

CJEU gives Green Light for Facebook Lawsuit in Vienna

The Court of Justice of the European Union (CJEU) confirms that Max Schrems can litigate in Vienna against Facebook for violation of EU privacy rules. Facebook's attempt to block the privacy lawsuit was not successful.

However, today the CJEU gave a very narrowly definition of the notion of a "consumer" which deprives many consumer from consumer protection and also makes an Austrian-style "class action" impossible.

Max Schrems: „For three years Facebook has been fighting nail and toe against the Courts jurisdiction in Austria and lost. Now, we can finally go ahead with the case. Facebook will now have to explain to a neutral Court whether its business model is in line with stringent European privacy laws. This is a huge blow for them. Unfortunately the Court of Justice has not taken up the golden opportunity to finally establish collective redress options in Europe, but kicked the ball back to the legislator.“

Short Summary:

- In the "Facebook-Lawsuit" ([C-498/16](#), [FBclaim.com](#)) the CJEU has decided on national jurisdiction in consumer matters.

Vienna Courts have jurisdiction to hear Schrems v. Facebook Case

- "Model Case" on Facebook's misuse of personal data is admissible in Vienna, according to CJEU.
- For the first time a broad review of Facebook's compliance with EU data protection laws will be possible (e.g. illegal privacy policies, online tracking, sharing of data with US authorities and alike).
- Facing a lawsuit, which questions Facebook's business model, is a huge risk for the company. Any judgement in Austria is directly enforceable at Facebook's Irish headquarter and throughout Europe.
- Facebook's blocking attempt was not successful.
- Facebook will be liable to pay the lion share of the cost of litigation in this case: 20 of of Schrems 22 claims are admissible.

Highly Problematic "Consumer" Definition Undermines "Class Action"

- The CJEU decided Contrary to the view of the governments of Germany, Austria, Portugal, the European Commission and the plaintiffs.
- The CJEU introduced in this case a new limited definition of a "consumer". According to this, only the original contract partner of a business is granted the right to bring cases at their home court. This is a very extreme ruling, as many consumer situations are now outside of the "consumer" definition.
- The new consumer definition also impedes the possibilities of a "class action" as a consequence.
- Companies can continue to "divide and conquer" and block enforcement of consumer rights. The continuous lack of a European "consumer class action" leads to a huge enforcement gap.
- Countless European courts would have to individually process 25.000 lawsuits by Facebook users.

"noyb" will be able to collectively protect users' privacy from May 25th under new law

- "Privacy class actions" will be possible again under the new EU data protection law ("GDPR") from May 25th 2018 on. The new privacy enforcement non-profit [noyb](#) will provide the structure for this.

Schrems: „I am happy that after more than three years, Facebook’s blocking strategy has not paid off. Facebook can no longer hide behind the Irish Data Protection Authority against claims brought in a Court in Vienna by a Vienna resident. The fact that the case is now clearly admissible is a huge problem for Facebook. Irrespective of whether I can bring only my own private claims or whether 25.000 other private claims can be added to mine – if the business model of Facebook is tested in a court that’s a huge risk for a company that ignored the law. That’s why Facebook desperately tried to block the whole case.”

Dr. Arndt Eversberg, Roland ProzessFinanz AG, Cologne, Germany: „As the CJEU has not allowed a European Class Action, the legislator now has to take action. The Austrian ‘class action’ shows that there are great tools that allow consumers to enforce their rights without questionable situations as in the United States. After cases like the Volkswagen emissions scandal we finally need to ensure that consumers don’t just have rights on paper, but are also able to enforce their rights.“

Schrems: “Unfortunately the CJEU has massively limited consumer rights in this case and missed a golden opportunity to finally allow collective redress in Europe. This will hit consumers in many cases where they have not signed the original contract with a company. We have succeeded on 20 of 22 claims in the lawsuit. In the end Facebook will have to cover most of the legal costs of this procedure.”

Background:

Fight over Jurisdiction: “Consumer Lawsuit” in Austria or Huge Costs in Ireland?

For three years, the Courts have been only addressed if Austria has jurisdiction in this case but have not so far reviewed the substance of the lawsuit. The core matter before the Court of Justice of the European Union was the scope of the consumer definition and jurisdictional issues linked to the consumer status.

Under the relevant EU legislation (Article 15 [Brussels-I](#)) a consumer can sue a company at his home court (in this case Vienna, hometown of the plaintiff) – and does not have to bring a case at the court where a company is based (in this case Dublin, headquarter of Facebook).

The difference between a court case in Austria and Ireland is dramatic:

- (1) In Ireland ‘class actions’ are not known. The costs for a single model case could easily reach more than 10 million Euros (see e.g.: [€ 2 million for one party in one instance in a pending case](#))
- (2) In Austria claims can be joined in a “class action” and costs are moderate.

Schrems: „If a multinational knows that they cannot win a case, they try to find reasons so that a case is not admissible, or they try to squeeze a plaintiff out of the case by inflating the costs.. Facebook wanted to ensure that the case can only be heard in Dublin, as Ireland does not have any class action and litigating even one model claim would cost millions of Euros in legal fees. In this case we’d have a valid claim, but it would be basically unenforceable.“

Overall Facebook objected to the case being heard in Vienna on six grounds, and the Austrian courts have already rejected five of them. The final objection was now largely decided in favor of the plaintiff, while Facebook succeeded against its users on the ‘class action’ heading of the claim.

CJEU: Schrems is acting as a “consumer”

The CJEU rejected Facebook’s attempt to paint Mr Schrems political activities as a “business” and violate his Consumer rights. The CJEU clarified that Mr Schrems is acting as a consumer when taking actions against Facebook. Schrems: „After throwing dirt at me for three years and circulating that I would try to make a profit from my political activities, it’s maybe the time now for Facebook to apologize.“

Limitation of „Consumer” Definition makes Class Action impossible

For an „Austrian style class action“ more than 25.000 users have assigned their rights against Facebook to Max Schrems, who enforces their claims on a *pro bono* basis.

Instead of bringing 25.000 identical lawsuits in countless local courts around Europe, a class action allows to have one joint procedure before one judge. This is the only way to realistically bring cases when a large number of consumers are concerned. Individual cases on rather small claims are usually too expensive and complicated for each individual user to bring.

CJEU has now greatly limited consumer protections: Only the original contract partner of a business is a “consumer” in the view of the CJEU. To bring a “class action” in Austria, an Austrian court has to have jurisdiction not only for the claims of the plaintiff, but also for claims of all individuals who have transferred their rights to Schrems..

Schrems: *“The CJEU has greatly limited the definition of a consumer in European law and there the protection of consumers: Only the original contract partner of a company can sue at his or her home Court. This means,*

- *If you bought a second hand dieselgate car you are not a ‘consumer’, as you did not sign the original contract with Volkswagen.*
- *If you buy bad food at a supermarket for your family, your kids do not fall under ‘consumer’ protection, as they did not have a contract with the supermarket.*
- *If you got a present that was bought on Amazon, you will have to sue Amazon in Luxembourg if there is a problem, because only the person buying the present had a direct contract with Amazon.*

This shows that limiting the consumer protection leads to absurd results. I really have to say that I cannot see how the CJEU could decide this way. The Court cannot have thought this through and will need to correct its approach in future case law.”

Under the CJEU judgement it is now a matter of luck, if plaintiffs can get together in a ‘class action’:

- (1) A ‘class action’ is still possible if the defendant is headquartered in a member state with class actions (e.g. 25.000 Irish plaintiffs sue an Austrian company), also
- (2) If a harmful event happened in a member state that allows collective redress, as the CJEU has ruled in a recent cartel case ([C-352/13](#)) between 71 companies, but
- (3) Only at if a case is based on consumer jurisdiction, there is no option for a ‘class action’ based on assignments.

Schrems: *„We now have the absurd situation that 71 companies that were harmed by a cartel could bring their claims jointly, only consumers cannot join forces. Equally you can sue ‘into’ a country that has a class action but not ‘out’ of such a country. As the Advocate General has already said in its opinion: There is now an urgent need to get a European solution for collective redress.“*

Personal Fight should be replaced with organization: *noyb*

On November 28th Schrems and a number of colleagues have founded “*noyb – European Center for digital Rights*”. *noyb* wants to collectively enforce the right to privacy through strategic litigation. A new European data protection law (“GDPR”) will allow the non-profit to collectively enforce user rights. So far *noyb* is not fully financed. A kickstarter campaign is pending on www.noyb.eu for six more days until January 31st. About 85% are so far funded.

Schrems: *„My fight shows that as an individual user you need a lot of energy and time to even just get a case before a court, but it also shows that a lot is possible, like the win over ‘Safe Harbor’ in 2016. But it is time that the fight for our fundamental rights is not a matter of an individual, but is based on a proper structure.“*

From May 25th 2018 the new EU data protection law (“GDPR”) will be in force. This will allow noyb to bring “class actions” again under a different legal regime (Article 80 GDPR). Under the new law, today’s decision will not save companies that violate our privacy from collective redress.

Background: Ongoing procedures since 2011

(1) Irish Data Protection Authority: In 2011 Schrems submitted a couple of complaints with the Irish Data Protection Authority. The Authority has not decided for three years ([Complaints](#)).

(2) Judicial Review on “Safe Harbor“: Against the inaction on one of the complaints concerning Facebook’s involvement with NSA surveillance, Max Schrems filed a judicial review the Irish courts, which lead to the invalidation of the so-called “Safe Harbor” agreement by the CJEU ([C-362/14](#)).

The Irish Authority has then for the first time investigated this complaint in 2016, but has soon held the procedure to refer another question to the CJEU. This case is still pending in Ireland, but the Irish court has already decided that it will refer to the CJEU for a third time ([Judgement of 6. Oct. 2017](#)). The reference to the CJEU shall be issued within the next weeks. So far the Irish Authority has not decided over any of the complaints.

(3) Direct Civil Lawsuit in Vienna: As the Irish Data Protection Authority has not decided within three years, Schrems took back all remaining complaints in 2014 and filed a civil lawsuit against Facebook at his home court ([all documents](#)). More than 25.000 Facebook users have joined this class action. Facebook has tried to block this procedure with countless objections. After the case was before the Viennese Regional Court, the Higher Regional Court and the Austrian Supreme Court, the case was referred by the Austrian Supreme Court to the Court of Justice of the European Union (CJEU) who has now decided over it.

After more than six years the CJEU has now finally decided about a court that has to hear the claims against Facebook, as the Irish Data Protection Authority has not decided over the case.

Questions / More Information?

Fact Sheet on the Class Action: www.europe-v-facebook.org/sk/fs_en.pdf

FAQs on the Class Action: www.fbclaim.com/ui/page/faqs

Litigation Funding: www.roland-prozessfinanz.de

Webpage: www.fbclaim.com

Twitter: [@maxschrems](https://twitter.com/maxschrems)

E-Mail: media@fbclaim.com

Phone: +43 660 1616327 (Max Schrems)

+49 162 9944910 / +49 40 244 24 28 42 (Dr. Arndt Eversberg, Roland ProzessFinanz AG)

+43 663 454 9660 (Werner Reiter, noyb)