11 Questions to the CJEU

The case has its roots in a complaint made by Maximilian Schrems to the Irish Data Protection Commissioner ("**DPC**"), because his personal data was being transferred from Facebook Ireland Ltd to its US parent company. In his opinion, his personal data was then being accessed unlawfully by US national security agencies.
In this article, we will first have a brief review of the initial case ("**Schrems I**") of the transfers under 'Safe Harbour.' We then give an overview of the proceedings after Safe Harbour was struck down: the transfer continued under Standard Contractual Clauses (SCCs) and Mr. Schrems reformulated and resubmitted his complaint to the DPC ("**Schrems II**"). Next we will summarize the questions that were referred to the Court of Justice of the EU ("**CJEU**") in this context and today's opinion of the Advocate General 'Henrik Saugmandsgaard Øe' ("**AG**") responding to these questions.
Finally, we will discuss possible consequences of the CJEU decision to be made in the light of the AG's opinion, anticipating the final CJEU decision and potential solution directions.

Schrems I
Mr. Schrems issued his initial complaint to the DPC on 25 June 2013. He challenged the validity of Facebook applying the Safe Harbour agreement, a legal instrument for EU/US data transfers. The DPC declined to investigate the complaint, as it was of the opinion that it was bound by EU law to comply with the Safe Harbour agreement. Mr. Schrems appealed this decision before the Irish High Court, which then decided to refer the issue to the CJEU for preliminary ruling.

On 6 October 2015, the CJEU ruled that national data protection authorities (DPA) are not prevented from investigating individual complaints related to EC decisions and legal instruments based on them, but made very clear that only the CJEU can declare such decisions invalid. Although not specifically asked for, the CJEU declared the Safe Harbour agreement invalid, stating that in adopting Article 3 of the Safe Harbour agreement, the EU Commission (EC) exceeded its powers and made a shortcut on the adequacy procedure laid down in the Directive 95/46/EC. Following the invalidity of the Safe Harbour agreement, the Privacy Shield mechanism was set up as an alternative instrument for EU/US data transfer.

Schrems II
Following the Schrems I decision, Mr. Schrems reformulated and resubmitted his complaint and requested the DPC again to suspend data flow from Facebook Ireland to its US parent company that were now based on the SCCs mechanism.
Again, the DPC concluded that it was not possible to close the investigations without a ruling from the CJEU on the validity of the SCC decision. They therefore commenced proceedings before the Irish High Court to seek a preliminary reference to the CJEU on the issue of the validity of that decision.
In its ruling on 3 October 2017, the Irish High Court confirmed that in order for the DPC to close its investigations it was necessary to analyze the validity of the SCC decision. As ruled under Schrems I, this could only be done by the CJEU. To this end, 11 questions were referred to the CJEU for preliminary ruling.

Questions referred to the CJEU
The Schrems II questions referred to the CJEU were based on a number of generic issues of personal data transfer to countries outside the EU and some US specific issues. Finally, the ultimate question was raised: do the EC decisions on Standard Contractual Clauses violates the European Charter of Fundamental Rights?

Generic issues:

- Does EU law apply to the further transfer and processing of data by national security authorities in countries outside the EU ("Third Counties")?
- Should potential violations of the rights of individuals through the SCC transfer be determined based on EU or Member State law?
- When assessing Third Countries' level of data protection, should this only be done based on its applicable domestic laws, or should exiting administrative rules, executive orders, etc. also be considered?
- In relation to the EU data protection laws and/or the European Charter of Fundamental Rights ("ECFR"), what is the level of protection required and what matters should be taken when transferring personal data to Third Countries under the SCCs?
- Have national DPAs the power to suspend data flows, if they deem a transfer in conflict with the SCCs, EU data protection laws and/or the ECFR?

US specific issues:

- Is a SCC transfer to the US violating the relevant articles of the ECFR?
- Is the Privacy Shield Decision binding on the national DPAs and courts of the Member States?
- Does the Privacy Shield ombudsperson provide a sufficient remedy in relation to the ECFR?