

## Irish High Court:

### Judgement on Facebook and US surveillance delivered on 3<sup>rd</sup> October 2017

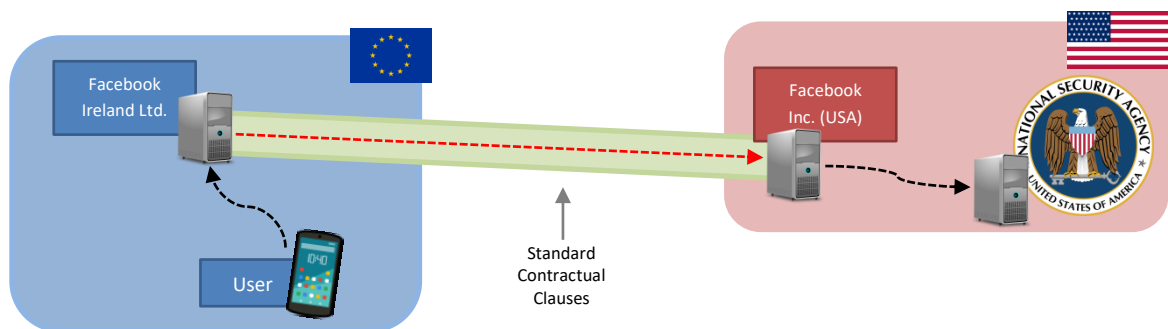
**Facts.** The Irish High Court has informed the parties today, that it deliver the judgement regarding Facebook's EU-US data transfers in the light of US surveillance laws (like FISA 702 and EO 12.333), as well as US surveillance programs disclosed by Edward Snowden (like "PRISM" and "Upstream") on October 3<sup>rd</sup> 2017.

**Next Steps.** The Irish High Court will have to decide if (A) there should be a reference to the European Court of Justice (CJEU) in Luxemburg (as wished for by the Irish Data Protection Commissioner) or (B) decide the case without a reference, as wished for by the complainant, Max Schrems and Facebook. If there is a reference to the CJEU, the highest court would have to deal with this case, dealing with Facebook's EU-US data transfers, after it has previously struck down the "Safe Harbor" data transfer deal its judgement C-326/14 from in October 6<sup>th</sup> 2015.

**Facebook's EU-US data transfers.** Facebook operates its international business outside of the United States and Canada out of a subsidiary in Dublin, Ireland called "Facebook Ireland Ltd". 84% of all worldwide Facebook users are managed in Dublin, which is understood to be part of Facebook's tax avoidance scheme.

At the same time Facebook currently send all user data to its parent company, Facebook Inc. in the United States for processing. While Facebook Inc. in the USA is subject to US mass surveillance laws, which require Facebook to make data available to the NSA, EU law requires that data can only be transferred outside of the EU if the personal data is protected.

Facebook uses so-called "Standard Contractual Clauses" ("SCCs", a contract between Facebook USA and Facebook Ireland) to transfer personal data from the EU to the US, that requires Facebook USA to follow EU data protection laws.



Max Schrems: "In simple terms, US law requires Facebook to help the NSA with mass surveillance and EU law prohibits just that."

**Positions of the Parties.** The three parties of the procedure took the following simplified positions:

- Mr *Schrems* is of the view, that the Irish DPC could deal with the complaint against Facebook itself and suspend Facebook's EU-US data transfers, with a reasonable implementation period. A reference to the CJEU in Luxembourg seems therefore not necessary to deal with the complaint filed. The existing law (Article 4 of the relevant "Standard Contractual Clauses") requires the DPC to take care of this situation itself.
- The Irish *Data Protection Commissioner* took the view that there is a systematic issue concerning US surveillance laws and practices and especially a lack of legal redress and that therefore the

“Standard Contractual Clauses” must be invalid and the case should be referred to the CJEU. The DPC does in this respect take the most radical view of the three parties.

- *Facebook* was in substance of the exactly opposite view of the DPC, that there is no need for a reference, as US surveillance (like PRISM) does not violate EU fundamental rights. Facebook even argues that EU fundamental rights do not apply.

Max Schrems: *“I am of the view the Standard Contractual Clauses are perfectly valid, as they would allow the DPC to suspend individual problematic data flows. It is unclear to me until today why the DPC is taking the extreme position that the SCCs should be invalidated across the board. The only explanation I have is that that they want to shift the responsibility back to Luxembourg.”*

**Background.** The case is based on a complaint brought by Mr Schrems against Facebook Ireland Ltd. before the Irish Data Protection Commissioner (“DPC”) in 2013.

- The DPC first refused to investigate the complaint, calling it *“frivolous”*, but Mr Schrems subsequently succeeded before the CJEU, which overturned the *“Safe Harbor”* in 2015.
- After the invalidation of *“Safe Harbor”*, Facebook used another legal tool to transfer data outside of the EU, called *“Standard Contractual Clauses”* (SCCs).
- SCCs are a contract between Facebook Ireland and Facebook USA, where Facebook USA pledges to follow EU privacy principles.
- The case subsequently continued with an updated complaint in 2015. The Irish DPC joined Mr Schrems view that the SCCs cannot overcome fundamental problems under US surveillance laws, and specifically agreed that there is no proper legal redress in the United States in such cases. Other issues raised in Mr Schrems complaint have not been investigated yet.
- The DPC refused to use its power to suspend data flows of Facebook as asked by Mr Schrems.
- Instead of only prohibiting Facebook’s EU-US data transfers under Article 4 of the SCCs, the DPC took the unusual move of issuing proceedings against Facebook Ireland Ltd. and Mr Schrems before the Irish High Court. In the procedure the DPC aims to invalidate the SCCs entirely by referring the case to the European Court of Justice (CJEU) in Luxembourg.
- The case was heard for five Weeks in February 2017. The United States Government was joined as an *“amicus”* to the case, along two industry lobby groups and the US privacy non-profit *“EPIC”*.