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Press and Information

Advocate General's Opinion in Case C-311/18
Data Protection Commissioner v Facebook Ireland Limited, Maximillian Schrems

According to Advocate General Saugmandsgaard Øe, Commission Decision 2010/87/EU on standard contractual clauses for the transfer of personal data to processors established in third countries is valid

The General Data Protection Regulation (GDPR),[1] like the Data Protection Directive which it replaced,[2] provides that personal data may be transferred to a third country if that country ensures an adequate level of protection of the data. In the absence of a decision of the Commission finding that the level of protection ensured in the third country in question is adequate, the data controller may nevertheless proceed with the transfer if it is accompanied by appropriate safeguards. Those safeguards may take the form, inter alia, of a contract between the exporter and the importer of the data containing standard protection clauses set out in a Commission decision. By Decision 2010/87/EU,[3] the Commission established standard contractual clauses for the transfer of personal data to processors established in third countries. The present case concerns the validity of that decision.

The facts and the background to the dispute in the main proceedings

The dispute in the main proceedings has its origins in the proceedings initiated by Mr Maximillian Schrems, an Austrian Facebook user, which gave rise to a judgment of the Court of Justice delivered on 6 October 2015 ('the judgment in *Schrems*').[4]

The data of Facebook users residing in the EU, such as Mr Schrems, are transferred, in full or in part, from Facebook Ireland, the Irish subsidiary of Facebook Inc., to servers located in the United States, where they are processed. In 2013, Mr Schrems lodged a complaint with the Irish authority responsible for monitoring the application of the provisions relating to the protection of personal data ('the supervisory authority'), taking the view that, in the light of the revelations made by Edward Snowden concerning the activities of the United States intelligence services (in particular the National Security Agency or 'NSA'), the law and practices of the United States do not offer sufficient protection against surveillance, by the public authorities, of the data transferred to that country. The supervisory authority rejected the complaint, on the ground, inter alia, that in a

[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (OJ 2016 L 119, p. 1).
[2] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, p. 31).
[3] Commission Decision of 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46/EC of the European Parliament and of the Council (OJ 2010, L 39, p. 5), as amended by Commission Implementing Decision (EU) 2016/2297 of 16 December 2016 (OJ 2016, L 344, p. 100).
[4] Case: C-362/14 Schrems; see also Press Release No 117/15.

decision of 26 July 2000[5] the Commission had considered that, under the 'safe harbour' scheme,[6] the United States ensured an adequate level of protection of the personal data transferred.

By the judgment in *Schrems*, the Court of Justice, in response to a question referred to it by the High Court (Ireland), declared that the 'safe harbour' decision was invalid.

Following the judgment in *Schrems*, the referring court annulled the decision whereby the supervisory authority had rejected Mr Schrems' complaint and referred that decision back to that authority for assessment. The supervisory authority opened an investigation and requested Mr Schrems to reformulate his complaint having regard to the declaration that the 'safe harbour' decision was invalid.

To that end, Mr Schrems asked Facebook Ireland to identify the legal bases for the transfer of personal data of Facebook users from the EU to the United States. Facebook Ireland referred to a data transfer processing agreement between it and Facebook Inc., which had been applicable since 20 November 2015, and relied on Decision 2010/87.

In his reformulated complaint, Mr Schrems claims, first, that the clauses in that agreement are not consistent with the standard contractual clauses set out in Decision 2010/87 and, secondly, that those standard contractual clauses could not in any event justify the transfer of the personal data relating to him to the United States. Mr Schrems claims that there is no remedy that would allow the persons concerned to invoke, in the United States, their rights to respect for private life and to protection of personal data. In those circumstances, Mr Schrems asks the supervisory authority to suspend the transfer of such data in application of Decision 2010/87.

By its investigation, the supervisory authority sought to determine whether the United States ensures adequate protection of the personal data of EU citizens and, if not, whether the use of standard contractual clauses offers sufficient safeguards as regards the protection of those citizens' freedoms and fundamental rights. Considering that the adjudication of Mr Schrems' complaint depended on the validity of Decision 2010/87, the supervisory authority brought proceedings before the High Court requesting it to refer questions to the Court of Justice in that respect. The High Court made the request for a preliminary ruling sought by that authority.

In today's Opinion, **Advocate General Henrik Saugmandsgaard Øe proposes that the Court of Justice should reply that the analysis of the questions has disclosed nothing to affect the validity of Decision 2010/87.**

The Advocate General observes, as a preliminary point, that the sole issue in the main proceedings before the High Court is whether Decision 2010/87 — whereby the Commission established the standard contractual clauses relied on in support of the transfers to which Mr Schrems' complaint relates — is valid.

The Advocate General considers, in the first place, that EU law applies to transfers of personal data to a third country where those transfers form part of a commercial activity, even though the transferred data might undergo processing, by the public authorities of that third country, for the purposes of national security.

In the second place, the Advocate General finds that the provisions of the GDPR on transfers to third countries are aimed at ensuring the continuity of the high level of protection of personal data, whether the data are transferred on the basis of an adequacy decision or on guarantees provided by the exporter. In his view, the way in which that aim is achieved differs according to the legal basis of the transfer. On the one hand, the purpose of an adequacy decision is to find that the third country concerned ensures, as a result of the law and practices of that country, a level of

[5] Commission Decision 2000/520/EC of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce (OJ 2000, L 215, p. 7).

[6] The safe harbour scheme includes a series of principles concerning the protection of personal data to which United States undertakings may subscribe voluntarily.

protection of the fundamental rights of the persons whose data are transferred essentially equivalent to that provided by the GDPR, read in the light of the Charter. On the other hand, **the appropriate safeguards afforded by the exporter, inter alia by contractual means, must themselves ensure that level of protection**. In that respect, the standard contractual clauses adopted by the Commission provide a general mechanism applicable to transfers irrespective of the third country of destination and the level of protection guaranteed there.

In the third place, the Advocate General examines the validity of Decision 2010/87 in the light of the Charter. He considers that the fact that that decision and the standard contractual clauses which it sets out are not binding on the authorities of the third country of destination and therefore do not prevent them from imposing obligations that are contrary to the requirements of those clauses on the importer does not in itself render that decision invalid. The compatibility of Decision 2010/87 with the Charter depends on whether there are sufficiently sound mechanisms to ensure that transfers based on the standard contractual clauses are suspended or prohibited where those clauses are breached or impossible to honour.

In his view, that is the case in so far as there is an ***obligation*** **— placed on the data controllers and, where the latter fail to act, on the supervisory authorities — to suspend or prohibit a transfer when, because of a conflict between the obligations arising under the standard clauses and those imposed by the law of the third country of destination, those clauses cannot be complied with**.

The Advocate General also notes that the referring court indirectly calls into question the assessments made by the Commission in the decision of 12 July 2016, known as the 'privacy shield' decision.[7] In that decision, the Commission found that the United States ensured an adequate level of protection of data transferred from the EU under the system established by that decision, having regard to, inter alia, the safeguards surrounding the access to the transferred data by the United States intelligence authorities and the judicial protection available to the persons whose data are transferred. [8] According to the Advocate General, the resolution of the dispute in the main proceedings does not require the Court to rule on the validity of the 'privacy shield' decision, since that dispute concerns only the validity of Decision 2010/87. Nevertheless, the Advocate General sets out, in the alternative, the reasons that lead him to question the validity of the 'privacy shield' decision in the light of the right to respect for private life and the right to an effective remedy.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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[7] Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to [Directive 95/46] on the adequacy of the protection provided by the EU-U.S. Privacy Shield (OJ 2016, L 207, p. 1).

[8] Like the 'safe harbour' decision before it, the 'privacy shield' decision is based on the voluntary adherence of undertakings to a series of principles concerning the protection of personal data.