An Coimisinéir Cosanta Sonraí
Data Protection Commissioner

Mag. Maximilian Schrems
Schadekgasse 2/13
1060 Wien
Austria

11 October 2013

RE: Complaint against Facebook Ireland Limited (PRISM)

Dear Mr. Schrems,

I refer to your letter of 7 October 2013 in relation to your Complaint #23, titled "PRISM".

Under Section 10(1)(a) of the Data Protection Acts, 1988 and 2003 ("the DP Acts"), the Commissioner may investigate, or cause to be investigated, whether any of the provisions of the DP Acts have been, are being, or are likely to be contravened, either where an individual files a complaint with this office of a contravention of any of those provisions, or the Commissioner is otherwise of the opinion that there may be such a contravention.

In this case, and for the reasons set out in previous correspondence, the Commissioner declined to exercise his above-referenced statutory power of investigation. He took this course having formed the opinion that the Complaint was not admissible on the grounds that it was *"frivolous and vexatious"* within the meaning of that term as used in Section 10(1)(b)(i).

While fully satisfied that the basis upon which the Commissioner formed his opinion has been clearly set out in correspondence (specifically, the correspondence issued by this office on 23 July 2013, 24 July 2013 and 25 July 2013), I am taking this opportunity to re-state the Commissioner's position in relation to the Complaint to ensure there is clarity between us.

Preliminary Point

As a preliminary point, I would emphasise that the term *"frivolous and vexatious"* is not used in any pejorative sense. The term bears a very particular meaning when used in a legal context, separate and distinct from the ordinary meaning of the words as used in non-legal contexts. In a legal context, and for the purposes of Section 10(1)(b)(i) of the DP Acts, the words mean that the Complaint is futile, misconceived, academic and/or not capable of being sustained.

Basis for the Commissioner's opinion

As previously advised, Section 11 of the DP Acts addresses issues relating to the transfer of personal data by a data controller based in Ireland to a country or territory outside the European Economic Area (typically referred to as "a **Third Country**"). In general terms, Section 11(1) provides that such transfers "may not take place unless [the Third Country] ensures an adequate level of protection for the privacy and the fundamental rights and freedoms of data subjects in relation to the processing of personal data having regard to all the circumstances surrounding the transfer ..." The section goes on to list a number of specific circumstances to which regard may be had in this context.

Independently of the DP Acts, a mechanism operates at European Union level whereby, under a procedure provided for at Article 31(2) of Directive 95/46/EC of the European Parliament and of the Council, the European Commission is authorised to make findings under Article 25(6) of the Directive to the effect that the level of data protection provided for personal data processed in a particular Third County is adequate.

Recognising the European Commission's competence in the designation of Third Countries having in place adequate levels of data protection, Section 11(2) of the DP Acts provides that, where, in any proceedings under the DP Acts, a question arises as regards the adequacy of the level of data protection available in a particular Third Country, that question "shall be determined in accordance with" any finding of the Commission referable to that Third County.

By a decision adopted on 26 July 2000 (Decision No. 520/200/EC), the European Commission determined that,

> "For the purposes of Article 25(2) of Directive 95/46/EC ... the "Safe Harbour Privacy Principles" (hereinafter "the Principles"), as set out in Annex 1 to this Decision, implemented in accordance with the guidance provided by the frequently asked questions (hereinafter "the FAQs") issued by the US Department of Commerce on 21 July 2000 ... are considered to ensure an adequate level of protection for personal data transferred from the Community to organisations established in the United States, having regard to the following documents issued by the US Department of Commerce ..."

As a result, a data controller established in Ireland (or any other member state within the European Economic Area) may lawfully transfer personal data to an entity established in the United States provided that the entity in question (a) subscribes to (and complies with) the Principles, and (b) implements the guidance contained in the FAQs.

Amongst other things, the Principles expressly provide that they shall be interpreted in accordance with U.S. law. Compliance with their terms is likewise to be assessed under U.S. law. The Principles also expressly provide that *"Adherence to these Principles may be limited: (a) to the extent necessary to meet national security, public interest, or law enforcement requirements ..."*

Accordingly, the position is that, by means of Decision 520/2000/EC, the European Commission has made a finding to the effect that personal data may be transferred from the European Economic Area to the United States, notwithstanding the fact that the application of the Principles may be abridged to meet the particular interests identified above.

Facebook Inc. is established in the United States and has elected to bind itself to adhere to the Principles and to implement the guidance contained in the FAQs. Consequently, the company is deemed to provide adequate levels of protection for personal data transferred to it by data controllers located in the European Economic Area. It follows that Facebook Ireland Limited may lawfully transfer personal data to Facebook Inc.

For these reasons, details of which were previously set out in the correspondence issued by this office on 23 July 2013, 24 July 2013 and 25 July 2013, the Commissioner formed the opinion that a complaint to the effect that the transfer of personal data by Facebook Ireland Limited to Facebook Inc. gives rise to a contravention of the DP Acts was not capable of being sustained and, as such, the Complaint was *"frivolous and vexatious"* within the meaning of that term as used in Section 10(1)(b)(i) of the DP Acts. Accordingly, the Commissioner declined to exercise the statutory power to investigate vested in him by Section 10(1)(a) of the DP Acts.

In making this assessment, the Commissioner also noted that no evidence had been submitted to his office that your personal data had in fact been disclosed to any U.S. security or other authority. In fact, no assertion was made by you in your complaint to the effect that any such disclosure had been made concerning personal data relating to you.

Judicial Review

I note from your letter of 7 October 2013 that that you do not accept the Commissioner's opinion that your complaint is not capable of being sustained or (to use the language of Section 10(1)(b)(i)) that your complaint is "frivolous or vexatious".

I note that you intend to challenge that opinion by way of judicial review proceedings and, further, that in the context of those proceedings, you intend to ask the Court to make an order insulating you from the costs risks associated with the commencement and conduct of your legal action.

Clearly, it is a matter for you to decide whether you consider that your legal rights have been affected in a way that requires the intervention of the Court, whether by way of judicial review proceedings, or otherwise. Likewise, it is a matter for you, together with your legal advisors, to decide whether it would be appropriate to seek the protection of the Court in relation to the question of costs.

For the reasons set out in this letter, however, I am to instruct you that the Commissioner is satisfied that the opinion he formed in relation to your complaint is both correct and sustainable, and that course of action pursued by him was likewise consistent with the provisions of sub-sections 10(1)(a) and 10(1)(b) of the DP Acts. That being so, I must advise you that the Commissioner intends to oppose any judicial review proceedings issued by you.

In relation to the question of costs, the position is that the Commissioner cannot agree to underwrite the costs of proceedings which, as a matter of principle, he considers to be misconceived. Ultimately, it will be a matter for the Court to determine how its discretion on the question of costs should be exercised, the Court having first decided your case, and having considered such submissions as may be made by the parties in relation to the costs consequences flowing from that decision. In all of these circumstances, the Commissioner does not intend to make a proposal to you on the question of costs. Nor will he be in a position to consent to any application you make for a protective costs order.

I trust you will note the position.

Yours sincerely,

Ciara O'Sullivan
Senior Compliance Officer