

DATA SECURITY AND PRIVACY ALERT

OCTOBER 6, 2015

SHOOK
HARDY & BACON

EUROPEAN COURT OF JUSTICE INVALIDATES THE U.S.-EU SAFE HARBOR FRAMEWORK FOR TRANSFERS OF PERSONAL DATA

Today, the European Court of Justice (ECJ) ruled that the U.S.-EU Safe Harbor framework for the transfer of personal data from Europe to the United States is invalid. Companies relying on the Safe Harbor framework for international data transfers will need to reassess priorities and risks and identify alternative measures for ensuring adequate protection of personal data in light of this decision.

Background

Under the EU Data Protection Directive (1995), personal data (defined as data about an identified or identifiable individual) can be transferred to another country where that country ensures “adequate” protection of the data. In 2000, the European Commission concluded that the Safe Harbor framework provided such protection for data transferred to the United States.

Following revelations of U.S. surveillance practices, in 2013, an Austrian national named Max Schrems filed a complaint with the Data Protection Authority (DPA) in Ireland seeking review of data transfers from Facebook’s EU operations (based in Ireland) to its U.S. operations arguing that data transferred to the United States was subject to government surveillance in contravention of EU citizens’ privacy rights. The DPA rejected the claim, however, stating that it was bound by the Commission’s 2000 determination and so could not conduct an investigation. Schrems appealed the DPA’s decision to the Ireland High Court, which referred the matter to the ECJ.

Shook, Hardy & Bacon understands that companies face challenges securing information in an increasingly electronic world.

Shook guides its clients through an ever-changing patchwork of data security and data privacy laws and regulations, and helps its clients manage litigation and other risks associated with maintaining and using electronic information.

To learn more about Shook’s Data Security and Privacy capabilities, please visit shb.com or contact:



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The Decision

The question referred to the ECJ by the Ireland High Court was essentially whether an EU DPA is bound by an adequacy determination of the Commission or whether it must conduct its own investigation of a claim that data is being transferred to a third country where the laws and practice do not provide adequate protection.



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In today's ruling, the ECJ concluded that national supervisory authorities are not bound by a Commission determination. But it went a step further and assessed the validity of the specific determination implicated. In doing so, the ECJ concluded that the 2000 adequacy determination was too narrowly focused on the Safe Harbor scheme and did not consider whether the United States ensures a level of protection essentially equivalent to that in the EU through its domestic law or international commitments beyond the Safe Harbor scheme. The ECJ found two main components to be lacking. First, the Safe Harbor scheme applies only to those entities that adhere to it. Therefore, it is not universally applicable and, of particular interest here, public agencies in the United States are not themselves subject to it. Second, there are no redress mechanisms in place for EU citizens to challenge the processing of their personal data where that processing is beyond the scope for which the data was collected. For these and other related reasons, the ECJ concluded that the 2000 adequacy determination is invalid.

Next Steps

In the Schrems case, the matter is referred back to the Ireland DPA to investigate whether Facebook offered adequate protection when transferring personal data of EU citizens to the United States. But in a larger context, the decision opens the door for DPAs throughout Europe to investigate claims of inadequate protection of data transferred to the United States and to set up regulations for the handling of EU citizen data by U.S. companies.

Today's decision affects business operations as they relate to cross-border data flows and will require companies to reassess these issues. For the moment, companies in the United States receiving personal data from the EU can still rely on other cross-border transfer mechanisms, such as Model Contracts and Binding Corporate Rules. Model Contracts contain standard clauses that have been approved by the European Commission and can be used to ensure adequate protection of personal data transferred to an entity in the United States. Binding Corporate Rules (BCRs) are a set of legally binding internal data protection rules that, when approved by DPAs in the EU, can facilitate the free-flow of information among the corporate units subscribing to those rules. These solutions can be tailored to business needs and varying degrees of risk, and will be increasingly looked to by companies of all sizes in determining the most effective way to ensure adequate protection of data going forward.

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For more information, or to discuss potential alternatives to Safe Harbor, please contact Camila Tobón, Director of Shook's International Data Privacy Task Force at mtobon@shb.com or (305) 358-5171.

TOMORROW'S EVENT

TELECONFERENCE SERIES

Conversations in Privacy

Wednesday, October 7, 2015

11:00 - 11:30 a.m. (Eastern) | 10:00 -10:30 a.m. (Central)

9:00 - 9:30 a.m. (Mountain) | 8:00 - 8:30 a.m. (Pacific)

Shook's "***Conversation in Privacy***" will focus on the European Court of Justice ruling that the U.S.-EU Safe Harbor framework for the transfer of personal data from Europe to the United States is invalid.

CALL-IN INSTRUCTIONS

Toll-Free Call-in Number: 866 564 7440

Conference Title: Conversations in Privacy

Conference ID: 6562073

Participant Passcode: 893607

QUESTIONS

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The choice of a lawyer is an important decision and should not be solely upon advertisements.

For more information about data security law, please visit Al Saikali's [blog](#).