Update Data Protection

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Safe Harbor under attack

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Safe Harbor is invalid. National supervisory authorities may deviate from the European Commission's decisions when assessing a third countries' level of data protection.

This at least is the conclusion that the Advocate General to the CJEU came to in a current case against the Irish Data Protection Commissioner. As the CJEU often follows the Advocate Gerneral's opinion many companies need to swiftly prepare for the worst case: a data protection foreclosure of the European Union from the United States and possibly further parts of the world. This concerns a multitude of companies that transfer personal data into the USA for instance to use relatively cheap cloud-computing offerings of US-American vendors. The topic is also particularly relevant for corporations with offices on both sides of the Atlantic: the transfer of numerous employee and customer data could soon be barred.

Legal background of the Advocate General's recommendation

The dispute began when the data protection activist Maximilian Schrems and his association „Europe versus facebook" complained about facebook and other US-company's data transfers into the US to national Data Protection Supervisory Authorities. In fact, the EU-Data Protection Directive (95/46/EC) in article 25 prohibits the transfer of personal data into a third country which does not have an "adequate level of data protection".

Safe Harbor since 2000

This did not hinder data transfers into the USA for a long time, though, as either the Safe Harbor Privacy Principles or the so called Standard Contractual Clauses issued by the European Commission help to level out any data protection deficits. According to the European Commission's decision 2000/520 EC

the transfer to a US company that had self-certified itself according to the Safe Harbor Privacy Principles in the USA was considered as a safe transfer with an “adequate level of data protection”. Therefore national supervisory authorities in Europe did not question a transfer from Europe to the USA that was based on Safe Harbor for a long time despite growing criticism directed towards Safe Harbor. Accordingly the Irish Data Protection Commissioner threw out Mr. Schrems’ complaint against facebook on the basis of Safe Harbor. The complaint filed with the Irish High Court against this decision was referred to the CJEU for a preliminary hearing.

Critical Questions to the CJEU

The Irish High Court asked the CJEU whether national Supervisory Authorities are bound to the European Commission’s Safe Harbor decision if they have to assess a data transfer into an unsafe third country.

Advocate Gerneral‘s reply

The Advocate General to the CJEU denied this. He concluded that due to the Member States’ obligation to enforce the important data protection fundamental rights pursuant to Articles 7 and 8 of the European Human Rights Charta each Member State must be entitled to review a third country’s data protection level on a case by case basis. On top of that the Advocate General elaborated on the actual question of transferring data into the US and the enforceability of the European Commission’s Safe Harbor decision. Due to the fact that European citizens cannot enforce Safe Harbor themselves and the extensive exemptions which allow national security agencies to spy the Advocate General came to the conclusion that the European Commission should have suspended Safe Harbor. The Advocate General recommends to the CJEU to declare Safe Harbor for invalid.

Implications for Standard Contractual Clauses

At this time it is unclear whether the Standard Contractual Clauses, the other tool to allow easy data transfers into the USA, are also affected by this line of argumentation and a possible decision by the CJEU on Safe Harbor. As with Safe Harbor the Standard Contractual Clauses due to a European Commission decision provide that a data transfer to a company that is bound by the Standard Contractual Clauses is considered a data transfer into a safe third country. In any case the national supervisory authorities according to the Advocate Gerneral will be entitled to review on a case by case basis whether the data tranfser complies with

requirements of the European data protection levels. Should one national supervisory authority come to the conclusion that the recipient does not ensure an adequate level of data protection – despite having entered into the Standard Contractual Clauses – it may prohibit the data transfer and penalise it with a fine. In the past German supervisory authorities in the context of the Safe Harbor criticism have already indicated that they would also critically question the usage of the Standard Contractual Clauses. However, the Standard Contractual Clauses provide for rights of the data subjects that they can enforce themselves against the processing companies and are stricter in general than the relatively generic Safe Harbor principles. Both are aspects that according to the Advocate General are too weak in Safe Harbor. The Standard Contractual Clauses' future however must be considered as questionable.

Effect on data transfers into further countries with low level of state of law

The Advocate General argued that the almost unlimited access to personal data by foreign national security agencies without factual possibilities of the data subjects to enforce their rights constitute an infringement of Articles 7 and 8 of the European Human Rights Charta. These arguments can be mirrored to a number of less democratic countries that also have a less organized state of law. In light of this the future of data transfers for instance to China or a number of African countries could be prohibited - despite the use of Standard Contractual Clauses.

To-Do for companies

In the event that data transfers into the United States so far were done exclusively based on Safe Harbor certification alternative solutions should be reviewed as soon as possible. Whether these can be seen in the Standard Contractual Clauses must be considered as uncertain at this time, though. Another option might be a timely inquiry to the national supervisory authorities. When doing so one should keep in mind, however, that national supervisory authorities most likely will not make any final statements until the CJEU hands down its decision. This means that practical solutions such as moving all data processing to Europe should also be reviewed and prepared should the need be to use this last resort. When procuring new IT-solutions companies should focus on a European solution from the outset.

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