



noyb – European Center for Digital Rights
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AUSTRIA

The following “model request” is a preliminary attempt to highlight the elements that any EU controller or processor should request from any EU controller or processor with ties to the US (such as an EU provider with a US parent company).

Depending on your situation, you may need to amend this text or omit certain elements. Please be aware that these questions only highlight the elements that the CJEU has relied on in C-311/18. There may well be other laws that a controller or processor also has to take into consideration.

This text is free to use (CC0). Given its preliminary nature, we cannot guarantee that this text will cover all legally relevant elements for your specific processing operation. We are looking forward to your feedback via info@noyb.eu and will continuously update this document over the coming days.

To use this form without the cover page go to: https://noyb.eu/files/CJEU/EU-EU_form_v3_nc.pdf

We hope this document is useful for you!

The *noyb* team

Request to an EU provider with US ties (case by case analysis)

Given the judgment of the Court of Justice of the European Union in C-311/18, especially paragraphs 138 to 145, we urgently seek clarification on the following questions:

Direct Application of 50 U.S.C. § 1881a (= FISA 702)

- (1) Do you or any other relevant US entity (controller or processor) that processes or has access to personal data that is transferred to you fall under one of the following definitions in 50 U.S.C. § 1881(b)(4), that could render you or the other entit(ies) directly subject to 50 U.S.C. § 1881a (= FISA 702)?

☐ Yes ☐ No ☐ We are under a legal obligation not to answer this question

- (2) Especially,

- (A) are you or any other relevant US entity a telecommunications carrier, as that term is defined in section 153 of title 47 U.S.C.;

☐ Yes ☐ No ☐ We are under a legal obligation not to answer this question

- (B) are you or any other relevant US entity a provider of electronic communication service, as that term is defined in section 2510 of title 18 U.S.C.;

☐ Yes ☐ No ☐ We are under a legal obligation not to answer this question

- (C) are you or any other relevant US entity a provider of a remote computing service, as that term is defined in section 2711 of title 18 U.S.C.;

☐ Yes ☐ No ☐ We are under a legal obligation not to answer this question

- (D) are you or any other relevant US entity any other communication service provider who has access to wire or electronic communications either as such communications are transmitted or as such communications are stored; or

☐ Yes ☐ No ☐ We are under a legal obligation not to answer this question

- (E) are you or any other relevant US entity an officer, employee, or agent of an entity described in (A), (B), (C), or (D)?

☐ Yes ☐ No ☐ We are under a legal obligation not to answer this question

Indirect Enforcement of FISA 702

- (3) Are you controlled by a US parent company or shareholder, or do you have another relevant tie to the US that could make US law indirectly enforceable against you?

☐ Yes ☐ No ☐ We are under a legal obligation not to answer this question

- (4) If so, are you, as a matter of EU law, national law, corporate, and private international law, bound to ignore any order, request or directive from any US entity that would require you to expose any of the personal data that you process to the U.S. government under 50 U.S.C. § 1881a (= FSIA 702) or EO 12.333 and are you able to factually block such access?

☐ Yes ☐ No ☐ We are under a legal obligation not to answer this question

Please specify what legal and/or technical protections you rely on:

Processing under EO 12.333

- (5) Do you, or any other relevant US entity (controller or processor) that processes personal data that is transferred from us to you, cooperate in any respect with US authorities conducting surveillance of communications under EO 12.333, should this be mandatory or voluntary?

☐ Yes ☐ No ☐ We are under a legal obligation not to answer this question

Other relevant Laws

- (6) Are you or any other relevant US entity (controller or processor) that processes personal data that is transferred from us to you subject to any other law that could be seen as undermining the protection of personal data under the GDPR (Article 44 GDPR)?

☐ Yes ☐ No ☐ We are under a legal obligation not to answer this question

If so, please specify these laws:

Measures against Mass and Indiscriminate Processing in Transit (FISA 702 and EO 12.333)

(7) As the Court of Justice has also highlighted the need to ensure that personal data is not subject to mass surveillance in transit, we seek the following clarifications:

(A) Have you implemented appropriate technical and organisational measures (see Article 32 GDPR) for every step of the processing operations which ensure that mass and indiscriminate processing of personal data by or on behalf of authorities in transit (such as under the “Upstream” program in the US) is made impossible?

☐ Yes ☐ No ☐ We are under a legal obligation not to answer this question

(B) If so, please specify which technical and organisational measures (including encryption) have been taken so that neither content nor meta data can be processed by sophisticated state actors with direct access to the internet backbone, switches, hubs, cables and alike:

Termination of Contract and Liability

In the case that you are unable to demonstrate full compliance with the GDPR, we reserve the right to terminate the contract with you and/or seek compensation for any damages under the applicable law.

Response

We kindly request you to respond to these questions without undue delay, but no later than five working days from today.