

***Maximillian Schrems v Data
Protection Commissioner
(Case C-362/14)***

“The Schrems Decision”

What was the Safe Harbor Mechanism?

- *“An agreed bench mark of protection”* – Article 29 Working Party
- recognised by the European Commission as providing adequate protection for data transferred from the EU to the US

Safe Harbor Principles

1. Notice
2. Choice
3. Onward transfer
4. Security
5. Data integrity
6. Access
7. Enforcement

What was the need for Safe Harbor?

- enhanced level of data protection in the EU:
 - Data Protection Directive 95/46/EC
 - Commission Decision 2000/520 “Safe Harbor Decision”
- complex nature of US privacy and data protection law
- foster, promote and develop international commerce

How did Safe Harbor Operate?

- voluntary scheme
- US organisations could sign up to the seven Safe Harbor principles
- annual self-certification to the US Department of Commerce

Enforcement

- US Department of Commerce
- Federal Trade Commission (FTC)
- Levels of Enforcement:
 - **1999-2009**: 0 enforcement actions
 - **2009-2013**: 10 enforcement actions
 - **2014**: 14 enforcement actions
 - **2015**: 13 enforcement actions (pre Schrems)

Concerns surrounding Safe Harbor

- Edward Snowden's 2013 mass surveillance revelations
- lack of transparency
- enforcement not rigorous enough

The Schrems Decision

6 October 2015

Who is Mr Schrems?

- Austrian privacy activist and law student
- part of the citizens' rights v state powers movement
- friend of Edward Snowden

Why did Mr Schrems make a complaint?

- Mr Schrems made a complaint against Facebook on the basis that transferring data from the EU to the US violated his privacy rights
- data transferred to the US may be subject to indiscriminate, mass surveillance by US intelligence services

Why did the case come before the CJEU?

- Facebook's European headquarters are in Ireland
- Irish High Court referred question to CJEU:
 - does the Safe Harbor decision prevent a national DPA from investigating a complaint that a third country does not ensure an adequate level of protection and, where appropriate, from suspending the contested transfer of data?

CJEU Decision

- Safe Harbor decision and Safe Harbor mechanism invalid with immediate effect
- DPAs must be able to examine data transfers with complete independence
- case sent back to the Irish High Court
- Irish High Court ordered Irish Data Protection Commissioner to investigate

Reactions to the Schrems Decision

Privacy Activists

- **Max Schrems @maxshrems:** “**YAY* #CJEU on #SafeHarbor: SH invalid. DPC had to investigate. #EUdataP*”
- **Edward Snowden @Snowden:** “*Congratulations, @MaxSchrems. You’ve changed the world for the better.*” ... “This is the second time in as many years the world has relied upon #CJEU to defend digital rights. Thank you Europe. #DataRetentionDirective

US

- US Secretary of Commerce: *“We are deeply disappointed ... today’s decision ... creates significant uncertainty ... and puts at risk the thriving transatlantic digital economy”*
- White House Press Secretary: *“we believe this decision was based on incorrect assumptions about US data privacy protections”*
- Senator Ron Wyden: *“This will result in ‘open season’ on American Business”*

UK

- Baroness Neville-Rofle, UK Government:
“The Government is disappointed ... There is an important principle here that companies must be able to transfer data to third-party countries with appropriate safeguards and we are concerned about the uncertainty this judgement creates.”

EU

- Article 29 Working Party: *“welcomes the fact that the Court’s decision reaffirms that data protection rights are an inherent part of the EU fundamental rights regime”*
- German Minister of Justice: *“The judgement is a strong signal for the European Commission to fight for our data protection standards internationally.”*

Silicon Valley

- Microsoft: *“We don’t think today’s ruling has a significant impact on our consumer services”*
- Internet Association: *“the US and EU should join forces to implement a revised Safe Harbor framework”*
- AirBnB: *“This ruling does not have a significant impact on us”*
- Facebook: *“relies on a number of methods prescribed by EU law to legally transfer data to the US from Europe, aside from Safe Harbor”*

EU DPAs

- UK ICO: *“Concerns about Safe Harbor are not new ... negotiations have been taking place for some time ... with a view to introducing a new, more privacy protective arrangement to replace the existing Safe Harbor agreement.”*
- Czech Republic UOOU *“Safe Harbor cannot factually ensure the adequate level of protection of data in the US”*
- French CNIL: *“welcomes the CJEU decision”*
- German FCDPI: *“The judgement strengthens the powers of European DPAs”*

Article 29 Working Party Statement

16 Oct 2015

- mass surveillance was at the core of the Court's analysis
- Member States and DPAs to be involved in discussions with US
- approval of Binding Corporate Rules (BCRs) and Model Clauses aka Standard Contractual Clauses
- end of January 2016 deadline

Alternative Mechanisms for Transatlantic Data Transfers

Model Clauses

- issued by the Commission
- impose obligations on both importer and exporter
- affect all of a business: map data flows, amend privacy policies and terms and conditions

Binding Corporate Rules

- provide a basis for intra group transfers
- must be approved by DPA in which company operates
- tailor made to the particular needs of the corporate group
- designate a member of the group within the EU which accepts liability

Consent

- from individuals subject to data transfers
- not commercially practical
- must be unambiguous
- can be withdrawn at any time

Appropriate Alternatives?

- Amazon and Google endorsed the use of model clauses post Schrems
- Article 29 Working Party approved model clauses and BCRs
- approval does not bind DPAs
- DPAs may investigate the use of model clauses and BCRs in individual cases and before a new Safe Harbor framework is reached!

Commission Jouvra's Speech

Strasbourg 26 Oct 2015

- the Court is “*not* assessing the US system”
- the Commission has not been “*dragging their feet*”
- Commission is working with the US to deliver “***Safe Harbor 2.0***”

Safe Harbor 2.0

- system based on self certification
- stronger oversight by the US Department of Commerce
- stronger cooperation with European DPAs from the FTC
- responsive and pro-active oversight system backed up by enforcement

Commission view of alternatives

- Commission Communication 6 November 2015
COM(2015) 566
- approved use of model clauses and BCRs as a basis for data transfers
- DPAs may examine the lawfulness of such transfers in full independence
- responsibility of data controller to ensure data transfers take place in accordance with safeguards set out in Directive 95/46/EC

Corporate Giants Find Solution

- **6 Nov 2015** Amazon Web Service announces plans for new UK data centres
- **10 Nov 2015** Microsoft announces plans for new UK data centres
- **11 Nov 2015** Microsoft announce Germany based data centres for cloud services
- *“strong data sovereignty to local users”*

Aligning EU and US opinion

- Schrems decision as a criticism of US privacy law
- EU's enhanced protection of privacy as a fundamental right
- *“Plaintiffs have not alleged that they lost anything of value”* – 7th Circuit in *Silha v ACT, Inc* (18 Nov 2015)
- *“oftentimes what is portrayed as high-minded positions on issues sometimes is just designed to carve out some of their commercial interests.”* – President Obama on EU enforcement of privacy rights.

January 2016 Deadline

- no communication from the Commission or Working Party since 6 Nov 15
- Spanish AEPD 29 Oct 16 deadline issued to companies
- French CNIL warns of enforcement action from EU DPAs should deadline not be met
- agreement dependent on forthcoming US legislation restricting surveillance acts of the NSA?
- political solution v technical solution

2 February 2016

- EU DPAs to gather in Brussels on 2 Feb
- equipped with package of proposals from US Secretary of Commerce
- resolve a common position for a new mechanism?

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