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The case of Schrems 2.0 – the challenge to Standard Contractual Clauses allowing personal data transfer outside the European Union

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Following the CJEU ruling in Schrems I, however, several organisations (including Facebook, which was one of the subjects of Schrems' 2013 complaint) maintained that rather than having relied on the now invalidated Safe Harbour agreement, they had relied upon Standard Contractual Clauses (**SCCs**) as an alternative transfer mechanism. Used by hundreds of organisations in more than 150 countries globally, SSCs are akin to a template set of data protection clauses approved by the European Commission that may be used by organisations carrying out international transfers of personal data. Such clauses require certain commitments from the parties involved (the exporter and importer of personal data).

In light of a further complaint by Max Schrems before the Irish DPC, challenging the use of SCCs by Facebook, the Irish DPC filed a lawsuit against Facebook Ireland Limited and Max Schrems (both to appear as defendants). In 2017, the Irish High Court found that the US authorities had participated in "mass processing" activities of European data subjects' personal data, with the data allegedly being transferred on the basis of SCCs. The Irish High Court made a "reference" to the CJEU, which is a procedure under EU law where the national court seeks clarification of EU law questions from the CJEU (http://www.europe-v-facebook.org/sh2/ref.pdf). Underpinning the 11 questions referred to by the CJEU is the allegation that the access, use and retention of data in the US is contrary to the level of data protection and privacy guaranteed as a fundamental right under EU law. It was this same principle that led to the challenge to and subsequent invalidation of Safe Harbour. Although the complaint brought by Max Schrems initially focused solely on SCCs used by Facebook in

the US, the CJEU decision could affect the use of SCCs more generally, not least as the questions referred by the Irish High Court are drafted rather broadly.

During the hearing on 9 July, the parties, together with the EU institutions and the EU Member States, had the opportunity to present their views, including through expert witness testimony. For example, the European Data Protection Board, representatives from the UK, the US, Ireland, Austria, the Netherlands, Germany and France and the European Commission provided statements, in addition to statements from lobby groups including the Business Software Alliance. Having heard the representations by the various interested parties, the CJEU has reported that Advocate General Henrik Saugmandsgaard Øe will issue a nonbinding opinion on the case on 12 December 2019. This will then be followed by the CJEU judgment, which may occur a further three to six months after the provision of the Advocate General's opinion. A judgment by the CJEU on Schrems II is therefore expected in the first half of 2020, although it may be handed down earlier.

Following the judgment of the CJEU on the EU law questions referred to it, the Irish DPC will have to make a final decision on the matter. However, both Facebook and Max Schrems could appeal any decision by the Irish DPC.

Impact on the EU-US Privacy Shield

The Schrems II judgment is likely to have a significant impact on a second hearing in the matter of *La Quadrature du Net and Others v Commission* (Case T-738/16) ("**La Quadrature du Net**"). That case concerns the validity of the Privacy Shield—a framework arrangement between the US and the EU to enable the transmission of personal data from the territory of the EU to the US. In place of the now invalid Safe Harbour agreement, the Privacy Shield became operational on 1 August 2016 following a European Commission decision confirming that it provided adequate protection to allow personal data to be transferred to the US. However, although the case was due to be heard on 1-2 July 2019, a decision in that case has since been delayed, pending the Schrems II judgment.

Conclusion

The CJEU's decision with regard to the validity of SCCs, together with any comments made pertaining to the Privacy Shield, will not only determine the fate of SCCs and the *La Quadrature du Net* decision but also shape European privacy law going forward. A ruling striking down SCCs could have wide economic ramifications, potentially undermining the basis upon which an array of organisations transfer data to the US.

In the event that the CJEU strikes down SCCs and/or the Privacy Shield, it is possible that the judgment will take effect immediately and apply retroactively. This means that businesses that have thus far been relying on SCCs and/or the Privacy Shield framework will be required to consider appropriate alternative mechanism in order to facilitate data transfers. At present, Binding Corporate Rules might provide an alternative mechanism, but whether such an alternative is viable, practicable or indeed possible would have to be assessed on a case by case basis by each individual entity that needs to comply with the EU data privacy rules.

We will be continuing to monitor the situation in relation to the CJEU judgment and report on any further developments.

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