THE HIGH COURT
JUDICIAL REVIEW

Record No. 2013/765/JR

BETWEEN:

MAXIMILIAN SCHREMS

APPLICANT

AND

DATA PROTECTION COMMISSIONER

RESPONDENT

NOTICE OF MOTION

TAKE NOTICE that on the 10th day of December, 2013, at 11.00 o'clock in the forenoon or at the first available opportunity thereafter, Counsel appearing on behalf of the Applicant herein will apply to the this Honourable Court sitting at the Four Courts, Inns Quay, Dublin 7, for the following Reliefs:

1. A Declaration that the failure or refusal of the Respondent to investigate a complaint filed by the Applicant with the Respondent on the 25th June 2013 in respect of Facebook Ireland Limited and "PRISM" (hereinafter referred as "the complaint") is unlawful.

2. An Order of mandamus compelling the Respondent to investigate the complaint and make a formal decision under Section 10(1)(b) Data Protection Act (DPA).
3. An order of certiorari quashing the decision of the Respondent expressed in the letter dated the 23rd of July 2013 (hereinafter referred to as "the refusal decision") to refuse to investigate the complaint.

4. The costs of these proceedings.

WHICH APPLICATION will be grounded upon this Notice of Motion and the Proof of Service thereof on the Respondent, the grounding Affidavit of Maximilian Schrems sworn 21st day of October 2013 and the exhibits thereto (a copy of which is served herewith), the Statement required to ground application for Judicial Review herein, the Order of this Honourable Court (His honour Mr. Justice Keane) dated the 21st day of October 2013 granting leave herein (a copy of which is served herewith), the Affidavit of Service thereof, the nature of the case and the reasons to be offered and the evidence to be adduced at the hearing of this motion.

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RESPONDENT

STATEMENT REQUIRED TO GROUND APPLICATION FOR JUDICIAL REVIEW

(A) APPLICANT'S NAME:

Mag. Maximilian Schrems;

(B) APPLICANT'S ADDRESS & (G) APPLICANT'S ADDRESS FOR SERVICE:

[redacted] Vienna, Austria;

(C) APPLICANT'S DESCRIPTION:

PhD-Student at School of Law of the University of Vienna;
Austrian Citizen; Born [redacted]

(D) RELIEF SOUGHT:

1. A Declaration that the failure or refusal of the Respondent to investigate a complaint filed by the Applicant with the Respondent on the 25th June 2013 in respect of Facebook Ireland Limited and "PRISM" (hereinafter referred as "the complaint") is unlawful.
2. An Order of mandamus compelling the Respondent to investigate the complaint and make a formal decision under Section 10(1)(b) Data Protection Act (DPA).
3. An order of certiorari quashing the decision of the Respondent expressed in the letter dated the 23rd of July 2013 (hereinafter referred to as "the refusal decision") to refuse to investigate the complaint.
4. The costs of these proceedings.

(E) GROUNDS UPON WHICH SUCH RELIEF IS SOUGHT:

Grounds 1-3

1. By relying to the extent that was done on the EU Commission Decision C2000/520/EC the Respondent unlawfully fettered his own discretion. It was irrational to rely upon this Decision in circumstances where the Applicant's complaint is specifically contesting its validity and arises from facts that were unknown or did not exist at the date of EU Commission Decision C2000/520/EC. EU Commission Decision C2000/520/EC can no longer represent good law in the light of those revelations and the passage of time and by reference to higher ranking law (Directive 95/46/EC, Article 8 ECHR and Article 8 CFR). In addition the Responded did not consider the limitations of exceptions in the EU Commission Decision C2000/520/EC
2. The opinion of the Respondent that the complaint was frivolous and vexatious was irrational in the light of the evidence put forward. In circumstances where it was brought to the attention of the Respondent that other Data Protection Commissioners in other EU states were treating similar and almost identical complaints very seriously and that the European Commission is reviewing its Decision C2000/520/EC it was irrational and unreasonable for the Respondent to form such an opinion as expressed in the decision and to base a refusal to investigate thereon.
3. The refusal to investigate the Applicant's complaint was in breach of EU law, in particular the provisions of Directive 95/46/EC and Article 8 CFR. Article 25(1) of Directive 95/46/EC requires a member state to ensure that a transfer of data may only take place where the destination third country ensures an adequate level of protection. In the light of the recent revelations concerning spying by the intelligence services of the United States of America and the making available on a large scale of private data to the said intelligence services it was irrational for the Respondent to conclude or be satisfied that, in the United States of America, an adequate level of protection was in place.
4. The Respondent erred in law in ascribing the meaning to the words "frivolous and vexatious" in the context of the Data Protection Acts as set out in the letter of the 11th October 2013. The Respondent acted unlawfully in ascribing a certain meaning to those words when the Respondent's published policy and case law ascribes a different meaning to them.
5. The opinion of the Respondent that the complaint was frivolous and vexatious was irrational in the light of the claims made. The Respondent has not assessed the claims made, but based his opinion on matters that are irrelevant to the claims by the Applicant.
6. It was ultra vires the power of the Respondent to refuse to consider the Applicant's complaint in circumstances where there was no valid basis to consider the Applicant's complaint as being "frivolous and vexatious".
7. The Respondent failed to carry out any proper level of investigation as to whether the complaint was frivolous and vexatious and thereby failed in his duty to investigate.
8. The decision not to investigate the Applicant's complaint was arrived at in breach of the Applicant's fundamental right to be heard. The core aspects of the complaint were not considered at all.
9. The decision was based on irrelevant factual considerations. In particular and without prejudice to the generality of the foregoing the question of whether the Applicant's own data was transferred to a third country was of no relevance to the claim made and the refusal to consider the Applicant's complaint.

10. The decision to refuse to investigate the Applicant's complaint was arrived in breach of the principle of good administration. No proper reasons were provided for reaching the decision. Numerous arguments put forward by the Applicant in his complaint were not addressed at all. In particular and without prejudice to the generality of the foregoing no regard was had to the argument of the Applicant in relation to the validity of Decision C2000/520/EC and the scope of its exceptions, "purpose limitation" and "proportionality" as set out in the applicant's complaint. Furthermore had the Applicant's right to good administration been respected and applied then a different and more favourable decision might have been arrived at in respect of the Applicant's Complaint.
11. The refusal to investigate the Applicant's complaint placed an unlawful obstacle in the way of the Applicant's attempt to exercise EU law rights.
12. The Respondent misinterpreted the Data Protection Acts, and particularly section 10 (1) (a) and 10 (1) (b) thereof, and the legal effect thereof, in arriving at the decision not to investigate.
13. Insofar as the rights contained in the ECHR constitute general principles of European law and otherwise then the refusal to investigate the Applicant's complaint was in breach of the Applicant's rights under Articles 6 and 8 thereof.

(F) Name and address of Applicant's Solicitors:

Ahern Rudden Solicitors, 5 Clare Street, Dublin 2.

Dated this day of October 2013

Signed: _____

Ahern Rudden,

Solicitors,

5 Clare Street,

Dublin 2.

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RESPONDENT

AFFIDAVIT OF MAXIMILIAN SCHREMS

I, Maximilian Schrems, Phd Student, of [redacted] Vienna, Austria, aged 18 years and upwards make oath and say as follows:

1. I am the Applicant herein and I make this affidavit from facts within my own knowledge, save where otherwise appears, and where so otherwise appears I believe those facts to be true and accurate. I make this affidavit to verify the facts set out in the Statement Required to Ground Application for Judicial Review herein and I hereby so verify same. I say that I am a fluent speaker of English and I understand the contents of the within proceedings and this affidavit.

2. I am an Austrian citizen, born in Salzburg, Austria on [redacted] I am a PhD student (German: Doktorat) at the University of Vienna specializing in data protection law.

3. In this capacity I have published my first book on the use of CCTV under the Austrian Data Protection Act in 2011 and hold lectures (e.g. at Universities or law conferences) on a regular basis. In the past years I have especially dealt with and researched the use of personal data of European consumers by American based corporations.

4. I am also a user of the social network “facebook.com”. I have (with others) started an NGO called “europe-v-facebook.org” that has, since 2011, been making complaints to the Respondent relating to “Facebook Ireland Limited” because of different breaches of the Irish Data Protection Acts and Directive 95/46/EC which I assert have occurred. These previous complaints are still undecided and are not in issue in these proceedings.

5. From June 6th 2013 the British “Guardian” newspaper and the “Washington Post” have published a series of leaked documents that uncovered the so called “PRISM” surveillance system, operated by the United States National Security Agency (NSA). Other media has published further documents in the following weeks and months. I beg to refer to a true copy of an article published on the Guardian Webpage on the 6th day of June 2013 and an article published on the Washington Post Webpage on the 6th day of June 2013 by way of example upon which pinned together and marked with the letters and number “MS1 I have signed my name prior to the swearing hereof. These and other reports are overall alleging that the NSA has not only wiretapped global communication networks, but also gained direct access to data held by American internet companies, including Facebook, who cooperated with the NSA. Contrary to the practice in most EU states, this form of access was reported to be a direct access to the servers. The system reportedly also allowed access in bulk and not only access to the data of individual suspects upon probable cause.

6. When the “XKeyScore” spy software was later uncovered it was shown that Facebook chats could be directly searched by US intelligence. I beg to refer to a true copy of an article published on the Guardian Webpage on the 31st day of July 2013 and an article published in the Washington Post on the 6th day of June 2013 by way of example upon which pinned together and marked with the letters and number “MS2 I have signed my name prior to the swearing hereof.

7. Such access happened under Section 702 of the US FISA Amendments Act of 2008 where the secret “U.S. Foreign Intelligence Surveillance Court” has issued secret court orders that allow for mass harvesting of personal data without probable cause. I beg to refer to a true copy of an article published on the New York Times Webpage on the 6th day of July 2013 and a statement of the US Director of National Intelligence published on the 6th day of June 2013 by way of example upon which pinned together and marked with the letters and number “MS3 I have signed my name prior to the swearing hereof. In contrast to the European human rights approach (which

protects all people), the US Constitution does not protect the privacy of foreigners that live outside of the United States.

8. The PRISM system was reported to happen in cooperation with the named companies and placed under a so-called “gag order”, which prohibited the involved companies from disclosing anything that relates to the program. To the best of my knowledge most companies involved originally denied any involvement in the program. The American government on the other hand has not denied the existence of PRISM, but has rather sought to justify it. Overall there is little doubt about the existence of this program by now, while the exact details and functioning of the system are not fully clear.

9. The matter is clearly one of the most important public debates of this year. For weeks all worldwide news were dominated by this matter. Politicians in all countries and on all levels have dealt with this issue of general public importance.

10. One of the companies named in disclosures was “Facebook”. Very likely this meant “Facebook Inc.”, based in the United States of America (USA). Legally all users outside of the USA and Canada have a contract with “Facebook Ireland Limited” (based in Dublin, Ireland), not its parent company “Facebook Inc.” (based in Menlo Park, California, USA).

11. Based on the arrangements that are in place as between “Facebook Ireland Limited” and “Facebook Inc” in respect to personal data “Facebook Ireland Limited” is the “data controller” of all data of users that reside outside of the USA and Canada. The data controller’s powers and duties are set out in the Data Protection Acts 1988 and 2003 which, *inter alia*, transpose the provisions of Directive 95/46/EC into domestic law.

12. I say and believe that European data, including my personal data, is not safe from access through the PRISM program by the USA authorities. “Facebook Ireland Limited” is itself not operating any data centers or processing facilities as it has outsourced the actual processing of its users’ data back to its parent company “Facebook Inc”. Europeans’ data on Facebook is therefore actually processed in data centers in the USA. Only recently Facebook has also opened a European data center in Sweden, but to the best of my knowledge information and belief these centers are interconnected and Europeans’ data is still exported to the USA. “Facebook Inc” is consequently considered the “data processor” under the control of “Facebook Ireland Limited”.

13. This forwarding of data is considered a “transfer of data” and in this case it is in addition a transfer to a third country outside of the European Economic Area (EEA) which falls under special restrictions in order to keep Europeans’ data protected (data export).

Complaint to the Data Protection Commissioner

14. After carrying out extensive research I formed the view that this seemingly unlimited access to European users’ data without probable cause would be contrary to EU law. I therefore filed a complaint on June 25th 2013 with the Respondent against “Facebook Ireland Limited” for breach of the provisions of Irish Data Protection Act and Directive 95/46/EC. I beg to refer to a true copy of my said Complaint upon which pinned together and marked with the letters and number “MS4” I have signed my name prior the swearing hereof.

Similar Complaints in Ireland, Luxemburg and Germany

15. On the same day I have also filed another complaint against “Skype Software S.à.r.l.” and/or “Skype Communications S.à.r.l.” with the Luxemburg Data Protection Commission (“Nationale Kommission für den Datenschutz”).

16. Two other colleagues of mine have in addition filed three more complaints against „Apple Distribution International” with the Irish Data Protection Commissioner, against “Yahoo! Deutschland GmbH” with German Data Protection Commissioners (first the „Bayrisches Landesamt für Datenschutzaufsicht“, which was then forwarded to the „Bundesbeauftrageter für den Datenschutz“) and against “Microsoft Luxemburg S.à.rl.” with the Luxemburg Data Protection Commission (“Nationale Kommission für den Datenschutz”).

17. All five complaints were drafted very similarly in English (for Ireland) and German (for Luxemburg and Germany). I beg to refer to true copies of these other complaints upon which pinned together and marked with letters and number “MS5” I have signed my name prior the swearing hereof.

18. The core of all of the aforesaid complaints was the argument that Article 25 Directive 95/46/EC is only allowing a transfer to a non-EEA country (data export) if an “adequate level of protection” is ensured.

19. I felt that after the revelations by the media, in particular the Guardian and the Washington Post, that there was more than just reasonable doubt that an “adequate level of protection” can be ensured when data is processed in the USA by “data processors” that cooperate with the NSA in the PRISM program. I am of the opinion that an unlimited, secret collection of personal data, without any probable cause cannot be in compliance with Article 8 ECHR. In the assessment of an “adequate protection” I also relied on the findings in WP12 of the Article 29 Working Party. I beg to refer to a true copy of the WP12 upon which pinned together and marked with the letters and number “MS6” I have signed my name prior the swearing hereof. The Article 29 Working Party is constituted of all European Data Protection Authorities and tries to find a common understanding of Directive 95/46/EC throughout the European Union.

20. Directive 95/46/EC enables the European Commission to find in a decision that certain countries that are not in the EEA have an “adequate level or protection”. This was for example found for countries like Argentina, Switzerland or Canada. I understand that no such finding by the European Commission has been made in this regard in respect of the USA.

21. In 2000 the European Commission, in EU Commission Decision C2000/520/EC, found that US companies that “self-certified” under “Safe Harbour” deliver an “adequate level of protection”. I beg to refer to a true copy of the Safe Harbour Decision upon which pinned together and marked with the letters and number “MS7” I have signed my name prior the swearing hereof.

22. All companies I and my colleagues have filed complaints against have made use of the “Safe Harbour” Decision. “Facebook Inc” has also self-certified with the US Department of Commerce to respect the “Safe Harbor Principles” and is therefore generally operating under the “Safe Harbor” Decision, which generally says that they provide an “adequate level of protection”.

23. It is my view that the Safe Harbour Decision must be in line with Article 25 of Directive 95/46/EC, Article 8 ECHR and Article 8 of the Charter of Fundamental Rights of the European Union (CFR) and that its validity is always subject to higher ranking law and to any changes in circumstances such as have arisen in the light of the PRISM revelations..

24. In my view self-certification by companies such as “Facebook Inc” should not lead to transfer of data outside the EEA and a blanket allowance to those companies to disclose private data of

European citizens, including myself, to foreign authorities which appears to be what is happening.

25. In addition to the question if data is "adequately protected" when it is exported, I have also relied on the "SWIFT" working paper by the Article 29 Working Party. This working paper is naming a number of other data protection principles that have to be satisfied to make a transfer to the USA legal under Directive 95/46/EC. These are namely the principle of "purpose limitation" and "proportionality". I beg to refer to a true copy of the Working Paper 128 upon which pinned together and marked with the letters and number "MS8" I have signed my name prior the swearing hereof.

26. Overall my complaint is comprised of three main arguments: a) that the "Safe Harbor" is to be interpreted to prohibit EU companies to forward data to a US based entity where there is a possibility that it forwards all data to the NSA in bulk and b) that if this is not the case then the "Safe Harbor" might be not in line with superior law. In addition I argued c) that other sections of the Irish Data Protection Acts and the parent Directive 95/46/EC prohibit such mass surveillance based on the "SWIFT" case.

Investigations by Luxemburg and German Data Protection Authorities

27. The authorities in Luxemburg and Germany have subsequently confirmed that they have started an investigation. The German Federal Data Protection Commissioner has asked "Yahoo Deutschland GmbH" to respond to the accusations. Since then the equivalent procedures in Luxemburg and Germany are running. On the 11th day of October 2013 the Guardian newspaper reported that the Luxemburg Data Protection Authority investigated Skype's involvement in "PRISM". It was later confirmed that this was based on our complaints. I beg to refer to a true copy of the Article by the Guardian and the emails received from the Luxemburg and German DPC upon which pinned together and marked with the letters and number "MS9" I have signed my name prior the swearing hereof.

Denial of Investigation by the Data Protection Commissioner

28. On July 23rd 2013 the Respondent informed me that he does not feel that "Facebook Ireland Limited" has breached the law. In a further email dated July 24th 2013 the Responded has clarified that are no grounds for an investigation. A procedure was not opened and a legal decision (subject to a statutory appeal under the Irish Data Protection Act) was therefore not

made. I beg to refer to a true copy of this letter and email from the Respondent dated the, 23th July 2013 and 24th July 2013 upon which pinned together and marked with letters and number "MS10" I have signed my name prior the swearing hereof.

29. I say that the Respondent was relying on the fact that "Facebook Inc" has self-certified under the "Safe Harbor" in the letter of the 23rd July 2013 and that the "Safe Harbor" was allowing for the use of Europeans' data for "national security" or "law enforcement".

30. At the same time, all matters I brought up in my complaint were apparently not considered. The fact that my complaint was raising the question of the scope of these exceptions and whether the "Safe Harbor" decision is in compliance with higher ranking law was not dealt with, as well as my claims based on the "SWIFT" working paper.

31. I was insisting that under section 10(1)(b) Irish Data Protection Act and EU law the Respondent has a duty to decide on complaints one way or another, unless they are "frivolous or vexatious". Asked if my complaint was considered to be "frivolous or vexatious" the Respondent, at that stage, did not respond.

32. On October 11th 2013 I received another letter from the Data Protection Commissioner dated the 11th October 2013 exhibit above in response to a short letter asking about an agreement on costs for this Judicial Review process. In this letter the Commissioner has for the first time argued explicitly that my complaint was in his opinion "frivolous or vexatious". In this letter the Respondent has interpreted these words as meaning "futile, misconceived, academic and/or not capable of being sustained". The Respondent only dealt with the fact that "Facebook Inc." has self-certified under the "Safe Harbour". All other matters raised in the complaint concerning other duties under the law and the legality of the "Safe Harbour" decision were not considered.

33. Furthermore I say that the Respondent on the website of the DPC has indicated that the words "frivolous and vexatious" have a different interpretation ("not serious") to that applied by the Respondent in his letter of the 11th October 2013 and in this regard I beg to refer to a true copy of a printout of an extract from what is published on the said website upon which pinned together and marked with letters and number "MS11" I have signed my name prior the swearing hereof.

34. In an interview with Reuters on the 25th day of July 2013 a Spokesperson for Respondent said that the fact that a recipient of data in the USA has self-certified "ticks a box" for the Commissioner, which would appear to mean that the Respondent, as a matter of practice, will look no further than the fact of "self-certification" as a justification for considering that where self-certification has occurred the complaint will automatically be frivolous and vexatious in the eyes of the Respondent and that no investigation would commence. I beg to refer to a true copy of a transcript of that interview as retrieved from the Reuters webpage upon which pinned together and marked with the letters and number "MS12" I have signed my name prior the swearing hereof.

35. In an interview with RTÉ Radio on the 10th day of June 2013 and two interviews with RTÉ Radio and RTÉ Television on the 26th day of July 2013 the Data Protection Commissioner made similar statements and also argued that the access to data would be in many ways more liberal in Europe than under the PRISM program. While the Data Protection Commissioner has argued in his letter of July 25th 2013 that there was no evidence for the existence of the PRISM program the interviews with RTÉ in my view leaves no question about the fact that the Commissioner was convinced that the PRISM program exists. I beg to refer to true copies of transcripts of those interviews that were available online or recoded from the radio upon which pinned together and marked with the letters and number "MS13" I have signed my name prior the swearing hereof.

36. In these interviews the Data Protection Commissioner has also said that he is not to question EU law like the "Safe Harbor" decision and he would be "bound by it" and there would be "nothing to investigate". Thereby he has ignored that such decisions are not absolute and may be contested by a citizen that feels that such decisions are incompliant with higher ranking law or fundamental rights. This was exactly the point of my complaint, but was totally ignored by the Respondent. The Respondent has also not referred to, or, seemingly, considered that there may be limitations to the applicability of EU Commission Decision C2000/520/EC in the light of superior law and changed circumstances.

37. Overall I got the impression that the Data Protection Commission was not investigating the merits of the complaint but wanted to get this "hot potato" off the table without making any decision. He seemed to have rather taken the way of least resistance than take a clear position.

By not making any formal decision he has also brought about a situation where his decision (not to investigate) is not subject to an appeal to any Court.

Reactions by other Data Protection Authorities and the European Commission

38. The European Commission has in a response to the actions by the Irish Data Protection Commissioner clarified its position. In an interview the Commission has said that the "Safe Harbor" is only allowing for what is "strictly necessary" for purposes of "law enforcement" or "national security". I say that this must be interpreted to mean that the authority that has issued the "Safe Harbor" decision (C2000/520/EC) has clearly disassociated itself from the interpretation of the Respondent in regard to the applicability of "Safe Harbour" Decision. I beg to refer to a true copy of a news story published by TechCrunch on the 25th day of July 2013 where the statement from the European Commission was fully included upon which pinned together and marked with the letters and number "MS14" I have signed my name prior the swearing hereof.

39. The German Data Protection Authorities' Conference (representing all German State Data Protection Authorities) has sent a public letter to German chancellor Merkel on July 24th 2013. In this letter the German data protection authorities claim that there is a substantial likelihood that the "Safe Harbor" principles are violated. That they will therefore not agree to any new forms of transfer and consider suspending data transfers. I beg to refer to a true copy of the published English version of the aforesaid letter of the 24th July 2013 upon which pinned together and marked with the letters and number "MS15" I have signed my name prior the swearing hereof.

40. On August 13th 2013 the Article 29 Working Party (representing all European Data Protection Authorities) sent a public letter to the European Commission. In this letter the Working Party questions whether the use of Europeans' data is covered under the "Safe Harbor" and highlights that the large-scale surveillance is in line with the law enforcement provisions of the decision, since the decision is only allowing for law enforcement access to the extent that it is "necessary". In addition the Working Party highlights that authorities in the Member States have the authority to suspend the application of the Safe Harbor decision. I beg to refer to a true copy of the aforesaid letter of the 13th August 2013 upon which marked with the letters and number "MS16" I have signed name prior the swearing hereof.

41. On October 7th 2013 Peter Hustinx, the European Data Protection Supervisor has held a speech at the European Parliament. In his speech he highlighted that exceptions that are limiting fundamental rights are interpreted restrictively by the ECHR and that the PRISM program might be in excess of the exceptions within the Safe Harbour decision. In addition he claimed that Article 4 of the Safe Harbour Decision could be applicable. I beg to refer to a true copy of the aforesaid speech of the 7th October 2013 upon which marked with the letters and number "MS17" I have signed name prior the swearing hereof.

42. Overall I am confident that the view I have expressed in my complaint is the clear majority view throughout Europe. I personally do not know of any expert that has taken another view. Only the Irish Data Protection Commissioner feels that there is "nothing to investigate". In addition I beg to refer to a booklet of true copies of correspondence between the Respondent and myself subsequent to the making of the complaint until the swearing hereof upon which pinned together and marked with the letters and number "MS18" I have signed my name prior the swearing hereof.

43. In the circumstances I pray this Honourable Court for leave to apply for Judicial Review.

Sworn by the said Maximilian Schrems on this the day of October 2013 before me a Practising Solicitor/Commissioner for Oaths at the Four Courts in the City of Dublin and I know the Deponent (or the deponent has been identified to me

by who is personally known to me)

_____

Practising solicitor/ Commissioner for Oaths

THIS AFFIDAVITIS FILED ON BEHALF OF THE APPLICANT BY AHERN RUDDEN SOLICITORS OF 5 CLARE STREET, DUBLIN 2 THIS DAY OF OCTOBER 2013.