

CJEU ruling on Facebook action on January 25, 2018: Class action, model case or no jurisdiction?

In August 2014, lawyer and data protection expert Max Schrems filed a lawsuit against Facebook with his competent court in Vienna, as previous complaints in Ireland have not been decided by the Irish Data Protection Commissioner since 2011. Now the CJEU decides on the admissibility of the lawsuit against Facebook. Previously, in 2015 Schrems brought down the EU-US "Safe Harbor" system through a case against Facebook at the CJEU.

Dispute solely on jurisdiction and on two questions

Facebook has submitted various grounds with the court in Vienna, why the procedure should not be heard at all. The majority of these attempts to prevent the procedure have already been rejected by the Austria courts over the past three years.

What remained, were two questions: (1) whether Mr Schrems is a "consumer" or has lost this status through his pro bono work as a privacy advocate; and (2) whether he can bring claims of other users jointly in a "class action". The class action is financed by ROLAND Prozessfinanz AG.

Facebook wants each of the 25,000 other users to have to sue in a separate procedure - which would make the legal costs skyrocket and a case against Facebook financially impossible for most users. In Facebook's view, the same legal and factual issues should therefore be trailed 25,000 times in front of thousands of European courts and judges ("divide and conquer").

These two questions were submitted to the Court of Justice of the European Union (CJEU) for a preliminary ruling by the Austrian Supreme Court. A material review of the lawsuit against Facebook is only possible after all objections of Facebook are dealt with.

Max Schrems: "Facebook knows that they can't win this case when it will be heard. Therefore, they try everything to block the lawsuit by making it economically impossible or for formal or reasons. This has been going on for a good seven years now. The Irish Data Protection Commissioner did not want to decide for three years. Now Facebook tries everything in the courts to prevent the lawsuits from being deal with. I am now awaiting a decision as to whether, by means of a model case or a class action lawsuit. I hope will finally be able to get to the substance against Facebook. By January 25th three years of blockade should be overcome, and we can finally get to the substance of it. "

Advocate General: "Model Case" is possible, "Class Action" is not.

In November, Michal Bobek, the Advocate General at the CJEU, published his opinion in the case. In the non-binding opinion he confirms that Max Schrems is a consumer. The Advocate General generally advocated for class actions in the EU, but he argued for a regulation by the legislature and did not want to allow an "Austrian style class action". By contrast, two years ago the CJEU allowed a class action of 71 companies in an antitrust proceeding.

Max Schrems: "The Advocate General seems to have no problem with class actions. In antitrust proceedings, the ECJ has already approved this for 71 companies. The problem of the AG seems to lie with the consumer definition. The Advocate General seems to argue that only the original contract partner of a company is a 'consumer'. The consequence would be absurd: Companies could easily file class actions in antitrust cases, but consumers would not be able to do the same."

Massive limitation of “consumer” rights possible

The Advocate General's opinion would go beyond the issue of "class actions" and (if joined by the CJEU) could lead to a massive limitation of consumer protection law: *"If only the original contracting party falls under consumer definition, the buyer of a pre-owned car is for example no longer a 'consumer', as he has no direct contract with the car dealership. If you receive a gift for Christmas, you are not 'contract partner' of Amazon because you did not buy the product, but only received it as a gift. You then have no consumer protection if there is a problem. This approach would be a massive restriction of the consumer definition."*

After Ireland and Class Action: “noyb.eu” as next huge step for privacy enforcement

Independent of the judgement by the CJEU the new "EU Data Protection Regulation" (GDPR), will provide greatly improved opportunities to enforce the fundamental right to data protection. It will come into force in May 2018 and will allow non-profits to enforce users' rights collectively. This is exactly what the new organization "noyb.eu" is designed to do, by using effective and strategic enforcement methods of European privacy protections.

noyb wants to ensure that privacy is not an abstract right on a piece of paper, but reaches every user's smartphone or computer (*#MakePrivacyReal*). Partners such as the Austrian or Norwegian consumer organization, national data protection NGOs and ROLAND Prozessfinanz AG will support *noyb* in its activities. Expert members include Jan-Philipp Albrecht (Member of the European Parliament and GDPR rapporteur) or Paul Nemitz (formerly Director of Fundamental Rights, European Commission).

Schrems: *"The case against Facebook perfectly shows that as a single user - even if you are a privacy expert - you need a lot of time and energy to enforce your rights. We currently have a right to privacy on paper, but often not in practice. The solution for this enforcement gap is collective and strategic enforcement on a European level. With the new EU data protection regulation and the establishment noyb, we now have the opportunity to massively improve the situation."*

Until end of January 2018, *noyb* seeks stable funding through a [Kickstarter campaign](#). So far, over 50 percent of the minimum required 250,000 euros per year were pledged. In addition to numerous individual supporting members, *noyb* is also funded by the City of Vienna (25,000 euros per year), the operator of the privacy-friendly search engine StartPage.com (20,000 euros per year) and Mozilla, the foundation behind the Firefox browser (10,000 euros). Further institutional funding will be announced shortly.

More information at: www.fbclaim.com

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