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Update

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Data Protection: EU Court of Justice declares US-EU Safe Harbor invalid – implications for Switzerland

In its judgement of 6 October 2015, the Court of Justice of the European Union ("CJEU") declared the European Commission's decision of July 2000 on the US-EU Safe Harbor Framework invalid for reason of insufficient protection of personal data provided by the framework. This decision has wide ranging consequences for companies exporting personal data from the EU to the United States. Since a similar framework is in place for exporting personal data from Switzerland to the United States, there are considerable implications also for Swiss companies with cross-border data flows to the United States.

Background

Austrian Facebook user Maximillian Schrems lodged a complaint with the Irish data protection authority, arguing that the United States do not ensure an adequate level of protection for his personal data submitted from Facebook's Irish subsidiary to the parent company in the United States. The Irish authority rejected the complaint with reference to the European Commission's decision 2000/520/EC which states that US-EU Safe Harbor-certified US companies provide adequate protection for personal data. The case was appealed to the High Court of Ireland which referred the question to the CJEU (case C-362/14, Schrems v Data Protection Commissioner). The CJEU now held that the US-EU Safe Harbor Framework does not provide adequate protection for personal data, in particular in view of the US authorities' broad access rights to data transmitted to and stored in the United States.

Situation in the EU before the CJEU decision

EU data protection legislation prohibits transfer of personal data to countries not providing an adequate level of protection to such data. Since the United States are considered not to protect personal data sufficiently from a European perspective, the US Department of Commerce developed the US-EU Safe Harbor Framework. About 4'400 US companies registered and self-certified with the Department as adhering to the data protection principles the framework sets out. EU companies could thus transfer personal data to such US companies without breaching EU data protection laws.

Implications of the CJEU decision

The CJEU decision is non-appealable and has immediate effect. The national data protection authorities must now, if called upon, ascertain whether a particular transmission of personal data is in breach of European data protection laws. Any such breach could result in fines

and/or other sanctions such as being ordered to suspend transmission of personal data to the United States.

Implications for Switzerland

Switzerland has entered into a separate US-Swiss Safe Harbor Framework in 2008 and is not directly affected by the CJEU's decision. However, due to parallels and overlaps of Swiss and EU data protection legislation and practice, and the similarity of the US-Swiss Safe Harbor Framework to its EU pendant, Swiss courts and authorities may be influenced by the CJEU's assessment. Currently, about 3'400 US companies are certified under the US-Swiss Safe Harbor Framework (see list at http://safeharbor.export.gov/swisslist.aspx).

In some respects, Swiss data protection provisions are even stricter than EU laws. The Swiss Federal Data Protection and Information Commissioner ("FDPIC") promptly issued a statement noting that, by the CJEU's decision, the US-Swiss Safe Harbor Framework "is also called into question".

Swiss companies may be affected by the CJEU decision, e.g., in case of

- sharing Swiss employee or customer data intra-group with US entities (e.g. payroll data);
- subcontracting data processing to US companies in the context of an outsourcing;
- using cloud storage with servers located in the United States;
- using software tools hosted on US servers for personal data related tasks, such as CRM.

Next steps

To minimize possible exposure, companies having previously relied on the US-EU or US-Swiss Safe Harbor Framework should consider additional measures, such as:

- including standard contractual clauses regarding trans-border data flow in their agreements with receiving parties in the US;
- if only personal data of a small number of individuals is affected, obtaining their consent to such transmission;
- for intra-group transmissions, implementing binding corporate rules (BCR) on data protection;
- if a service provider offers different (storage) locations for their services, switching to a location providing adequate protection (e.g. an EU member state or Switzerland).

It is worth noting that, in case the Swiss courts should share the CJEU's criticism regarding insufficient protection of personal data in the US, this may in the future also affect other protective measures, such as trans-border data flow agreements, standard contractual clauses and BCR, since they cannot hinder US authorities accessing data stored in the United States either.

Outlook

Given the broad impact of the CJEU's decision, it is likely that the EU and the US will strive for a solution on a political level. Also for Switzerland, the future of the US-Swiss Safe Harbor Framework must be determined in an internationally coordinated approach. Until such time, it is prudent for Swiss businesses to act quickly and identify data transfers conducted under Safe Harbor, assess their current data transfer arrangements, and implement the most appropriate alternative measures allowing for a lawful flow of personal data to the United States.

Please do not hesitate to contact us in case of any questions.

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