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Case note on C-362/14 *Maximilian Schrems v Data Protection Commissioner*

29 October 2015

Case facts

Maximilian Schrems, an Austrian law student and co-founder of the initiative and website "europe-v-facebook.org" has become the face of data protection in Europe. A Facebook user, he stepped up against Facebook's business practice of transferring the personal data of its **European subscribers to servers located in the United States**. Schrems complained to the Irish Data Protection Commissioner who is responsible for overseeing Facebook's compliance with data protection laws within the EU as the subsidiary is established in Ireland.

The Irish Data Protection Commissioner, however, refused to investigate the case because a July 2000 decision by the European Commission affirmed that the US protected personal data to an adequate level. The Commission's decision is known as the Safe Harbour Agreement. Schrems challenged the decision of the Irish Data Protection Commissioner before the Irish courts which referred two questions for preliminary ruling to the Court of Justice of the EU (CJEU).

In his complaint, Schrems relies on the 2013 revelations by Edward Snowden which brought to light the mass surveillance programmes operated by US intelligence agencies. In light of the scale and scope of US spy programmes, Schrems claimed that the laws and practices of the US did not provide for a sufficient level of protection of one's personal data and did not meet the requirements enshrined in Union law (i.e. the Data Protection Directive of 1995, DPD). He alleged, in short, that the US could no longer be considered a safe harbour for personal data of EU users of Facebook.

Ruling

The *Schrems* case was rendered on 6 October 2015, in the midst of the on-going reform of data protection legislation at the EU level. The centrepiece of this reform is the **General Data Protection Regulation** which is currently being finalised in so-called trilogue meetings between the European institutions. The Court of Justice, in its ground-breaking Grand Chamber judgment, follows Advocate General Bot's opinion delivered only a fortnight earlier on 23 September. Two aspects are especially noteworthy.

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- Powers of national data protection authorities

Firstly, the Court reinforces the independence of Member States' supervisory authorities. It points out that these are vested with the power to check compliance with the DPD in cases where data is transferred from the national territory to a third country. Thus, they are empowered to verify whether the level of protection provided by the third country is adequate and in line with the DPD. As a result, a person cannot be prevented from lodging a complaint with a national supervisory authority concerning the protection of their rights and freedoms and domestic authorities must be able to examine, in **complete independence**, whether the **transfer of data complies with European standards**.

It follows that the Irish Data Protection Commissioner will have to investigate the complaint lodged by Schrems.

- Invalidity of the Commission's decision regarding the US as a safe harbour

The Court notes that domestic authorities cannot, however, take measures contrary to those adopted by the Commission. This is why, in a second step, the Court declares the Commission's decision of July 2000 **invalid**. It interprets the notion of **"adequate level of protection"** as implying that a third country effectively guarantees an equivalent - though not identical - level of protection of fundamental rights and freedoms to that offered to citizens in the EU. The Court observes that the safe harbour principles only apply to US companies which have subscribed to a system of self-certification. By contrast, **US public authorities are exempt** from the scheme. What is more, the Court notes the broad formulation of the **derogations** from the principles on grounds of national security, public interest and law enforcement. In case of conflict, the latter prevail over the safe harbour agreement. Finally, the Court calls on the Commission to **regularly review** its decisions and verify whether the level of protection remains adequate, in particular when new evidence emerges.

Implications

- EU policymakers to stand up for legal certainty and a coordinated approach

On both sides of the Atlantic, the Court's decision has been received with great attention by politicians as well as businesses. The Commission immediately announced it would **re-negotiate** the scheme under which personal data would be transferred from the EU to the US. In the aftermath of the Snowden revelations, the Commission had already proposed several amendments to the Safe Harbour Agreement (in response to the European Parliament's repeated demands for its suspension) and the judgment will certainly give new

impetus to these negotiations. Should these fail to succeed by the end of January 2016, the **Article 29 Working Party** composed of representatives of national data protection authorities, the European Data Protection Supervisor and the European Commission are prepared to take **coordinated action** regarding the enforcement of the judgment. In addition, the Commission is negotiating an **Umbrella Agreement** with US authorities which would strengthen EU citizen's rights to effective judicial remedies in case of privacy breaches in the US.

In the meantime, transatlantic flows of personal data are still possible provided they comply with the requirements of the DPD which sets out mechanisms like **standard data protection clauses** in contracts or **binding corporate rules** for transfers within a corporate group. Yet, such tools may be more complex and burdensome to implement as companies will have to seek authorisation either from the Commission or national supervisory authorities. Furthermore, **industry** representatives from the EU as well as the US addressed an **open letter** to the Commission in which they called for the harmonised implementation of the judgment, a transitional period for companies and the timely resolution of the uncertainties brought about by the Court's invalidity decision.

Hence, it is essential for European media companies which process their users' personal data to ensure respect of EU data protection law, in particular when using data storing or processing centres located in the US or their cloud computing services.

- EU fundamental rights protection given higher priority

The *Schrems* judgement also further **strengthens** the respect for private and family life and the right to protection of personal data as enshrined in Articles 7 and 8 of the EU Charter of Fundamental Rights (CFR). The Court found that the **essence** of the fundamental right to **respect for private life** (Art. 7 CFR) was seriously compromised by US legislation permitting public authorities to access on a general basis the content of electronic communications. Due to the lack of legal remedies for EU citizens to have access to, modify or delete personal data relating to themselves, the Court held that the **right to an effective judicial remedy** as prescribed by Art. 47(1) CFR was also violated.

The Court's clear statement regarding the disrespect of the essence of the rights of the Safe Harbour Agreement guaranteed by the CFR is all the more remarkable as Advocate General Bot had been more cautious in his opinion, stating that "*it could be considered* that (…) the essence of the fundamental right to protection of personal data [is compromised]" (para. 177).

Thus, the *Schrems* case can be regarded as a continuation of the Court's recent data protection jurisprudence, in particular, *Digital Rights Ireland* (regarding the validity of the Data Retention Directive) and *Google Spain* (regarding "the right to be forgotten"), both of which

were decided in 2014. It will stimulate the debates about the appropriate level of data protection within the EU as well as those on the differences between the EU and the US. Importantly, in the Schrems decision, the CJEU has demonstrated its readiness to assert EU fundamental rights, thereby elevating the status of the CFR for the EU legal order.