

The Commission considers the measures adopted by the Portuguese Republic, in particular, the Natura 2000 Network sectoral plan, as well as other measures referred to by the Portuguese authorities, do not correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II of the Directive and cannot, therefore, be considered 'necessary conservation measures', within the meaning of Article 6(1) of the Directive.

- (¹) Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7).
- (²) Commission Decision 2004/813/EC of 7 December 2004 adopting, pursuant to Council Directive 92/43/EEC, the list of sites of Community importance for the Atlantic biogeographical region (OJ 2004 L 387, p. 1).
- (³) Commission Decision 2006/613/EC of 19 July 2006 adopting, pursuant to Council Directive 92/43/EEC, the list of sites of Community importance for the Mediterranean biogeographical region (OJ 2006 L 259, p. 1).

Reference for a preliminary ruling from the High Court (Ireland) made on 9 May 2018 — Data Protection Commissioner v Facebook Ireland Limited, Maximillian Schrems

(Case C-311/18)

(2018/C 249/21)

Language of the case: English

Referring court

High Court (Ireland)

Parties to the main proceedings

Applicant: Data Protection Commissioner

Defendants: Facebook Ireland Limited, Maximillian Schrems

Questions referred

1. In circumstances in which personal data is transferred by a private company from a European Union (EU) member state to a private company in a third country for a commercial purpose pursuant to Decision 2010/87/EU (¹) as amended by Commission Decision 2016/2297 (²) ('the SCC Decision') and may be further processed in the third country by its authorities for purposes of national security but also for purposes of law enforcement and the conduct of the foreign affairs of the third country, does EU law (including the Charter of Fundamental Rights of the European Union ('the Charter')) apply to the transfer of the data notwithstanding the provisions of Article 4(2) of TEU in relation to national security and the provisions of the first indent of Article 3(2) of Directive 95/46/EC (³) ('the Directive') in relation to public security, defence and State security?
2. (1) In determining whether there is a violation of the rights of an individual through the transfer of data from the EU to a third country under the SCC Decision where it may be further processed for national security purposes, is the relevant comparator for the purposes of the Directive:
 - a) The Charter, TEU, TFEU, the Directive, ECHR (or any other provision of EU law); or
 - b) The national laws of one or more member states?(2) If the relevant comparator is b), are the practices in the context of national security in one or more member states also to be included in the comparator?

3. When assessing whether a third country ensures the level of protection required by EU law to personal data transferred to that country for the purposes of Article 26 of the Directive, ought the level of protection in the third country be assessed by reference to:
 - a) The applicable rules in the third country resulting from its domestic law or international commitments, and the practice designed to ensure compliance with those rules, to include the professional rules and security measures which are complied with in the third country;

or

 - b) The rules referred to in a) together with such administrative, regulatory and compliance practices and policy safeguards, procedures, protocols, oversight mechanisms and non judicial remedies as are in place in the third country?
4. Given the facts found by the High Court in relation to US law, if personal data is transferred from the EU to the US under the SCC Decision does this violate the rights of individuals under Articles 7 and/or 8 of the Charter?
5. Given the facts found by the High Court in relation to US law, if personal data is transferred from the EU to the US under the SCC Decision:
 - a) Does the level of protection afforded by the US respect the essence of an individual's right to a judicial remedy for breach of his or her data privacy rights guaranteed by Article 47 of the Charter?

If the answer to a) is yes,

 - b) Are the limitations imposed by US law on an individual's right to a judicial remedy in the context of US national security proportionate within the meaning of Article 52 of the Charter and do not exceed what is necessary in a democratic society for national security purposes?
6. (1) What is the level of protection required to be afforded to personal data transferred to a third country pursuant to standard contractual clauses adopted in accordance with a decision of the Commission under Article 26(4) in light of the provisions of the Directive and in particular Articles 25 and 26 read in the light of the Charter?
- (2) What are the matters to be taken into account in assessing whether the level of protection afforded to data transferred to a third country under the SCC Decision satisfies the requirements of the Directive and the Charter?
7. Does the fact that the standard contractual clauses apply as between the data exporter and the data importer and do not bind the national authorities of a third country who may require the data importer to make available to its security services for further processing the personal data transferred pursuant to the clauses provided for in the SCC Decision preclude the clauses from adducing adequate safeguards as envisaged by Article 26(2) of the Directive?
8. If a third country data importer is subject to surveillance laws that in the view of a data protection authority conflict with the clauses of the Annex to the SCC Decision or Article 25 and 26 of the Directive and/or the Charter, is a data protection authority required to use its enforcement powers under Article 28(3) of the Directive to suspend data flows or is the exercise of those powers limited to exceptional cases only, in light of Recital 11 of the Directive, or can a data protection authority use its discretion not to suspend data flows?

9. (1) For the purposes of Article 25(6) of the Directive, does Decision (EU) 2016/1250⁽⁴⁾ ('the Privacy Shield Decision') constitute a finding of general application binding on data protection authorities and the courts of the member states to the effect that the US ensures an adequate level of protection within the meaning of Article 25(2) of the Directive by reason of its domestic law or of the international commitments it has entered into?
- (2) If it does not, what relevance, if any, does the Privacy Shield Decision have in the assessment conducted into the adequacy of the safeguards provided to data transferred to the United States which is transferred pursuant to the SCC Decision?
10. Given the findings of the High Court in relation to US law, does the provision of the Privacy Shield ombudsperson under Annex A to Annex III of the Privacy Shield Decision when taken in conjunction with the existing regime in the United States ensure that the US provides a remedy to data subjects whose personal data is transferred to the US under the SCC Decision that is compatible with Article 47 of the Charter?
11. Does the SCC Decision violate Articles 7, 8 and/or 47 of the Charter?

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- ⁽¹⁾ Commission Decision of 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46/EC of the European Parliament and of the Council (OJ 2010, L 39, p. 5).
- ⁽²⁾ Commission Implementing Decision (EU) 2016/2297 of 16 December 2016 amending Decisions 2001/497/EC and 2010/87/EU on standard contractual clauses for the transfer of personal data to third countries and to processors established in such countries, under Directive 95/46/EC of the European Parliament and of the Council (OJ 2016, L 344, p. 100).
- ⁽³⁾ Directive 95/46/EC of the European Parliament and of 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 (OJ 1995, L 281, p. 31).
- ⁽⁴⁾ Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield (OJ 2016, L 207, p. 1).

**Reference for a preliminary ruling from the Court of Appeal (England & Wales) (Civil Division)
(United Kingdom) made on 14 May 2018 — Commissioners for Her Majesty's Revenue and Customs
v The Chancellor, Masters and Scholars of the University of Cambridge**

(Case C-316/18)

(2018/C 249/22)

Language of the case: English

Referring court

Court of Appeal (England & Wales) (Civil Division)

Parties to the main proceedings

Applicants: Commissioners for Her Majesty's Revenue and Customs

Defendants: The Chancellor, Masters and Scholars of the University of Cambridge

Questions referred

1. Is any distinction to be made between exempt and non-taxable transactions for the purpose of deciding whether VAT incurred for the purposes of such transactions is deductible?