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Top EU Court Strikes Down Popular Data Transfer Tool

By **Allison Grande**

Law360 (July 16, 2020, 5:04 AM EDT) -- The European Union's top court on Thursday invalidated the popular Privacy Shield tool used to transfer data across the Atlantic, but upheld the use of standard contractual clauses to legally move personal information outside the bloc.

In a highly anticipated ruling, the European Court of Justice rejected the argument that standard contractual clauses should be deemed invalid because the mechanism does not prevent U.S. intelligence officials and other third parties from accessing transferred data.

The court concluded that "effective mechanisms" require both sides on a data transfer to make sure that the information will get the same degree of protections mandated under EU law and stop using the clauses if they cannot comply.

But the court struck down Privacy Shield, a tool used by more than 5,300 companies to transfer data from the EU to the U.S. It was instituted in 2016 to replace Safe Harbor, a mechanism that was invalidated by the court the previous year.

Lisa Peets, partner at Covington & Burling LLP, who represented the Software Alliance known as BSA in the proceedings, said the decision to reject the privacy shield without holding arguments on the merits of the tool was "disappointing to many."

But she said that upholding the contractual clauses will be a "huge relief to companies across Europe."

"Data flows between Europe and the United States are an integral part of the European economy and of the day-to-day lives of millions of European consumers, and the [standard contractual clauses] are the backbone for many of those data transfers," Peets said in a statement.

The dispute before the high court stems from a complaint brought by prominent Austrian privacy activist Max Schrems to Ireland's data protection authority in 2015, which challenged Facebook's reliance on standard contractual clauses to transfer data from the EU to the U.S.

Schrems has argued that the privacy rights of Europeans are not adequately protected from U.S. surveillance when data is transferred outside the bloc, a contention that stems from revelations leaked by former government contractor Edward Snowden that the National Security Agency has engaged in mass surveillance of non-U.S. citizens.

Irish Data Protection Commissioner Helen Dixon brought the challenge to Ireland's high court, which in turn referred 11 questions to the Court of Justice about the validity of standard contractual clauses. Privacy Shield was not implicated in the dispute, but the mechanism was brought up in oral arguments last July, leaving the door open for the high court to opine on the transfer tool's future as well.

In a nonbinding opinion issued in December, Advocate General Henrik Saugmandsgaard Oe found standard contractual clauses to be legally valid. But he concluded that companies and supervisory authorities have an obligation to suspend or prohibit specific transfers when surveillance laws in the U.S. or other countries outside the EU make it impossible to provide the privacy protections that the transfer mechanism is meant to offer.

The advocate general also recommended that the high court refrain from ruling on the ancillary issue of Privacy Shield's validity. He did however he use 10 pages of the ruling to lay out his concerns with the data transfer mechanism and skepticism about the European Commission's conclusion that U.S. surveillance law doesn't infringe the data protection rights of EU citizens whose information has been transferred under the arrangement.

The dispute resolved Thursday marks the second time the Court of Justice has weighed in on a challenge mounted by Schrems to mechanisms relied on by companies to transfer data from the EU to countries like the U.S. that the EU has found to have privacy regimes that don't adequately protect its citizens' data.

In the earlier case, Schrems sought to scrap Safe Harbor, a mechanism that had provided a lawful basis for companies to send data from the EU to the U.S. since 2000. The Court of Justice invalidated the tool in an October 2015 decision, concluding that it failed to adequately protect the privacy rights of EU citizens because it put the needs of U.S. law enforcement officials ahead of citizens' rights by allowing the authorities unfettered access to the transferred data.

U.S. and EU officials quickly responded to the ruling by putting in place the Privacy Shield mechanism, which imposes stronger obligations on U.S. companies to protect the personal data of Europeans and requires stronger monitoring and enforcement by the U.S. Department of Commerce and the Federal Trade Commission.

The case is Between the Data Protection Commissioner and Facebook Ireland Ltd. and Maximillian Schrems, case number C-311/18, in the Court of Justice of the European Union.

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