

DPC cannot identify legal basis to deny PRISM investigation

This is a summary of all letters exchanged with the Office of the Irish Data Protection Commissioner, in order to find out on what legal basis the ODPC has denied an investigation into PRISM. Section 10(1)(b)(i) DPA (see below) clearly says that there is a duty to investigate where there is a complaint, unless a complaint is “frivolous or vexatious”. The ODPC however did not say that our PRISM complaint is frivolous or vexatious, but took the position that based on the word “*may*” in section 10(1)(a) DPA it is upon their sole discretion to not investigate a complaint. Additional other arguments were made (see below).

In a final letter (see page 18 of this PDF) the ODPC took the ultimate position that it may have based its denial to investigate our complaints on

- a) section 10(1)(a)** [very likely meaning the word “*may*”] **or**
- b) section 10(1)(b)(i)** [very likely meaning “*frivolous or vexatious*”] **or**
- c) a combination of a) and b) or**
- d) any other legal basis.**

By doing so the ODPC has taken the position that it does not even have to explain its actions when denying a European citizen its right to a complaint. We see this to be unacceptable under the rule of law and plan to take appropriate action.

As the ODPC also wrote about the other 22 complaints that are still before the ODPC but are of no relevance for the PRISM complaint, we have marked these sections with a red box to make it easier for you to bypass them.

The Law: Section 10(1) DPA

[...]

10. Enforcement of data protection

10. (1)(a) The Commissioner may investigate, or cause to be investigated, whether any of the provisions of this Act have been, are being or are likely to be contravened in relation to an individual either where the individual complains to him of a contravention of any of those provisions or he is otherwise of opinion that there may be such a contravention.

(b) Where a complaint is made to the Commissioner under paragraph (a) of this subsection, the Commissioner shall-

- (i) investigate the complaint or cause it to be investigated, unless he is of opinion that it is frivolous or vexatious, and

[...]



23 July 2013

Maximilian Schrems



AUSTRIA

Dear Mr. Schrems,

I refer to your recent correspondence to this Office which we have reviewed. Please find below our assessment of the matters outlined in your correspondence.

The Irish Data Protection Acts 1988 and 2003 which transpose the 1995 EU Data Protection Directive (95/46/EC) permits Irish based data controllers to contract with third party data processors to provide services on their behalf, Section 2C(3) of the Acts refers. Where those third party data processors are based outside the European Economic Area (EEA), the Irish based data controller must also comply with Section 11 of the Data Protection Acts 1988 and 2003 which specify conditions that must be met before personal data may be transferred to third countries.

Organisations that transfer personal data from Ireland to third countries – i.e. places outside of the European Economic Area (EEA) – will need to ensure that the country in question provides an adequate level of data protection. The US ‘Safe Harbor’ arrangement has been approved by the EU Commission, for US companies which agree to be bound by its data protection rules. In the case of countries that have not been approved in this way, there are a number of other ways in which a data controller can ensure that the data protection rights of individuals are respected. The Irish based data controller can use EU-approved ‘model contracts’ which contain data protection safeguards to EU standards.

Our website guidance on this matter suggests that a best practice approach would be for a data controller planning an international data transfer to consider first whether the third country provides an adequate level of protection and to satisfy himself or herself that the exported data will be safeguarded in that country. In the case of data transfers to the US, we recommend that the data controller exporting the data based in this jurisdiction may want to encourage the importer to subscribe to the Safe Harbor principles.

In the case of Facebook-Ireland, we note and our audit of the company accepts, that Facebook Inc, California acts as a data processor for Facebook-Ireland. We note also that Facebook Inc, California has a current ‘Safe Harbor’ self-certification entry.

The 'Safe Harbor' Privacy Principles as issued by the U.S Department of Commerce and agreed by the EU Commission pursuant to the EU Data Protection Directive provide that "adherence to these Principles may be limited: (a) to the extent necessary to meet national security, public interest, or law enforcement requirements; (b) by statute, government regulation, or case law that create conflicting obligations or explicit authorizations, provided that, in exercising any such authorization, an organization can demonstrate that its non-compliance with the Principles is limited to the extent necessary to meet the overriding legitimate interests furthered by such authorization". Similar provisions are also contained in the model contracts approved by the EU Commission for the transfer of personal data to third countries.

We consider that an Irish-based data controller has met their data protection obligations in relation to the transfer of personal data to the U.S. if the U.S. based entity is 'Safe Harbor' registered. We further consider that the agreed 'Safe Harbor' Programme envisages and addresses the access to personal data for law enforcement purposes held by a U.S. based data processor.

We are aware of and welcome the fact that the proportionality and oversight arrangements for programmes such as PRISM are to be the subject of high-level discussions between the EU and the USA. The issue was already raised by the (Irish) Minister for Justice in his meeting with the US Attorney-General on the occasion of the EU-US meeting on justice and law enforcement issues in mid-June (<http://www.justice.ie/en/JELR/Pages/PR13000237>). We also welcome the fact that the broader issue of the proper balance to be struck in a democratic society between the right to protection of personal data and measures to combat terrorism and serious crime - such as in relation to the Data Retention Directive and the activities of European intelligence services - are also receiving attention in the EU, notably in cases before the European Court of Justice and in the context of the negotiation of new data protection laws.

Finally, we would remind you that the Data Protection Commissioner has yet to receive from you a formal request for a decision in relation to the twenty two complaints previously made to this Office. In the absence of such a request, we must assume that you are now satisfied that actions taken by Facebook-Ireland in response to our audit have fully dealt with your complaints. If that is not the case, we would wish to uphold your right to receive formal decisions on these complaints as soon as possible, decisions that you may then appeal to the Courts if you so wish.

Yours sincerely,



Ciara O'Sullivan
Senior Compliance Officer

[REDACTED]

Von: DPC Info <info@dataprotection.ie>
Gesendet: Mittwoch, 24. Juli 2013 18:11
An: [REDACTED]
Betreff: Re: AW: Reply from ODPC

Dear Mr. [REDACTED]

Thank you for your further email.

I can advise that we do not consider that there are grounds for an investigation under the Irish Data Protection Acts given that "Safe Harbor" requirements have been met and on that basis we cannot identify that a contravention of the Acts has taken place.

Yours sincerely,

Ciara O'Sullivan
Office of the Data Protection Commissioner

[REDACTED] on 24/07/2013 13:06:33

To: "'DPC Info'" <info@dataprotection.ie>
cc:

Subject: AW: Reply from ODPC

Dear Mrs. O'Sullivan,

I am happy to make a submission, but for now I only wanted to know of what legal nature (decision, refusal of a decision, informal letter...) your document was. Maybe you can send me a quick mail on this matter or call me at [REDACTED] I think this could be answered very quickly over the phone - or if you wish via an email.

If you do not respond today I assume that the document was an informal letter reflecting your first thoughts on the matter raised with the DPC and that I will soon see further steps to be taken.

Thank you for your quick response,
[REDACTED]

To
Office of the Data Protection Commissioner
Canal House, Station Road
Portarlinton , Co. Laois
IRELAND

| [REDACTED]
[REDACTED]
[REDACTED]
AUSTRIA

Vienna, July 25th 2013

Complaint against Facebook Ireland Ltd – 23 “PRISM”

Dear Mrs. O’Sullivan,

Thank you for your letter from July 23rd 2013 and your email from July 24th 2013, in which you reply to my formal complaint against “Facebook Ireland Ltd” from a month earlier.

On the procedural matter:

As you have confirmed on the phone your letter does not constitute a formal decision on my complaint. At the same time you were unable to name the legal nature of this document and you also indicated that the ODPC is not intending to further engage in any form of action concerning this complaint. In addition you said that your letter does not allow me to appeal to any court under Irish law. For now I understand that the ODPC has not even opened an investigation and is in fact simply ignoring the complaint, without taking a decision. Please let me know if any of the above is incorrect.

Such a reaction is unfortunately not in line with the Irish Data Protection Act (DPA). When reading Section 10 DPA you will find that it clearly says the DPC has to form a decision on a complaint, unless it is “frivolous or vexatious”. This means that a complaint in itself is opening an investigation. It can then – apart from an amicable resolution - only be terminated through a decision upholding or turning down the complainant’s view, or by a finding that it is “frivolous or vexatious”. A termination of a procedure by a letter from a “complaint officer” is not an option under the law.

Therefore I am in no way accepting your letter as the end of a formal complaint. I am kindly asking you to either have the DPC decide that the complaint is “frivolous or vexatious” or have a decision in the matter itself. If you have spotted a legal basis for “turning down” a complaint in another way than described as above, please let me know about the exact legal basis. If you are of the opinion that your letter is the end of any legal procedure in Ireland, I would ask you to send me this in writing, if this is not the case, please explain what the next steps or options are.

In addition I kindly ask you to clearly state the status of the complaints, the legal basis for the status it has and the legal options to appeal any such procedural decision by the ODPC.

On the material arguments:

While all other paragraphs of your letter seem to repeat thoughts from my complaint or only reference to already known facts, the only new part that I was able to find was the following:

"We consider that an Irish-based data controller has met their data protection obligations in relation to the transfer of personal data to the U.S. if the U.S. based entity is 'Safe Harbor' registered. We further consider that the agreed 'Safe Harbor' Programme envisages and addresses the access to personal data for law enforcement purposes held by a U.S. based data processor."

This overall means that you are apparently of the opinion that the European Commission has (in the year 2000) envisaged surveillance programs like the "PRISM" program, and found them to be in line with an "adequate protection" for European's citizens privacy. I personally doubt both, since the European Commission has itself said that it has not in any way known about the PRISM program and such a form of mass surveillance is in no way compatible with Article 8 ECHR.

From this you follow that a European company can simply forward personal data to the NSA, through a US based company. This can possibly be the final solution, since a legal analysis does not stop at the letters of a decision by the European Commission, but has to also consider if an "adequacy decision" is even legally binding. Your letter does not address this crucial issue at all, despite this being the key question raised in the complaint.

In a very recent letter to the German Chancellor Angela Merkel the German DPCs have expressed the very same view as I did in my complaint. The German DPCs have also argued that there is a "substantial likelihood that the [Safe Harbor] Principles are being violated", which would mean that the DPC may suspend data flows under Article 3(1)(b) of the Safe Harbor Decision.

I would kindly ask you to add this argument to the initial complaint to the DPC or review this as well, since the European Commission has repeatedly voiced the opinion that the "Safe Harbor" decision must be interpreted as a general rule, but does not apply in exceptional cases. I understand that the PRISM program is clearly such an exceptional case.

I am therefore looking forward to hearing from the DPC with a formal decision on this matter, which addresses *all* issues raised in my initial complaint and this letter. I would also like to ask you to let me know about any reaction from "Facebook Ireland" on this matter, as well as the investigative and enforcement actions your office has undertaken so far.

On the outstanding 22 complaints:

I am irritated about the fact that the ODPC "assumes" that I have taken back my 22 previous complaints or that I am happy with the results from the two non-binding reports your office has published. This indicates to me that you have not at all read previous submissions including a response from December 4th 2012 and the most recent email from June 26th 2013. If it is of any help for future assumptions, you are always welcome to download the key documents on of the procedure from our web page (<http://www.europe-v-facebook.org/EN/Complaints/complaints.html>).

We are still working on a request for a formal decision that will be sent to you as soon as it is ready. Your former colleague Gary Davis has repeatedly told me that it is upon my sole discretion when I will make a request for a formal decision. If the law has changed in this matter, please let me know as soon as possible, by citing the section of the DPA that has changed in this respect.

As you may know, all previous requests, submissions and interventions were so far turned down or ignored by your office. But you are more than welcome to go back in your emails and answer these submissions as this would be a major help for a request for a formal decision.

In addition I am also inviting you to speed up the process by adhering to your duties under Article 6 ECHR ("fair trial") and the Irish administrative law. The ODPC is still not providing me with any documents, evidence and legal arguments on the outstanding 22 complaints. Further details on this matter can also be found in my submission from December 4th 2012. If the ODPC would finally respect the law in this matter it would allow us to concentrate on the actual arguments on the table, rather than researching and including options for any possible argument and submission that we might not be aware of. This issue is consuming most of the work we are currently engaged in.

It is therefore in my view mainly upon the ODPC to enable me to make a request for a formal decision on the initial 22 complaints in due course. Under the former complaints officer Gary Davis, one could get the feeling that the ODPC tried everything to avoid forming any legally binding decision on "Facebook Ireland Ltd". I would be delighted if this impression is proven wrong in the future, after you have taken over the case from your former colleague. If you need and further information or have any further questions I am also available to speak to you in person at +[REDACTED].

Kind Regards,

[REDACTED]



25 July 2013

Mag. Maximilian Schrems



AUSTRIA

Dear Mr. Schrems,

With reference to your letter of today's date, I am happy to clarify the points you raise.

Your recent Complaint ("complaint 23"):

In relation to the issue you have raised on the disclosure of personal data to US law enforcement authorities, my letter of 23 July 2013 and follow-up email of 24 July 2013 explained why we consider that this disclosure is permitted under Irish law and why we consider therefore that there is no reason to formally investigate this issue. During our phone conversation of 24 July, I repeatedly invited you to submit in writing any queries which you had and that I would arrange a reply to those queries. I did not confirm any of the points which are outlined in the first main paragraph of your letter where you reference that phone call.

Section 10 (1) (a) of the Data Protection Acts provides that the Commissioner *may investigate whether any of the provisions of (the) Act ... have, are being or are likely to be contravened in relation to an individual either where the individual complains to him of a contravention of any of those provisions or he is otherwise of opinion that there may be such a contravention*. As the Commissioner is satisfied that there is no evidence of a contravention in this case, he has exercised his discretion not to proceed to a formal investigation under section 10 (1) (b) of the Acts. In making this assessment, the Commissioner is also mindful of the fact that there is no evidence - and you have not asserted - that your personal data has been disclosed to the US authorities. The situation in this respect is quite different to that in relation to the 22 complaints you submitted earlier which related to terms and conditions of Facebook-Ireland which clearly apply to you as a user.

The right of the Commissioner not to proceed to a formal investigation of a complaint has recently been upheld by the Irish High Court in the cases of *Peter Nowak and the Data Protection Commissioner* [2012] IEHC 449] and *David Fox and the Office of the Data Protection Commissioner* [2013] IEHC 49 – both judgments available at www.courts.ie.

The requirement under Article 28.4 of the Data Protection Directive 95/46/EC, which is transposed by the Irish Acts, is that *...each supervisory authority shall hear claims lodged by any person.... concerning the protection of his rights and freedoms in regard to the processing of personal data. The person concerned shall be informed of the outcome of the claim*. We consider that this requirement has been met in relation to your "claim".

If you wish to contest the Commissioner's assessment of the law, you are free to seek judicial review in the Irish High Court.

Your other Complaints:

You and your organisation have consistently maintained that the Commissioner has failed in his duty to uphold Irish and EU law in relation to the processing of personal data by Facebook-Ireland and have repeated this claim to the European Commission, the European Parliament and in public statements. In your letter to us – which you published on your website – you referred to “previous – so far undecided – 22 complaints”, with the implication that we have refused or delayed making such decisions and are thus failing in our legal duty.

Lest there be any further doubt on this issue, the Commissioner wishes to see your complaints finalised as soon as possible. If you are not satisfied that some or all of these complaints have been “amicably resolved” in the context of our detailed audit of Facebook-Ireland (published on our website) - and you are free to reformulate your complaints or to submit fresh complaints if you wish – then you should seek formal decisions from the Commissioner. If you were not happy with these decisions, you would be free to appeal them to the Irish Courts and to seek referral of any disputed points of EU law to the European Court of Justice. Your failure to date to seek such decisions after such a long delay could reasonably lead to a conclusion that you no longer considered them to be valid, hence the reference in my letter.

We have explained to you repeatedly that we follow exactly the same procedure in relation to your complaints as we do in all other complaints we receive. The Data Protection Acts oblige the Commissioner to seek an amicable resolution to any such complaints in an ombudsman-type role. Our procedures are therefore informal and not those of a court. We ensure that both parties have a clear understanding of the issues in dispute without giving direct access to source documentation.

In most cases, we manage to achieve an amicable resolution. In cases where this cannot be achieved between the parties to the complaint – and this may be the case in relation to some or all of your complaints – then the Commissioner issues a formal decision as to whether or not he considers there has been a breach of the Data Protection Acts. Such decisions can be appealed to the Circuit Court - and to higher (and European) courts on points of law - where the more formal procedures of a court apply.

I hope that this letter clarifies the points you have raised. You may also consider it useful to publish this letter in full on your website, together with the letter I addressed to you in relation to Facebook-Ireland.

Yours sincerely,



Ciara O'Sullivan
Senior Compliance Officer

To
Office of the Data Protection Commissioner
Canal House, Station Road
Portarlinton , Co. Laois
IRELAND

Mag. Maximilian Schrems

[REDACTED]
[REDACTED]
AUSTRIA

Vienna, July 25th 2013

Complaint against Facebook Ireland Ltd – 23 “PRISM”

Dear Mrs. O’Sullivan,

Thank you for your letter from yesterday. I am seriously glad to see, that you are taking a different approach than your former colleague and make an effort to explain your actions. This approach will hopefully enable us to work in a way that lowers the work load for the ODPC as well as for us.

On the procedural issues:

1. General Duty to Investigate Complaints:

On your argument that it is up to the sole discretion of the DPC to investigate a complaint based on the word “may”, I want to add the next sentence of s 10 DPA, which you have not cited:

“(b) Where a complaint is made to the Commissioner under paragraph (a) of this subsection, the commissioner shall (i) investigate the complaint or cause it to be investigated

The word “shall” clearly indicates that there is a duty of the DPC to investigate if he received a formal complaint, while s 10(1)(a) DPA is saying that the DPC “may” in general investigate – no matter if there is a complaint or not. This is also reflected in what I was able to derive from the “Nowak” and “Fox” decisions that I have read multiple times since they were published. Both decisions are only saying that the DPC may only dismiss a complaint if it is “frivolous or vexatious”.

“Subsection (2) goes on to require the Commissioner to investigate a complaint” (from Fox v DPC)

Therefore I understand that – unless my online dictionary is outdated – “shall” makes it clear that there is a general duty of the DPC to investigate the matter, if a complaint was filed under s 10 DPA. If there is any other reason to interpret the law in a different way, please let me know about it.

2. Exception from Duty if Complaints are “frivolous or vexatious”:

This general duty is followed by an exception (which also underlines that there is a duty, since there would otherwise be no reason for an exception). This exception may be utilized by the DPC if a complaint is “frivolous or vexatious”.

“the commissioner shall (i) investigate the complaint or cause it to be investigated unless he is of opinion that it is frivolous or vexatious”

If this section of the law is the basis to deny a decision, then I am asking you to clearly indicate that the Irish DPC is seeing a well-grounded complaint against a company that is involved in the PRISM scandal as “frivolous or vexatious”. In line with the recent “three strikes” case I would also expect that the DPC is giving the reasons for such a refusal.

Despite the fact that I would not share this view on material grounds, I would surely accept it from a procedural perspective, if the DPC is claiming this exception. I understand that this exception was also the exception utilized the “Fox” and “Nowak” decisions you have cited in your letter. The decision also literally supports my view that this exception has to be utilized by the DPC:

“Subsection (2) goes on to require the Commissioner to investigate a complaint but only if he does not consider the complaint to be frivolous or vexatious. In the latter case he is not required to investigate the complaint at all.” (from Fox v DPC)

I am however not able to accept a denial of a decision without the DPC claiming this exception, as this is unacceptable under the rule of law to simply deny a legal relief without proper reasons.

➔ ***I am therefore kindly asking you if the complaint was not investigated because the DPC assed it to be “frivolous or vexatious”? I hope you can give me a clear yes/no answer on this question.***

On the material issues:

I found it rather disturbing that the denial of an investigation is based on the fact that the DPC does see “no evidence of a contravention”. It is the basic purpose of an investigation to produce evidence if there is a probable cause. In addition it is clearly upon Facebook Ireland to demonstrate the allegations are false, since Facebook has to ensure an adequate protection of my data in the US.

In a media statement on the refusal of the DPC the European Commission, which has issued the ‘Safe Harbor’ decision, has highlighted that the “*Safe Harbor allows transfers for national security only where they are strictly necessary. The Commission is concerned that PRISM requires data transfers beyond what is strictly necessary for national security.” This is in direct contrast to the blanket approach by the DPC, reflected in a statement your office gave to Reuters: “*If something is agreed by the European Commission for the purpose of providing safeguards, that ticks a box under our jurisdiction.*” The DPC is also putting the “PRISM” program under the realm of “law enforcement”, but there are serious allegations that personal data is used for “spying” which is clearly not covered by the ‘Safe Harbor’ decision. The DPC is also not at all investigating whether the ‘Safe Harbor’ might be unlawful given the revealed facts. A decision can in no way overrule Irish law or Directive 95/46/EG. The DPC has not elaborated at this matter, despite this being the core argument of my complaint.*

Overall the DPC might want to consider, that the ‘Safe Harbor’ is not a blanket allowance to do anything you want, as long as a recipient has self-certified and is raising a “law enforcement” or “national security” argument. Instead the European Commission (as well as other DPCs and experts) has voiced the opinion that there are exceptions and limitations that have to be observed properly.

I would say that there is more than just a “probable cause” that the media reports and political reactions to the PRISM scandal are not just based on a hoax. The US has by now confirmed the existence of the PRISM program. If the DPC is of the opinion that there is no reason to believe that the PRISM scandal has any truth to it, I would kindly ask the DPC to express this clearly.

You are also saying that I have not claimed that my personal data is disclosed to the US. I thought that you would have derived this from the complaint, but if you feel more confident if you would have this claim in plain English, I would hereby like to claim that my personal data was forwarded to the NSA.

In addition I want to mention that s 10(1) of the DPA does not say a complainant has to claim that his rights were infringed in order to file a complaint, but the DPA only says that there has to be a contravention of the law (in contrast to personal rights of the complainant).

➔ ***I can therefore not follow your explanation for the refusal of a decision from a material view and kindly ask you to reconsider it, especially given the clarification from the Commission.***

On the outstanding 22 complaints:

I am sorry if you had the impression that I make the ODPC solely responsible for the fact that the 22 complaints are undecided after almost two years. I am of the opinion however that the ODPC could have made a decision previously, as I have made requests for a formal decision multiple times, that were then refused by your former colleague, claiming that the “audit” has to be completed first and that I do not have a right to ask for a formal decision at that stage.

After this “audit” process I was asked to say if I am happy with the result. I did so in a document submitted on December 4th 2012. The ODPC has only reacted by saying that “they do not comment on the enclosure”. This has frustrated more than a months’ work. There was no reason given by the ODPC on the status of this submission or the reason why there is “no comment”. There were multiple request made in this submission, that the ODPC has apparently ignored. From this point on there was no reason for me to believe that the ODPC would react to any further submissions. I am happy that you now indicate that the ODPC is again open for properly processing any new submission.

I might be able to make a request for a formal decision on some of the complaints in a very short period of time, but previously your former colleague has indicated that he would only process such a request in bulk. Please let me know if this is still the position of the ODPC, otherwise I am happy to submit a request for a formal decision in smaller portions.

In your letter you refer to the different steps of a procedure before the ODPC. I have not been informed that the ODPC has tried to find an amicable resolution in relation to my complaints. In the most recent comments the ODPC has taken the position that all actions in relation to the “audit” were not connected to my complaints. This would mean that the ODPC would now have to take action to find an amicable resolution first. I therefore would ask you what the “status” of my 22 complaints is and if the ODPC is seeing them to be past the “amicable resolution” phase.

If the “amicable resolution” phase is still ongoing I am happy to come to Ireland to have a meeting with the ODPC and Facebook. We had a meeting with Facebook in Vienna, in which they have pledged to at least provide us with further information, but did not live up to their promise. There was no indication by Facebook that they would be willing to change anything of their systems to comply with the law. This meeting was also a private initiative outside of the Irish procedure.

If this “amicable resolution” phase is overcome I do have to insist that a legal decision in this matter has to be based on a solid procedure, which is adhering to proper procedural laws. The recent “three strikes” decision by the Irish Supreme Court is making it clear that a decision by the DPC has to follow similar rules as other government authorities. From this I am confident that any court would find that there needs to be a proper exchange of arguments before the DPC, allowing each party to make its best possible case. I am however in no way questioning whether the ODPC is following the same procedures in my case than in all other cases, but the fact that the ODPC has followed a certain procedure before does not necessarily mean that these procedures are in line with Irish and European law. I want to add that a possibility to appeal to court on *points of law* does in no way waive the duty of the ODPC to properly examine and disclose the *facts* in a procedure before it. It seems obvious that a court cannot even form a decision on points of law, if the facts were not properly established in the first procedure. For a more detailed analysis of Irish and European procedural law I am again referring to my submission from December 4th 2013.

Yours Sincerely,

Mag. Maximilian Schrems



26 July 2013

Mag. Maximilian Schrems



AUSTRIA

Dear Mr. Schrems,

With reference to your letter of today's date, I would make the following points.

In relation to your first point in relation to "**Complaint 23**", we would reiterate that the "Safe Harbor" agreement stands as a formal decision of the EU Commission (decision C2000/520/EC) under Article 25.6 of the Data Protection Directive 95/46/EC that the agreement provides adequate protection for personal data transferred from the EU to the USA. Section 11(2) of the Irish Data Protection Acts which we consider faithfully reflects our obligations to accept "adequacy" decisions provides that "Where in any proceedings under this Act a question arises - (i) whether the adequate level of protection specified in subsection (1) of this section is ensured by a country or territory outside the European Economic Area to which personal data are to be transferred, and (ii) a Community finding has been made in relation to transfers of the kind in question, the question shall be determined in accordance with that finding". The Commissioner has concluded that, as Facebook-Ireland is registered under the Safe Harbour arrangement, and as this provides for US law enforcement access, there is nothing for this Office to investigate.

In relation to your other **22 complaints**, we consider that the status of those complaints at this time constitute allegations of non-compliance by Facebook-Ireland (FB-I) with Irish Data Protection law and which we understand you consider were not resolved by the audit process we undertook. Other matters which you have highlighted in relation to these complaints concern other generalised allegations that this Office has failed to discharge our duties under Irish and EU law.

We are therefore still awaiting your request for formal decisions on these existing 22 complaints. I would also advise that you are free to submit requests for decisions on a piecemeal basis or in bulk.

If you wish to submit new complaints about other alleged FB-I failures to comply with the Data Protection Acts, we will assess those matters and if we deem them to be valid complaints concerning data protection contraventions we will proceed to investigation where required in accordance with our normal procedures, involving referral to FB-I in the "amicable resolution" procedure in the first instance and subsequently to a formal decision if you so request where you are not satisfied with the outcome of the amicable resolution process.

I can also advise that we have no plans to change our procedures and so this is something you may wish to challenge as part of any referral of matters by you to the courts.

As previously advised, we are anxious to have the process completed as soon as possible, including referral to the courts by you of any remaining issues of contention.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Ciara O'Sullivan', with a stylized flourish at the end.

Ciara O'Sullivan
Senior Compliance Officer

To
Office of the Data Protection Commissioner
Canal House, Station Road
Portarlinton , Co. Laois
IRELAND

Mag. Maximilian Schrems



AUSTRIA

Vienna, July 28th 2013

Complaint against Facebook Ireland Ltd – 23 “PRISM”

Dear Mrs. O’Sullivan,

Thank you for your letter from past Friday. I am sorry to see that my hopes for clear answers were not met by your response, but you chose to rather not address my questions.

In this letter I will only concentrate on the recent complaint “23 PRISM” to not further complicate these documents. I will however send you a separate letter on my other complaints soon.

I want to summarize the following things and ask you to indicate if there is any form of a misunderstanding on my side. As a matter of fairness I want to let you know that this is intended to be the basis for a Judicial Review, which we are intending to file with the High Court after clarifying remaining procedural matters.

If I do not get a meaningful answer within this week I take it that I understood you correctly concerning my complaint on Facebook Ireland’s alleged involvement in the “PRISM” program. If you feel that despite my efforts I misunderstood your position I kindly ask you to indicate exactly in what point I misunderstood you and correct my misunderstanding. The reason why I am highlighting this is because from previous correspondence I had to learn that the ODPC is usually giving general and vague answers whenever I am asking for a clear word on your position. I therefore kindly ask you to stand up for your position and to not engage in any tactics that could lead to the impression that the DPC wants to obscure its position.

Form our correspondence I understand that the DPC is claiming the following:

- a) The DPC is of the opinion that it is under his sole discretion to investigate a formal complaint under s. 10 DPA. This is based on the word “*may*” in s. 10(1) DPA The word “*shall*” in s. 10(2) DPA does not lead to a duty to investigate complaints. This also means there is no duty to investigate a complaint whatsoever, no matter if they are “frivolous or vexatious” or not. (Letter from July 25th)

- b) The DPC does not feel that my complaint was “frivolous or vexatious” within the meaning of s. 10(2) DPA, but is only denying the processing of my complaint on what I have described above. (No response on this question raised in my letter from July 25th)
- c) The DPC has based his (proclaimed) discretion to not investigate my complaint only on the following analysis:
- I. The DPC feels that the “Safe Harbor” requirements have been fully met, based only on the fact that “Facebook Inc.” is appearing on the “Safe Harbor” list. (Letter from July 26th)
 - II. The DPC feels that there is no need to inquire whether the “Safe Harbor” applies in this specific situation, if exceptions are triggered or if the “Safe Harbor” might in this situation be not in line with the underlying Directive 95/46/EG. (Letter from July 23rd and 26th)
 - III. The DPC feels that the European Commission has “*envisaged and addressed*” programs like the PRISM Program when delivering the Safe Harbor decision in 2000 and there is no need to elaborate about this. (Letter from July 23rd)
 - IV. The DPC is maintaining the position as explained above (III.) despite the comment from the Commission (“*Safe Harbour allows transfers for national security only where they are strictly necessary. The Commission is concerned that PRISM requires data transfers beyond what is strictly necessary for national security.*”) and the German DPCs that do not share this view.
 - V. The DPC considered that I was unable to provide evidence that the NSA has accessed my data through “Facebook Inc”. (Letter from July 25th)
 - VI. The DPC considered that I was (allegedly) not claiming that my data was forwarded to the NSA and has considered that I clarified this point. (Letter from July 25th and my response from July 25th)
 - VII. The DPC does not see the need to consider any other arguments made in my initial complaint like the question of “purpose limitation” or “proportionality”. The DPC does also not see the need to address any other legal principles that could hinder such data export. (No response in your letters to these claims or legal principles)
- [Note: The DPC has voiced other arguments in the media, but I did not personally receive any such arguments, which is why I understand that they were of political nature, but not basis for the refusal of a decision.]
- d) The DPC has raised the issue with “Facebook Ireland” concerning this complaint but does not feel the need to share the reaction with me. (Interview by Billy Hawkes on RTE Radio)

If there is anything more you want to add in relation to my complaint against Facebook concerning the PRISM project, please do not hesitate to add anything you would wish to add at this point. Thank you for any additional clarification!

Kind Regards,

Mag. Maximilian Schrems

To
Office of the Data Protection Commissioner
Canal House, Station Road
Portarlinton , Co. Laois
IRELAND

Mag. Maximilian Schrems

[REDACTED]

[REDACTED]

AUSTRIA

Vienna, July 29th 2013

Complaint against Facebook Ireland Ltd – 23 “PRISM”

Dear Mrs. O’Sullivan,

You were now sending me the fifth (!) letter, without really answering to my questions. One could get the impression the DPC is afraid to take one or the other position, but I was glad to note that you do not disagree with the summary I made in my previous letter.

If you are referring to the case “*Nowak -v- The Data Protection Commissioner*”, delivered by Judge Birmingham I cannot see that this applies to cases where the DPC has not formed the view that a complaint is “frivolous or vexatious” as the case is only referring to such a situation. Correct me if I missed out on a detail. In any other case I understand that this case does not apply to my situation.

You go on to say that the DPC has – in your view – the right not to investigate a complaint either based on your understanding of the word “may” in s 10(1)(a) DPA or based on s 10(1)(b)(i) DPA. If you refer to s 10(1)(b)(i) DPA I understand that you are referring to the words “*unless he is of the opinion that it is frivolous or vexatious*”.

As you are not indicating that the DPC has used another basis than your understanding of s 10(1)(a) DPA and the word “may” I understand that you are only basing the refusal on this interpretation. This can be clearly followed as you only say that both “provide a basis” in general, but you do in no way indicate that the latter was the actual basis in my case, while you have indicated in previous letters that the DPC’s decision in my case was based on the word “may” in s 10(1)(a) DPA.

I also asked you in my previous letter to clearly state if I misunderstood you concerning a number of facts. I cannot see that you did state (clearly or in any other way) that my understanding is incorrect, which is why I am happy to note that none of the points I made in my letter from July 28th 2013 are contested by the DPC. I highlight that my complaint was not turned back because the DPC formed the view that it was “frivolous or vexatious”, but because the DPC is of the opinion that it is under his sole discretion to prosecute a complaint (based on the word “may” in s 10(1)(a) DPA).

This also means that I have no further questions regarding this case as of now. If you feel like you want to add anything, feel free to contact me at any time.

Kind Regards,

Mag. Maximilian Schrems



30 July 2013

Mag. Maximilian Schrems



AUSTRIA

Dear Mr. Schrems,

With reference to your letter of 29th July 2013, please see the following points.

As previously stated, we consider that we have set out our position clearly in previous correspondence and the fact that we choose not to comment on all arguments you have presented should not be taken to mean that we agree with them. We therefore reserve the right to argue them as necessary in the course of judicial review proceedings.

To be clear we remain of the position that there is a basis within the Data Protection Acts 1988 and 2003 for the Commissioner to make a determination not to investigate a complaint and that in Judicial Review proceedings **we reserve the right to seek to rely on Sections 10 (1) (a), 10 (1) (b) (i) or a combination thereof or indeed any other relevant legal basis**, including previous High Court decisions, in defending our position on this point or, should it arise, defending our position that there is no basis for an investigation of this complaint ("Complaint 23").

Please be advised that we can no longer respond in detail to further correspondence where you seek to summarise or limit our position in this matter and instead we will refer you to our correspondence to date on this matter.

Yours sincerely,

Ciara O'Sullivan
Senior Compliance Officer