

European Privacy Class Action: Facebook even contests “legal competence” of its users.

Facebook is trying everything it can to delay the largest European privacy class action ever filed (www.fbclaim.com). In this attempt, Facebook came up with countless arguments to delay the lawsuit filed at an Austrian court this August. It seems more than questionable whether the IT giant’s attempt at delaying will be successful, given the arguments presented. In this first response¹ to the lawsuit, Facebook submitted 30 pages that are in essence arguing that no court should ever decide over the companies’ questionable privacy practices. At the same time Facebook remains silent about the actual content of the class action – a long list of alleged violations of EU privacy laws.

Facebook users not legally competent? In order to get the lawsuit dismissed, Facebook came up with rather obscure arguments: Facebook is e.g. contesting the legal competence² of all users that participate in the class action. Max Schrems, the main plaintiff in the procedure: *„I have never heard of any company which has flat out contested the legal competence of its own customers.“* At the same time the social network does not explain how the same users were previously able to consent to Facebook’s terms and privacy policy. Naturally the users must have lost their legal competence after they have joined Facebook and agreed to the contract. Schrems: *„Given that users cannot retroactively have become minors, Facebook is effectively arguing that its users have become mentally insane – a rather interesting argument.“* While being at it, Facebook also contests that it’s users are “consumers” and therefore enjoy consumer protection laws.

Translated³ Quote from Facebook’s Submission: *„It is contested, that [the users]⁴, as claimed in the lawsuit, have actually assigned their claims to the plaintiff. The plaintiff has not proven that (...) they are, as claimed, consumers and have the necessary legal capacity to conduct the assignment as claimed. (...) Consequently the capacity to bring the claim (*locus standi*) is contested.“*

Immunity from Lawsuits? According to Facebook it is even impossible to sue the IT giant at ordinary courts. The company argues that only the relevant Data Protection Commissioner in Ireland can address privacy issues. The company argues that it is immune from lawsuits. Facebook explicitly confuses the role of an administrative oversight body with the ordinary courts. Schrems: *„The fact that there is an – inactive – oversight authority has nothing to do with the possibility to sue a company. According to the logics of Facebook, customers could not sue their bank, because there are banking regulators.“* The background for these arguments are obvious: The Irish authority has so far only issued two non-binding ‚reports‘ and has been refusing a decision in the case for the past three years. Courts outside of Ireland may take the matter more seriously.

No Comment on Violations. It is remarkable that Facebook does not respond to the actual claims of the lawsuit in the 30 page submission. On roughly two pages, Facebook flat out denies any wrongdoing, without any further explanation. The accusations that Facebook never got a valid consent by its users, that it is illegally analysing user data, tracking users on third-party pages or

¹ Facebook Ireland has not consented to the publication of the response.

² The legal competence describes the mental capacity of an individual to participate in legal transactions. Typically only underage and insane people lack legal competence.

³ German Original: *„Es wird bestritten, dass [die Nutzer], wie in der Klage behauptet, ihre Ansprüche tatsächlich an den Kläger abgetreten haben. Der Kläger hat nicht nachgewiesen, dass (...) diese, wie behauptet, alle Verbraucher sind und über die für die behaupteten Abtretungen notwendige Geschäftsfähigkeit verfügen. (...) Die Aktivlegitimation wird daher bestritten.“*

⁴ The names of the individual users was replaced by „the users“

participating in the NSA “PRISM” program are not contested in detail. Once again Facebook remains silent.

Delay Tactics. The strategy of Facebook in the procedure seems clear: Facebook concentrates on formal matters, so that it does not have to address the content of the class action. Schrems: *„We expected a delay tactic on formal grounds, but we thought they will come up with better arguments.“*

Next Steps. The plaintiffs can now reply to Facebook’s submissions. The lawyer representing the plaintiff, Dr. Wolfram Proksch (PFR lawyers) on the next steps: *„Even these – solely formal – arguments by Facebook have to be assessed by the court, but I am confident that they will be discharged. The court will now set a date for the first hearing and will address the submissions by both parties. The judge will then set out a timeline for the oral hearings.“* The class action is financed by ROLAND Prozessfinanz, a German legal financing company. This means that the plaintiffs are well funded and there is no financial risk for participants.

Background. Within six days more than 25.000 Facebook users have assigned their claims for the class action, which was launched at a Viennese court on August 1st this year. Another 50.000 Facebook users from more than 100 countries have since then registered at www.fbclaim.com to later join the procedure. The class action, which was filed against “Facebook Ireland Ltd” is therefore the largest privacy class action ever filed in Europe. All Facebook users outside of the US and Canada (about 82%) are managed by “Facebook Ireland Ltd” and can still register for the class action.

More Information and free pictures: <http://www.europe-v-facebook.org/EN/Media/media.html>

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