

Court of Justice of the
European Union
Case T-670/16
(2016/C 410/37)

Application to intervene in *Digital Rights Ireland v Commission*

On the bases of
Article 143 of the Rules of procedure of the General Court
and Article 40 of the Statute of the Court of Justice

ON BEHALF OF

1. La Quadrature du Net

a French association pursuant to the Act of 1st July 1901, with registered seat at 60 rue des Orteaux à Paris (75020);

2. La Fédération des fournisseurs d'accès à Internet associatifs, a.k.a. "FFDN"

a French association pursuant to the Act of 1st July 1901, with registered seat at 16 rue de Cachy à Amiens (80090);

3. French Data Network (Réseau de données français), a.k.a. "FDN"

a French association pursuant to the Act of 1st July 1901, with registered seat at 16 rue de Cachy à Amiens (80090)

Represented in these proceedings by

M^e Alexis FITZJEAN Ó COBHTHAIGH
Avocat au Barreau de Paris
5 rue Daunou, Paris 2^e (75002)
France

The Applicant interveners agree to the service of documents on their legal representative at Alexis Fitzjean Ó Cobhthaigh, Avocat au Barreau de Paris, c/o SCP Marlange-de la Burgade, 5, rue Daunou à Paris (75002) France, who is authorised and willing to accept and render service herein by e-Curia;

IN SUPPORT OF

Digital Rights Ireland Limited ("DRI") of Bennettsbridge, County Kilkenny, Ireland, a company possessing legal personality under Irish law, domiciled in Ireland; represented in this case by Edward McGarr, solicitor having his office at 12 City Gate, Lower Bridge St. Dublin 8.

I. Introduction

- 1 The three Applicants hereby seek to file a Statement of Intervention in support of the action brought on September 16, 2016 by Digital Rights Ireland against the Implementing Decision of the Commission (EU 2016/1250) of July 12, 2016 (hereafter, the “**Privacy Shield Decision**”) (Case T-670/16).
- 2 The Plaintiff Digital Rights Ireland is an Irish non-for-profit organisation founded in 2005 and devoted to defending civil, human and legal rights in a digital age. It seeks to inform and educate members of the public regarding their rights in the information society and where possible to vindicate and assist in vindicating those rights.
- 3 The Respondent European Commission is an institution of the European Union under Article 17 of the Treaty on European Union (“TEU”). The European Commission is the EU’s executive body. It represents the interests of the European Union as a whole.
- 4 Case T-670/16 was published on the Official Journal on November 7, 2016.¹
- 5 This Application is made pursuant to Article 143 of the Rules of procedure of the General Court and Article 40 of the Statute of the Court of Justice.
- 6 This Application is made in English (the language of Case T-670/16); however, the Applicants support the Plaintiff’s request to allow the submission of further statements and documents (if any) in French, pursuant to Article 45(1)(c) of the Rules of procedure of the General Court. In any case, the Applicants being non-for-profit and volunteer-based organisations, they do not have the means to obtain the translation of any further statements and/or documents. For this reason they respectfully ask the judges to allow them to use French in their future writings.

II. Statement of interest of the Applicants

- 7 The Applicants are three French non-for-profit organisations.
- 8 La Quadrature du Net is a non-for-profit association that defends the rights and freedoms of citizens in the digital environment. More specifically, it advocates for the adaptation of French and European laws to the founding principles of the Internet, and in particular for the free circulation of knowledge, the protection of personal data and the right to be free of undue surveillance. As such, La Quadrature du Net takes part in public policy debates concerning, for instance, freedom of expression, copyright, regulation of telecommunications, data protection and online privacy.
- 9 La Quadrature du Net aims to promote users’ autonomy and control over their personal data, pursuant to Article 3 of its bylaws (**attachmt. no A.1**).

¹Case T-670/16: Action brought on 16 September 2016 — Digital Rights Ireland v Commission, *OJ C 410*, 7.11.2016, p. 26–27

- 10 French Data Network (FDN) is a French non-profit Internet service provider, operating networks and providing access to the Internet since 1992. It is the oldest Internet service provider still active in France. The goal of FDN is to promote the use of the Internet in accordance with its ethics, pursuant to Article 2 of its bylaws (attachmt. no A.2).
- 11 La Fédération FDN (FFDN) is a non-profit organisation registered in France, bringing together non-profit 28 Internet service providers (registered officially with their respective national electronic communications regulatory agencies) from France and from Belgium, such as French Data Network. It also provides information on how to build and operate non-profit internet service providers.
- 12 FDN, as well as any other FFDN member, has contractual obligations towards their subscribers to provide a service, making them particularly affected by the Privacy Shield Decision in their day-to-day activities (i.e., providing a clean, neutral and open Internet access to their users, in respect of their rights and freedoms in adequation with the founding principles of the associations). For instance, FDN subscribers may pay from 23 to 42 € per month in return for FDN’s ADSL services.² One of the main rationale for joining an Internet access provider such as FDN or any other FFDN members is to use the Internet in confidence that users’ activities on the networks are not tampered with or subject to corporate surveillance, neither from the internet access provider or from third-parties. For this purpose, FFDN members provide internet access notably in accordance with their good practices policy (attachmt. no A.3).
- 13 The Applicants are currently involved in several proceedings, in France (notably, at the Conseil d’État, cases 393099 relating to the French data retention regime and cases 394922, 394924, 394925, 397851 relating to the Intelligence Act implementation decrees) and at the European Court of Human Rights (cases 38337/16 and 39157/16), which are directly related to or impacted by the outcome of Case T-670/16; on matters of surveillance, protection of the right to privacy and protection of personal data.
- 14 The Applicants also filed an application with the General Court of the European Union (Case T-738/16) seeking annulment of the Privacy Shield Decision, pursuant to Article 263 of the Treaty on the Functioning of the European Union, on the basis of Articles 7, 8 and 47 of the Charter of fundamental rights of the European Union (“the Charter”).

Case T-670/16 raises questions of principle affecting the Applicants

- 15 Article 40 of the Statute of the Court of Justice provides that an application for leave to intervene must establish that the applicant has an interest in the outcome of the case in question.

²FDN.fr, Internet subscription prices, <https://www.fdn.fr/services/adsl/> (in French).

- 16 The Applicants assert that their circumstances, being similar to those of the Plaintiff in Case T-670/16, qualify them to have an interest in the outcome. If the Plaintiff is successful in the case, the Applicants will benefit collaterally.
- 17 It is established policy of the European Union that the personal data of its citizens shall be adequately protected. The provisions to achieve that protection are to be found in Directive 95/46/EC and in Articles 7, 8 and 47 of the Charter.
- 18 An ever growing amount of such personal data is digitised and being transferred at great speed and little costs to jurisdictions outside the European Union.
- 19 The Privacy Shield Decision, which is binding on the Member States under the terms of Article 288 TFEU, purports to protect personal data, in accordance with European Union law, when it is transferred to the United States of America.
- 20 The Applicants deny that the Privacy Shield Decision achieves its objective in that regard.
- 21 The Privacy Shield Decision was adopted by the Commission in the exercise of an implementing power and not in the exercise of legislative powers. It is of general application and produces legal effects in general and in abstract. The subject of the Privacy Shield is the adequacy of the level of protection for personal data in the United States of America and, in particular, personal data transferred from the European Union to the United States of America. The Privacy Shield Decision affects legal persons as well as natural persons whose personal data is or may be transferred to the United States of America.
- 22 The Privacy Shield Decision is not in accordance with Article 25(6) of Directive 95/46/EC on the ground, on the one hand, that the privacy principles and official representations and commitments are not United States of America law, and, on the other hand, that the United States of America law does not provide an adequate level of protection for personal data consistent with the Court of Justice of the European Union judgment in Case C-362/14 *Schrems vs. Data Protection Commissioner*.
- 23 Adding to this, the “privacy principles” and/or the official United States of America “representations and commitments” contained in Annexes I, III to VII of the Privacy Shield Decision do not constitute “international commitments” within the meaning of Article 25 (6) of Directive 95/46/EC.
- 24 The provisions of the FISA Amendments Act of 2008 constitute legislation permitting American public authorities to have access on a general basis to the content of electronic communications and consequently are not coherent with Article 7, nor with Article 47 of the Charter. The bulk access permitted by the FISA Amendments Act of 2008 hence allows for the unlawful access to personal data transmitted through the services provided by two of the Applicants (FDN and FFDN) and used by their subscribers and the natural persons working for the third Applicant (La Quadrature du Net). In the

wording of Case C-362/14 *Schrems vs. Data Protection Commissioner*, the bulk access permitted by the United States of America law and technically enabled by the transmissions made by FDN and FFDN is “compromising the essence of the fundamental right to respect for private life, as guaranteed by Article 7 of the Charter” (§ 94). This consequence of the transmission of personal data to the United States of America allowed by the Privacy Shield Decision gainsays the very core of FDN and FFDN’s engagements (see the interests of the Applicants above) towards their subscribers.

- 25 By failing to fully transpose the provisions contained in Directive 95/46 (specifically Article 14, 15 and 28(3)), the Privacy Shield Decision fails to adequately ensure that the European Union citizens’ rights under European Union law are fully provided for where their personal data is transferred to the United States of America.
- 26 The Privacy Shield decision is incompatible with Articles 7, 8 and 52(1) of the Charter in that it enables (or alternatively does not prohibit) beyond what is strictly necessary, the possibility of processing of personal data by United States of America authorities, with no distinction for personal and sensitive data, including for disclosure and retention by those authorities.
- 27 The Privacy Shield Decision is invalid as a breach of the rights to privacy, data protection, freedom of expression and freedom of assembly and association, as provided for under the Charter and by the general principles of European Union law, insofar as the Privacy Shield Decision allows, or in the alternative fails and has failed to safeguard against, indiscriminate access to electronic communications by foreign law enforcement authorities.
- 28 The Privacy Shield Decision is invalid as a breach of the right to an effective remedy and the right to good administration, contrary to the Charter and the general principles of European Union law, insofar as the Privacy Shield Decision allows, or in the alternative fails and has failed to safeguard against, indiscriminate access to electronic communications by foreign law enforcement authorities. Moreover, its being a breach of the right to an effective remedy has been highlighted by the European Ombudsman Ms O’Reilly, in her letter to Commissioner Jourova of February 22th 2016 (attachmt. no A.4). In this letter she denounces a remedy failing to provide for the mere safeguards associated to ombudsmen in international law.

III. Applicants' request to the court

29 For the reasons mentioned above, and pursuant to Articles 143 of the Rules of procedure of the General Court and Article 40 of the Statute of the Court of Justice, the Applicants request the Court of Justice to:

- a) grant them leave to intervene in support of Digital Rights Ireland;
- b) provide the Applicants with copies of any and all documents served on all parties to the proceedings;
- c) allow the Applicants, within the prescribed period, upon receiving those documents, to submit their statement of intervention; and
- d) rule that the costs of the Applicants' intervention be paid by the European Commission.

For the Applicants

Alexis FITZJEAN Ó COBHTHAIGH

A. Attachments

- A.1. La Quadrature du Net – Statuts (bylaws) (pages 1 to 11) cited in paragraph 9 on page 1.
- A.2. FDN – Statuts (bylaws) (pages 12 to 13) cited in paragraph 10 on page 2.
- A.3. Fédération FDN – Charte des bonnes pratiques et des engagements communs (FFDN – Good Practices and Common Undertakings Policy) (pages 14 to 17) cited in paragraph 12 on page 2.
- A.4. Letter of Ms Emily O'Reilly, European Ombudsman, to Ms Věra Jourová, Commissioner responsible for Justice, Consumers and Gender Equality, 22/02/2016 (pages 18 to 19) cited in paragraph 28 on page 4.