

**CJEU Advocate General: Facebook privacy “model case” admissible, but legal succession between consumers kills consumer rights.**

**Schrems: „Collective redress only within EU member states?”**

**First Statement. Please [load the latest version here](#) and check [@maxschrems](#)! Thanks!**

The advocate general (AG) at the Court of Justice of the European Union (CJEU) Michal Bobek has published his opinion ([PDF](#)) in case C-498/16 today. In the pending case between the lawyer and privacy activist Max Schrems and Facebook, the advocate general has strengthened the plaintiff, but voiced concerns over a “class action”. The AG did not side with the view of Mr Schrems and the governments of Germany, Austria and Portugal that intervened in the case and saw no problem to bring a collective lawsuit.

### **Background**

Max Schrems has sued Facebook over his private Facebook account at his home court in Vienna, Austria. Schrems accuses Facebook to massively violate strict European privacy laws. The lawsuit includes claims from invalid privacy policies all the way to data sharing with US intelligence services. In addition to bringing his personal claims, he also invited other users to sign over their rights to him, to form a so-called “Austrian style class action” against Facebook, in which he represents other users on a *pro bono* basis. The procedure was supported by the German procedure financing company ROLAND Prozessfinanz.

### **Perliminary Question: Civic engagement not a „business“ Model case against Facebook in Austria is admissible.**

In addition to fighting a “class action”, Facebook tried to argue that Mr Schrems cannot bring a lawsuit at his home court, as he would not qualify as a consumer, but as a business. This is despite the fact that the courts have found, that the lawsuit is organized on a *pro bono* basis and he never used his Facebook account in any commercial way.

The strategy of Facebook was to force Schrems to bring his lawsuit at Facebook’s home court in Dublin – where a single case of € 500 could cost Millions in legal fees. This was clearly rejected by the AG, just like previously by the Higher Regional Court in Vienna: Individuals that fight for their rights as volunteers are not ‘businesses’ and can enjoy their consumer rights. The AG confirmed: Mr Schrems can bring a ‘model case’ in Vienna.

Schrems: „The argument by Facebook that a person who fights publicly but unpaid for his rights becomes a ‘business’ was rather absurd. I am therefore happy, that the advocate general has sent an important sign for all citizens that engage in volunteer work. It will be

*a matter for Facebook to issue a public correction in this respect, after publicly denouncing me for years.*

*In the advocate general's view, I can at least bring a 'model case' at my home jurisdiction in Vienna, which may enable us to debate the illegal practices of Facebook in an open court for the first time."*

### **Advocate General: Cross-border collective redress not admissible**

In relation to the second question referred by the Austrian Supreme Court, the advocate general accepted Facebook's point of view: An "Austrian style class action" is only admissible against an Austrian company – but not if an Austrian consumer sues a company in another EU member state.

His opinion is mainly based on general considerations, such as legal certainty and the general possibility to have "forum shopping" in Europe – which was clearly not alleged in the specific case.

The advocate general hereby also argues against the views of the European Commission, Austria, Germany and Portugal, who all joined the view of Mr Schrems, that an Austrian consumer class action should be possible against a company in another member state.

In the case before the CJEU, about 25,000 other consumers have assigned their rights to the plaintiff. If the CJEU follows the view of the AG, the plaintiff can bring one lawsuit on behalf of all 25,000 consumers – which greatly limits the burden and costs of the procedure for the plaintiff and defendant.

The Advocate General however clearly voiced a view that collective redress for consumers is necessary in the EU, but he insists that this should be done through legislative action and not a decision by the CJEU.

*Schrems: „The opinion by the advocate general on the admissibility of a class action, is unfortunately hard to understand. It seems that he did not want to engage in policy decision, but quite honestly, this case got to the CJEU, because the matter is a policy issue.“*

*Recently the Court of Justice has accepted a class action by 71 companies in a case called „Cartel Damage Claims“). Two years later, consumers that do the same thing as companies and generally enjoy higher protection, should not be protected by the law?*

*Equally the "legal certainty" argument makes little sense. A change of jurisdiction is happening thousands of times every day in Europe. European citizens and businesses can freely move within the Union, which automatically changes their home court. It is hard to understand why a company should have trust in the jurisdiction of a certain court if a 'class action' is formed, but not in daily business. Facebook itself has moved its operations from California to Ireland and thereby changed its jurisdiction, without anyone claiming that this would not be possible, because users trusted in the jurisdiction of a California court when signing up to Facebook.*

*It seems that Facebook has managed to score with their emotional horror stories, according to which collective actions by consumers are highly questionable. From a purely legal point of view, I have a hard time to follow the arguments by the advocate general.*

*Prof. Herwig Hofmann, representative of Mr Schrems: Should the Court follow the opinion of the advocate general, this could also hurt the common market. Consumers would be prevented from using services located in other member states. Their rights would be hardly enforceable in practice – a terrible result, which would send us back to the 1950ies.*

*Max Schrems: “The consequence would be that thousands of courts in the whole European Union would have to deal with an identical, but local lawsuit against Facebook. Bringing a case in Ireland is equally impossible, because the legal costs for a data protection lawsuit of € 500 could easily lead to legal costs of 10-20 million under the Irish system. In this case we would be in a situation where citizens have rights on paper – but no realistic option to ever defend their rights in practice.*

*I hope that the five judges that will ultimately decide over this case will take a closer look and will not follow the advocate general. I had the impression that the advocate general was more critical during the hearing, which may have led to this opinion.”*

## **Next Steps**

The advocate general gave his opinion on how the panel of five judges should decide in this case. The final judgement in this case is expected by the beginning of 2018. After the decision the case will continue at the Austrian Supreme Court, who has referred it to the CJEU.

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## **Questions / More Information?**

Fact Sheet on the Class Action: [http://www.europe-v-facebook.org/sk/fs\\_en.pdf](http://www.europe-v-facebook.org/sk/fs_en.pdf)

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

Webpage: [www.fbclaim.com](http://www.fbclaim.com)

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

E-Mail: [media@fbclaim.com](mailto:media@fbclaim.com)

Phone: +43 660 1616327