Ahern Rudden Quigley
Solicitors
5 Clare Street
Dublin 2
T +353 (0) 1 661 6102
E enquiries@arqsolicitors.com
W www.arqsolicitors.com
DX 162 Dublin

AHERN RUDDEN QUIGLEY

Our Ref: **GR/MC/SCH002-9341** Your Ref: Date: **7 September 2020**

Data Protection Commission
21 Fitzwilliam Square
Dublin 2
Attn: John O'Dwyer

[redacted]

**Re: Our Client – Maximilian Schrems**
**Complaint against Facebook Ireland Limited ("FB-I")**

Dear Sirs,

We refer to your letter of 31 August 2020.

Our client has grave concerns about the procedure that you have adopted in relation to his Complaint.

You have stated, without providing any rationale to support the position, that it is necessary and appropriate for you to undertake an inquiry (the "Inquiry"), to be conducted pursuant to Section 110 of the Data Protection Act 2018 and Article 60 of the GDPR. It is not clear from your letter whether the Inquiry is an "own volition" inquiry or a "complaints based" inquiry.

**Breach of High Court Undertaking**

At paragraph 109 of the recent judgment in *Data Protection Commission v Facebook and Schrems C-311/18*, the Court of Justice of the European Union stated the following:

*"The supervisory authority must handle such a complaint with all due diligence"*

Furthermore, you gave an undertaking to the High Court on 20 October 2015 that our client's complaint would be *"investigated with all due diligence and speed"*. At no time have you applied to be released from this undertaking.

In the letter under reply, you state the following:

> *"Thereafter the Commission will, in turn, review and consider such further or other steps as may be required to conclude its ongoing investigation into your complaint."*
>
> and
>
> *"The Commission will review and, if necessary, determine your complaint following the completion of the inquiry described above".*

It therefore appears that you have launched a wholly unnecessary secondary inquiry, without providing any rationale for so doing, with the consequence that your investigation of our client's complaint is suspended indefinitely. Further to the above, it is clear from the letter that it is your intention to breach the undertaking, as you are unilaterally staying or suspending the investigation while you undertake the Inquiry.

As no doubt you are aware, there are serious consequences for breaching an undertaking to the High Court.

**No rational reason for undertaking the Inquiry**

As stated above, you have provided no rationale to support your opening of the Inquiry. There appears to be no rational reason that the issues that you propose to address in the Inquiry cannot be addressed in the context of our client's complaint and in the course of the investigation of that complaint, as set out below.

Our client lodged his Complaint more than 7 years ago. The effect of undertaking this Inquiry will be to undoubtedly delay the investigation of our client's complaint for a further considerable period.

In the Statement of Claim delivered on 31 May 2016 in The Data Protection Commissioner v Facebook Ireland Limited and Maximilian Schrems 2016/4809P, you described the context in which the Draft Decision dated 24 May 2016 was issued.

At paragraph 42 (3) it is stated:

> *"Strand 1 comprised a factual investigation which focussed on establishing whether FB-I has continued to transfer subscriber's personal data to the US subsequent to the CJEU Ruling and to the extent that it does, Strand 1 also sought to examine the legal bases on which such transfers are effected".*

At paragraph 43 it is stated:

> *"With respect to Strand 1, the Draft Decision explained that, in the course of exchanges between FB-I and the Commissioner in relation to Strand 1, FB-I had acknowledged that it continues to transfer personal data relating to Facebook subscribers resident in the EU to Facebook Inc. FB-I had acknowledged that it makes these transfers, in large part, on the basis of its contention that – by means of the deployment of the form of standard contractual clauses set out in the Annexes to the SCC Decisions – the company ensures adequate safeguards for the purposes of Article 26(2) of the Directive with respect to the protection of privacy and fundament rights and freedoms of EU resident subscribers to the Facebook platform and as regards the exercise by such subscribers of their corresponding rights."*

In your letter under reply you have identified two issues that are being considered in the Inquiry:

A. *Whether, taking into account the analysis contained in the Judgment, FB-I is acting lawfully, and in particular, compatibly with Article 46(1) of the GDPR, when, pursuant to the standard contractual clauses contained in the Annex to Commission Decision 2010/87/EU (as amended), it transfers, to the United States, personal data relating to individuals who are in the European Union/ European Economic Area who visit, access, use or otherwise interact with products and services provided by Facebook Ireland Limited; and,*

B. *if, upon the conclusion of the procedures provided for at Chapter VII of the GDPR, a decision is made to the effect that the transfers in issue give rise to an infringement of Article 46(1), whether any one or more of the corrective powers set out in Article 58(2) of the GDPR should be exercised and, if so, which such power(s) should be exercised.*

It is clear from the foregoing that both Strand 1 of the investigation of our client's complaint clearly encompasses Issue A in the Inquiry, namely, the lawfulness of FB-I transfer of data to Facebook Inc pursuant to the SCC Decisions.

Given your assertions and pleadings, there is no reason that the 2 issues that are being considered in the Inquiry could not be considered and determined in the context of Strand 1 of the ongoing investigation of our client's Complaint.

**Further delay**

Despite the fact that you propose that the draft Decision arising from the Inquiry will be issued in 42 days, the Article 60 procedure may take a considerable period of time to complete. As you are aware, if the case is submitted to the "consistency mechanism" pursuant to Article 63 to 65 GDPR and the EDPB makes a decision, Facebook can apply for that Decision to be annulled by the CJEU.

Thereafter, you intend to lift the stay and resume the investigation of our client's complaint and issue a further Decision that will also be subject to the Article 60 procedure and will be subject to the same delays as set out above.

Therefore, the procedure that you have adopted will inevitably lead to a duplication of work, **two** Article 60 procedures and will lead to major delays.

In the absence of a rational explanation as to why the Inquiry is necessary at all, this is clearly unreasonable and unacceptable to our client.

Further, there is no reason why you could issue a Decision in relation to the Complaint within a similar time period (42 days) and submit that Decision to the Article 60 procedure, such as would avoid duplication of that procedure.

**Breach of our client's right to be heard**

The proposed course of the inquiry breaches our client's right to be heard, particularly where:

A. You have identified two new issues arising on foot of the Complaint and have invited Facebook to make submissions on same while expressly stating that our client is not permitted to make any such submissions;
B. Your reliance on the statement from our client that voluminous submissions had previously been made in relation to the Complaint and were sufficient is erroneously placed in circumstances where you have identified *new* issues arising from the Complaint, on which our client has yet to be heard;
C. You have informed Facebook of your initial views on these issues and have invited Facebook's counter-views, but propose to exclude our client from providing his counter-views, thus depriving him of an equal right to be heard in relation to matters affecting his complaint;
D. Your express intention in opening the Inquiry is to produce a decision that will inform and perhaps determine the investigation into our client's Complaint without allowing him to be heard in relation to that decision.

Further to the above, if the Inquiry is an "own volition" Inquiry, our client would not receive notification of the Decision and therefore would not be able to exercise any right of appeal from that Decision, notwithstanding that it is intended to, and likely would, affect his rights and interests both as a data subject and as a complainant.

In the circumstances, your action in the opening of the Inquiry and your express exclusion of our client from submissions on new issues, or to afford our client parity with Facebook in making such submissions, is a clear breach of his right to be heard.

In this regard, we also note that you have not denied that there was communication with FB-I on this issue, but have not provided us with such communication. This breaches the right of our client to be heard in the existing complaints procedure.

**Resilement from previous positions.**

At paragraph 68 of your draft Decision dated 24 May 2016 you stated the following:

> *"68. A final decision will be issued following conclusion of the said proceedings. A party to the within complaint procedure who is aggrieved by the said final decision in relation to Mr Schrems' complaint against FB-I will be entitled to appeal that decision to the Circuit Court under Section 26 of the Acts within 21 days of receipt of notification of the final decision."*

This was the basis on which you commenced proceedings leading to the recent Judgment of the CJEU.

Your pleadings in those proceedings also referred to and relied on the draft Decision to support the bringing of those proceedings, including stating *inter alia* that the Decision was issued in draft format to preserve the right of the affected parties to "make such further submissions *as they may wish to make*" in relation to its terms".

In opening an Inquiry in the manner advised by your letter of 31 *ult.*, and in excluding our client from such inquiry in the manner proposed, you are resiling from positions relied on by you in instituting the proceedings and seeking a ruling from the CJEU on foot of same.

**Scope of the Inquiry is Insufficient and Irrational**

Without prejudice to our client's position that the undertaking of the Inquiry is irrational, the scope of it is insufficient to deal with our client's Complaint.

In our letter of 27 July 2020 to your solicitors, we requested you to clarify the legal bases that Facebook rely on to transfer data to the US. It appears that you did not do this and have instead launched the Inquiry that will not address this issue at all.

In light of the lack of any investigation by the DPC as to the actual legal basis that FB-I is currently relying on, we have taken it upon ourselves to get clarifications from FB-I. In that regard, we enclose recent correspondence between this firm and solicitors for FB-I in relation to the legal bases that FB-I rely on to transfer data to the US. As you will note from their letter of 19 August 2020, solicitors for FB-I state the following:

> *"The "What is our legal basis for processing data?" section of FIL's Data Policy and the legal basis information page note, among other things, that one of the core data uses necessary to provide Facebook's contractual services is to "transfer, transmit, store, or process your data outside the EEA, including to within the United States and other countries."*

Clearly, therefore, FB-I are now purporting to also rely on Art 49(1)(b) GDPR to legitimise the transfer of data to the US. The Inquiry will only cover a small aspect of the case before you. This "piece meal approach" will inevitably result in a wholly deficient draft Decision in the Inquiry.

Furthermore, it appears that you do not intend to investigate the historical unlawful processing by Facebook until the coming into force of the GDPR, which formed the basis for the original and reformulated Complaint, instead focusing on whether Facebook is *currently* in breach of the GDPR in relation to processing of our client's data. A failure by you to investigate Facebook's actions from the time of the complaints to date is a breach of your obligations under, *inter alia*, the old and new Data Protection Acts, Directive 95/46, the GDPR and the Charter of Fundamental Rights.

While it may be your intention to deal with such issues after the Inquiry and after the lifting of your stay on the investigation, it is our client's position that such action is lacking a rational basis and is unreasonable in all the circumstances. This is particularly where, as set out above and in the Draft Decision, bifurcation of issues will lead to further, unacceptable delays in reaching decisions, which in turn may produce dichotomous results, thus preventing effective enforcement of data protection law.

**Conclusion**

In light of the above, we call upon you to confirm, by close of business on Wednesday 9 September 2020, that you will not proceed with the Inquiry but rather deal with all issues with the context of your investigation of our client's complaint. Should you fail to do so, we have instructions to apply for injunctive relief against your office restraining you from proceeding with the Inquiry and compelling you to comply with your undertaking to the High Court by immediately resuming the investigation of our client's complaint.

Yours faithfully

**Ahern Rudden Quigley**

**Email:** [redacted]

CC. [redacted]