The Impact of the Sentence C-362/14 in the Case Maximillian Schrems Against Data Protection Commissioner Over the Personal Data Transfer from the European Union to the United States of America

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ABSTRACT

Personal data transferring from the EU member states to third countries, i.e. such ones which are located outside the European Economic Area, is subject to separate provisions set forth in the provisions of the Directive on the protection of physical persons with regards to personal data processing and the free flow of such data as well as the act on personal data protection. A possibility to transfer the personal data to third countries occurs only on condition that an adequate degree of protection with regards to such data is provided. This means that protective measures applied within a given state at least equal those applied within the European Union. Legal norms binding in the United States do not guarantee the proper level of protection with regards to personal data. Applied sector regulations, introducing mostly the bans from personal data processing, give more freedom to the data administrators as far as personal data processing is concerned compared to the countries located within the European Economic Area. The year 2000 brought the introduction of the „safe harbour” programme which was supposed to ameliorate the transfer of personal data to the USA. The entities that joined the programme were qualified as the ones providing the proper level of personal data protection. Hence, such data could have been transferred to the servers located in the USA. Legality of personal data transferring to the USA has been questioned by Maximilian Schrems. Schrems addressed the Irish data protection authority. The dispute regarding the case was settled by the EU Tribunal of Justice. The objective of my research is to analyse the sentence C-362/14 passed in the case Maximilian Schrems against Data Protection Commissioner and the consequences of the said
sentence over the possibilities to transfer the personal data to third countries and its potential impact on the final shape of the data protection enactment.

**Keywords**: data protection; privacy; fundamental rights; personal data transfer to third countries

1. INTRODUCTION

The right for privacy belongs to fundamental rights and, as such, is subject to special protection [5]. People are becoming more and more aware of such rights. However, the breakthrough that enhanced people’s awareness of privacy was the disclosure by Edward Snowden of the information on the programme of mass invigilation run by the United States of America. Being an activist, Maximilian Schrems instituted a dispute against Facebook for having infringed on the privacy, including the data transferring to American Intelligence Agency (NSA) as part of the PRISM programme. His actions influenced noticeably the Safe Harbour programme as well.

2. SAFE HARBOR

A possibility to restrict electronic trading between the United States and the European Union within the times of a rapid development of Internet has led to the commencement of works over an institution which would ameliorate the personal data transferring from the territory of the European Economic Area to the USA. The European Commission together with the US Department of State have achieved the so called Safe Harbour programme. The decision of the European Commission dated 26th July 2000 introduced a possibility to transfer personal data to the entities based in the United States [1]. American business entities, subject to the Federal Trade Commission (FTC) or the Department of Transportation were allowed to join the safe harbour programme once certain conditions have been fulfilled by them. The fulfilment of the said terms and conditions were determined by the introduction of the relevant internal procedures, policies and principles [3]. Joining the programme meant that a given entity applied proper technical and organisational measures which provide a proper level of protection with regards to personal data. This meant as well that transfer ring personal data to an entity that had undergone self-certification would not infringe on the provisions on personal data protection valid within the European Union [8,9].

3. AN APPEAL FROM MAXIMILIAN SCHREMS

Following the disclosure of information made by Edward Snowden revealing the fact of the mass invigilation of the citizens by USA, Max Schrems started to question the legality of personal data processing by Facebook service [2]. It referred to transferring the personal data to the Server located within the United States. Schrems addressed the Irish organ dealing with personal data protection on that matter lodging for the ban from running such practices. However, his case was dismissed. Schrems case then reached the Irish Supreme Court which stated that it should be decided by the EU Tribunal of Justice.
4. THE CONSEQUENCES OF THE SENTENCE PASSED IN MAXIMILIAN SCHREMS’ CASE

The Court submitted to the Tribunal two questions referred for a preliminary ruling regarding the interpretation of article 7, 8 and 48 of the Charter of Fundamental Rights as well as article 25 clause 6 of the Directive. The first of the questions is whether a personal data protection organ in a given state is unconditionally bound by the decision acknowledging the adequate personal data protection level in the third country despite of the fact that in the complainant’s opinion the relevant rules do not provide adequate protection. The second question referred to the fact whether a personal data protection organ in a given state may or has to examine the case individually in the light of new factual circumstances that came into force once the Commission decision was published.

In the aforementioned sentence the Tribunal stated that the decision 2000/520/WE, giving a possibility to transfer the personal data to the entities located in the United States and which underwent self-certification within the safe harbour programme, was invalid. Another crucial element of the ruling was the statement that there are no obstacles whatsoever for a personal data protection organ in a given state to examine an appeal from a person who questions the appropriateness of the personal data protection level in a state with relation to which the decision acknowledging the correct level of such protection was given.

Finding the decision 2000/520/WE invalid means that personal data cannot be transferred to USA in line with it. In that case, it is indispensable to apply other legal bases which would make the personal data transfer to third countries possible. In Poland, the aforementioned bases are contained in article 47 clause 3 and article 48 of the Personal Data Protection Act. Pursuant to article 47 clause 3, an administrator of personal data may transfer the data to third countries in several situations. The first of them refers to a written consent granted by the data subject. The second case refers to the data that are publically accessible. The third situation encompasses the situation in which data transferring will remain indispensable to reach one of the objectives stipulated by article 47 clause 3 points 2,3,4,5 of the Personal Data protection Act. In line with article 48 of the Personal Data Protection Act, it is possible to transfer personal data to third states with the participation from the General Inspector on Personal Data Protection. The first of such situations is a consent from GIPDP having a form of an administrative decision in the circumstances when a personal data administrator guarantees adequate protective measures with regards to the protection of privacy as well as the rights and freedoms which the data refer to (article 48 clause 1). A consent from GIPDP to transfer personal data to third countries is not required under circumstances set forth by article 48 cause 2, i.e. when standard contractual clauses are applied or once the corporate regulations have been approved by GIPDP as valid.

5. CONCLUSIONS

Personal data transferring pursuant to the decision passed in Maximilian Schrems’ case only shall remain unlawful. The sentence passed in the said case will not make it impossible entirely to transfer personal data to USA [4]. Transferring the personal data to the servers located in USA will be still possible based on the binding corporate rules, the decision issued by a local personal data protection organ or a consent granted by a person who the data refer
to. The sentence passed in the case bears noticeable importance for the local personal data protection organs as their position will be strengthened, especially as far as their capability to give administrative decisions is concerned. The aforementioned sentence could have been a turning point in the case regarding the mass invigilation performed by the US government. It commenced the discussion over technological and organisational solutions that would ameliorate personal data transferring the USA in the manner compliant to article 7 of the Charter of Fundamental Rights, i.e. when the right for privacy is to be observed as one of the most important fundamental right at all [6,7].

The Safe Harbour programme was substituted by „EU-U.S. Privacy Shield”, which is supposed to guarantee a noticeably higher standard of personal data protection. A working group established pursuant to article 29 remarked that the Privacy Shield does not consider many principles which remain the core of the European Personal Data Protection system.

In my opinion, the decision issued to lift the Safe Harbour programme was a step forward in the questions of personal data protection. However, the introduction of the Privacy Shield will not improve the problem of privacy infringement of the EU citizens.

Biography

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