US-EU Data Privacy Safe Harbor Program Invalidated

On October 6, 2015, the European Court of Justice ("ECJ") invalidated the safe harbor program negotiated between the United States Department of Commerce and the European Commission pursuant to which safe harbor-registered United States companies have processed personal data transferred from the EU within the United States since 2000 (the "Safe Harbor"). The ECJ's decision has left a wave of uncertainty in its wake about whether US companies have any right to process personal data transferred from the EU (including customer data, employee data, and data processed on behalf of other companies as a service provider) without facing claims from EU data subjects under the EU Privacy Directive[1].

The EU Privacy Directive prohibits the transfer of personal data outside of the European Union for processing unless the data is transferred to a non-EU country (a so-called "Third Country") where the EU Commission has found that the Third Country ensures the privacy of personal data to EU standards by reason of its domestic law or its international commitments.

The US and the EU differ on their respective approach to data privacy principles and the US is thus not a Third County that is considered to have enacted domestic laws that ensure the privacy of personal data to EU standards.

However, the Safe Harbor negotiated between the US Department of Commerce and the EU Commission establishing a legal framework for transfer of data from the EU to the US for processing in compliance with the EU Privacy Directive, appeared to qualify the US "by reason of its international commitments" provision permitting transfer of data from the EU for processing in the US.

With its decision in the case of "Maxmillian Schrems v Data Protection Commission" on October 6, 2015, the European Court of Justice has not only invalidated the Safe Harbor, but also cast some degree of doubt on whether any binding arrangement regarding processing of data in the US may ever be negotiated by the United States government at the EU level, for so long as the US insists on bulk data collection/mass surveillance practices by US law enforcement and intelligence agencies, such as those authorized under the Patriot Act.

Companies that relied on the Safe Harbor to process data transferred from the EU are now on uncertain ground. Companies that process HR, payroll or other data on their own employees in the

[1] EU Directive 95/46/EC

EU may nonetheless start to face questions, objections or claims from EU employees, or workers' councils regarding the potential transfer of employee data out of the EU for processing in the United States. Just as Facebook received a challenge by an end-user in the Schrems case, companies processing customer data transferred from the EU to the United States may start to face pressure from customers, employees and/or workers' councils to set up data centers in the EU so that data can be processed without leaving the EU.

A few additional thoughts in terms of context and meaning to the ECJ's Schrems decision:

1. Companies rely on the Safe Harbor to process not only information collected from external parties such as customers, but also to process employee data such as HR or payroll.

2. The ECJ invalidated the Safe Harbor, in part, on a technicality stating that the EU Commission had only examined the adequacy of the Safe Harbor as it pertains to private parties without ever meeting the actual requirement under the EU Privacy Directive to issue a finding that the United States affirmatively meets the requirement of ensuring, by reason of US domestic law or the US's international commitments, a level of privacy protection equivalent to EU standards.

3. Although the discussion of the technicality above might appear to leave the door open for the EU Commission to issue a formal finding that the Safe Harbor constitutes an international commitment by the US that meets the requisite criteria for ensuring privacy equivalent to EU standards, the ECJ did not stop with its discussion of the technicality. After declaring as invalid the EU Commission's Decision putting the Safe Harbor in place, the ECJ noted that the Safe Harbor expressly includes requirements requiring Safe Harbor companies to comply with national security, public interest requirements or other domestic legislation of the United States, even where such compliance is contrary to Safe Harbor principles. Without ever mentioning the Patriot Act by name, or the Edward Snowden leaks regarding mass data collection by US intelligence agencies, the ECJ stated that domestic legislation that "authorizes, on a generalized basis, storage of all personal data of all persons whose data has been transferred from the European Union to the United States without any differentiation, limitation or exception being made in light of the objective pursued and without an objective criterion being laid down by which to determine the limits of the access of the public authorities to the data…must be regarded as compromising the essence of the fundamental right to respect for private life."[2] In doing so, the ECJ casts doubt on whether or not any agreement between the United States and the EU Commission will ever satisfy the requirements of the EU Privacy Directive so long as the United States has laws in place that authorize mass data collection by law enforcement and intelligence agencies such as that authorized by the Patriot Act.

4. The ECJ's decision to invalidate the Safe Harbor is final, binding and cannot be appealed.

5. Please note that, depending on the nature of the personal data being processed, and the nature of the data subjects to whom the data pertains, there may be alternative ways to transfer data from the EU for processing in the United States in compliance with the EU Privacy Directive. Two of the more prevalent means under the EU Privacy Directive consist of obtaining the express, informed consent of the data subject and/or negotiating a private agreement (more often used where data is

[2] "Maximillian Schrems v Data Protection Commissioner", European Court of Justice Case C-362/14, Judgment of the Court, October 6, 2015, Paragraphs 93 – 94, available online at http://curia.europa.eu/juris/documents.jsf?num=C-362/14

being transferred business-to-business). Each of these alternatives can be challenging from a practical standpoint, and one could argue that the ECJ's references to fundamental incompatibility between US bulk data collection by law enforcement/intelligence agencies and EU privacy principles in the Schrems decision will further complicate questions regarding the scope of disclosure necessary to obtain a data subject's informed consent and whether even a private agreement will continue to be an adequate basis for processing EU data in the United States.

6. The United States Department of Commerce has issued a statement[3] in response to the ECJ's Schrems decision noting an urgent need for a new Safe Harbor framework. However, as stated above, aspects of the ECJ's decision in this case may make reaching any meaningful agreement with the EU Commission on a new Safe Harbor very challenging, at least so long as the United States maintains its insistence on the continued scope of data collection practices by US law enforcement/intelligence agencies for national security purposes.

We will continue to monitor developments, but we encourage our clients who have registered for the Safe Harbor to be proactive in taking stock of the nature and scope of data transferred from the EU for processing in the United States, to be prepared to discuss privacy implications with EU based employees and customers, and perhaps be prepared to budget for network architecture changes that may be required in the wake of the invalidation of the Safe Harbor.

The ECJ's Press Release on the Schrems decision may be found online at http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-10/cp150117en.pdf.

The full text of the Schrems decision may be found online at http://curia.europa.eu/juris/documents.jsf?num=C-362/14

The US Department of Commerce's statement in response to the Schrems decision was published online at https://www.commerce.gov/news/press-releases/2015/10/statement-us-secretary-commerce-penny-pritzker-european-court-justice

For further information, please contact your Cohen & Grigsby attorney.

[3] "Statement from U.S. Secretary of Commerce Penny Pritzker on European Court of Justice Safe Harbor Framework Decision", October 6, 2015, available at https://www.commerce.gov/news/press-releases/2015/10/statement-us-secretary-commerce-penny-pritzker-european-court-justice