EU to US Data Transfers

Is it the end of Safe Harbour asks John Whelan head of A&L Goodbody's International Technology practice

What's all the recent fuss about?

The highest court in Europe, the Court of Justice of the European Union (CJEU) ruled, on October 6th, 2015, that the EU-US Safe Harbour regime is invalid. The finding has caused significant uncertainty for businesses, advisers, regulators and national governments in relation to what happens next and how current ongoing transfers of data to the US are affected. Understandably so, as where things will end up is far from clear. In this piece, John Whelan from A&L Goodbody explains the ruling and the issues to be considered in the days ahead, answering the key questions being posed by companies following the CJEU ruling.

How and why did this all arise?

Put simply, the Edward Snowden affair. We are all familiar with media coverage of the Snowden revelations, but probably more used to seeing this in newspaper headlines, magazine articles and TV documentaries. Now the reports have been raised as a basis for seeking legal redress in the courts. The background is that on June 25th, 2013 an Austrian law student, Maximillian Schrems, filed a complaint with the Irish Data Protection Commissioner about the fact that Facebook Ireland was transferring his personal data to the US, which he said was unlawful in light of the Snowden revelations, and that the US legal regime did not properly protect his personal information. It was his 23rd complaint to the Irish authority about Facebook, but this one was targeted and based on the Snowden reporting and the PRISM program.

How did it end up before the CJEU?

The Irish Data Protection Commissioner declined to investigate Mr. Schrems' complaint. It would have involved taking an independent view on the legal protections offered (or not offered) by the US legal system. Instead the Irish authority took the position that the European Commission had already approved, by way of a formal Decision it had issued in 2000, the transfer of personal data to US recipients that had signed up to the "Safe Harbour" regime (a system where US companies certify that they will comply with certain standards of data protection). Mr. Schrems appealed the Irish authority's refusal to investigate, to the Irish High Court. The High Court examined the position, and recognizing the concerns arising from the Snowden affair (but acknowledging the US is not alone in having been accused of state surveillance in the past), decided that the issue was a serious matter of European law, and referred it on to the CJEU.

What exactly did the CJEU decide?

The judgment is a long one that goes into some detail in relation to the obligations of Member States to protect their citizen's right to privacy, and limit state interference with that right. These aspects of the judgment will have reverberations for years to come, and will no doubt be relied upon by privacy activists in cases that will inevitably continue to be taken in the future before national and European courts. The two key findings of the CJEU however, with immediate effect, were that: (i) based on the lack of protection afforded to EU citizens by alleged mass and indiscriminate surveillance of personal data by the US government, the Safe Harbour regime is invalid - and therefore can no longer be used; and (ii) the Irish Data Protection Commissioner should have investigated the complaint (the issue has now in fact gone back to the Irish Data Protection Commissioner to reconsider the complaint, not an enviable task).

Will EU to US data transfers have to cease?

Before the CJEU's decision, a company in Europe could rely on a Safe Harbour certification providing sufficient legal basis for transferring personal data to a US company. That legal justification has been removed with immediate effect. It's very early to say whether EU to US data transfers will have to cease, but hopefully not. The net effect of the CJEU decision is to require European companies to look to alternative legal structures to Safe Harbour certification.

What are the alternative legal structures?

There are a number of legal grounds that can technically be relied upon for transferring personal data outside of the EEA, but each may be treated or interpreted differently by different countries within Europe. In practice, only three of them have emerged in recent legal coverage of the CJEU Decision. They are (i) obtaining data subject consent; (ii) implementing Binding Corporate Rules (BCRs); and (iii) signing up to Model Contracts. Obtaining individual ("unambiguous" and "informed") consent from the data subject, for each and every transfer of his or her personal data to the US, will not be an option for most companies. BCRs are an approval mechanism, confined to intra-group transfers, take many months to get approved and so are unlikely to be a solution for most companies. The adoption of Model Contracts is likely to be the only viable legal mechanism available for remedying the majority of impacted EU to US data transfers. These are a set of "standard" contracts approved by the European Commission, that oblige a non-EEA party receiving personal data to adhere to a set of limitations on processing personal data that are designed to reflect the requirements of European data protection law.

But are "Model Contracts" also at risk in light of the CJEU decision?

This is an interesting question. The European Commission Decision regarding Safe Harbour was struck down by the CJEU. The European Commission Decision relating to Model Contracts was not before the CJEU, and remains valid. The various national data protection authorities in Europe have come out with a joint statement (on October 16th, 2015) to say that while their analysis of the effect of the CJEU judgment on alternative transfer mechanisms is ongoing, Model Contracts can still be used. All companies can really do in the current situation is follow the guidance given by this group and their national data protection authorities. From a pure legal perspective however, it is impossible to envisage a situation where if the Model Contracts regime came before the CJEU, in the same manner as the Safe Harbour regime did, the CJEU would not also strike down the Model Clauses regime. This is because the CJEU decision is based on the alleged untargeted surveillance by the US government, not related to the compliance or otherwise of US companies. Therefore the problem can't be fixed by contractual agreements between companies, no matter how "model" they are. Companies will just have to keep a close eye on guidance from their national regulators, as it evolves, over the coming months.

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What does the future hold for EU to US transfers?

Prior to the CJEU ruling, the EU and US were close to concluding an agreement on a replacement to the (now invalid) Safe Harbour regime. It is not clear yet how the CJEU ruling will affect those negotiations. The assumption is that it will speed them up – the European Commission and the US government will be keen to come up with an arrangement that would stand up to future scrutiny by the CJEU. They will also want to clear up the current prevailing uncertainty.

> On 25th June 2013 an Austrian law student, Maximillian Schrems, filed a complaint with the Irish Data Protection Commissioner about the fact that Facebook Ireland was transferring his personal data to the US, which he said was unlawful in light of the Snowden revelations, and that the US legal regime did not properly protect his personal information.

Some say that a revised Safe Harbour arrangement is impossible to achieve, as it would involve the US authorities agreeing to give more safeguards and privacy protections to EU citizens, than it gives to its own citizens. That certainly poses a challenge, but things are now with the politicians on both sides to see if a compromise can be reached – a compromise that will satisfy the CJEU. If one cannot be reached, it seems industry is heading for a situation in which all data pertaining to European citizens will have to be kept within Europe.

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