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C-311/18 ("Schrems II"), AG's Opinion: Commission Decision 2010/87 on standard contractual clauses for the transfer of personal data to processors established in third countries is valid

On 19 December 2019, Advocate General Saugmandsgaard Øe ('AG') filed his Opinion in case C-311/18 ('Schrems II'), concluding that Commission Decision 2010/87/EU (as amended), on standard contractual clauses concerning the transfer of personal data to processors established in third countries under Directive 95/46/EC (the 'Decision') is compliant with the Charter of Fundamental Rights of the European Union (the 'Charter').

Background and subject matter of the referral to the CJEU

The case originates from the proceedings initiated by Mr Maximillian Schrems - an Austrian Facebook user and data activist - before the Irish Data Protection Commissioner ('DPC') in 2013.

The DPC is the local authority responsible for monitoring that data controllers comply with the provisions concerning the protection of personal data. Based on a contract between Facebook Ireland and Facebook users, their personal data are transferred from the Irish subsidiary to its parent company, Facebook Inc., whose servers are located in the US.

Mr Schrems filed a complaint with the DPC, arguing that US law does not ensure adequate protection compared to EU law, thus requesting the ban of the transfer of his personal data to the US. The DPC rejected the complaint, based on the 'Safe Harbour' Decision[1], whereby the Commission established that the US offered an adequate level of protection for personal data transferred to undertakings in its territory that adhered to the principles set out therein. Mr Schrems thus brought an action before the High Court of Ireland, which requested a preliminary ruling to the CJEU. In the subsequent decision - hereinafter, the 'judgment in Schrems'- the CJEU concluded that the 'Safe Harbour' was invalid. Thus, the High Court annulled the DPC's decision, which had to review the case. Upon request of the DPC, Mr Schrems reformulated his complaint, asking Facebook Ireland to identify the legal bases for the transfer of users' personal data from the EU to the US. Facebook Ireland referred to a data transfer processing agreement between it and Facebook Inc., and relied on the Decision to argue that the data transfer to the US was lawful.

Mr Schrems claimed that (a) the clauses in that agreement were not consistent with the standard contractual clauses in the Annex to the Decision; and that (b) at any rate, the standard contractual clauses did not justify the transfer of his data, as US law required Facebook Inc. to make users' personal data available to US authorities in the context of surveillance programs, which contrasts with Articles 7, 8 and 47 of the Charter. Arguing that there was no way to enforce his right to privacy

[1] Decision of 26 July 2000 pursuant to Directive [95/46] (OJ 2000 L 215, p. 7).

in such a situation, Mr Schrems asked the DPC to suspend the transfer of his data. In view of the above, the DPC asked the High Court of Ireland to refer to the CJEU for an assessment of the validity of the Decision.

The transfer of personal data from the EU to third States: legal framework

Among the goals of Regulation EU 2016/679 ('GDPR'), repealing and replacing Directive EC 96/46, there is the right balance between the free flow of personal data in the EU, and an adequate level of protection of natural persons with regard to the processing of personal data (Art. 1).

In that view, the rules governing the transfer of personal data to third countries (Art. 45 et seq. GDPR) play an essential role. Indeed, as noted by the AG, '*in the absence of common personal data protection safeguards at global level, cross-border flows of such data entail a risk of a breach in continuity of the level of protection guaranteed in the European Union*'.

The GDPR identifies the mechanisms for the lawful transfer of personal data to third countries as to ensure the continuity of the high level of protection of personal data ensured by the GDPR in case of data transfer outside the EU.

The primary mechanisms are Commission 'Adequacy Decisions', which determine whether a country outside the EU offers an adequate level of data protection (Art. 45), and **contracts between the exporter and the importer of the data containing standard protection clauses adopted by the Commission** (Art. 46) through Decisions – notoriously one of the EU binding legal acts.

The request for a preliminary ruling in this case relates to the latter and namely to the validity of Decision 2010/87 - whereby the Commission established standard contractual clauses for certain categories of transfers - in the light of Art. 7, 8 and 47 of the Charter.

The AG's Opinion

Preliminarily, the AG considers that EU law applies to a transfer of personal data by a company established in the EU to a company established in a third country for commercial reasons, regardless of the purposes for which the data transferred may be processed (*e.g.*, protection of national security or other purposes).

The AG also observes that, as clarified by the CJEU in the judgement in Schrems, the Commission can adopt an adequacy decision on the level of protection only after it has found that the third country concerned ensures a level of protection that is essentially equivalent to that provided for by EU law, read in light of the Charter.

Absent an adequacy decision, the data controller may transfer personal data to third countries by providing appropriate safeguards, *inter alia* by contractual means, which also ensure that same level of protection. In that connection, the standard contractual clauses adopted by the Commission represent a general mechanism applicable to data transfers regardless of the third country of destination and the level of protection it guarantees.

The AG then moves on to consider the validity of the Decision, whereby the Commission established standard contractual clauses for certain categories of transfers, in the light of Article 7, 8 and 47 of the Charter. The referring Court wondered whether the Decision was invalid as not being binding on the authorities of the third countries to which the data are transferred based on the standard

contractual clauses set out in the Annex to that Decision. It was questioned whether the standard contractual clauses provided for in the Decision may nonetheless ensure the protection of the data subjects' fundamental rights.

The AG notes that the data controller and, in the alternative, the supervisory authority are responsible for examining whether the law of the third country allows to implement the standard contractual clauses, thus ensuring that data transferred to a third country benefit from appropriate protection. Indeed, there is an **obligation placed on the data controllers and, in the alternative, on the supervisory authorities to suspend or prohibit a transfer if the standard contractual clauses cannot be complied with due to a conflict between the obligations arising under the standard clauses and those imposed by the law of the third country**.

Therefore, the fact that the Decision and the standard contractual clauses it contains are not legally binding for the authorities of third countries does not imply the Decision's invalidity. What needs to be considered is the existence of sound mechanisms ensuring that unlawful transfers, not complying with the standard contractual clauses, are suspended or prohibited.

Finally, although the resolution of the dispute in the main proceedings – which concerns only the validity of the Decision – did not require the CJEU to rule on the validity of the 'Privacy Shield' decision[2], the AG sets out the reasons that lead him to question its validity.

The 'Privacy Shield' decision (adopted after the 'Safe Harbour' was declared invalid), allows undertakings having self-certified their adherence to the principles set out therein to transfer personal data to the US without further formalities. Art. 1 of the 'Privacy Shield' reads that the US ensure an adequate level of protection for personal data transferred from the EU to organizations in the US having regard to, *inter alia*, the safeguards surrounding the access to the data by the US intelligence authorities and the judicial protection available to the data subjects concerned.

Interestingly, the AG concludes as follows: '***I entertain certain doubts as to the conformity of the 'privacy shield' decision to Article 45(1) of the GDPR****, read in the light of Articles 7, 8 and 47 of the Charter and of Article 8 of the ECHR*'.

[2] 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).