Enforcing EU Electronic Communications Rules: Experiences and Challenges Ahead

Schrems v. Data Protection Commissioner, 18 June 2014

Schrems v. Data Protection Commissioner, 6 Oct 2015
C-362/14

Data Protection Commissioner v. Facebook Ireland Ltd and Schrems, 3 Oct 2017, [2017] IEHC 545 (No Irish Reports Citation)


The Legal Framework

The Charter

Article 7: Respect for private and family life
Everyone has the right to respect for his or her private and family life, home and communications.

Article 8: Protection of personal data
1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

Article 47: Right to an effective remedy and to a fair trial
Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

The Treaty on the European Union

Article 4
1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.
2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.
3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties....

Article 5
1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.
2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.
3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level....
Directive 95/46 EC

(Recital 2) Whereas data-processing systems are designed to serve man; whereas they must, whatever the nationality or residence of natural persons, respect their fundamental rights and freedoms, notably the right to privacy, and contribute to economic and social progress, trade expansion and the well-being of individuals;

... 

(Recital 57) Whereas, on the other hand, the transfer of personal data to a third country which does not ensure an adequate level of protection must be prohibited;

...

Article 1: Object of the Directive
1. In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.
2. Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection afforded under paragraph 1.

...

Article 13: Exemptions and restrictions
1. Member States may adopt legislative measures to restrict the scope of the obligations and rights provided for in Articles 6 (1), 10, 11 (1), 12 and 21 when such a restriction constitutes a necessary measures to safeguard:
   (a) national security;
   (b) defence;
   (c) public security;
   (d) the prevention, investigation, detection and prosecution of criminal offences, or of breaches of ethics for regulated professions;
   (e) an important economic or financial interest of a Member State or of the European Union, including monetary, budgetary and taxation matters;
   (f) a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority in cases referred to in (c), (d) and (e);
The European Convention on Human Rights

Article 8: Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
The Data Protection Act:
1988 - 2003
An application for a preliminary ruling was made regarding:

(1) Whether the requirements of Article 47 were met;

(2) Whether the existence of the exceptional discretionary power conferred on the Data Commissioner by Article 28 of the Directive to suspend or ban the transfer of data to a data importer in a third country on the basis of the legal regime in that third country is sufficient to secure the validity of the SCC Decisions; and,

(3) The potential for inconsistent applications of the Directive if the validity of transfers of personal data outside the EEA pursuant to the SCC Decisions depends on the exercise by individual national supervisory authorities of their independent discretion in individual cases.
Reasons


2. The court’s jurisdiction arose because the Data Protection Commissioner has raised well-founded concerns as to the validity of the decisions.

3. Union law and the Charter are engaged, notwithstanding the fact that the interferences with personal data the subject of the case arise from surveillance for the purposes of national security.

4. The court is not obliged to reject the application by reason of the adoption by the Commission of the EU-US Privacy Shield Decision.

5. Union law guarantees a high level of protection to EU citizens as regards the processing of their personal data within the EU. They are entitled to an equivalent high level of protection when their personal data are transferred outside the EEA.

6. EU citizens have a right guaranteed by Article 47 of the Charter to an effective remedy before an independent tribunal if their rights or freedoms are violated. These include the rights under Articles 7 and 8 to respect for private and family life and protection of personal data concerning him or her.

7. Rights and freedoms guaranteed by the Charter may be limited by law but the essence of the right or freedom must be respected. Limitations must be necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.

8. The court considered that Data Commissioner has raised well-founded concerns that there was no effective remedy in US law compatible with the requirements of Article 47 of the Charter, for an EU citizen whose data are transferred to the US where they may be at risk of being accessed and processed by US state agencies for national security purposes in a manner incompatible with Articles 7 and 8 of the Charter.

9. The introduction of the Privacy Shield Ombudsperson mechanism in the Privacy Shield decision does not eliminate those well-founded concerns.