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The European Court of Justice to rule on the validity of standard contractual clauses

On 25 May 2016, the Irish Data Protection Commissioner ("**DPC**") released a press statement informing that it will continue to thoroughly and diligently investigate Max Schrems' complaint to ensure the adequate protection of personal data. The DPC also informed Max Schrems and Facebook that it intended to seek declaratory relief in the Irish High Court and a referral to the CJEU to determine the legal status of data transfers under Standard Contractual Clauses ("**SCC**").

This brings us back to Max Schrems' initial complaint in 2013 to the DPC by which he questioned the validity of Facebook Ireland's transfer of his personal data to the United States.

Remember: Safe Harbor is invalid

As everybody knows, Max Schrems' action led to the decision of 6 October 2015 by the European Court of Justice - "**CJEU**" (C-362/14 Schrems -v- Data Protection Commissioner) whereby the European Commission Decision approving the US Safe Harbor was invalidated. The reasoning was that such Decision authorised the transfer of personal data to the US which could then be accessed by US Authorities (specifically the NSA) on a generalised basis and without any differentiation or limitation, in violation of the essence of the fundamental right for private life.

For the record, the Safe Harbour was a voluntary scheme set up some 15 years ago by the European Commission and the US Department of Commerce, signed up by over 4000 entities, including both large and medium sized US companies but also European ones, under which such companies were deemed to afford an adequate level of protection to the personal data transferred from the European Economic Area ("**EEA**"), extended to some countries which had recognised the scheme (such as Switzerland).

Use of SCC to transfer data to the USA

To overcome the invalidation of the above Decision on Safe Harbor, numerous companies switched to the SCC to continue transferring their customers' data to the US. For example, Facebook Ireland Limited and

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Facebook Inc. in the US entered into an agreement including the SCC, reportedly in November 2015.

SCC are template agreements adopted by the European Commission through its decisions 2001/497/EC, 2004/915/EC, and 2010/87/EU (the "**SCC Decisions**") which conform to EU law principles and which EU companies can enter into with their foreign counterparts to serve as a basis for transferring personal data.

Are Standard Contractual Clauses any better than Safe Harbor?

For Max Schrems, "As long as the US does not substantially change its laws I don't see how [model contracts] could be a solution".

Mr. Schrems added that "model contracts pose a very serious issue for the US tech industry and EU–US data flows. As long as far-reaching US surveillance laws apply to them, any legal basis will be subject to invalidation or limitations under EU fundamental right."

In other words, Mr. Schrems raises the question whether SCC should be treated the same way as Safe Harbor or whether, on the contrary, they afford better protection to EU-based individuals.

On the one hand, one could consider that SCC are no better than Safe Harbor in that they do not prevent generalised surveillance by US State agencies and are not effectively monitored by a public authority of the importing country. But, on the other hand, SCC are more protective because (i) they allow better control by European Data Protection Authorities ("**DPAs**") prior to transfer, at least in the Member States where they are subject to prior formalities like in Belgium and in France, (ii) they allow better control by European DPAs after transfer as the clauses impose cooperation and audit duties on data importers and (iii) they allow better control by the exporting party which has contractual right to suspend the transfer or terminate the agreement.

What is next for Standard Contractual Clauses?

A risk: that DPAs freeze SCC transfers and that the CJEU invalidate SCC Decisions of the European Commission

Certain actors may decide that transfers based on SCC are not sufficiently safe and should therefore be suspended (or even stopped): the data exporter further to the SCC, the competent European DPAs and the CJEU.

Under the terms of the SCC, a data importer must agree that it has no reason to believe that any applicable laws will prevent it from fulfilling its contractual obligations. If that is not the case, then the data exporter has the right to suspend the transfer of data and/or terminate the contract.

Besides, under the SCC Decisions, the DPAs may prohibit or suspend data flows to third countries when (i) the law to which data importer is subject imposes derogations from the applicable data protection law which go beyond the restrictions necessary in a democratic society, (ii) a competent authority

has established that the data importer or a sub-processor has not respected the standard contractual clauses or (iii) there is a substantial likelihood that the standard contractual clauses are not being or will not be complied with and the continuing transfer would create an imminent risk of grave harm to the data subjects.

On 14 October 2015, the DPA in the German Federal State of Schleswig-Holstein released a position paper on the Schrems' decision, considering that the current data protection regime in the US does not provide the protection required for transfers of personal data from the EU. This DPA indicated further that model contracts are not an adequate data transfer mechanism, stating that "private bodies, which use Standard Contractual Clauses to transfer personal data to the US, now need to consider terminating the underlying standard contract with the data importer in the United States or suspending data transfers. In consistent application of the requirements explicated by the CJEU in its judgment, a data transfer on the basis of Standard Contractual Clauses to the US is no longer permitted."

At this stage, it is unclear whether this position will be echoed by other European DPAs, on the first rank of which the Irish DPC, which could even decide to suspend data flows to the US. However, it is more likely that DPAs will remain on a wait-and-see position until (i) it is confirmed whether the Privacy Shield will actually replace the Safe Harbor (see below) and (ii) the CJEU rules on the referral by the Irish High Court. Transatlantic data transfers indeed play a significant role in the European economy and any sudden interruption could severely impact businesses. A measured approach will therefore be key.

In any case, the ultimate word will be for the CJEU which is the sole institution which has jurisdiction to invalidate the SCC Decisions and possibly terminate the existing SCC mechanism.

A chance: that the Privacy Shield negotiation is used for reforming SCC

In February 2016, the EU Commission reached a political agreement with the US Department of Commerce and the US Department of Justice on the "EU-US Privacy Shield". It is intended to replace the now defunct US Safe Harbor regime and provide a more robust basis for transfers of personal data to the US.

The Article 29 Working Party ("**WP29**") has given an opinion on the scheme in April. According to the WP29, while the Privacy Shield affords a better protection than the Safe Harbor, improvements are still expected, essentially to clarify its different provisions, avoid any recognition of bulk collection of data and better guarantee the status / independence as well as the effective power of the ombudsman in charge of monitoring surveillance activities.

In order to achieve the adoption process, two important steps are still ahead of us (i) closing of the ongoing negotiations between the EU and US on the aspects that still need further clarifications and (ii) approval by the Article 31 Committee, which is made up of Member State representatives. Two meetings are scheduled in June for that purpose.

The WP29's opinion of last April on the Privacy Shield was expected to discuss the validity of other transfer mechanisms, including Standard Contractual Clauses and Binding Corporate Rules. While the WP29 indicated that nothing would change as regards such transfer solutions for the time being, it transpired from the responses during its public Q&A session that this position could be reviewed after the final decision on the Privacy Shield has been issued by the EC, hopefully in July of this year.

Now, do the concessions by the US, through the Privacy Shield negotiation, mean it is capable of offering adequate protection under other transfer mechanisms? No doubt that the commitments towards the limitation of indiscriminate and mass surveillance should equally apply in the case of data transferred through SCC. It is also possible that the right to an Ombudsperson will eventually be extended to other transfer mechanisms, including the SCC.

This reform, together with the intrinsic advantages of SCC may suffice to avoid an invalidation of the SCC.

Otherwise, if Model Contracts are put to an end, it will require EU businesses to completely re-engineer their systems and processes, for example by only using EU based data centres which could raise other types of issues such as financial and environmental ones but also in terms of protectionism.

The clock is ticking and everyone should get ready to adapt in such a changing environment. Let's hope a solution will come out sooner than later as the current uncertain environment is undoubtedly not favourable for the European economy and could lead to weaken it.

Contacts

For further information please contact:

Tanguy Van Overstraeten

Partner, Global Head of Privacy and Data Protection

+32 2 501 9405

tvanover@linklaters.com

Richard Cumbley

Partner

+44 207 456 4681

richard.cumbley@linklaters.com

Alexandre Entraygues

Managing Associate

+33 156 435 628

alexandre.entraygues@linklaters.com

Authors: Tanguy Van Overstraeten and Alexandre Entraygues