

Billy Hawks
Data Protection Commissioner
Canal House, Station Road
Portarlinton , Co. Laois
IRELAND

Maximilian Schrems

[REDACTED]

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AUSTRIA

Vienna, January 2nd 2012

Recent report on “Facebook Ireland Ltd.”

Dear Mr. Hawks,

I now had time to read through the very extensive report your office has published on Facebook Ireland Ltd. and that was sent to me by Mr. Gary Davis. We are very happy about some of the findings in this report and we also **respect the ODPC's approach of a “best practice”** and audit-based form of enforcement.

At the same time we believe that the published report and the suggestions that were made in the report can only be a first step to make Facebook Ireland Ltd. comply with Irish and European data protection laws. In **many ways we cannot accept this report as some form of a final decision as it was indicated to be.** These are some of the reasons why we wish to proceed further:

- There is a lack of a sound legal reasoning within the report. Instead of a legal analysis the report only lists general suggestions. The legal thoughts behind the outcome are not disclosed and often times not in line with the principles in the Directive 95/46/EG.
- Many issues raised in my complaints are not even mentioned in the report. Often times only some of the legal issues raised are touched upon, others seemed to be ignored. It seems that the report has not dealt with any of the complaints in all points raised.
- What the report calls a “best practice” often times seems to not even reach the minimal standard set down in the Directive 95/46/EG.
- Claims and explanations made by Facebook frequently lack any form of proof. There is no sound explanation why the report is following only Facebook's claims.
- I did not get any copy of the communication between the ODPC and Facebook which would enable me to respond to claims or explanations made by Facebook. It is therefore impossible to correct false claims made by Facebook.
- There are multiple findings in the report that are clearly contradictory. The section about access requests is e.g. not listing data categories that are in other sections found to be collected by Facebook Ireland Ltd. in a personalized way.

A more general problem we identified was the lack of a detailed analysis of the underlying legal responsibility of the use of facebook.com.

- The report treats the use of Facebook as solely private or household activity. This legal opinion is not in line with decisions by the European Court of Justice (see "*Lindqvist*"). A Facebook profile is nothing other than a public webpage, when used with standard settings. Even with setting such as "friends of friends" it seems questionable if sharing of personal data of a third party with e.g. 40.000 users is a "household activity".
- When a private user is passing on personal data of third parties to a cooperation this disclosure by transmission of personal data cannot be seen as a "private" or "household activity", if the cooperation is using the data for its own purposes. Private individuals that engage in such processing of data do clearly fall within the scope of Directive 95/46/EG.
- At the same time Facebook Ireland Ltd. can by no means be the controller of data that is submitted by the users that is merely "hosting". Everything else would mean that every webhost would be the controller of the data hosted and liable for all wrongdoings, while the private individual running the webpage would be without liability.

Concerning the "amicable agreement" approach by the ODPC I have to say that I am not sure if it is realistic that a student is seriously bargaining with a multinational. I have serious doubts that this would bring a sound solution in the current case. I also have my doubts concerning principles of the rule of law and from a democratic standpoint. Our campaign is meant to test Facebook Ireland Ltd. against the rights of all users under European law and not against our personal luck in bargaining.

Following my communication with Mr. Davis, I now have a couple of questions that seem to be important to be officially answered before we can take further steps. I would be very happy if the ODPC could give me a quick and understandable answer on the following issues:

- What will be the next steps in the complaint process?
- Is the ODPC awaiting any comment by me on the report?
- Is the ODPC awaiting any other action by me?
- How would the ODPC work towards an "amicable agreement"?
- Is there a right to access to the communication between the ODPC and Facebook Ireland Ltd. as it is generally guaranteed under Art. 6 ECHR in such proceedings?
- Under which procedural law is the ODPC operating?

Thank you for your understanding and help. I am looking forward to an ongoing constructive and interesting proceeding that will enable users in Europe to trust new technologies more than today.

Regards,

Maximilian Schrems



Mr Maximilian Schrems



AUSTRIA

VIA E-MAIL

Report on Facebook-Ireland Ltd (FB-I)

Dear Mr Schrems

Thank you for your letter of 2 January.

In response to the questions you have raised:

What will be the next steps in the complaint process?

We expect Facebook-Ireland to implement the “best practice” recommendations in the Report in accordance with the timetable set out in pages 4 to 20 of the Report. We will continue to discuss with FB-I the details of implementation and will carry out a **formal review in July next**. If FB-I fully implements the recommendations in accordance with the agreed timetable, and in a manner satisfactory to us, we would expect that such action would make a substantial contribution to the process of amicable resolution of your complaints.

Is the ODPC awaiting any comment by me on the report?

Not at present. When the process of implementing the “best practice” recommendations has been completed in accordance with the agreed timetable, we will invite you to indicate if you are satisfied, or otherwise, that implementation of the recommendations constitutes an amicable resolution of your complaints.

Is the ODPC awaiting any other action by me?

No

How would the ODPC work towards an “amicable agreement”?

See response above. If you are satisfied that the actions to be taken by FB-I deal satisfactorily with your complaints, that will be the end of the process of amicable resolution. If you inform us that implementation of the “best practice” recommendations will not, in your opinion, bring FB-I into full compliance with the requirements of the Data Protection Acts in relation to any of your complaints, we will examine the issue further, contacting FB-I as necessary, and inform you of the outcome. **If you are not satisfied that the outcome constitutes an “amicable resolution” of the complaint(s) in question, you have a right to seek a formal decision of the Commissioner.** If you are not satisfied with the formal decision, you have a right of appeal to the Courts.

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Is there a right to access to the communication between the ODPC and Facebook Ireland Ltd. as it is generally guaranteed under **Art. 6 ECHR** in such proceedings?

No. The Data Protection Acts (Second Schedule, paragraph 10) provides that: "...the Commissioner shall not disclose ...any information ..that could reasonably be regarded as confidential without the consent of the person to whom it relates". This provision impose a duty of confidentiality on the Commissioner and his staff and transposes **Article 28 (7) of Directive 95/46/EC** ("Member States shall provide that the members and staff of the supervisory authority, even after their employment has ended, are to be subject to a duty of professional secrecy with regard to confidential information to which they have access."). For this reason, reports of audits carried out by the Office (around 30 each year) are not published unless the organisation concerned agrees (Most organisations we audit do not agree to publication; FB-I, exceptionally, did).

Under which procedural law is the ODPC operating?

The Data Protection Acts, 1988 and 2003 (particularly Sections 9 to 15) and general principles of administrative law as laid down by the Irish Courts.

I would like to thank you and your colleagues for your contribution to our work with FB-I.

Yours sincerely



Billy Hawkes
Commissioner

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Data Protection Commissioner
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IRELAND

Maximilian Schrems

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AUSTRIA

Vienna, January 9th 2012

Recent report on "Facebook Ireland Ltd."

Dear Mr. Hawks,

Thank you for your quick answer to my letter of January 2nd 2012.

Regarding to your letter from January 7th 2012, I felt that I have to answer on the following issues.

1. Further Proceeding

I am currently in a state of discussion with Facebook Ireland Ltd. that is aimed at an amicable solution for as many complaints as possible. At the same time we are currently aiming for a formal decision by the ODPC regarding all complaints we cannot find such a solution. We will inform the ODPC about the steps we are jointly taking with Facebook Ireland Ltd. as soon as Facebook has made a final decision on the procedure.

2. Access to files

I have to inform you that I cannot understand your answer regarding our wish to access the files.

After I have analyzed the law and talked to different experts and DPCs of other Member States I am confident that there must be some sort of misunderstanding.

The legal counterarguments by Facebook Ireland can, to my understanding, not "*reasonably be regarded as confidential*" (Section 9 (10) DPA). Whenever the files are including confidential material I am of course accepting a reasonable limitation to the access to files (e.g. whenever trade secrets or copyrightable material is involved). At the same time I am not willing to accept a general denial of access to the counterarguments and evidence that was presented by Facebook Ireland. I feel that by doing so the ODPC is depriving me of one of the most basic rights in any legal proceeding.

The cited Article 28 (7) of the Directive 95/46/EG clearly not interpreted to shield all information obtained in a proceeding from the eyes of any other party. The Austrian DPA is in connection with the Austrian procedural law e.g. just limiting the scope of the right to access to files in individual cases. At a first glance this seems to be the same way in many other Member States, which raises the question if there is a general uncertainty within the EU on the interpretation of the Directive.

On a practical basis it also seems not to make a lot of sense, if the one party cannot answer to the claims of another party. I would suspect that the ODPC also forwarded my complaints to Facebook Ireland in order to give them the possibility to react to my claims. The same must be true for any counterargument by Facebook Ireland Ltd. in order to enable the ODPC to collect all arguments relevant to make a final decision. To my understanding section 10 DPA, that suggests an “amicable solution”, indicates that there has to be some exchange of standpoints and information in any complaint procedure. If the section 9 (10) DPA would be really applicable for generally all information obtained by the ODPC this would include my 22 complaints and the enclosed evidence as well, since the DPA is to my understanding missing any explicit provision that would allow the ODPC to forward my complaints.

For all the reasons above I am hereby kindly asking you to further clarify your view that all files must be seen as confidential. I would ask you to refer to any court cases that have dealt with this issue in Ireland if your decision is based any legal basis that I am not aware of.

If the ODPC is not able to further clarify this decision and is not seeing a reason to change its position I would ask you to explain to me how the legal move I have against such a decision of the ODPC within the Republic of Ireland.

If the ODPC is uncertain about the application of Article 28 (7) of Directive 95/46/EG we are suggesting a discussion within the Article-29-Group as well as a formal clarification by the European Court of Justice under Article 267 of the Treaty of the functioning of the EU.

Yours sincerely,

Maximilian Schrems



13 January 2012

Mr Maximilian Schrems



AUSTRIA

VIA E-MAIL

Dear Mr Schrems

Thank you for your further letter of 9 January.

I am happy to clarify further our position on disclosure of information provided to our Office when we are investigating a complaint.

Our standard procedure when investigating a complaint - having first established that the complaint merits investigation - is to **provide both parties with a summary of the points made by each**. Based on these exchanges - which often involve multiple exchanges of letters, e-mails and phone-calls to clarify particular points - we attempt to reach an amicable resolution of the complaint, failing which the complainant is entitled to ask for a formal decision of the Commissioner.

We do not give either party copies of the actual communications from the other party, unless we are explicitly authorised to do so. This permits us to respect the confidentiality of a complainant and also to receive confidential information from a data controller about the circumstances in which a particular action affecting the data subject was taken. Often the complainant is making a complaint against a data controller, such as an employer, where it would not be in the interests of the complainant to have her/his identity revealed.

Obviously the issue of confidentiality did not arise in relation to your complaints as you had - commendably - made your complaints and supporting arguments public on the Europe Versus Facebook website. Also, arising from your commendably open approach, we were able to publish your complaints as part of our audit report, together with Facebook-Ireland's (FB-I) responses.

We provided FB-I with a copy of your complaints and invited their comments. Again, in accordance with our standard procedure, **we analysed and summarised FB-I's responses and provided these to you, via the published Report** (the FB-I responses to your complaints are given in italics throughout the Report). The only difference to our normal procedure is that the process was public rather than being conducted in private exchanges with the data subject (you) and the data controller (FB-I) and that the full text of your complaints, as published on your website, was provided to FB-I.

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In terms of progressing this matter we understand from FB-I that you have suggested a bilateral meeting with it to explore in more detail the matters which you consider remain outstanding or for which more clarity would be helpful. We would consider such a meeting between FB-I and yourself to present a helpful opportunity to progress the amicable resolution process and therefore we will recommend to Facebook Ireland that it agree to your suggestion. That engagement may also present **an opportunity for FB-I to provide documentation to you outlining the position it has adopted** on the matters that remain of concern to you. **This would be more beneficial to you than receiving the initial responses received in October as in almost all cases in the course of the intensive engagement within the audit, FB-I in the light of the explanations and clarifications provided by this Office adopted an amended position.**

Clearly at the end of your engagement with FB-I if there remain issues which you consider are not amicably resolved you should revert to this Office and they will be further assessed within the process I have outlined.

Finally, if your bilateral with Facebook Ireland takes place in Dublin, we would be glad to meet with you following its conclusion to begin to address any outstanding issues immediately.

Yours sincerely



Billy Hawkes
Commissioner

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AUSTRIA

Vienna, January 26th 2012

Further Proceedings, Access to Files

Dear Mr. Hawks,

Thank you for your letter of January 13th 2012. I would like to update you on our efforts to find an amicable resolution with Facebook Ireland Ltd (FB-I).

We agreed with FB-I to meet by the beginning of February (very likely February 6th) in Vienna to go through the ODPC's findings and the arguments of both parties. We hope that we can sort our issues that have been solved or that are based on misunderstandings. This will enable us to concentrate on the issues that are seriously disputed which will enable the ODPC to focus on fewer legal problems as well. Concerning the issue of access to the counterarguments by FB-I we were able to agree with FB-I that they will at least send us official counterarguments for all cases.

At the same time our side will not get involved in any form of "bargaining" with FB-I since we feel that we have no official mandate to do so. We think that the right application of the law should be exclusively done by a government institution, such as the ODPC or the different courts. In order to do so, we will ask the ODPC soon after our meeting with FB-I to make a formal decision in all cases that were not resolved. Concerning the amicable resolution we were wondering if the ODPC has a standard procedure of making the outcome of the amicable resolution legally binding for FB-I?

Following your last letter I do understand the approach of the ODPC better concerning the access to records, but I have to let you know that **I can still not fully accept it.** We are aware that balancing the legitimate right to trade secrets by FB-I and the rights under Article 6 ECHR is a difficult task. At the same time **we have to repeat that the ODPC is not handing us out *any* arguments by FB-I. We are currently only getting the excerpts in the report, so only secondary access. This *general* denial of access cannot be justified by Article 28 (7) of Directive 95/46/EG.**

It is impossible for us to assess the legal reasoning by the ODPC, if there is no reference to all counterarguments and sound evidence. **The access to such information is also a basis on which we can assess the need to bring the final findings of the ODPC to a court or to the European level. Not giving me access to the relevant information is depriving me of the basis for any further proceeding.**

We are still viewing the ODPC's understanding of Article 28 (7) of Directive 95/46/EG as inconstant with the understanding in most other member states, as well as inconsistent with Article 6 ECHR.

I also want to remind you that I did not get an answer on how I could appeal against this practice by the ODPC within the Irish legal system, or if there is no such possibility. I hope you are able to give me a quick answer on this issue as soon as possible.

For now we want to inform you that we will continue to work on the case despite this situation, since we got the word by FB-I that we will get more information from them. We are still hoping to work with FB-I and the ODPC in a constructive way and find a good solution in all 22 cases that were brought before the ODPC. Hopefully this will be the opportunity to bring the users' trust in social networks to a whole new level, years before there is new EU legislation.

Regards,

Maximilian Schrems



30 January 2012

Mr Maximilian Schrems



AUSTRIA

VIA E-MAIL

Dear Mr Schrems

Thank you for your further letter of 26 January.

I am happy to confirm that I have no objection to you disclosing our exchange of letters.

I am glad to hear that you will be meeting with Facebook-Ireland (FB-I) representatives shortly and that **they have undertaken to provide you with further information on their response to your complaints**. I hope that this meeting will contribute towards reaching an amicable resolution of your complaints. If, after the meeting, you are unclear on the position being taken by FB-I on any issue, we will be happy to try to clarify the position, as part of the “amicable resolution” process.

You ask if the outcome of the “amicable resolution” process can be made binding on FB-I on a particular issue. The answer depends on whether failure by FB-I to implement an agreed outcome would mean that its practices were in contravention of the Data Protection Acts. If they were, the Commissioner has power, under Section 10(2) of the Data Protection Acts, to issue an “Enforcement Notice” to FB-I. The Notice would direct FB-I to take whatever steps he considered necessary to bring these practices into compliance with the specific provision(s) of the Acts which he considered were being breached by FB-I. If the “amicable resolution” involved FB-I taking action that was not required by the Acts but would be considered “best practice”, **the Commissioner would not have the power to enforce such a “best practice” outcome.**

The process of attempting to achieve an “amicable resolution” to your complaints will continue until FB-I has completed the process of implementation of the recommendations listed in the audit Report, in accordance with the target implementation dates listed in the Report. These dates run from January (for example, in relation to the additional notifications in relation to facial recognition which FB-I have provided) to end July. If you inform us that implementation of the recommendations will not, in your opinion, bring FB-I into compliance with the Data Protection Acts, we will consider your arguments and, if necessary, contact FB-I about them. **If you remain of the opinion that FB-I is not in compliance with the Acts, you can seek a formal decision of the Commissioner on the issue.** That decision would set out the Commissioner’s view of the legal position. The decision could be

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appealed to the Circuit Court. If the decision were that FB-I was not in compliance with the Acts, the Commissioner would, if necessary, issue an Enforcement Notice to FB-I requiring them to take action to remedy the situation. FB-I would have the right to appeal against the Notice to the Circuit Court.

You asked about the right of appeal against the “amicable resolution” process. The “amicable resolution” process is provided for in section 10 (1) (b) of the Data Protection Acts¹ and is presumed to be in accordance with Directive 95/46/EC. There is no specific right of appeal against the process itself, rather, the right of appeal is against the decision which the Commissioner must make if the “amicable resolution” process fails.

I hope that this further clarifies the position for you. Like you, we hope that the outcome of the process we have engaged in, helped by your specific complaints, will lead to significantly improved transparency and control for FB-I data subjects, going beyond mere compliance with the law and instead moving in the direction of “best practice”.

Yours sincerely



Billy Hawkes
Commissioner

NOTE BY EUROPE-FACEBOOK.ORG:

**AFTER THIS WE CONCENTRATED ON THE MEETING WITH FACEBOOK
AND HOPED TO GET MORE INFORMATION FROM FACEBOOK.**

**IT TURNED OUT THAT THE PLEDGED INFORMATION WAS NOT PROVIDED
BY FACEBOOK, BECAUSE FACEBOOK WAS AFRAID WE MIGHT BE ABLE
TO USE IT AGAINST THEM.**

¹ “Where a complaint is made to the Commissioner ...the Commissioner shall ...if he or she is unable to arrange, within a reasonable time, for the amicable resolution by the parties concerned of the matter the subject of the complaint, notify in writing the individual who made the complaint of his or her decision in relation to it and that the individual may, if aggrieved by the decision, appeal against it to the Court”