



THE HIGH COURT
COMMERCIAL

Record No. 2016/4809P

BETWEEN

THE DATA PROTECTION COMMISSIONER

Plaintiff

-and-

FACEBOOK IRELAND LIMITED AND MAXIMILLIAN SCHREMS

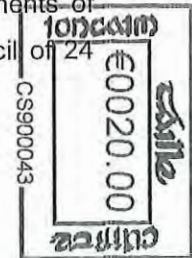
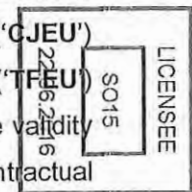
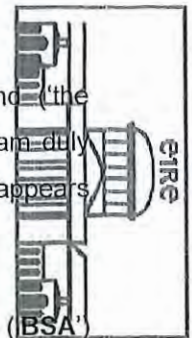
Defendants

AFFIDAVIT OF MARK REDMOND

I, **MARK REDMOND** of the American Chamber of Commerce of Ireland, of 6 Wilton Place, Grand Canal Dock, Dublin 2, aged eighteen years and upwards make oath and say as follows:

1. I am the Chief Executive of the American Chamber of Commerce of Ireland ('the **Chamber**') and I make this affidavit for and on behalf of the Chamber which I am duly authorised to do and from facts within my own knowledge save where otherwise appears and where so otherwise appearing I believe the same to be true.

2. I make this Affidavit in support of the BSA Business Software Alliance Inc's ('**BSA**') application to be joined to the within proceedings as an *amicus curiae* in circumstances where the Data Protection Commissioner ('**the Commissioner**') requests the Court to refer a preliminary question to the Court of Justice of the European Union ('**CJEU**') pursuant to Article 267 of the Treaty on the Functioning of the European Union ('**TFEU**') (the '**Proceedings**'). I say and believe that the requested reference relates to the validity of certain decisions of the European Commission in the context of standard contractual clauses ('**SCC Decisions**') and the use of such clauses to fulfil the requirements of Article 26(4) of Directive 95/46/EC of the European Parliament and the Council of 24



October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ('the **Directive**').

3. In that regard, I confirm that I have had sight of a copy of the final but unsworn affidavit of Thomas Boué which grounded the BSA's application to be joined to the Proceedings as an *amicus curiae*.
4. The Chamber is, *inter alia*, a representative body primarily for US companies in Ireland but its membership also includes Irish companies that support those US companies and Irish companies with business in the United States. It is estimated that there are over 700 US companies with operations in Ireland of various sizes. I note from the BSA membership list exhibited to Mr Boué's affidavit that a number of BSA members are also members of the Chamber. However, in an information technology context, the Chamber has a significant number of additional members.
5. Given the significance of the Commissioner's request for a preliminary reference in the context of the SCC Decisions and the use of SCCs by Chamber members, the Chamber considered bringing an application to be joined as an *amicus curiae* to the proceedings so that the views of its members could be ventilated before this Court and the CJEU. However, having had experience of the BSA and its role as an amicus in certain Information Technology related briefs and in light of the content of the affidavit of Thomas Boué, the Chamber recognises the insight and expertise which BSA can contribute to these proceedings. In the circumstances the Chamber has decided not to bring an application to be joined and instead supports the BSA's application for joinder as an *amicus curiae*.
6. A survey was conducted between 20-21 June 2016 amongst the Chamber's members. I beg to refer to a copy of the communication to our members of the survey, upon which marked with the letters "MR" I have signed my name prior to the swearing hereof. From the 45 responses received the following may be of relevance to the issues in the Proceedings:
 - o 91% of the respondents to the Survey have their headquarters/substantial operations in Ireland;
 - o 82% of the respondents to the Survey rely on SCCs for transfers of data to the US;
 - o 73% of the respondents to the Survey rely on SCCs for transfers to other countries;
 - o 86% of the respondents to the Survey rely on SCCs for both controllers and processors; and
 - o 82% of the respondents to the Survey do not have a readily available alternative data transfer solution if SCCs became unavailable.

7. In the circumstances it is important from the Chamber's perspective that the BSA is joined as an amicus curiae to the Proceedings.

SWORN by Mark Redmond

this 22nd day of June 2016

at 2 Grand Canal Square, Dublin 2
in the City/County of Dublin.

before me a Practising Solicitor/ Commissioner for Oaths and the Deponent has been identified to me by CHARLEEN O'KEEFE who is personally known to me and who certifies that the Deponent is personally known to him/her.

Mr Redmond

Sadh Fleming

Practising Solicitor/Commissioner for Oaths

I CHARLEEN O'KEEFE hereby certify that the Deponent is personally known to me.

Charleen O'Keefe

Person identifying Deponent

This Affidavit is filed on behalf of *American Chamber of Commerce Ireland* by William Fry, 2 Grand Canal Square, Dublin 2.

Filed this 22 day of June 2016.

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Plaintiff

- and -

FACEBOOK IRELAND LIMITED AND MAXIMILLIAN SCHREMS

Defendants

AFFIDAVIT OF MARK REDMOND
EXHIBIT "MR1"

Referred to in the Affidavit of Mark Redmond sworn this 22 day of June, 2016.



Deponent


Practising Solicitors/
~~Commissioner for Oaths~~

William Fry
Solicitors
2 Grand Canal Square
Dublin 2
www.williamfry.com

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024205.0001.DCU.JFM



Dear Jonathan,

We would be very grateful for your urgent attention and completion of this short survey before close of business today.

You will be aware of current Commercial Court proceedings that concern the validity of Standard Contractual Clauses (see [here](#)). The American Chamber is working to ensure that the voice of business is heard during the court proceedings. In the period between the invalidation of Safe Harbour and before Privacy Shield is approved, Standard Contractual Clauses (SCCs) remain the most viable option for transferring data internationally out of the EU.

In order to ensure that the Court is aware of the scale of reliance on SCCs among our membership I ask you complete the quick survey linked below. All answers will be anonymous and your input will be vital to assist the Court in understanding the critical importance of this issue.

<https://www.surveymonkey.com/r/NKM6FR6>

Thank you for your support in this important matter.

Mark Redmond,
Chief Executive

International Data Transfers - Standard Contractual Clauses

1. Does your company have a HQ/substantial operation in Ireland?

Yes

No

2. Does your company rely on SCCs for transfers of data to the United States?

Yes

No

3. Does your company rely on SCCs for transfers of data to other countries?

Yes

No

4. If you answered yes to Qs 2 and/or 3, does your company rely on SCCs for controllers, for processors, or for both?

Controllers only

Processors only

Both

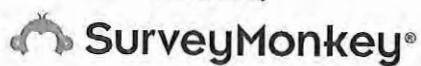
5. If SCCs became unavailable, does your company have an alternative data transfer solution readily available?

Yes

No

Done

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US government wants to be joined in Schrems case

Data commissioner wants key issues to be referred to Court of Justice of the EU

© Mon, Jun 13, 2016, 17:03

Mary Carolan

The US government wants to be joined to legal proceedings here involving issues of huge significance for privacy rights of EU citizens arising from transfer of their personal data to the US.

In the proceedings, the Data Protection Commissioner has reached a preliminary view, subject to considering any further submissions, there are “well-founded” claims the personal data privacy rights of EU citizens are being breached arising from transfer of their personal data to the US where it might be accessed and processed by US State agencies for national security purposes in a manner incompatible with the Charter of Fundamental Rights of the EU.

Commissioner Helen Dixon now wants the Commercial Court to refer key issues for determination by the Court of Justice of the EU (CJEU) before her office makes a final decision on the complaint by Austrian student Max Schrems alleging breach of his data protection rights by Facebook Ireland. It denies any breach of Irish or EU law.

Mr Justice Brian McGovern on Monday agreed to fast-track the Commissioner’s case against Facebook Ireland and Mr Schrems and to hear, on June 27th, the commissioner’s application for referral of issues to the CJEU for determination.

Clauses

Those concern the validity of various European Commission decisions approving standard contractual clauses (SCCs) under which Facebook Ireland and others make data available to the US. SCCs are the main channel relied on to transmit data since the CJEU ruled last year the 15-year-old Safe Harbour arrangement (which allowed some 4,500 US companies transfer personal data to the US) violated fundamental rights of EU citizens to privacy and data protection.

Michael Collins SC, for the Commissioner, said the case is of enormous urgency with huge potential impact for commercial trade and the rights of parties in relation to processing of their data. Because no national court can decide the validity of the EC decisions on SCCs, the CJEU must determine that, he said.

The commissioner believed the concerns were “well-founded” and was obliged to refer matters to the CJEU. Paul Gallagher SC, for Facebook Ireland, said the case was “considerably more complicated” than outlined and raised very significant issues for his client which was assessing its position. Eoin McCullough SC, for Mr Schrems, did not oppose the case being fast-tracked but said Mr Schrems has concerns whether another reference to the CJEU was necessary.

Any reference should concern all potential derogations, he urged.

Eileen Barrington SC, for the US government, said it would be applying to be joined as an amicus curiae (assistant to the court on legal issues) as the case has “potentially significant” implications for US authorities and companies and is of significant importance to the US.

Maurice Collins SC, for the ESA software alliance, a global representative association representing companies including Apple, Microsoft and Intel, said it also wanted to be joined as an amicus curiae as his clients use SCCs to transfer data to the US and elsewhere.

Paul Anthony McDermott SC, for the Irish Business and Employers Confederation (IBEC) and US Chamber of Commerce, said the proceedings have significance for thousands of companies in the context of trade with the US.

Complaint

In proceedings initiated in 2013, Mr Schrems challenged then Commissioner Billy Hawkes' refusal to investigate his complaint against Facebook Ireland, made after former NSA security contractor Edward Snowden claimed Facebook and other US firms were being forced to make their personal information, including EU user data, available to US intelligence.

Mr Hawkes argued his hands were tied due to the Safe Harbour arrangement but, after the CJEU struck down Safe Harbort as invalid, Commissioner Dixon agreed to investigate Mr Schrems' complaint, reformulated to include a substantive challenge to the validity of the EC decisions approving the SCCs.

Last month, the commissioner issued a preliminary decision to the effect transfer of data via SCCs is likely to breach provisions of the Charter of Fundamental Rights of the EU. That arose from a preliminary view EU citizens are unable to pursue a remedy in the US over transfer of their data there where it may be at risk of being accessed by US state agencies for national security purposes in a manner incompatible with the EU charter.

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