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Court of Justice of the European Union Says Safe Harbor Is No Longer Safe

Article By:

Amy C. Pimentel

Earlier today, the Court of Justice of the European Union (CJEU) announced its determination that the U.S.-EU Safe Harbor program is no longer a "safe" (*i.e.,* legally valid) means for transferring personal data of EU residents from the European Union to the United States.

The CJEU determined that the European Commission's 2000 decision (Safe Harbor Decision) validating the Safe Harbor program did not and "cannot eliminate or even reduce the powers" available to the data protection authority (DPA) of each EU member country. Specifically, the CJEU opinion states that a DPA can determine for itself whether the Safe Harbor program provides an "adequate" level of personal data protection (*i.e.*, "a level of protection of fundamental rights and freedoms that is essentially equivalent to that guaranteed within the European Union" as required by the EU Data Protection Directive (95/46/EC).)

The CJEU based its decision invalidating that Safe Harbor opinion in part on the determination that the U.S. government conducts "indiscriminate surveillance and interception carried out … on a large scale".

The plaintiff in the case that gave rise to the CJEU opinion, Maximilian Schrems (see background below), issued his first public statement praising the CJEU for a decision that "clarifies that mass surveillance violates our fundamental rights."

Schrems also made reference to the need for "reasonable legal redress," referring to the U.S. Congress' Judicial Redress Act of 2015. The Judicial Redress Act, which has bi-partisan support, would allow EU residents to bring civil actions in U.S. courts to address "unlawful disclosures of records maintained by an [U.S. government] agency.

Edward Snowden also hit the Twittersphere with "Congratulations, @MaxSchrems. You've changed the world for the better."

Background

Today's CJEU opinion invalidating the Safe Harbor program follows on the September 23,

2015, opinion from the advocate general (AG) to the CJEU in connection with Maximilian Schrems vs. Data Protection Commissioner.

In June 2013, Maximilian Schrems, an Austrian student, filed a complaint with the Irish DPA. Schrems' complaint related to the transfer of his personal data collected through his use of Facebook. Schrems' Facebook data was transferred by Facebook Ireland to Facebook USA under the Safe Harbor program. The core claim in Schrems' complaint is that the Safe Harbor program did not adequately protect his personal data, because Facebook USA is subject to U.S. government surveillance under the PRISM program.

The Irish DPA rejected Schrems' complaint because Facebook was certified under the Safe Harbor Program. Schrems appealed to the High Court of Ireland, arguing that the Irish (or any other country's) DPA has a duty to protect EU citizens against privacy violations, like access to their personal data as part of U.S. government surveillance. Since Schrems' appeal relates to EU law (not solely Irish law), the Irish High Court referred Schrems' appeal to the CJEU.

What This Means for U.S. Business

The invalidation of the Safe Harbor program, which is effective immediately, means that a business that currently relies on the Safe Harbor program will need to consider another legally valid means to legally transfer personal data from the EU to the United States, such as the use of EU-approved model contractual clauses or binding corporate resolutions.

We believe, however, that this is not the final chapter in the Safe Harbor saga. Please check back soon for more details and analysis.

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