

Jurius

Consumer Status for Private Usage of a Facebook Account

CJEU – According to Advocate General Bobek, Maximilian Schrems may be able to rely on his consumer status in order to sue Facebook Ireland before the Austrian Courts with respect to the private use of his own Facebook account. However, Mr Schrems cannot rely on his consumer status with respect to claims assigned to him by other consumers. (Judgement C-498/16)

Category: News

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[Rz 1] Mr Maximilian Schrems from Austria started legal proceedings against Facebook Ireland before the Austrian Courts. He alleges that Facebook Ireland has violated his own privacy and data protection rights¹ and those of seven other Facebook users who assigned their claims for allegations of the same violations to him² in response to his online invitation to do so³. Those users are domiciled in Austria, Germany and India.

[Rz 2] Facebook Ireland challenges the international jurisdiction of the Austrian Courts. First, it alleges that Mr Schrems cannot, in any case not any more, be regarded as a consumer for the purposes of the proceedings against Facebook. Facebook Ireland argues that due to Mr Schrems' professional activities connected to his claims against the company, he has lost his consumer status. Mr Schrems cannot therefore benefit from the privilege granted by EU law⁴ to consumers allowing them to sue a foreign contract partner at home, in their own place of domicile. In any event, the establishment of Mr Schrems' Facebook page means his use of Facebook is professional. Second, Facebook Ireland holds that the jurisdictional consumer privilege is strictly personal and cannot be relied on for assigned claims.

[Rz 3] The Oberster Gerichtshof (Supreme Court of Justice, Austria) has asked the Court of Justice to clarify the jurisdictional consumer privilege with respect to these two issues.

[Rz 4] The Oberster Gerichtshof sets out the background of the case and states that Mr Schrems specialises in IT law and data protection law, and is writing a PhD thesis on the legal aspects of data protection. He has used Facebook since 2008. First, he used Facebook exclusively for private purposes under a false name. Since 2010, he has used a Facebook account under his name, spelt using the Cyrillic alphabet, for his private use – uploading photos, posting online and using the messenger service to chat. He has approximately 250 «Facebook friends». Since 2011, he has also used a Facebook page. That page contains information concerning the lectures he delivers, his participations in panel debates and media appearances, the books he has written, a fundraiser he has launched and information about the legal proceedings⁵ he has initiated against Facebook Ireland.

[Rz 5] On the subject of these legal proceedings, Mr Schrems has published two books, delivered lectures (sometimes for remuneration), registered numerous websites (blogs, online petitions, crowdfunding actions for legal proceedings against the Defendant), obtained various awards and founded the association Verein zur Durchsetzung des Grundrechts auf Datenschutz. He has assembled a team of 10 individuals with a core of five to support him in «his campaign against Facebook».

¹ Mr Schrems seeks among others that certain contract terms be declared invalid, an injunction as regards the use of data, and damages. These proceedings have been brought with the support of a litigation funding company for a fee of 20% of the proceeds and with the support of a public relations agency.

² Purely for litigation purposes.

³ Following this invitation, over 25'000 people have assigned their claims against the Facebook Ireland to Mr Schrems through one of the websites registered by him. As of 9 April 2015 another 50'000 people were on a waiting list.

⁴ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters («the Brussels I Regulation», OJ 2001 L 12, p. 1).

⁵ In 2011, Mr Schrems submitted 22 complaints against Facebook Ireland before the Irish Data Protection Commissioner. As a response to those complaints, the Data Protection Commissioner issued a review containing recommendations to Facebook Ireland and, subsequently, a monitoring review. In June 2013 Mr Schrems brought a further complaint against Facebook Ireland in relation to the PRISM surveillance programme which led to the annulment of the Commission «Safe Harbour» Decision by the Court of justice of the European Union in case C-362/14, Schrems.

[Rz 6] In the Opinion, Advocate General Michal Bobek proposes that the Court answer the Oberster Gerichtshof, first, that the carrying out of activities such as publishing, lecturing, operating websites, or fundraising for the enforcement of claims do not entail the loss of consumer status for claims concerning one's own Facebook account used for private purposes'. Therefore, it would appear that Mr Schrems can be considered a consumer with regard to his own claims arising from the private use of his own Facebook account. It is however for the Oberster Gerichtshof to verify this.

[Rz 7] According to the Advocate General, consumer status as a general rule depends on the nature and the aim of the contract at the time it was concluded. An ulterior change in use may be taken into account only in exceptional scenarios. In cases where the nature and the aim of the contract are both private and professional, the consumer status may still be retained if the professional «content» can be considered as marginal. Knowledge, experience, civic engagement or the fact of having reached certain renown due to litigation do not in themselves prevent someone from being a consumer.

[Rz 8] The Advocate General proposes to answer, second, that a consumer who is entitled to sue his foreign contact partner in his own place of domicile, cannot invoke, at the same time as his own claims, claims on the same subject assigned by other consumers domiciled in other places of the same Member State, in other Member States or in non-Member States'.

[Rz 9] According to the Advocate General, the rules in question clearly show that the jurisdictional consumer privilege is always limited to the concrete and specific parties to the contract. It would be incompatible with these rules to allow a consumer to also make use of this privilege for claims assigned to him by other consumers purely for litigation purposes. Such an extension would, in particular, allow to concentrate claims in one jurisdiction and, for collective actions, to choose the place of the more favourable courts, by assigning all claims to a consumer domiciled in that jurisdiction. It could lead to unrestrained targeted assignment to consumers in any jurisdiction with more favourable case-law, lower costs or more generous jurisdictional aid, potentially leading to the overburdening of some jurisdictions.

[Rz 10] Advocate General Bobek admits that collective redress serves the purpose of effective judicial consumer protection. If well designed and implemented, it may also provide further systemic benefits to the judicial system, such as reducing the need for concurrent proceedings. However, it is not for the Court to create such collective redress in consumer matters, but eventually for the Union legislator.

Judgement of the CJEU no. C-498/16 of 14 November 2017 in case Maximilian Schrems v Facebook Ireland Limited – Opinion of Advocate General Bobek

Source: Press Release of the CJEU No. 119/17 of 14 November 2017

Further information:

- PETER SCHILLING, Nutzen und Zulässigkeit kommerzieller und eigener Social Media durch öffentliche Einrichtungen, in: Jusletter IT 25 February 2016
- SIMON SCHLAURI, Internationaler Datenaustausch: Entwicklungen nach dem Ende von Safe Harbor, in: Jusletter IT 25 February 2016
- JURIOUS, The Court of Justice declares that the Commission's US Safe Harbour Decision is invalid, in: Jusletter IT 19 November 2015
- The Safe Harbour Decision of the ECJ – 2 November 2015, in: Jusletter IT Flash

- **JURIUS**, European Privacy Class Action: Facebook even contests «legal competence» of its users, in: Jusletter IT 11 December 2014