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Comment

"Invalidator" strikes back: The harbour has never been safe

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Content of communications
Legal validity
Articles 7, 8, 11 and 47 of the Charter of Fundamental Rights
"Umbrella agreement"

A B S T R A C T

The Grand Chamber ruled that Commission decision 2000/520 on "safe harbour" was invalid since Article 1 thereof failed to comply with the requirements laid down in Article 25(6) of Directive 95/46 read in the light of the Charter; the Commission had exceeded the power which was conferred upon it in the same provision in adopting Article 3 of the decision; and Articles 1 and 3 and the decision of the Commission in its entirety were accordingly invalid. The Grand Chamber made critical observations about the safe harbour framework. The legal effects of this ruling should be clarified. In addition, the findings of the Grand Chamber on the powers of national data protection authorities and on transfers of personal data to the US have far-reaching legal implications for organisations in both the US and the EU.[1]

> "*One might say that the old world was ending, and the new beginning.*"
>
> François-René, viscount of Chateaubriand, *Mémoires d'Outre-Tombe*, Book XLII: Chapter 18, 1848

1. Introduction

In the ground-breaking judgment in the *Maximillian Schrems v Data Protection Commissioner* case which led to diverse

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[1] In the specific context of this commentary, the term "EU" also covers Member States of the European Economic Area (hereinafter the "EEA"), which include the 28 Member States of the EU as well as Iceland, Liechtenstein and Norway.

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comments,[2] the Grand Chamber invalidated the decision of the Commission in which it declared that the implementation of the "safe harbour" framework ensured an adequate level of protection in the US. The Grand Chamber found that the decision of the Commission infringed upon the directive read in the light of the Charter of Fundamental Rights and that the Commission infringed upon the authority granted to it by the EU legislature.

The Court sat in the Grand Chamber of fifteen judges, which includes both the President and the Vice-President of the Court as well as three Presidents of Chambers of five Judges, pursuant to Article 16(2) and (3) of the Statute of the Court and Article 27 of the Rules of Procedure of the Court. The fact that the Grand Chamber is composed of senior Judges of the Court shows the importance of the case.

Judge Rapporteur Thomas von Danwitz was also Judge Rapporteur in the case of *Digital Rights Ireland*.

2. Procedural background of the case

The background of the case originates from a complaint lodged on 25 June 2013 by Maximillian (Max) Schrems as an EU Facebook user since 2008 with the Irish Data Protection Commissioner which is the Irish Data Protection Authority (hereinafter "DPA"). Max Schrems complained that some or all of the data that he provided to Facebook were transferred by Facebook's Irish subsidiary to servers located in the US where it was processed and kept. In light of the disclosures made by Edward Snowden in 2013 about the activities of the US intelligence services in general, and the National Security Agency (hereinafter the "NSA") in particular, he submitted that the law and practices of the US did not offer sufficient protection of the personal data transferred to this country and kept there against surveillance by public authorities. Max Schrems has however not formally challenged the legal validity of the Commission decision.

By a letter of 25 July 2013, the then Commissioner, Billy Hawkes, refused to investigate the complaint and rejected it on the ground that there was "no evidence of a contravention in this case" and "no evidence – and you have not asserted – that your personal data has been disclosed to the US authorities." The Commissioner considered that Max Schrems had not shown that data that he had placed on Facebook Ireland had been compromised when it was thereafter transferred and stored in the US, and that he consequently suffered some particularised harm. By a letter of 26 July 2013, the Commissioner added that "the 'Safe Harbour' agreement stands as a formal decision of the EU Commission [. . .] under Article 25(6) of the Data Protection Directive 95/46/EC that the agreement provides adequate protection for personal data transferred from the EU to the USA." The agreement includes principles on the protection of personal data that US undertakings may voluntarily subscribe to. Any question relating to the adequacy of the protection of that data in the US had to be settled in accordance with that decision which prevented him from examining the problem raised by the complaint. The Commissioner considered himself legally barred from investigating the complaint. This finding of legal impediment triggered the whole court case.

Max Schrems challenged the decision of the Commissioner before the High Court of Ireland. He submitted that the decision was unlawful and that the disclosures made by Edward Snowden demonstrated that there was no effective data protection regime in the US. Although Max Schrems has not directly challenged the legal validity of the Commission decision, he objected in reality to the terms of the safe harbour regime itself.

By judgment of 18 June 2014,[3] Judge Gerard Hogan of the High Court considered that the data protection rights of ordinary citizens "have been seriously compromised by mass and largely unsupervised surveillance programmes."[4] He found that it was "irrelevant that Mr. Schrems cannot show that his own personal data was accessed in this fashion by the NSA, since what matters is the essential inviolability of the personal data itself."[5] Judge Hogan also considered that "the essential question [. . .was] whether, *as a matter of European Union law*, the Commissioner [was. . .] absolutely bound by that finding of the European Commission as manifested in the 2000 Decision in relation to the adequacy of data protection in the law and practice of the United States having in particular *to the subsequent entry into force of Article 8 of the Charter*, the provisions of Article 25(6) of the 1995 Directive notwithstanding."[6] The judge consequently referred the case to the Court of Justice for a preliminary ruling. He asked the Court of Justice whether the decision of the Commission had the effect of preventing a national supervisory authority from investigating a complaint which alleged that the third country did not ensure an adequate level of protection and, where appropriate, from suspending the contested transfer of personal data. Judge Hogan specifically requested an interpretation but not a ruling on the legal validity of the Commission decision.

On 24 March 2015, the Grand Chamber held an oral hearing in which the Commission made submissions defending the legal validity of its own decision.[7] Parliament and the European Data Protection Supervisor (hereinafter the "EDPS"), that the Grand Chamber invited for the second time in a preliminary procedure[8] to appear in the case, also made submissions.[9]

[2] Sarah Cadiot and Laura De Boel, "Safe Harbor invalid: What to expect after the ruling ?", *Privacy Laws & Business – International Report*, Issue 137, October 2015, p. 1, 3 and 4; Sylvie Peyrou, "La Cour de justice de l'Union européenne, à l'avant-garde de la défense des droits numériques", *Journal de droit européen*, 2015, p. 395 to 398.

[3] Ireland, High Court, *Maximillian Schrems v Data Protection Commissioner* [2014] IEHC 310, available at http://www.courts.ie/Judgments.nsf/0/481F4670D038F43380257CFB004BB125

[4] Ireland, High Court, *Maximillian Schrems v Data Protection Commissioner* [2014] IEHC 310, para 8.

[5] Ireland, High Court, *Maximillian Schrems v Data Protection Commissioner* [2014] IEHC 310, para 75. See also *ibidem*, para 42.

[6] Ireland, High Court, *Maximillian Schrems v Data Protection Commissioner* [2014] IEHC 310, para 70.

[7] Opinion in Case C-362/14 *Maximillian Schrems v Data Protection Commissioner* [2015] para 224.

[8] The first time was in the case of Digital Rights Ireland, see Xavier Tracol, "Legislative genesis and judicial death of a directive: the European Court of Justice invalidated the data retention directive (2006/24/EC), thereby creating a sustained period of legal uncertainty about the validity of national laws which enacted it", *Computer Law and Security Review*, Volume 30, Issue 6, December 2014, p. 737.