

## **Background Information ahead of judgement:**

### **Irish High Court to send off Facebook & US surveillance case to CJEU**

This document was written, before the judgement by the High Court was delivered today at 10:30 GMT (11:30 CET). Please check [@maxschrems](#) for updates and [click here](#) for a first statement after the decision.

**Major Judgement on Facebook EU-US data flows.** Today (April 12<sup>th</sup>) the Irish High Court will refer to the Court of Justice of the European Union (CJEU) for a second time over a complaint by Max Schrems against Facebook's data sharing with US surveillance services, as disclosed by Edward Snowden. The High Court seeks a preliminary ruling ([Wikipedia](#)) on core questions of US surveillance and Facebook's involvement in it, the reference and the relevant questions will be delivered today at 10:30 GMT by the Irish High Court. The decision that there will be a reference was delivered last year.

**Short History of the Procedure.** Mr Schrems made a complaint with the Irish Data Protection Commissioner in 2013, over Facebook's involvement in US mass surveillance, as disclosed by Edward Snowden. The first reference by the Irish High Court to the CJEU in 2014 led to the groundbreaking invalidation of the "Safe Harbor" system in 2015, which allowed US companies to transfer personal data from the European Union (see judgement [C-362/14](#)).

The case went back to the DPC, which was forced to investigate Facebook. The DPC later brought a case against Facebook and Mr Schrems. No remedy was sought against Facebook or Mr Schrems, but the DPC wanted the High Court to make a second reference to the CJEU in this case, as Facebook has switched from "Safe Harbor" to so-called "Standard Contractual Clauses" (also "Model Clauses") to justify EU-US data transfers and the CJEU has not adjudicated on them in the first reference.

After about five weeks of intense hearings in February and March 2017, the Irish High Court has delivered a second judgement on October 3<sup>rd</sup> 2017 ([PDF](#)) where it found for a second time that US laws allowed the US government "mass processing" of personal data of non-US citizens.

After intense debates about the actual questions that should be referred to the CJEU the High Court will deliver the actual reference to the CJEU today.

If the views of the Irish DPC or Mr Schrems succeed, Facebook would not be allowed to send users' data from its international headquarters in Ireland to the United States, where most of its servers are located, given that they are subject to US surveillance there. The reference will surely include one legal instrument that allows EU-US data transfers (so-called "Standard Contractual Clauses") but may also include the replacement for the invalidated "Safe Harbor", the so-called "Privacy Shield".

Max Schrems: *"Given the clear judgement by the Court of Justice in 2015, I have no doubt that Facebook's EU-US data transfers will be declared illegal in this case. The Irish High Court has already held that there is continuous 'mass processing' by US intelligence services and the Court of Justice has held in 2015 that this is a violation of EU fundamental rights. This case will very likely just re-affirm the 2015 judgement for all forms of EU-US data transfers that are subject to US mass surveillance."*

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## Background Information

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**US Surveillance.** US surveillance laws (like FISA 702 and EO 12.333) and US surveillance programs disclosed by *Edward Snowden* (like “[PRISM](#)” and “[Upstream](#)”) allow the US government legally and factually to access data from large US tech companies, such as Apple, Facebook or Microsoft.

**Facebook’s EU-US data transfers.** Facebook operates its international business outside of the United States and Canada via a separate company in Ireland called “Facebook Ireland Ltd”. 85,9% of all worldwide Facebook users (everyone except USA and Canada) are managed in Dublin ([Link](#)), which is understood to be part of Facebook’s tax avoidance scheme.

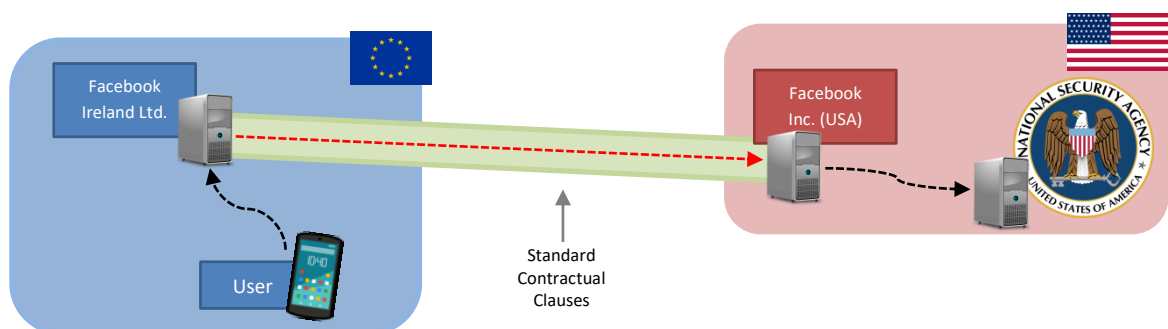
Facebook currently sends all user data to its parent company, “Facebook Inc.” in the United States for processing. European law (Articles 25 and 26 of Directive 95/46/EC) requires that data can only be transferred outside of the EU if the personal data is “adequately protected”. This is in conflict with US mass surveillance laws, which “Facebook Inc.” in the USA is subject to.

Max Schrems: “*In simple terms, US law requires Facebook to help the NSA with mass surveillance and EU law prohibits just that. As Facebook is subject to both jurisdictions, they got themselves in a legal dilemma that they cannot possibly solve in the long run unless they split the service in two or give up tax avoidance in Ireland.*”

**Standard Contractual Clauses.** EU law in principle prohibits all data transfers outside of the EU, where the strict EU privacy laws do not apply. To still allow necessary data flows, there is a number of exceptions to this principle, that expand EU law through a B2B contract.

- One exception was “Safe Harbor”, which Facebook used before it was invalidated by the CJEU.
- Another exception are “Standard Contractual Clauses” (“SCCs”, also called “*Model Clauses*”) which a non-EU company can sign to receive data from the EU ([official EU info page](#)). Facebook is currently using SCCs between “Facebook Ireland” and “Facebook Inc.” [[Facebook’s SCCs](#)].

All contractual systems have an “*emergency clause*” built in (Article 4 of the SCCs). This clause allows the local data protection authority (the DPC in this case), to stop data flows, even if SCCs are in place, whenever there is a conflicting law in a foreign country (in this case US surveillance laws).



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

- Mr *Schrems* is of the view, that a ‘targeted solution’ is available and a reference to the CJEU is not necessary. The Irish DPC could have used Article 4 of the “Standard Contractual Clauses” decision to stop the specific data sharing of Facebook only. Mr Schrems has never taken any issue with the system of “Standard Contractual Clauses”
- The Irish *Data Protection Commissioner* took the view that there is a larger, systematic issue concerning SCCs. The DPC took the view, that as the validity of the SCCs is at stake the case should therefore be referred to the CJEU. Contrary to Mr Schrems’ view, the DPC felt, that it cannot utilize Article 4 of the SCCs, as this would be an unfair treatment of Facebook.
- *Facebook* was in substance of the view, that there is no problem concerning US surveillance laws. Consequently there is no need for a reference and Facebook does not violate EU fundamental rights by transferring data to the United States. It also took the position that, even if there would be a problem, US surveillance falls under the exception of EU law for “national security”.

Max Schrems: *“I am of the view the Standard Contractual Clauses are perfectly valid, as they would allow the DPC to do its job and suspend individual problematic data flows, such as Facebook’s. It is still unclear to me why the DPC is taking the extreme position that the SCCs should be invalidated across the board, when a targeted solution is available. The only explanation that I have is that that they want to shift the responsibility back to Luxembourg instead of deciding themselves.”*

**Full History of Case.** The case is based on a complaint, filed by Mr Schrems against Facebook:

- The case is based on a complaint [[PDF](#)] brought by Mr Schrems against Facebook Ireland Ltd. before the Irish Data Protection Commissioner (“DPC”) in 2013 (5 years ago).
- The DPC first refused to investigate the complaint, calling it “*frivolous*”, but Mr Schrems subsequently succeeded before the CJEU, which overturned the “Safe Harbor” (a EU-US data sharing system) in 2015 [case [C-362/14](#)] and ruled that the DPC must investigate the complaint.
- After the invalidation of “Safe Harbor”, Facebook used another legal tool to transfer data outside of the EU, called “Standard Contractual Clauses” (SCCs) [[Facebook’s SCCs - PDF](#)].
- SCCs are a contract between Facebook Ireland and Facebook USA, where Facebook USA pledges to follow EU privacy principles [[official EU Info Page](#)].
- The case subsequently continued with an updated complaint [[PDF](#)] 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 and March 2017. The United States was joined as an “amicus” to the case, along two industry lobby groups and the US privacy non-profit “EPIC”.
- A second judgement was delivered on October 3<sup>rd</sup> 2017, holding that US surveillance laws allow “mass processing” of personal data. The High Court also decided that a reference to the CJEU is necessary ([PDF](#)).

**Common Misunderstandings.** There are a number of misunderstandings regarding this case. We have tried to address the most relevant issues:

- Separate “Class Action”: There is separate case on an Austrian “class action” pending before the CJEU between Mr Schrems and Facebook Ireland. This is a wholly different case, which was referred by the Austrian Supreme Court and is not connected to this case at the Irish High Court. Today’s case was initiated by the Irish DPC against Facebook and Mr Schrems.
- “All EU-US data flows challenged”: Not all EU-US data flows are under challenge. The situation is specifically problematic regarding US companies that are “*electronic communication service providers*”, because the relevant law (FISA 702) only applies to them. Most “normal” businesses (like trade in goods and services and alike) do not fall under such US surveillance laws and there is therefore no direct conflict with EU laws. The problem is however similar for most other large US technology providers that provide IT outsourcing services (e.g. “cloud services”) to the EU.

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