities, in addition to those specifically referred to in Article 26(1), include amongst others without limitation:

Implementation of general data protection principles (Article 5)

Legal basis of the processing (Article 6)

Security measures (Article 32)

Notification of a personal data breach to the supervisory authority and to the data subject (Articles 33 and 34)

Data Protection Impact Assessments (Articles 35 and 36)

The use of a processor (Article 28)

Transfers of data to third countries (Chapter V)

Organization of contact with data subjects and supervisory authorities"

In the opinion of the Danish Data Protection Authority, two or more parties who are joint data controllers must therefore together observe the obligations incumbent on data controllers according to the data protection regulation. The parties are thus jointly responsible for ensuring that the processing activities in question take place in accordance with the data protection rules.

As a starting point, Boligportal as the (sole) data controller is therefore responsible for the obligations such as follows from the data protection regulation articles 5-22, 24-28, 30-39 and 44-49.

In this connection, the EU Court of Justice has clarified that joint data responsibility does not necessarily imply that the parties

have the same responsibility for the same processing of personal data. On the contrary, the different actors may be responsible for the processing of personal data at different levels and to different extents, so that the individual's level of responsibility must be assessed taking into account all relevant circumstances in the case.[11]

In other words, the joint data responsibility only covers the processing operations for which the parties jointly determine the purpose and means for.

In line with the practice of the EU Court of Justice and the Danish Data Protection Authority, the Authority finds that Boligportal - as mentioned above in section 3.2. - must be considered the joint data controller for the processing operations that consist in the collection and transmission of personal data about website visitors, including complaints. Boligportal is therefore not responsible for the processing of personal data carried out by Meta Ireland after the information has been transmitted to it, as Boligportal does not determine for what purposes and with what aids this subsequent processing takes place.

However, Boligportal is the joint data controller together with Meta Ireland for the collection and transmission of personal data about website visitors, including the complainant's information.

It is the Danish Data Protection Authority's assessment that there are certain obligations that normally fall to the data controller, which Boligportal is excluded from having to observe due to the nature of the processing operations. For example, it seems out of the question that Boligportal should be obliged to observe the obligation regarding the right to access or the right to rectification, as the company is solely responsible for the processing of personal data in the form of collection and transmission and thereafter does not have access to the information.[12]

On the other hand, it does not seem out of the question that Boligportal should be obliged – together with Meta Ireland – to observe the obligations regarding the transfer of personal data to third countries, cf. Article 44, if and to the extent that the processing of personal data in the form of collection and transmission finds place when using aids located outside the EU/EEA. Given that collection and transmission can take place using aids located outside the EU/EEA, it is the Danish Data Protection Authority's assessment that Boligportal is at least partly responsible for ensuring that Article 26 of the Data Protection Regulation is complied with, particularly in relation to the role - and the distribution of responsibility in connection with the transfer of personal data to third countries. The Norwegian Data Protection Authority attaches particular importance to the fact that personal data as part of these processing operations may be processed outside the EU/EEA, particularly if the processing takes place using data processors outside the EU/EEA.

The Data Protection Authority has also emphasized that the processing operations in question are only made possible by the fact that Boligportal has embedded tools from Meta Ireland on boligportal.dk, fully aware that these tools serve as a means of collecting and transmitting personal data of visitors to boligportal.dk , including complaints, to Meta Ireland. By its decision to embed these tools on boligportal.dk, Boligportal has a decisive influence on how and where the processing of personal data about website visitors takes place, including whether the processing is possibly done using aids located outside the EU/EEA. The Danish Data Protection Authority notes below that in the situation in question there is no transfer of personal data between two data controllers, where Boligportal, as part of a transfer of personal data, will in particular be obliged to (i) ensure that the basis for processing and (ii) observe its obligation to provide information. On the other hand, there is joint data responsibility for the processing operations that consist of collection and transmission.

The Norwegian Data Protection Authority also notes that one of the basic purposes of the data protection regulation is to ensure effective and complete protection of natural persons' fundamental rights and freedoms, in particular the right to privacy and the right to data protection.

In light of this, the Danish Data Protection Authority finds that Article 26 of the Data Protection Regulation implies that two or more parties who are joint data controllers for the processing of personal data are jointly obliged to ensure that the Data Protection Regulation is complied with and must be able to demonstrate this together.

Thus, the Danish Data Protection Authority is of the opinion that the basic premise of shared data responsibility is that the parties together must demonstrate compliance with the obligations incumbent upon them as data controllers according to the data protection regulation.

If the parties were each solely obliged to ensure compliance with parts of the data protection regulation, in the opinion of the Danish Data Protection Authority, this would entail a risk that the data subject would not be guaranteed complete and effective protection of his rights and freedoms, as certain obligations could be overlooked by both parties with the result that neither party observes these obligations.

However, it is not excluded that the parties, taking into account the specific processing activity, arrange themselves in such a way that the obligation according to Article 44 is observed in practice by the party that is closest to it, e.g. if one of the parties has the contractual relationship with the data processor(s) located outside the EU/EEA. However, if applicable, this must be stated in the arrangement between the parties according to Article 26 of the Data Protection Regulation.

3.5. The principle of accountability

The data protection regulation contains a general principle of responsibility in the regulation's article 5, subsection 2. It follows from this that the data controller is responsible for and must be able to demonstrate, among other things, that personal data is processed lawfully.

The principle of responsibility is further developed in Article 24 of the Data Protection Regulation, from which it follows that the data controller – depending on the specific processing activity – must take appropriate measures to ensure and to be able to demonstrate that the processing takes place in accordance with the data protection rules.

In addition, in the so-called Proximus case, the EU Court of Justice has stated that the data protection regulation's article 5, paragraph 2 and Article 24 impose general obligations regarding responsibility and compliance on the data controllers for the processing of personal data. In particular, these provisions require data controllers to take appropriate measures to prevent any infringements of the rules laid down in the Data Protection Regulation in order to ensure the right to data protection.[13]

In the opinion of the Danish Data Protection Authority, it is therefore incumbent, according to the Data Protection Regulation, Article 5, subsection 2, and Article 24, an obligation for the data controller to be able to document and present this documentation, including in particular to the Danish Data Protection Authority, that the processing of personal data takes place in accordance with the data protection rules.

It is the Danish Data Protection Authority's assessment that, in connection with the company's embedding of tools from Meta Ireland, Boligportal has not demonstrated that the processing of the complainant's personal data on 12 August 2020 was lawful, just as the company has not demonstrated that the current processing of personal data about visitors to boligportal.dk is done legally, cf. the data protection regulation, article 5, subsection 1, letter a, cf. Article 5, subsection 2, and Article 24, subsection 1.

With regard to the processing of the complainant's personal data in connection with the complainant's visit to boligportal.dk on 12 August 2020, the Data Protection Authority has in particular emphasized that there has been an insufficient distribution of roles and responsibilities between Boligportal and Meta Ireland with regard to the processing activities and purposes for which Boligportal, according to its own statements and as described in section 3.3 above, has processed the complainant's personal data, and that Boligportal has therefore had no further knowledge of whether personal data has been processed outside the EU/EEA, and if so where, including possibly when using data processors outside the EU/EEA, as regards the processing

activities for which the parties are joint data controllers.

The Danish Data Protection Authority has also emphasized that Boligportal itself has stated that the company is not aware of whether the personal data as part of the collection and transmission to Meta Ireland is processed outside the EU/EEA, including possibly using data processors outside the EU/EEA, and that it does not appear from Meta Ireland's terms and documentation, which Boligportal has referred to, whether this is the case.

With regard to the processing of personal data about website visitors since Meta Ireland's change of terms on 31 August 2020, the Danish Data Protection Authority has emphasized in particular that it does not appear from the current arrangement entered into between Boligportal and Meta Ireland as joint data controllers pursuant to Article 26 of the Data Protection Regulation, on personal data is processed outside the EU/EEA, and where applicable, including possibly using data processors outside the EU/EEA, as regards the processing activities for which the parties are joint data controllers, as well as which party(ies) who, if applicable, is responsible for compliance with Article 44 of the Data Protection Regulation. The Danish Data Protection Authority has also emphasized that Boligportal has not taken independent measures to clarify these matters in more detail.

It is the Danish Data Protection Authority's basic opinion that the data controller cannot demonstrate compliance with the data protection rules when the data controller is not fully aware of the actual circumstances that are relevant to the processing of the personal data.

On the contrary, the data controller, when he processes personal data – regardless of whether this happens alone or together with others – must provide the necessary and relevant information about how the processing of personal data for which the organization is (jointly) responsible takes place.

In the Data Protection Authority's opinion, this applies particularly when the data controller, by not providing the necessary information, avoids taking a position on and assessing publicly known circumstances that are relevant to the processing activity. In the present case, this entails, among other things, the publicly known fact that Meta Ireland (with whom Boligportal is a joint data controller), as part of its ordinary business generally processes personal data using aids, such as technical infrastructure, provided by Meta Platforms in the USA.

Given that it does not appear from the current arrangement entered into between Boligportal and Meta Ireland as joint data controllers pursuant to Article 26 of the Data Protection Regulation, whether the processing for which the parties are joint data

controllers takes place outside the EU/EEA, and if so where, as well as which party(ies) must, in practice, ensure compliance with Article 44 of the Data Protection Regulation, and that Boligportal has not otherwise produced documentation to the Data Protection Authority in order to demonstrate this, the Data Protection Authority finds that Boligportal does not can demonstrate that Boligportal's processing of personal data takes place in accordance with Article 26 of the Data Protection Regulation, cf. the Regulation's Article 5, subsection 1, letter a, cf. Article 5, subsection 2 and Article 24, subsection 1.

4. Summary

The Danish Data Protection Authority finds that there are grounds for expressing serious criticism that Boligportal has not demonstrated that the processing of the complainant's personal data on 12 August 2020 was in accordance with the data protection regulation, and that Boligportal has not demonstrated that the company's current processing of personal data whether website visitors are in accordance with the data protection regulation, cf. the data protection regulation, article 26, cf. the regulation's article 5, subsection 1, letter a, cf. Article 5, subsection 2 and Article 24, subsection 1.

The Danish Data Protection Authority initially finds that the Danish Data Protection Authority cannot make a decision regarding the possible transfer of personal data on complaints to the USA, as there is disagreement between the parties as to whether personal data on complaints has actually been transferred to the USA.

The fact that the Norwegian Data Protection Authority cannot make a decision on a possible transfer of personal data about complaints to the USA, however, gives the authority the opportunity to investigate whether Boligportal has complied with its obligations under the data protection regulation, including the company's obligation to demonstrate its compliance with the data protection regulation, cf. article 5, subsection 1, letter a, article 5, subsection 2, as well as Article 24, subsection 1.

In this connection, the Data Protection Authority finds that at the time of the complainant's visit to boligportal.dk on 12 August 2020, there was an insufficient distribution of roles and responsibilities between Boligportal and Meta Ireland in light of the processing of personal data that took place.

Considering the processing activities and the purposes for which Boligportal, according to its own statements, which are described in more detail in section 3.3 below, has processed the complainant's personal data, the parties must be considered joint data controllers for the processing of the complainant's personal data.

In light of this, and the fact that at the time of the complainant's visit to boligportal.dk there was no arrangement in accordance with Article 26 of the regulation, which in a transparent manner determined the distribution of roles and responsibilities

between the parties, the Data Protection Authority finds that Boligportal has not demonstrated that their processing of the complainant's personal data has taken place in accordance with Article 26 of the Data Protection Regulation, cf. Article 5, subsection 1, letter a, article 5, subsection 2 and Article 24, subsection 1.

The Danish Data Protection Authority also finds that it does not appear from the current arrangement entered into between Boligportal and Meta Ireland as joint data controllers pursuant to Article 26 of the Data Protection Regulation, whether personal data about website visitors is processed using aids located outside the EU/EEA, and in if applicable where, including possibly using data processors outside the EU/EEA, as regards the processing activities for which the parties are joint data controllers, and consequently which party is responsible for ensuring compliance with Article 44.

Based on this, the Danish Data Protection Authority finds that Boligportal has generally not demonstrated that the company's current processing of personal data is in accordance with Article 26, cf. Article 5, subsection 1, letter a, article 5, subsection 2, as well as Article 24, subsection 1, i.a. by not having clarified whether personal data about website visitors is processed using aids located outside the EU/EEA, and if so where, including possibly using data processors outside the EU/EEA, as far as the processing activities are concerned, for which the parties are joint data controllers.

On this basis, the Danish Data Protection Authority finds grounds to issue an order to Boligportal to bring the company's processing of personal data in line with the data protection regulation's article 5, subsection 1, letter a, article 5, subsection 2, Article 24, subsection 1 and Article 26, as well as being able to demonstrate this.

The deadline for compliance with the order is 18 May 2023. The Danish Data Protection Authority must request to receive confirmation that the order has been complied with by the same date.

In the opinion of the Danish Data Protection Authority, it can i.a. happen by clarifying the distribution of roles and responsibilities between Boligportal and Meta Ireland, so that it is clear from the arrangement between the parties whether personal data about website visitors, for which the parties are joint data controllers, is processed using aids located outside the EU/EEA , and if applicable where, including possibly using data processors outside the EU/EEA, and consequently how Article 44 of the Data Protection Regulation is observed with regard to the processing activities for which the parties are joint data controllers, and which party(ies) , if applicable, must in practice ensure compliance with Article 44 of the Data Protection Regulation. Alternatively, this can be done by stopping the processing activity in question.

The Danish Data Protection Authority notes that the above proposed solutions do not constitute the only option for the way in

which the Danish Data Protection Authority's order can be complied with and can be demonstrated to have been complied with. Boligportal has – as the (sole) data controller – full freedom of choice, cf. the data protection regulation, article 24, subsection 1, and Article 5, subsection 2, with regard to how the company demonstrates its compliance with the data protection regulation.

The order is announced in accordance with the data protection regulation, article 58, subsection 2, letter d.

According to the Data Protection Act § 41, subsection 2, no. 4, anyone who fails to comply with an order issued by the Data Protection Authority pursuant to Article 58 of the Data Protection Regulation shall be punished with a fine or imprisonment for up to 6 months. 2, letter d.

[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons in connection with the processing of personal data and on the free exchange of such data and on the repeal of Directive 95/46/EC (general regulation on data protection).

[2] Printed by Complainant on August 10, 2020 from <https://www.facebook.com/legal/terms/dataprocessing>

[3] <https://www.facebook.com/legal/terms/businessstools>

[4] https://www.facebook.com/legal/controller_addendum

[5] Under s. 5.2.ii refers Meta Ireland to the following website:

https://www.facebook.com/legal/terms/businessstools_jointprocessing

[6] Judgment of the European Court of Justice of 16 July 2020 in case C-311/18, Schrems II.

[7] RIPE NCC is the Regional Internet Registry (RIR) for Europe. An RIR is an organization that handles the allocation and registration of e.g. IP addresses within a specific region. There are a total of five regional registers.

[8] Judgment of the European Court of Justice of 29 July 2019 in case C-40/17, Fashion ID, paragraph 78.

[9] Judgment of the European Court of Justice of 29 July 2019 in case C-40/17, Fashion ID, paragraph 80.

[10] European Data Protection Board's guidelines 7/2020 on the concepts of controller and processor in the GDPR, version 2, adopted on 7 July 2021, para. 162, 163, 165 & 166.

[11] Judgment of the European Court of Justice of 29 July 2019 in case C-40/17, Fashion ID, paragraph 70, as well as the references therein.

[12] Advocate General Bobek's proposal for decision of 19 December 2018 in case C-40/17, Fashion ID, paragraph 83, and

135-136.

[13] Judgment of the European Court of Justice of 27 October 2022 in case C-129/21, Proximus, paragraph 81.