

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

Maximilian Schrems

[REDACTED]

[REDACTED]

AUSTRIA

Vienna, March 26th 2012

Formal decision concerning “Facebook Ireland Ltd”

Dear Mr Billy Hawkes,
Dear Mr Gary Davis,

I am hereby informing you that we decided that we will soon ask for a formal decision concerning all 22 complaints we filed against Facebook Ireland Ltd.

In order to make this next step in the proceeding as constructive as the first investigation by your office, we would like to get in contact with you before we file any formal request for a decision. We would like to agree on a roadmap that enables the ODPC to decide on each individual case in the most effective way. Therefore we would like to point out the problems that we are facing in the proceeding at this point:

Direct Negotiations

As I said before, our direct talks with Facebook were constructive and enabled us to narrow down the issues. At the same time we have to inform you that we came to the conclusion that the direct talks were unable to lead to a solution of the issues we brought before the ODPC. Facebook has not committed to any material changes. The commitment we got to get more information was breached soon later by a “follow up” document sent to us that did not include the pledged additional information. Facebook oftentimes did not explain its counterarguments because the legal team was afraid we might use their arguments against them, according to a Facebook representative. This left us with the impression that Facebook is currently afraid of its own counterarguments. This behavior and the oftentimes absurd counterarguments we were presented with have only strengthened our belief that Facebook Ireland Ltd is breaching the most basic principles of European and Irish data protection legislation.

First Report by the ODPC

After intense analysis of the pending case we are confident Facebook did either not fulfill the ODPC’s recommendations that were already due or is still engaging in illegal processing of personal data despite the fulfillment of the “best practice” approach that the first report was based on.

For the recommendations which should be implemented until June 31st we strongly believe that the “best practice” that was recommended by the ODPC in its first report does not meet the minimal standard set forth under the Irish and European data protection legislation.

The only issue on which we have so far not formed a clear opinion is the question of a new privacy policy that should be in place by March 31st according to the report. Currently it seems to us that this deadline will not be met by Facebook. Therefore we believe that when this deadline has elapsed, it is the right time to take the next step in the pending case in order to finish it within a reasonable time.

As I told you before, we believe that the first report, issued in December 2011, does clearly not reach far enough and does not address many issues raised in the 22 complaints. Oftentimes the report only discusses one of many issues raised in the individual complaints. Where certain issues are addressed, this first report lacks a sound legal reasoning that would enable us to understand the underlying legal argumentation of your office. The first report is also sometimes contradictory, which makes it even harder for us to understand the ODPC’s decision. We were strengthened in this opinion by the feedback we got from many high ranking experts on data protection as well as other European DPCs that publicly or in direct talks joined us in this view.

For these reasons we see the ODPC’s report only as a first summary of the important and excessive work your office engaged in the last year, that is a great basis for the ongoing process. At the same time this report cannot be seen as a final decision on the complaints that we filed with your office.

Procedural Issues

Another issue that we feel very strong about is the **question of access to the records of this case**. It is almost impossible to engage in a proceeding where one party does not have any idea about the arguments that were brought before the tribunal by the other party. It also seems that many of the problems of the report are directly linked to the absence of our counterarguments to Facebook’s claims.

During our last phone call Mr Billy Hawkes has told us that the relevant files will be delivered before a final decision will be made. We think the best time to do so is before we request a formal decision, since convincing evidence and arguments may enable us to narrow the complaints further or even drop some of the complaints. We therefore insist (again) that we get all relevant materials that explain Facebook’s counterarguments in the pending case, as you are obliged to under Article 6 ECHR.

To ensure that the second part of the ODPC’s investigation into Facebook Ireland Ltd is as productive and effective as possible we would like to like to hear the ODPC’s view on the following questions:

- Given our view on the material issues, will the ODPC **work on a formal decision if asked to do so after April 1st 2012?** If not, please inform us about the reasons, the legal basis and the options to appeal such a decision under the Irish legal framework.
- Would the ODPC prefer to get requests for a formal decision separately for each individual issue, or would you prefer to get them in e.g. two or three rounds?
- Given the problem that some issues (e.g. the question who the controller is) are the basis for the legal argumentation of other problems, should there be different rounds of decisions?
- Given the fact that some issues are highly controversial (e.g. the “controller” issue) and from a European relevance is the ODPC planning to clarify some of these issues before the European Court of Justice or within the Article 29 working party?
- Is there any period under the Irish law until which the ODPC has to make a formal decision or can the ODPC decide freely until when it wants to decide on the 22 complaints brought before it?

- In which form does the ODPC want us to ask for a formal decision? Does the ODPC prefer to get a full legal argumentation including all arguments by Facebook that we know of, or do you prefer to get a simple statement that asks for a formal decision based on the 22 complaints?
- How is the **access to the files usually done by the ODPC?**
Will the office send them to us by e-mail/mail or in another form?
- Which reasons does the ODPC generally recognize as a “legitimate interest” that would prevent the access to files?
- If the ODPC finds that Facebook has legitimate interests that make it impossible to access the files of this proceeding, how will the ODPC deal with it? Will parts of the files be blackened or will the entire document be inaccessible? Will the ODPC at least inform us about the existence of such individual documents and the general content? Who will take such decisions?
- At what stage in the processing will we **get access to Facebook’s legal argumentation and the evidence** that was presented to the ODPC? Wouldn’t it make sense to do so before we ask for a formal decision so that we can include this in our legal argumentation?
- If the ODPC does not give us access to all or individual files of the pending proceeding, how can we appeal this decision under the Irish law?

Thank you for your cooperation. We hope that this will enable both of us to engage in a constructive and effective procedure that will clarify the legal basis of social networking in Europe.

Best regards,

Maximilian Schrems

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

Maximilian Schrems

[REDACTED]

[REDACTED]

AUSTRIA

Vienna, April 16th 2012

Formal Decisions and Access to Files

Dear Mr Billy Hawkes,
Dear Mr Gary Davis,

I was **trying to call and e-mail you multiple times** within the last weeks and your colleagues have surely passed on multiple notes to you. After three weeks we are still waiting for a response to the attached letter from March 26th 2012.

We will now start to work on our requests for a formal decision concerning all 22 complaints. Since we did not receive any response from your office and could not find a provision in the law that would bind us to file such a request in a certain form we will decide ourselves how to make such request. At the same time we are still very much interested in a response by your office that would enable us to file such a request in a form that enables your office to process them in the most effective way.

I am hereby also requesting your office to present to me all files concerning the 22 complaints, including all counterarguments that were presented by Facebook Ireland Ltd. and any other form of documents that do not fall under trade secret or other exemptions from a right to access files (see Article 6 ECHR). I am waiting to get these documents **until April 25th 2012** via e-mail or regular mail. If your office wished to withhold such documents from me I would kindly ask you inform me and specify the reasons and the legal basis **until April 20th 2012**.

Best Regards,

Maximilian Schrems



16 April 2012

Mr Maximilian Schrems



AUSTRIA

VIA E-MAIL

Dear Mr Schrems

Thank you for your letters of 26 March 2012 and 16 April 2012.

The published report of our audit of Facebook-Ireland (FB-I) set out a number of recommendations. We are monitoring the ongoing implementation of these recommendations by Facebook-Ireland. As indicated in the report, we intend to carry out a formal review of the implementation of these recommendations in July. **In the light of that review, we will consider if, at that stage, FB-I is in compliance with the requirements of Irish (and by extension EU) data protection law.** If it is not, we can use our considerable enforcement powers to require such compliance (subject to FB-I's right to appeal to the Courts). **We will not take any enforcement action in advance of that date.**

We will also, as part of the July review, consider again each of the specific complaints you had made against FB-I. If you are not satisfied that FB-I, **at that point**, has taken action to satisfactorily resolve any of these complaints, **you are entitled to ask for a formal decision** of the Commissioner on whether, in respect of each complaint, he considers that FB-I is in compliance with Irish law. **Any such decision would set out the arguments presented by each party** and the conclusion reached by the Commissioner, having taken account of these arguments. If you did not agree with the Commissioner's decision on any complaint, you would have a right to appeal his decision to the Circuit Court. If you were not satisfied with the Circuit Court's decision, you would have a right to appeal that decision, on a point of law, to the High Court. You could also seek referral to the European Court of Justice on a point of EU law in the context of any such appeal to the Courts.

I hope that this letter clarifies our position for you. You are free to make any submissions that you wish to make in relation to your complaints at any time. However, as indicated above, we will continue to act in accordance with the timetable set out in the audit report and with due respect to the requirements of fair procedure.

Yours sincerely

Gary Davis
Deputy Commissioner

Cuirfear fáilte roimh chomhfhreagras i nGaeilge

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

Maximilian Schrems

[REDACTED]

[REDACTED]

AUSTRIA

Vienna, April 16th 2012

Schrems/Facebook Ireland - Questions

Dear Mr Gary Davis,

Thank you for today's letter! I am sorry that your office is **now taking the standpoint that there will be no formal decision before the July 2012 review**. As far as I remember you were telling me during our phone call two weeks ago that we can request a formal decision at any time and that the ODPC would decide within about a month. We are now considering how we will deal with this new development.

I am also very sorry to let you know that **your letter is not fully answering the questions I raised** in my letter from March 23rd 2012 and April 16th 2012. Therefore I am trying to summarize the questions that are remaining. I hope that you can give us a quick response within the next days so that we can move on with the case.

Regarding my letter from April 16th 2012 I would like to clarify that the ODPC is currently denying access to any of the files concerning the 22 complaints that I brought before the ODPC? (You may want to answer this question together with bullet point 7.)

I would also kindly ask you again to clarify the following issues from my letter of March 23rd 2012: (the numbers refer to the bullet points of the letter)

Ad 1) I am aware of the options to appeal a formal decision by the ODPC, but what options would I have to appeal a **denial of a formal decision by the ODPC?**

Ad 2-4) Obsolete, since the ODPC will not accept a request for a formal decision before July 2012.

Ad 5) Is there **any period under the Irish law until which the ODPC has to make a formal decision** or can the ODPC decide freely until when it wants to decide on the 22 complaints brought before it? What does the ODPC consider a "reasonable time" to from a decision as specified in Section 10 (1) (b) (ii) DPA?

I am aware of the options to appeal a formal decision by the ODPC, but what options do I have to challenge a proceeding that is not conducted in a "reasonable time"?

Ad 6) Obsolete, since the ODPC will not accept a request for a formal decision before July 2012.

- Ad 7)** How is the access to the files usually done by the ODPC?
Does the ODPC feel bound by Article 6 ECHR or another law that would guarantee access to files in a legal proceeding?
- Ad 8)** Which reasons does the ODPC generally recognize as a “legitimate interest” that would prevent the access to files? Is there a statutory basis on which the ODPC is deciding on such questions? Is there any other legal basis?
- Ad 9)** If the ODPC finds that Facebook has legitimate interests that make it impossible to access the files of this proceeding, how will the ODPC deal with it? Will parts of the files be blackened or will the entire document be inaccessible? Will the ODPC at least inform us about the existence of such individual documents and the general content? Who will take such decisions?
- Ad 10)** At what stage in the ODPC’s timetable will we get access to the files?
Wouldn’t it make sense to do so before we ask for a formal decision so that we can include this in our legal argumentation?
- Ad 11)** If the ODPC does not give us access to all or individual files of the pending proceeding, how can we appeal this decision under the Irish law?

Please feel free to simply refer to the legal basis if there is one that would clarify my questions. I am very sorry to bother you with these questions again, but we feel that they are essential to plan our next steps. If there is any way how we can get this information a way that is easier for you, please let us know. As always: I am available at +43 [REDACTED] any time.

Best Regards,

Maximilian Schrems

max [REDACTED]

Von: Gary T. Davis <[REDACTED]>
Gesendet: Dienstag, 17. April 2012 11:30
An: Max Schrems
Betreff: Re: AW: Schrems/Facebook - Formal Decisions and Access to Files

Dear Mr Schrems,

We have nothing further to add at this point in the process to that outlined in the attached and previous replies. In case you have not already viewed it I would draw your attention to the attached link on our website which outlines our procedures for investigating complaints.

<http://www.dataprotection.ie/ViewDoc.asp?fn=/documents/rights/2f.htm&CatID=24&m=e>

Yours sincerely

Gary

From: Max Schrems,
To: Gary Davis and Billy Hawkes
17. 4. 2012, 12:11

Dear Mr Davis,
(CC: Dear Mr Hawkes,)

I am very sorry to see your response. I hope you understand that we have a very hard time to understand your office's moves. While we are well aware of the material law, I have to rely on our office for any procedural issues. Being from a country that runs on a strictly statutory system does not make it much easier. We are very much interested in working towards an effective proceeding but every time we talk to representatives of your office it seems that we get different answers, if we get any at all. I have to confess that our uncertainty, together with unclear and changing answers and the outcomes of the first report resulted in a growing mistrust within our group. This is why we are so interested in finally getting a clear statement that we can then rely on.

We will discuss how we want to go about this situation and I will let you know about the outcomes soon. Very likely some of us are going to fly to Ireland soon, so maybe we would be able to talk about some of the issues directly, which might help overcoming the problems we are seeing right now.

Despite your last e-mail I am still hoping to get a response to the questions we raised within the coming days.

Thank you,
Max Schrems