Linklaters

October 2015

Court of Justice – Safe Harbor invalid

The huge volume of information held about European citizens in the United States, particularly by US tech companies, has been a concern for some time. These concerns were heightened by the *Snowden* revelations, which continue to cast a long shadow over transatlantic privacy relations.

The Court of Justice has now ruled that Safe Harbor is invalid (*Schrems C-362-14*). This enormously popular scheme was used by thousands of US companies offering cloud computing, whistleblowing hotlines, social media and other services but no longer provides a justification for transfers of personal data to the US.

The Court came to this conclusion not because of potential misuse by commercial organisations that are part of Safe Harbor, but instead because of access to that personal data by US government, particularly its intelligence agencies. This conflicts with the rights to privacy and data protection under the Charter of Fundamental Rights.

It is not clear if the current proposals to reform Safe Harbor are sufficient to remedy these concerns. The Court suggests that adequate protection means a level of protection "essentially equivalent" to that provided under the European Data Protection Directive. The US cannot allow its intelligence agencies generalised rights to store and access personal data transferred to the US, and must instead only allow access and use where strictly necessary and proportionate. European citizens must also have effective legal remedies for misuse by the US government. Whether the package of measures proposed to reform Safe Harbor, including the Judicial Redress Bill, are sufficient is likely to be the subject of much debate.

Given the above uncertainties, organisations relying on Safe Harbor to transfer personal data to the US now need to move to alternative compliance solutions, such as Model Contracts. These should remain safe, although as with any of the other Commission's decisions, they too could be challenged in the Court of Justice in the future.

Background

The European Data Protection Directive contains a restriction on the transfer of personal data to third countries that do not have adequate data protection laws. This includes transfers to the US unless there is a justification, such as

Contents

Background 1

Safe Harbor invalid 2

Can Safe Harbor be saved? 2

Use of Model Contracts 3

Are Model Contracts at risk? 3

Will European citizens actually get better privacy rights? 4

where the recipient is a member of the Safe Harbor regime. The Safe Harbor is a European Commission approved voluntary scheme, which most businesses in the US can join. It is overseen by the Federal Trade Commission. There are around 4,400 entities signed up to Safe Harbor including most large US tech companies. It has been in place for 15 years and predates the creation of many of these companies.

Max Schrems, an Austrian law student, made a number of complaints to the Irish Data Protection Commissioner about Facebook Ireland Limited. One of those complaints was that Facebook Ireland Limited was transferring his personal data to Facebook Inc. in the US.

The Irish Data Protection Commissioner rejected that complaint. In particular, Facebook Inc. is part of the US Safe Harbor and the Commissioner decided he was bound by the European Commission's finding that the Safe Harbor provided an adequate level of protection.

Max Schrems appealed that decision to the Irish High Court who, in turn, referred the matter to the European Court of Justice.

Safe Harbor invalid

The Court of Justice has decided Safe Harbor is invalid and does not adequately protect European citizens' personal data.

This is not because of potential misuse by the commercial organisations receiving that personal data. Instead, it is because of access to that data by intelligence agencies once it is in the US. The Court ruled that this access is inconsistent with the requirements of the Data Protection Directive but, more importantly, Articles 7 & 8 of the Charter of Fundamental Rights.

Can Safe Harbor be saved?

The European Commission has been negotiating with the US to try to improve the protection afforded by Safe Harbor for more than two years. The Commission has proposed thirteen recommendations to improve Safe Harbor including two specifically aimed at access by US authorities, namely that access for national security should only take place where strictly necessary or proportionate and that data subjects should be granted a right of redress enforceable in the US. As part of that process, the US has proposed a number of reforms, including the Judicial Redress Bill, which if passed would provide some rights to European citizens in case of misuse of their data by US government agencies.

It is not clear if these proposals will be sufficient. The Court has stated:

> the requirement for "adequate protection" in a third country means the protection afforded by national law must be "essentially equivalent" to that afforded by the Data Protection Directive, even though it can be implemented in a different manner;

> there must be an effective detection and supervision mechanism enabling infringements to be identified and punished. This might fall to

the PCLOB. The FTC, which currently oversees Safe Harbor, has no jurisdiction over the US intelligence agencies;

> the law must only allow access to US intelligence agencies where strictly necessary and proportionate for the protection of national security. This cannot allow generalised storage of all personal data transferred from Europe to the US. Objective criteria must be used to limit access to and use of that data. US officials advocate this is already the case; and

> individuals must have legal remedies to allow them access to their personal data and rights have it corrected or deleted.

These requirements are more moderate than those proposed in the Advocate General's opinion but there is still likely to be significant debate about whether the current proposals for reform are sufficient.

Use of Model Contracts

Whilst Safe Harbor is one of the simplest means to transfer personal data to the US, other mechanism are available. For example, Facebook Ireland Limited could quite easily put Model Contracts (i.e. the standard contractual clauses approved by the European Commission to validate a data transfer) in place with Facebook Inc. and justify those transfers on that basis.

Any other organisations relying on Safe Harbor to justify transfers to the US could do the same. A switch to Model Contracts will involve:

> deciding which version of the Model Contracts to use. In particular, is the US entity a controller (requiring the use of controller-controller Model Contracts) or a processor (requiring the use of controller-processor Model Contracts) or both?

> ensuring the requirements of the Model Contracts are complied with. For example, if the US entity is a processor, it may have to enter into new arrangements with its sub-processors;

> the EU entity complying with additional formalities and in some cases filing the Model Contracts with national data protection authorities; and

> updating privacy policies and other collateral referring to Safe Harbor.

Other options include consent, though this might be challenging given that to be valid it might have to refer to access by US intelligence agencies.

Are Model Contracts at risk?

The decision also sets out the powers of national data protection authorities to review Safe Harbor and other adequacy mechanisms. In doing so, the Court had to balance:

> the need for national data protection authorities to have "complete independence" in fulfilling their functions - a right guaranteed under Article 8(3) of the Charter of Fundamental Rights; and

> the fact that Commission decisions, such as that on the Safe Harbor, are binding on Member States, including national data protection authorities, until declared invalid by the Court of Justice.

Based on the above, national data protection authorities may review the adequacy of transfer mechanisms. Where necessary they can refer the issue to their national courts which in turn can refer it to the Court of Justice. In other words, national data protection authorities do have the right to review these adequacy mechanisms and raise concerns but only the Court of Justice can declare them invalid.

In practice, this means that Model Contracts will continue to provide a justification for transborder dataflow for the time being. Whilst they might be challenged in the Court of Justice in the future, that is likely to be some years off. At this point though, it is hard to see how Model Contracts can survive as they suffer from the same defects as Safe Harbor.

Will European citizens actually get better privacy rights?

This action was brought to provide better protection for European citizens. Whether this will be the outcome is not entirely clear.

The most likely short-term outcome is a wholesale switch to alternative compliance solutions, such as Model Contracts. There is little evidence Model Contracts deliver better privacy compliance and this could lead to a worse outcome by undermining the work of US Federal Trade Commission to improve privacy compliance under the auspices of Safe Harbor.

In the medium term, the decision may lead to further changes to the US surveillance regime to ensure a more proportionate surveillance regime and better rights for European citizens in the US. This would clearly be beneficial from a privacy perspective.

Finally, perhaps the worst outcome is that some organisations, lacking a sensible means to transfer personal data to the US, will fail to do anything. This would undermine the credibility of this already difficult area of law.

Authors: Tanguy Van Overstraeten, Richard Cumbley *and* Peter Church

Contacts

For further information please contact:

Olivier Reisch
Counsel, IP/TMT Luxembourg

(+352) 2608 8294

olivier.reisch@linklaters.com

35, Avenue John F. Kennedy
L-1855 Luxembourg

Telephone (+352) 26 08 1
Facsimile (+352) 26 08 88 88

Linklaters.lu