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Advocate General considers EU-U.S. Safe Harbor to be invalid

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Privacy and Data Security

On September 23, 2015, EU Advocate General ("AG") Bot issued an Opinion in Case C-362/14 *Maximilian Schrems v Data Protection Commissioner*. The AG Opinion has gone further than expected, covering, not just the power of national data protection authorities ("DPAs") in relation to complaints under the Safe Harbor, but the validity of the Safe Harbor itself; the AG found that the entire Safe Harbor is invalid as it fails to adequately protect personal data transferred from the EU to the U.S.

The AG's Opinion is persuasive but is not legally binding on the CJEU.[1]

Background

In 2013, following the Snowden revelations, Austrian student Max Schrems filed a complaint with the Irish Data Protection Commissioner ("Commissioner") claiming, in essence, that the law and law enforcement practices in the U.S. offer no real protection against state surveillance for EU citizens' personal data held in the U.S. Schrems' complaint specifically related to his use of Facebook and the transfer of personal data relating to him under the Safe Harbor to Facebook's U.S. operations, where the personal data is subsequently stored on servers.

The Commissioner concluded that they were not required to investigate the complaint on the basis that it was unsustainable in law: Facebook had self-certified under the Safe Harbor regime, and the European Commission ("Commission") had determined in Decision 2000/520/EC that organizations participating in that regime ensured an adequate level of protection for the personal data ("Decision 2000/520").

Schrems brought proceedings before the High Court in Ireland for judicial review of the Commissioner's decision not to investigate his complaint. The Irish High Court, in turn, referred questions to the CJEU, essentially to ascertain whether the Commission's adequacy assessment contained in Decision 2000/520 is absolutely binding on national DPAs and prevents them from investigating allegations challenging that assessment.

AG Opinion

Powers of national DPAs

The AG concluded that, under EU law, Decision 2000/520 does not prevent national DPAs from investigating a complaint alleging that a third country does not ensure an adequate

[1] The role of Advocate Generals is to propose to the Court of Justice of the European Union ("CJEU") a legal solution to the cases for which they are responsible.

level of protection and, where appropriate (*i.e.*, where an EU citizen's fundamental rights have been breached), from suspending the transfer of that data. The AG came to this conclusion based on a review of several authorities, including relevant provisions of Directive 95/46 ("Data Protection Directive"), prior CJEU precedent, the Charter of Fundamental Rights of the EU ("Charter"), and the text of Decision 2000/520 itself.

The validity of Decision 2000/520

Despite the issue not being expressly referred to the CJEU, the AG considered that the CJEU should determine the validity of Decision 2000/520. The AG found that Decision 2000/520 is invalid as it fails to adequately protect personal data transferred from the EU to the U.S.

In the AG's view, the problem arises primarily from the excessive use of derogations permitted under the Safe Harbor. Among other things, those permit deviations from the Safe Harbor principles where necessary to meet "national security, public interest or law enforcement requirements" or where there are conflicting U.S. law obligations. The AG noted that the Commission was not entitled to say that there would be adequate protection for all personal data transferred to the U.S. because (i) there is no independent authority capable of verifying that the implementation of the derogations from the Safe Harbor principles is limited to what is "strictly necessary", and (ii) EU citizens do not have means to obtain access to or rectify or erase their data, or administrative or judicial redress with regard to collection and further processing of their personal data by U.S. security agencies.

Accordingly, Decision 2000/520 does not provide sufficient guarantees to EU-originating data nor does it satisfy the requirements of the Data Protection Directive (see, for example, Article 28 which gives national DPAs certain investigatory and enforcement powers) or the Charter (specifically the right to respect for private life (Article 7) and the right to the protection of personal data (Article 8)).

What is the impact?

The AG's Opinion, if followed by the CJEU, could have a material impact on many U.S. companies and influence ongoing political bi-lateral discussions between EU and U.S. authorities regarding cross-border data flows.

- The Safe Harbor scheme appears to be the primary target. Schrems did not allege that Facebook, as a self-certifying entity to which data is transferred, itself violated the Safe Harbor principles because of the access of the United States authorities to data that Facebook holds. The Irish High Court acknowledged this, and the AG found that the allegations "do not amount to a breach by Facebook of the safe harbour principles" (paragraph 168). As the AG explained, because Facebook was acting in compliance with U.S. law, and because the Safe Harbor explicitly contemplated disclosures in that scenario, "it is in reality the question of the compatibility of such derogations with primary EU law that is raised in the present case." (Id.) Accordingly, we would not expect liability to arise for organizations that transfer data based on the Safe Harbor unless (i) the Court follows the AG's Opinion and rules that the Safe Harbor decision is invalid, and (ii) organizations continue to try to rely on the Safe Harbor as a transfer mechanism.
- If the CJEU applies the AG's Opinion and rules that the Safe Harbor is invalid, organizations that rely on the Safe Harbor to transfer personal data to the U.S. will have to consider alternative transfer mechanisms in order to transfer personal data lawfully to the U.S. Immediate short-term alternatives are likely to include standard

contractual clauses and, in more limited instances, obtaining data subject consent. Binding Corporate Rules are another, long-term alternative.

- The ruling potentially complicates current bi-lateral negotiations between the EU and U.S. over modifications to the terms of the Safe Harbor scheme. It will be interesting to observe the impact that the AG's Opinion has on these discussions.

Next steps

The CJEU will now review the AG's Opinion and, in the ordinary course of events, can be expected to issue its judgment in 5-7 weeks' time, *i.e.*, at the very end of October or early November.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Privacy and Data Security team:

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