

**THE HIGH COURT
COMMERCIAL**

[2016 No. 4809 P.]

BETWEEN

THE DATA PROTECTION COMMISSIONER

PLAINTIFF

AND

FACEBOOK IRELAND LIMITED AND MAXIMILLIAN SCHREMS

DEFENDANTS

Executive Summary of the Judgment 3rd October, 2017

This is a summary of the judgment only. Please refer to the judgment for the statement of the facts, arguments and the reasons for the decision

Mr Schrems operates a Facebook account. He complained to the Data Protection Commissioner in Ireland about the transfer of his personal data by Facebook Ireland Ltd. (“Facebook”) outside the European Union to Facebook Inc., in the United States of America for further processing. He said that the legal regime in the United States does not afford his personal data the protection to which he is entitled under European law.

Facebook informed the Data Protection Commissioner that it transfers data for processing to Facebook Inc. including Mr Schrems’ data largely pursuant to an agreement between Facebook and Facebook Inc. which in turn is based upon a decision of the European Commission 2010/87/EU. This decision authorises the transfer of data by data exporters from the EEA to data importers outside the EEA on the basis of standard contractual clauses.

In considering Mr Schrems' complaint, the Data Protection Commissioner looked at the legal regime in the United States authorising electronic surveillance of data transferred from the EU to the US for processing and at the remedies available to EU data subjects whose data had been transferred to the US. She formed the view that there appeared to be well-founded concerns that there is an absence of an effective remedy in US law compatible with the requirements of Article 47 of the Charter of Fundamental Rights of the European Union for an EU citizen whose data are transferred to the US where the data may be at risk of being accessed and processed by US state agencies for national security purposes in a manner incompatible with Articles 7 and 8 of the Charter. She formed the view that the safeguards purportedly constituted by the standard contractual clauses set out in Decision 2010/87/EU do not appear to address this well-founded objection that there is an absence of a remedy compatible with Article 47 of the Charter.

The Data Protection Commissioner seeks a ruling on the validity of the Decision of the Commission (and two earlier decisions) ("the SCC Decisions"). Only the Court of Justice of the European Union (CJEU) has jurisdiction to rule on the validity of a European measure. She brought these proceedings seeking a preliminary reference to the CJEU on the issue of the validity of the SCC Decisions.

In this judgment the court is concerned with two issues:

- Whether the court has jurisdiction to grant the relief sought; and
- If so, whether the court should refer the issue of the validity of the SCC Decisions to CJEU for a preliminary ruling

In answering these questions the court looks to European law. The Directive with which this judgment is primarily concerned uses the word "adequate" and so the judgment, of necessity, refers to the adequacy or inadequacy of certain laws or provisions of third countries and in particular of the United States. This does not involve a decision on the respective merits of the

choices of the European Union (or its Member States) and the United States. The references to the adequacy or inadequacy of the provisions discussed in the judgment are references to the requirements laid down by the Directive. They do not constitute or reflect value judgments on the regime in the United States relating to data protection and surveillance by government agencies. It is not the function of this court to criticise the laws of a sovereign state, in this case the United States, or to pronounce on the relative merits of the laws of the United States and the European Union. I do not purport to do so in the judgment.

Conclusions

1. The court has jurisdiction to make a reference to the CJEU for a preliminary ruling on the validity of the SCC Decisions under Article 267 of The Treaty on the Functioning of the European Union.
2. The court may do so if it finds that the Data Protection Commissioner has raised well-founded concerns as to the validity of the decisions and the court shares those concerns.
3. Union law and the Charter are engaged, notwithstanding the fact that the interferences with personal data the subject of the case arise from surveillance for the purposes of national security.
4. The court is not obliged to reject the application by reason of the adoption by the Commission of the EU-US Privacy Shield Decision.
5. Union law guarantees a high level of protection to EU citizens as regards the processing of their personal data within the EU. They are entitled to an equivalent high level of protection when their personal data are transferred outside the EEA.
6. EU citizens have a right guaranteed by Article 47 of the Charter to an effective remedy before an independent tribunal if their rights or freedoms are violated. These include the rights under Articles 7 and 8 to respect for private and family life and protection of personal data concerning him or her.

7. Rights and freedoms guaranteed by the Charter may be limited by law but the essence of the right or freedom must be respected. Limitations must be necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.
8. The Data Protection Commissioner has raised well-founded concerns that there is an absence of an effective remedy in US law compatible with the requirements of Article 47 of the Charter, for an EU citizen whose data are transferred to the US where they may be at risk of being accessed and processed by US state agencies for national security purposes in a manner incompatible with Articles 7 and 8 of the Charter.
9. The introduction of the Privacy Shield Ombudsperson mechanism in the Privacy Shield decision does not eliminate those well-founded concerns. A decision of the CJEU is required to determine whether it amounts to a remedy satisfying the requirements of Article 47.
10. A decision of the CJEU is required to determine whether the existence of the exceptional discretionary power conferred on the Data Protection Commissioner by Article 28 of the Directive to suspend or ban the transfer of data to a data importer in a third country on the basis of the legal regime in that third country is sufficient to secure the validity of the SCC Decisions.
11. It is important that there be uniformity in the application of the Directive throughout the Union. Only a decision of CJEU can resolve the potential for inconsistent applications of the Directive which will arise if the validity of transfers of personal data outside the EEA pursuant to the SCC Decisions depends on the exercise by individual national supervisory authorities of their independent discretion in individual cases.