

Cybersecurity, Privacy, and Communications Webinar

Data Protection in 2016:

Update on Transatlantic Data Flows *After Schrems* and an Initial Review of the General Data Protection Regulation

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Agenda

- Introduction
- The U.S.-EU Safe Harbor Regime and International Data Transfers after *Schrems*
- Results of an Initial Read of the New EU General Data Protection Regulation
- Q&A



The U.S.-EU Safe Harbor Regime and International Data Transfers after *Schrems*



Background: *Schrems v. Data Protection Commissioner*

- On October 6th, 2015, the European Court of Justice invalidated the European Commission’s “Safe Harbor” decision, which served as a legal basis for transferring personal data to the United States
- National data protection authorities from various EU jurisdictions released initial statements following the decision:
 - Safe Harbor is no longer a legal basis for data transfers to recipients outside the EU
 - Alternative means are generally still available, but may be subject to additional scrutiny
 - More intense review of international data flows and enforcement beginning February 1st, 2016
 - Different degrees of aggressiveness among individual data protection authorities
- Different reactions by affected companies





Currently Available Options

- Companies must rely on other options for transferring personal data outside the EU:
 - Transfer only to recipients in countries with an “adequate” level of data protection
 - Binding Corporate Rules (“BCR”)
 - Consent
 - EU Standard Contractual Clauses
 - Controller-to-controller
 - Controller-to-processor
 - Transfer necessary “for purposes of a contract with the affected individual”
 - Other



Latest Information on “Safe Harbor 2.0”

- U.S. and EU officials are still attempting to negotiate a new framework to replace the Safe Harbor
- Federal Trade Commission Chairwoman Edith Ramirez was quoted on January 6th, 2016: “I think we’re getting very close to finding a solution here”
 - No details on the issues that are still open
 - The FTC has stated previously that “we continue to expect companies to comply with their ongoing obligations with respect to data previously transferred under the Safe Harbor Framework”
- Developments in January 2016
- Meeting of the Article 29 Working Party on February 2, 2016
 - Privacy commissioners from each of the 28 EU nations will consider the legality of other transfer mechanisms





EU General Data Protection Regulation



Status of the Procedure

- In December 2015, negotiators in the so-called “trilogue” reached agreement on the final text of the General Data Protection Regulation (“GDPR”)
- The text will undergo a cleanup (numbering, etc.), but is final from a content perspective
- It is expected that the text will go through the necessary approvals in the coming weeks/months, and will then be published in the Official Journal of the European Union
 - Publication likely in 2016
 - Provisions would take effect two years after publication, e.g., 2018
- The current version of the document has 204 pages (including 74 pages of recitals)





GDPR – Results of an Initial Reading

- **Article 3 – Territorial Scope**
 - Includes data “controllers” (e.g., companies that determine how data is collected, used, and shared) established outside the EU, if:
 - Offering services to recipients in the EU
 - Monitoring the behavior of individuals located within the EU

- **Article 25 – Representatives of Controllers Not Established in the European Union**
 - Controllers not established in the EU are required to name a representative within the EU
 - Representative acts as a contact, in addition to or instead of the data controller, for supervisory authorities and individuals on all issues related to the processing of personal data



GDPR – Results of an Initial Reading

- **Article 5 – Principles Relating to Data Processing, Accountability**

- **Article 28 – Records of Processing Activities**
 - Controller must be able to demonstrate compliance with general principles of data processing described in Article 5

- **Article 6 – Lawfulness of Processing**
 - Consent
 - Performance of a contract
 - Legal obligation
 - Vital interests of the data subject
 - Public interest
 - Balancing of interests



GDPR – Results of an Initial Reading

- **Article 7 – Conditions for Consent**
- **Article 8 – Specific Provisions for Child’s Consent in Relation to Internet Services**
- **Articles 12, 14, and 15 – Information of the Affected Individual**
- **Article 17 – Right to Erasure (e.g., “Right to be Forgotten”)**
- **Article 19 – Right to Object**
 - Including by “automated means using technical specifications” (e.g., “Do Not Track”)



GDPR – Results of an Initial Reading

- **Article 31 – Breach Notification Obligations**
- **Articles 40 through 45 – International Data Transfers**
- **Article 77 – Right to Compensation and Liability**
- **Article 79 – Administrative Fines**
 - Up to the higher of EUR 20 million, or 4% of global annual revenue





GDPR – Results of an Initial Reading

- **Cooperation and coherence across EU jurisdictions**
 - Extremely complex mechanism for achieving cooperation and coherence among the different national data protection authorities
 - Lots of language that allows individual countries to pass national law “specifying” GDPR obligations and/or laying down additional requirements





Litigating Data Protection under the GDPR – Preliminary Comments

- European Court of Justice Judge von Danwitz in a recent article:
 - Judgments in *Digital Rights Ireland*, *Google Spain*, and *Schrems* a “clarion call” for the protection of civil liberty?
 - Digitalization happens under market conditions that do not correspond with ideal competition
 - Call for application of competition law and data protection law
- Data subject-friendly jurisprudence of the European Court of Justice to be expected?
- Increased enforcement by DPAs and consumer protection associations to be expected?



Types of Litigation to Be Expected

- Increased administrative investigation activity of data protection authorities (Articles 53 and 79, GDPR)
 - Full investigative powers
 - Order to comply with GDPR
 - Imposing administrative fines
 - Competition law-like enforcement?





Types of Litigation to Be Expected

- Right of effective judicial remedy of a data subject, right to compensation and liability (Articles 75, 77 GDPR)
 - Venue: Place of establishment of data controller or habitual residence of data subject
 - International consumer class actions (Austrian *Schrems* case)?
 - Mandating of non-profit consumer protection association (Article 76(1), GDPR)
 - Individual right to bring complaints or civil litigation for consumer protection associations (Article 76(2), GDPR)





Questions?

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