An Coimisiún um Chosaint Sonraí
Data Protection Commission

Mr Juan Fernando LÓPEZ AGUILAR, Chair

Committee on Civil Liberties, Justice and Home Affairs

European Parliament

By email only attention the Chair : libe-secretariat@ep.europa.eu

Cc : Committee Shadow Rapporteurs

Dear Chair

I am writing to you in relation to a resolution of the Committee on Civil Liberties, Justice and Home Affairs, circulated in draft format last week.

I understand the draft resolution in question has been tabled by way of follow-up to the Committee's consideration of the Judgment of the Court of Justice of the European Union (CJEU) in proceedings titled *Data Protection Commission v. Facebook Ireland Limited & Maximilian Schrems*. As you know, that judgment was delivered on 16 July 2020 and is concerned with the application of European data protection rules to the transfer of European Union citizens' personal data to the United States.

I am aware, from media reports, that the Committee considered aspects of the Judgment in a public session held on Thursday, 3 September 2020, at which the Committee heard from three external parties, namely, European Commissioner for Justice, Didier Reynders, the Chair of the European Data Protection Board Chair, Andrea Jelinek, and data protection activist and founder of NOYB, Max Schrems.

I am not aware of any subsequent debate conducted by the Committee in public session in relation to the matters considered on 3 September, although I expect the Committee will have considered matters further in private session.

I very much welcome the Committee's engagement with the Judgment and, indeed, its engagement with issues relating to the enforcement of the GDPR more generally. It is imperative that the EU's elected representatives would lead the debate on these issues, not just because the European Parliament directed so much of the legislative process by which the GDPR itself was enacted, but also because it has long since been acknowledged that, if there is to be a resolution of ongoing problems relating to EU-US data transfers, such a resolution will require political engagement between the EU and the US and the agreement of a transfer scheme in which the protections afforded EU citizens by the GDPR and the Charter are respected – and given full effect – when their data is transferred to the US.

While, to date, I have not had the opportunity to address the Committee, either in private session, or at its public session of 3 September last, I would very much welcome an opportunity to engage with the Committee and to answer such questions as it may wish to direct to me in relation to the proceedings that gave rise to the CJEU's Judgment of 16 July. I would equally welcome an opportunity to engage with the Committee in relation to the enforcement of the GDPR generally. If the Committee considers that it would be of assistance to it, in terms of ensuring that it hears from all relevant parties and considers all of the available perspectives, I would be happy to share the experiences of my office in relation to these matters.

I acknowledge that it is of course a matter for the Committee to determine who it should hear from in any given context, and what conclusions, if any, may be drawn from the contributions it receives, whether those are provided by Committee members or by persons external to it. That cannot be gainsaid, given that Parliament is an important forum for political debate and decision-making within the EU's legal order. As a matter of first principles, however, it is surely the case that, where Parliament or any of its Committees wishes to provide leadership in a particular area, and particularly where it proposes to adopt a resolution critical of an agency charged with responsibility for the implementation of a key pillar of EU law, it would wish to ensure that it has access to all relevant facts; that all positions presented to it have been tested; and that actions taken by the agency with which members of the Committee disagree have been interrogated and properly understood. Most fundamentally, it must surely be the case that the Committee would wish to ensure that it has afforded an opportunity to the agency concerned to be heard (whether in person or through correspondence) in relation to the criticisms levelled against it.

Against this backdrop, the draft resolution circulated last week gives rise to significant concern.

So far as the document engages with the Judgment of 16 July last, it does so in just two bullet points. While it is accepted that, by its very nature, any such resolution must necessarily seek to identify – and present, in short form - those points which the Committee considers to be of most importance, there is nonetheless a significant risk that, when complex issues, such as those presented by the CJEU in a Judgment containing 203 paragraphs (and running to some 63 pages) are reduced to bullet points, the true import – and context - of those issues may be lost.

Given that the amount of information presented in the draft resolution is necessarily limited, and reflecting the impact such a statement will have in circumstances where it originates in a Parliamentary Committee noted for the leadership it provides in the area of data protection law generally, it is of particular importance that the information contained in the resolution is accurate and that basic tenets of fairness are observed in its presentation.

Turning then to the two bullets incorporated in the statement in relation to the CJEU's Judgment - and taking them in reverse sequence - the position is as follows:

The issue of costs

Contrary to what has been suggested, the DPC did not apply to recover its costs of the judicial review proceedings from Mr Schrems. On the contrary, the DPC agreed with Mr Schrems - in 2016 - that it would not look to recover its costs from him irrespective of the outcome. When the issue of costs came back before the Irish Court in October 2020, the DPC applied to recover its costs from Facebook; it also asked the Court to direct that Facebook pay Mr Schrems' costs, if it found that Mr Schrems was entitled to recover his costs notwithstanding his opposition to the making of the reference[1]. Consistent with the terms agreed with Mr Schrems in 2016, the DPC did *not* apply for its costs against Mr Schrems.

Given that the account of the relevant events as set out in the draft resolution is both inaccurate and incomplete, it follows that the accompanying 'strong condemnation' of the DPC's actions is neither sustainable nor appropriate and should be withdrawn.

The import of the CJEU Judgment

In the draft resolution, the Judgment has been reduced to a single proposition, to the effect that the legal proceedings that gave rise to it were unnecessary, i.e. it appears to be said that the DPC should not have sought a reference and the Irish High Court should not have made that reference; instead, the DPC could and should have exercised its powers under Article 58 of the GDPR to prohibit EU-US transfers between Facebook Ireland Limited and Facebook Inc.

This proposition does not accurately reflect the Judgment; nor does it engage with the history and content of the underlying proceedings.

So far as the Judgment itself is concerned, the draft resolution fails to engage with the core *structural* problems the subject of the reference, and the evidence and arguments presented by the parties – including Mr Schrems – in relation to each of those problems. In that regard, it is important to recall that the CJEU addressed a total of 11 questions. One of those questions was indeed concerned with the nature and extent of a data protection supervisory authority's obligation to intervene in any case where it discerns that an individual transfer is being conducted in a manner inconsistent with EU data protection law. As a matter of basic logic, however, issues relating to such an intervention only arise if it is first established that, in principle, the laws of the third country to which the data is to be transferred do not provide a level of protection to EU citizens essentially equivalent to that applicable within the EU, and/or that the legal means by which the data is transferred is itself deficient.

In the case before it, the CJEU was of course primarily concerned with the laws of the United States. Critically, the CJEU was concerned to establish, firstly, that, contrary to the position advanced by Facebook and a number of EU member states, steps taken by a US public authority to access an EU

[1] For completeness, it should be noted that Mr Schrems took a different position when the High Court's decision to make the reference was appealed by Facebook to the Irish Supreme Court. There, Mr Schrems agreed with the DPC position that, in circumstances where a reference had been directed by the High Court, it was not open to an appellate court to interfere with the decision to refer, or to impose changes to the questions referred. That is to say, Mr Schrems now sought to give effect to the reference, to include each of the 11 questions posed by the High Court.

citizen's data, post-transfer, for national security purposes, engage that citizen's rights under EU data protection law. From there, the Court considered the grounds for transfers generally, noting that the same standard of protection must be applied to all transfers, irrespective of the means by which such transfers are effected.

Separately, the Court set out the means by which the laws of the third country must be assessed, before going on to conclude, consistent with the DPC's analysis, that the US does not in fact provide a level of protection to EU citizens in a manner consistent with the requirements of EU law and, in particular, the EU's Charter of Fundamental Rights and Freedoms.

It is only on the basis of these pre-cursor points that one can sensibly consider the consequences that flow from a finding that a given transfer to the US – or any third country - does not satisfy the requirements of EU data protection law. In that regard, and having first addressed the nature and extent of the obligations borne by the exporting party, the Court provided extensive clarification as to when, and how, data protection supervisory authorities are required to intervene.

Against this backdrop, and even without looking beyond the content of the Judgment itself, it is clear that the characterisation of the Judgment as contained in the draft resolution is inaccurate and incomplete.

A full and meaningful examination of the issues addressed by the CJEU requires that consideration be given to a whole range of factors not even hinted at in the draft resolution. By way of example –

- While the draft resolution criticises the DPC for applying for a reference in the first place, it ignores directions given by the CJEU in its earlier Judgment of 6 October 2015 to the effect that, in any case where a national data protection supervisory authority forms the view that a legal instrument adopted at EU level may be inconsistent with the requirements of EU law, to include the Charter, it is bound to bring those concerns to the attention of the CJEU.

- In such a case, the national supervisory authority may not proceed directly to the CJEU; rather, it is required to bring its concerns to the attention of a national court in the first instance. If the national court shares the supervisory authority's concerns, the national court is in turn required to make a reference to the CJEU. (The CJEU is of course the only judicial entity with jurisdiction to invalidate a legal instrument adopted at EU level).

- In the present case, the DPC was concerned that the protections available to EU citizens within the EU are not maintained when their data is transferred to the US. Importantly, it formed the view that *structural* deficiencies within the US legal system in this particular context could not be said to be cured by means of the "standard contractual clauses" developed by the EU Commission, leaving EU citizens' exposed if/when their data is transferred to the US.

- Having formulated its concerns into a draft decision, the DPC brought its concerns to the Irish High Court, inviting Facebook and Mr Schrems to participate in a legal process intended to test whether or not the concerns identified by the DPC were well-founded. In the event, and following a lengthy hearing conducted over 6-weeks in which expert evidence was presented on behalf of each of the DPC, Facebook and Mr Schrems in relation to US law, the High Court concluded that the DPC's concerns were indeed well-founded.

- The High Court's analysis was upheld on appeal to the Irish Supreme Court.

- It is of note that, in deciding whether or not to make a reference, the High Court was specifically asked by Mr Schrems to treat the reference as being unnecessary on the grounds that the DPC could instead simply direct Facebook to cease transfers. Having considered the evidence and arguments presented by each of the parties, the High Court concluded that Mr Schrems' proposed solution was not appropriate; rather, it proceeded to formulate a series of 11 questions for consideration by the CJEU, targeting the key points of principle presented by transfers to the US. (Of course, it is not to be overlooked that, if the DPC had directed Facebook to discontinue EU-US transfers without first seeking to clarify the law, there is little question but that Facebook would have contested such direction by legal means, triggering a series of appeals in the national court but with no certainty that key points of principle would have been the subject of a reference to the CJEU).

- As indicated above, the CJEU engaged with the issues referred to it on their merits. In so doing, it declined to rule that the reference was unnecessary or should not have been brought in the first place. Nor did it have any concern that the reference was inadmissible. Rather, it dealt in a fulsome manner with each of the points of principle arising from the reference questions, recognising that the proceedings provided an opportunity to clarify the law in a number of key respects. (Given the depth at which the CJEU engaged with the questions referred by the High Court, it is difficult to understand how it could now be suggested, as the draft resolution appears to suggest, that the "answer" to the problem was obvious all along, being an answer that did not require the input of the CJEU at all).

- While it has been suggested that the DPC ultimately "lost" the case in circumstances where the validity of the EU Commission decision incorporating the standard contractual clauses was upheld, such an analysis overlooks those elements of the Judgment which specifically address transfers to the US and which underscore the challenges associated with reliance on the SCCs, whether in their published form, or with additional safeguards, to justify transfers to the US.

Two points may also usefully be made here about the Court's invalidation of the Privacy Shield Decision:

- Firstly, the CJEU's analysis of the deficiencies inherent in the Privacy Shield Decision rested, in large part, on facts as established by the Irish High Court.

- Secondly, in the course of the hearing before it, the Court observed that it was unclear whether, absent the invalidation of Privacy Shield, it would have been open to a national supervisory authority to prohibit transfers generally to the US, given that the Privacy Shield contained an adequacy finding (albeit qualified) in relation to the level of protection available in the US.

Ultimately, therefore, it will be seen that the draft resolution gets nowhere near the essence of the Judgment; on the contrary, and leaving aside the extent to which it appears to reflect the perspectives of one party to the underlying proceedings, the resolution presents a skewed picture of what the case was about, and the importance attaching to the issues decided by the Court. As such, it is respectfully submitted that the publication of the resolution in its current form would serve only to deepen common misconceptions as to the import of the judgment.

Enforcement of the law as it relates to transfers, before and after GDPR

It appears to have been overlooked by the Committee, as, in fairness, it has been overlooked by others, that the DPC is in fact the only supervisory authority to engage with EU-US transfers in a meaningful way, or at all. In that regard, it is noteworthy that, long before the advent of the GDPR's so-called "one-stop-shop" mechanism, Mr Schrems filed the same basic complaint in relation to Facebook's EU-US transfers, not just with the Irish supervisory authority, but also with the Belgian supervisory authority and the regional supervisory authority in Hamburg. Neither of those other complaints has been advanced.

Even since the CJEU delivered its judgment on 16 July 2020, it appears that no other supervisory authority has intervened in the manner mandated by the CJEU. Whilst it might be said that that is - at least in part - reflective of the number of so-called "big tech" companies having their main establishment in Ireland, that cannot be a full answer to the point, given the multiplicity of data brokers, platforms and other players in the digital economy that are established in member states right across the EU.

In contrast, within a period of approximately 6 weeks after the CJEU's Judgment was delivered in July, the DPC had commenced a regulatory procedure in respect of Facebook's EU-US transfers, in which it specifically seeks to apply the CJEU's analysis. The Committee will be aware that that procedure was met with a legal challenge by Facebook, fully contested by the DPC, in which judgment is presently awaited. (Separate proceedings were also brought by Mr Schrems, albeit on different grounds). As one consequence of the proceedings brought by both Facebook and Mr Schrems, the DPC's regulatory process has been stayed by order of the Court until the Court has ruled

on the merits of the underlying proceedings. (It is notable that Mr Schrems recently withdrew his objections to the process on terms agreed between Mr Schrems and the DPC. As one part of the terms so agreed, Mr Schrems has elected to discontinue that part of his complaint referable to the period from 2013 to 24 May 2018).

Enforcement generally

The draft resolution contains two further bullet points directed to the discharge by the DPC of its regulatory enforcement obligations generally. Here again, there is an obvious disconnect between the conclusion reached (i.e. that the EU Commission should bring infringement procedures against Ireland for failing to properly enforce the GDPR) and the factual basis upon which that conclusion is said to rest.

On its terms, the draft resolution appears to suggest that infringement proceedings are required because "several complaints against breaches of the GDPR filed on 25th May 2018, have not yet been decided by the Irish Data Protection Commissioner, which is the lead authority for these cases."

Quite apart from the fact that the complaints to which reference is made are not identified, the Committee has not engaged, at all, with the DPC in relation to such concerns as appear to be held by Committee members in relation to the DPC's enforcement activity. That being so, it is difficult to understand how or on what basis the Committee could consider it appropriate to call for infringement proceedings at this juncture.

Again, if and to the extent that the Committee wishes to obtain information relevant to the DPC's enforcement record, or indeed to interrogate the DPC as regards its record or enforcement priorities, the DPC will be happy to assist, in such format or forum as the Committee considers useful. Pending such engagement, however, it neither advances the cause of data subjects, nor contributes to an effective regulatory enforcement regime, if positions are adopted by a Parliamentary Committee that are informed, not by objectively verifiable facts, but by the blanket adoption of third party commentary without critical (or any) analysis.

Conclusion

As indicated at the outset, I welcome the Committee's engagement with the CJEU Judgment and issues relating to the enforcement of the GDPR generally. If the Committee considers it useful, I would be happy to engage with it with a view to advancing the Committee's understanding of the issues through the provision of relevant information and a national regulator's perspectives. I remain at the disposal of the Committee if it considers that such engagement would be helpful.

Yours sincerely

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Data Protection Commission

Helen Dixon
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