

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

Mag. Maximilian Schrems

[REDACTED]

[REDACTED]

AUSTRIA

Vienna, August 5th 2013

Initial 22 Complaints against Facebook Ireland Ltd

Dear Mrs. O'Sullivan,

As I told you last week I am now getting back to you concerning the remaining 22 complaints. In your previous letter you have not outlined the procedure in any substantial way, but have referred to "previous correspondence".

I have now reviewed the **75** emails (including automated and irrelevant emails), the **5** formal letters you sent me that past month, the **3** formal letter from Billy Hawkes in January 2012, the **one** letter you sent me as a first response in August 2011, the **2** formal letter from Gary Davis and the **one** text message from him, but I was unable to find any section that would in any way clearly outline the procedure under which the ODPC is operating. After reviewing the documents I was rather able to find endless inconsistencies in your responses and again reference to "previous correspondence".

Therefore I would ask you to let me know if I have overlooked any additional letters, emails or text messages, or indicate to which exact letter, emails or text messages you refer when you refer to "previous correspondence". Otherwise I assume that you are referring to non-existing clarifications, and would therefore ask you to clearly and fully outline the procedure as you envision it. In an effort to assist you I would kindly ask you to answer the following questions:

1. Is the "audit" procedure in any way part of my complaints procedure? (y/n)
 - a) If it is: Why was I not in any way included in the procedure?
 - b) If it is not: Why was I refused a decision before the final review?
2. Are my complaints still in the "amicable resolution" phase? (y/n)
 - a) If they are: What is the DPC planning to do to find an "amicable resolution"?
 - b) If they are not: What constituted the "amicable resolution" process?
3. You said that your rules are "informal". Can you name these "informal" rules? What laws, cases or principles are they based on? Are there formal rules after the "amicable resolution" phase?
4. How is the end of the "amicable resolution" phase determined and how determines it?
5. Where does the DPC take the idea or a "request for a formal decision" from?
6. What happened to my submission from December 4th 2012? Is it part of the procedure?

7. Is the DPC of the opinion that any procedural rules apply to him, which go beyond the DPA?
...if the DPC is of that opinion I would ask you to name these rules/principles.
8. Is the DPC of the opinion that Art 6 ECHR apply to him (through the Irish ECHR Act 2003)? (y/n)
9. Is the DPC of the opinion that Irish natural/constitutional justice rules apply to him? (y/n)
...if the DPC is of that opinion, I would ask you which rules you are following exactly.
10. What are the exact rules of the DPC when it comes to evidence, arguments and files?
So far we heard the following things:
 - a) In the letters from Billy Hawkes from Jan 2012 he is saying that there is no exchange of arguments, evidence or files, based on his understanding of the DPA and Directive 95/46/EG.
 - b) During our visit to your office in 2012 Gary Davis said that the files would only be disclosed in an appeals situation before the Circuit Court, so after a final decision by the DPC.
 - c) Later Gary Davis was saying that "some arguments" were to be disclosed after I make a request for a formal decision, so before the final decision. But it remains unclear which documents would be disclosed and who would take such a decision under which rule.
11. The some courts have held that there is only an appeal on points of law against decision by the DPC. If there is no previous full establishment of facts and disclosure of files, evidence and arguments, it seems that the facts would never be fully established throughout the procedure. Is this correct? (y/n)
12. What steps will the decision process include after I made my request for a formal decision?
..so far I was told that 1. there will be a preliminary decision by the DPC, 2. there will be opinions from both parties, 3. there will be a final decision delivered to us that is then 4. subject to an appeal. Is this still correct? (y/n)
13. If I feel that the procedures observed by the DPC are not in line with the law, how and at what point in the procedure can I have your actions or denial of actions reviewed/appealed?

I think I have outlined my understanding of a fair procedure more than precisely in my submission from December 4th 2012. If you have any argument you want to raise against this submission I would kindly ask you to get back to me. Otherwise I understand that you have no counterarguments to the section that deals with procedural issues.

To summarize a procedure that would meet these standards I would suggest the following steps:

1. Exchange of all documents, evidence and arguments. I accept that the DPC would blacken sections that interfere with trade secrets or other legitimate interests of any party.
2. A serious "amicable resolution" process that includes both parties equally.
3. A "request for a formal decision", if there is no possibility for an "amicable resolution".
4. A final decision by the DPC, subject to appeal in the courts.

If there is any reason the DPC would be unable to follow such a normal and natural proceeding I would be asking you to tell me why he thinks that this would not be necessary under the law.

Feel free to add anything that would provide further clarification!

Kind Regards,

Mag. Maximilian Schrems



8 August 2013

Mag. Maximilian Schrems



AUSTRIA

Dear Mr. Schrems,

With reference to your letter of 5 August 2013, I would make the following points in relation to the matter of your 22 complaints against Facebook-Ireland.

As you will be well aware, this Office following completion (and publication) of a detailed audit of Facebook-Ireland in 2011 and a follow-up audit during 2012 to ensure implementation of the “best practice” recommendations made during the initial audit, considers that Facebook-Ireland are fully compliant with Irish Data Protection Law. You will also be aware of our position that, through seeking a “best practice” approach, an outcome was achieved which resulted in Facebook-Ireland going beyond mere compliance on many issues. You will also be aware that the ethos of Irish Data Protection legislation is to bring organisations into compliance where/if required, using a combination of persuasion and formal enforcement mechanisms (including the power of compulsory audit and the power to order compliance under pain of criminal sanction). **In the case of Facebook-Ireland, we consider that full compliance has been achieved through implementation by the company of the “best practice” recommendations made through the formal audit process.**

As you know, the issues raised in your 22 complaints were considered as part of the audit process. As outlined to you in our letter of 26 July 2013 in the matter of your 22 complaints, we consider that the status of those complaints at this time constitute allegations of continued non-compliance by Facebook-Ireland (FB-I) with Irish Data Protection law and which we understand you consider were not resolved through implementation of the “best practice” recommendations made as part of the audit process. Furthermore, we are aware from general public statements published by Europe v Facebook and the complaints it submitted to the Article 29 Working Party, the European Commission and the European Parliament that it is your view that Facebook-Ireland is still not fully in compliance with the law and that it is your view that this Office has failed to discharge its duties under Irish and EU law to ensure such compliance – a charge which we strongly refute.

Cuirfear fáilte roimh chomhfhreagras i nGaeilge

At this stage it is not clear to this Office what specific matters contained in your 22 complaints you consider to represent ongoing alleged contraventions or indeed what issues (if any) you consider were resolved by implementation of the audit recommendations. Given your stated wish to escalate matters through the courts, we are anxious to bring these files to a conclusion pursuant to Section 10 of the Data Protection Acts 1988 and 2003. We are not willing to keep these files open indefinitely, both from a procedural perspective and more especially in the light of their use to make generalised allegations – which we firmly reject – of failure on our part to comply with our obligations under Irish and EU law.

We are therefore requesting that by Friday, 30 August 2013 you specify to this Office on which of the 22 complaints you are requesting formal decisions of the Commissioner under Section 10 of the Acts.

We are happy to offer an opportunity to you during this time to reformulate or update your original complaints, should you require, given the passage of time since their initial submission. However, we still require any updated submission by Friday, 30 August 2013 after which we will commence the process of drafting formal decisions in relation to the complaints. Drafts of formal decisions will be provided to you for comment prior to issue of the Commissioner's final decisions. As you know, you have a right to appeal any such decision to the Circuit Court and subsequently, on a point of law, to the High Court, with a possibility of referral of contested matters of EU law to the European Court of Justice.

As always and as previously advised, if you wish to submit new complaints about other alleged Facebook-Ireland 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 Facebook-Ireland 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 our complaints procedures are as described on our website reflecting the requirements of Section 10 of the Acts. We are satisfied that these procedures meet our legal obligations but you are, of course, free to challenge this through the courts if you wish.

In line with our recent exchanges, this Office continues to encourage full publication by you of our exchanges in this matter.

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, August 9th 2013

Complaints against Facebook Ireland Ltd

Dear Mrs. O'Sullivan,

I had a hard time to believe what I was reading in your letter from August 8th 2013. You have in no way answered any of the questions I have raised. Instead you have again ignored the substance of my letter. I must say that I am losing any trust in a fair on objective procedure before your office.

1. You are saying that "Facebook-Ireland [is] fully compliant with Irish Data Protection Law". I wonder how there is any further sense in having a procedure if the ODPC has apparently formed a decision already. All further submissions seem to be a total waste of time. This is a breach of the "rules against bias" that could not possibly be more obvious. Do you have anything to add?
2. You are in no way saying when and how you have tried to find an "amicable resolution" and if we have passed this stage of the procedure. Can you specify this point in any way?
3. You are also not saying when and if I will ever see the evidence, files and arguments that were involved in this case. This means to me that I will *never* see the actual submissions and evidence you base your decisions on. On such a basis there is no way of making any meaningful submission or even appeal you decision in any meaningful way. Do you want to add anything on this point?
4. You are totally ignoring my submission from December 4th 2013, which clearly outline what I consider as partly resolved or not resolved. Instead you are saying that this is "not clear" to your office. What is the status of this submission and any other submissions made before?
5. So far I was not at all involved in the complaints procedure after I have filed the complaints. The "audits" were done in the "back room" between you and Facebook Ireland Ltd without any involvement from my side. I got the results even after the media did. You are still not clarifying in what way the "audits" were part of my complaints. From you past letter I understand however that they were somehow part of the procedure. Please let me know if I misunderstand this!
6. Gary Davis has repeatedly said that it is at my sole discretion when to make a request for a formal decision. On what legal basis have you now changed this rule?

As your office has not responded to any submission I have made in the past two years in any material way and has also not allowed me to access files, evidence or arguments I do not see myself in a position to make such a request. I can therefore not accept your sudden deadline!

I am again kindly asking you to respond properly to my questions from August 5th 2013 and respond to the point made above as soon as possible.

If you are saying that I am using the complaints only to make “generalize allegations” against your office I have to firmly reject this unfounded and outrageous accusation. There are many things I am more interested in than dealing with the ODPC. I do not derive any personal pleasure from seeing that the “rule of law” and the ECHR has not made its way to every town in Europe.

It just seems to me that you are unable to cope with profound and well-grounded criticism and sometimes a hint of sarcasm. This might partly lie in a different cultural approach towards authorities, freedom of expression and public criticism. Be ensured that I and my colleagues have no intention to offend anyone at the ODPC, just like I do not feel personally offended by your responses.

However if the matters we raise would be without basis you would have little problems to answer my letters and explain your actions. Instead you rather chose to ignore them, leaving us with little options other than making your actions public. The total blockade on your side by not answering phone calls and not responding to the matters raised in emails or letters is just not helpful to resolve the situation. I am still inviting you to have a direct talk at any time. In previous letter you will also have seen that I am responding very enthusiastic about any material answer and that I am doing everything to ask constructive questions that are only aiming at a solution that will spare both of us to be before courts for the next couple of years. I am again inviting you to also join me on this path.

I am awaiting your (constructive) response to the issues raised above and in my previous letter!

Kind Regards,

Mag. Maximilian Schrems



9 August 2013

Mag. Maximilian Schrems



AUSTRIA

Dear Mr. Schrems,

I refer to your letter of today's date.

I wish to advise that we have nothing further to add to our reply of 8 August 2013.

Yours sincerely,

Ciara O'Sullivan
Senior Compliance Officer

Cuirfear fáilte roimh chomhfhreagras i nGaeilge

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

Mag. Maximilian Schrems

[REDACTED]

[REDACTED]

AUSTRIA

Vienna, August 12th 2013

Complaints against Facebook Ireland Ltd

Dear Mrs. O'Sullivan,

I am very sorry, but I cannot accept your letter from August 9th 2013, as it does not constitute a response. I have raised very specific questions. If you are not answering them there is no way that I could possibly make a "request for a formal decision".

I understand that you are well aware of this and have the intention to make such a request impossible by not answering clear, precise and valid questions. It seems to me that you are showing no effort at all to avoid a court procedure as you are not even stating your position.

I am hereby again asking you to at least answer the following most important questions:

- a) What is the status of my submission from December 4th 2012? Will it be considered by the DPC? Should I resubmit it, or will you again ignore it?
- b) At what point in the procedure will I get access to what part of the evidence, files and arguments that are before the DPC?

If you are not answering these questions within two days I have to assume the following:

- a) The submission from December 4th 2013 was ignored, not processed and will not be considered by the DPC. The same is true for any other submission I made previously. There is no legal basis for rejecting this submission. *[This assumption is based on your behavior and responses so far.]*
- b) I will not get any access to any files, arguments or evidence at any point in the procedure or in an appeal situation. *[This assumption is based on the letters I have received on this matter by the DPC Billy Hawkes in January 2012. I further assume that opposing views by Gary Davis are not the position of your office, since the authority rests only with the DPC himself.]*

I tried my best to summarize what I understand is your position. This does at the same time not at all reflect my opinion. The above assumptions will be the basis for further legal action if you do not respond anymore. If you feel they are incorrect, please say what exactly the position of your office is.

I am (as always) inviting you to answer all other outstanding issues raised in my letters from August 5th and August 9th 2013. I am also available to speak to you and will do anything in my power to settle this dispute and prevent this question going before courts.

Kind Regards,

Mag. Maximilian Schrems



13 August 2013

Mag. Maximilian Schrems



AUSTRIA

Dear Mr. Schrems,

With reference to your letter dated 12th August 2013, please see the following points.

As previously stated, we consider that we have set out our position clearly in previous correspondence in this matter and that we have addressed all relevant points. As previously advised in relation to other matters you have raised, we wish to be clear that in **not responding to or commenting** on every point you make in each of your letters, this should not be taken to imply that we agree with any or all of them.

Please be advised that we can **no longer respond in detail to further correspondence** from you where you seek to summarise or in certain instances limit our position in this matter and instead we will refer you to our correspondence to date, in particular our letter of 8th August 2013, on this matter.

Yours sincerely,

Ciara O'Sullivan
Senior Compliance Officer

Cuirfear fáilte roimh chomhfhreagras i nGaeilge

Vienna, August 13th 2013

Dear Mrs. O'Sullivan,

I am not trying to limit your position, but I would just like that you take ANY position that I can then work with. It is in no way illegitimate to ask you if you would just answer these two questions. It rather seems extremely unusual that you are constantly denying to take any position at all. It seems you are afraid to explain your actions and want to maintain the option to change anything at any time. This is just not a basis on which a proper procedure can be conducted. I understand that you are trying to have a legal advantage in any appeals or judicial review situation by not taking any position, but I doubt that any court would not see that this was done in bad faith by your office. Any reasonable authority would just state its position and go on with the case.

Given your reactions so far I have to assume that you are not giving access to files and have rejected my submission from December 4th 2012. I understand that they reflect your position given the previous correspondence. I will therefor operate under this condition as you were unable to clarify them in any other way.

I will now consider in more detail to file a JR not only on the PRISM complaints, but also on your refusal to process submissions, have an "amicable resolution" process and giving me access to the necessary files, evidence and arguments to make a proper "request for a formal decision" concerning the other 22 complaints. I think we may have now reached a point where the unwillingness of your office to offer these basic procedural options manifests enough to raise this question before the courts.

If you have any intention in showing a little effort to avoid a lengthy legal procedure I am again asking you to simply answer these very basic questions. If you are provoking a court case by simple unwillingness to communicate with a party I doubt that this would be assed to favor your position. I am again inviting you to just answer my questions in two simple lines.

Regards,

Mag. Maximilian Schrems