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# **Doubts cast on the validity of personal data transfers to the US under the standard contractual clauses**

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### ***The Schrems – Facebook litigation***

While the European Data Protection Commissioners are expected to publish in November their first annual review of the Privacy Shield, the system created by agreement between the US and the EU to legitimate, subject to specific conditions, EU to US personal data transfers pursuant to Directive 95/46/EC (“Directive”), doubts have been cast as to the validity of another frequently used means of legally transferring personal data from the EU to the US, the standard contractual clauses (“SCC”). In fact, last week the Irish High Court handed down a long awaited decision in the context of the complex litigation between Austrian privacy activist, Max Schrems (“Schrems”) and Facebook Ireland Ltd (“Facebook”), which led to the 2015 ruling of the CJEU which found invalid the previous Safe Harbor system for EU-US data transfers. This particular case was brought by the Data Protection Commissioner in Ireland (“the DPC”) against both Facebook and Schrems in the course of her investigation of Schrems’s complaint, in order to apply for a preliminary ruling of the CJEU as to the validity of the SCCs now used by Facebook to transfer personal data of its subscribers to the US.

### ***Irish Court refers to CJEU for a ruling on the validity of the Commission decision on standard contractual clauses***

Ms. Justice Costello pointed out in the decision that the matter raises important issues impinging on basic and important values such as “respect for private and family life” and “protection of personal data” stated as fundamental rights in the provisions of Article 7 and Article 8 of the Charter of Fundamental Rights of the European Union (“the Charter”). She considered well-founded the DPC’s concerns that the SCCs may not guarantee respect of these values and rights and afford adequate protection to EU data subjects whose personal data is wrongly interfered with by the US intelligence services once it has been transferred to the United States, and referred the matter to the CJEU for a preliminary ruling as to the validity of Commission decision 2010/87/EU (which approved the SCCs in question).

### ***Does surveillance by US intelligence agencies fall outside the scope of the European Directive?***

In the course of the DPC investigation, Facebook acknowledged that it continues to transfer data relating to its subscribers in the European Union to its US established parent and that it does so, in large part, on the basis that it has adopted the SCCs, claiming that it thus respects the privacy and fundamental rights and freedoms of EU resident subscribers to the Facebook platform and the exercise of such rights. It claimed that surveillance of data by US intelligence agencies on grounds of national security was outside the scope of the Directive. The judge rejected this view on the basis that the actual transfer of the data by Facebook Ireland to Facebook Inc. was for commercial reasons; furthermore, according to the EU Agency for Fundamental Rights any limitations to rights of privacy shall be interpreted in accordance with Art. 13 of the Directive and Art. 52(1) of the Charter and such limitations are subject to narrow interpretation and proper justification. Art. 13 of the Directive provides that Member States may adopt legislation to restrict data protection rights where necessary to safeguard national security, whereas Art. 52(1) of the Charter provides that “Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others” [our emphasis].

### **Does US law afford “essentially equivalent” protection of privacy rights to EU citizens?**

Ms. Justice Costello recalled the earlier Schrems judgment of the CJEU which emphasized that the criteria for assessing the adequacy of protection provided in the event of the transfer of personal data to a non-EU country was that it must offer “essentially equivalent” protection to that under the Directive. So she went on to examine whether in the context of applicable US law the transfer of the data of EU citizens according to the SCCs in fact enjoys “essentially equivalent” protection of the privacy and fundamental rights and freedoms of EU citizens; she focused in particular on whether EU citizens could actually exercise their rights and use the remedies available in US law for breach of data protection rights. The Judge raised doubts as to the proportionality of the surveillance carried out by US intelligence agencies (which is subject to the general rule that surveillance is legal unless it is forbidden) and found both specific and general deficiencies in the remedial mechanisms available under US law for EU citizens whose data is transferred to the US. Her doubts concerned particularly the breadth of the surveillance carried out by US intelligence agencies (i.e. not targeted), which failed both the proportionality test and the strictly necessary test provided in Art. 52(1) of the Charter; the absence of any duty of notification of the surveillance, making it difficult for any plaintiff to establish a standing to bring a case and obtain a remedy; and the fact that it was recognized by experts that the most effective protection against unauthorized government surveillance is under the Fourth Amendment to the US Constitution and not available to most EU citizens.

### **Does the Privacy Shield Ombudsperson mechanism remedy the problem?**

Finally, Ms. Justice Costello examined whether the new Privacy Shield framework for transatlantic data transfers, introducing the figure of an Ombudsperson, which - according to the US Department of State website - is “*a position dedicated to facilitating the processing of requests from EU individuals relating to national security access to data transmitted from the European Union to the United States*”, remedied the inadequacies of US law she had identified. While confirming that the Ombudsperson, although it is a position created in the context of the Privacy Shield, can be used in relation to SCCs, she was nevertheless of the view that, as the Ombudsperson is an executive position, the mechanism does not respect the requirement of EU law (emphasized in the earlier Schrems decision of the CJEU) to respect the essence of the fundamental right to effective judicial protection as enshrined in Art. 47 of the Charter. So she concluded that even the introduction of the Privacy Shield Ombudsperson “*does not eliminate the well-founded concerns raised by the DPC in relation to the adequacy of the protection afforded to EU data subjects whose personal data is wrongfully interfered with by the intelligence services of the United States once their personal data has been transferred for processing to the United States*”.

### **No effective remedies available to EU citizens for some US data breaches**

Consequently, the Judge shared the DPC’s concern that an effective remedy in US law compatible with the requirements of high EU standards is lacking where “*the data may be at risk of being accessed and processed by US State agencies for national security purposes*”, because “*the safeguards purportedly constituted by the standard contractual clauses do no more than establish a right in contract to a remedy in favour of data subjects*”, while from a specific perspective, the remedies provided by US law were deemed “*fragmented and subject to limitations that impact on their effectiveness to a material extent*”, because available “*only in particular factual circumstances, and*

*not sufficiently broad and scoped to guarantee a remedy in every situation in which there has been an interference with the personal data of an EU data subject”.*

***Necessity of uniform application of the EU Commission decision on SCCs***

Under Art. 28(3) of the Directive, as referred to in the amended text of the Commission decision authorizing the transfer of personal data on the basis of the SCCs in question (2010/87/EU), the DPC may exercise discretionary powers to prohibit transfer “*in those exceptional cases where it is established that a transfer on contractual basis is likely to have a substantial adverse effect on the warranties and obligations providing adequate protection for the data subject*”. In order to ensure uniform application throughout the EU, which can only be obtained by a ruling of the CJEU as to the validity or otherwise of that Commission decision, the Irish DPC had not exercised the powers in question but brought the case before the High Court for the purpose of obtaining such a preliminary ruling.

***What does this mean for the future of EU-US personal data transfers?***

The practical impact of the Irish High Court decision is hard to evaluate, and it should immediately be emphasized that a large number of US personal data importers will not be subject to surveillance by the US intelligence agencies in the same way as Facebook. Until the CJEU rules otherwise, Commission decision 2010/87/EU remains valid and SCCs can continue to be used. But the broad issues raised by the decision, including as to the role of the Ombudsperson under the Privacy Shield mechanism, could potentially have significant repercussions on EU-US data transfers, and it will be interesting to see if the annual review of the Privacy Shield now under way will take into consideration the issues raised by the Irish High Court in particular with regard to the Ombudsperson. It may be noted that the general principles provided by the General Data Protection Regulation applicable to transfers of personal data from the EU to non-EU/non-EEA countries are broadly similar to those of the Directive.

The full text of the decision is available at <http://www.europe-v-facebook.org/sh2/HCJ.pdf>

**De Berti Jacchia Franchini Forlani is an international law firm operating in multiple jurisdictions all around the world and specialized, *inter alia*, also in privacy law.**

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