

EU risks closing all legal avenues for EU to US personal data transfers

A BEERG analysis and commentary by Tom Hayes

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Last Friday, the Irish High Court dismissed complaints from Facebook Ireland¹ (FBI) that the Irish Data Protection Commission (DPC) had acted in haste last August and in breach of correct procedures when its commissioner Hele Dixon provisionally held that Facebook (Ireland) would be in breach of the Schrems II judgement of the Court of Justice of the European Union (CJEU) if it continued to transfer personal data to the US using Standard Contractual Clauses (SCCs) as the legal basis for so doing.

Delivering the [judgement](#) Mr. Justice David Barniville said:

"For the reasons set out in this judgment, I refuse all of the reliefs sought by FBI (Facebook Ireland) and dismiss the claims made by it in the proceedings ..."

"FBI has not established any basis for impugning the DPC's (Data Protection Commissioner's) decision or the PDD (Preliminary Draft Decision) or the procedures for the inquiry adopted by the DPC."

The way is now clear for the DPC to issue a final ruling that Facebook (Ireland) cannot use SCCs to transfer personal data from the European Union to the US. Because Facebook (Ireland) is headquartered in Ireland, the Irish DPC is the lead data protection supervisor for the company's data protection activities in Europe.

Other social media players, such as Google and Twitter also have their European headquarters in Ireland, so a decision by the DPC that SCCs cannot be a valid basis for EU/US transfers will have knock-on effects for these companies as well.

To put it bluntly: we are on the way to seeing all legal avenues for the transfer of personal data from the EU to the US being shut down. This will have devastating consequences for businesses on both sides of the Atlantic. There are no legal fixes available. It is an issue that needs to be dealt with at the highest political levels... and quickly.

Reactions

In reaction to the High Court decision, a Facebook spokesperson said:

"Today's ruling was about the process the IDPC followed. The larger issue of how data can move around the world remains of significant importance to thousands of European and American businesses that connect customers, friends, family and employees across the Atlantic."

"Like other companies, we have followed European rules and rely on standard contractual clauses, and appropriate data safeguards, to provide a global service and connect people, businesses and"

¹ While Facebook Ireland is often abbreviated to FBI in reports, for the avoidance of doubt we will use the full version

charities. We look forward to defending our compliance to the IDPC, as their preliminary decision could be damaging not only to Facebook, but also to users and other businesses.”

As the DPC finalises her decision, Facebook (Ireland) will be entitled to present a case that its processes are in line with the requirements of European law.

Facebook (Ireland) is right in saying that the proposed ruling from the Irish DPC will “damaging not only to Facebook, but also to users and other businesses.” It will be very damaging and effectively bring EU/US personal data flows to an end, until such time as a political solution is found between the EU and the US. The shutdown of data transfers is not a welcome prospect as both the US and the EU work to rebuild their economies after Covid.

The *Wall Street Journal* quotes Alexandre Roure a senior manager of public policy for the Computer & Communications Industry Association, which represents companies including Facebook, Amazon Inc. and Google, as saying:

“The preliminary order from the DPC is concerning as it could jeopardize data flows from Europe to the U.S. for a wide range of companies ... Europe is unlikely to meet its digital aspirations and become a ‘world-class data hub’ if it can’t even connect with its main trading partners in the first place.”

Unsurprisingly Max Schrems, whose complaint back in 2013 began the process which took us to where we are today, takes a different view:

"We now expect the DPC to issue a decision to stop Facebook's data transfers before summer. This would require Facebook to store most data from Europe locally, to ensure that Facebook USA does not have access to European data. The other option would be for the US to change its surveillance laws." [here](#)

Logical outcome

The final decision on Facebook (Ireland) from the DPC, when it comes, will just be the logical working out of the Schrems II [decision](#) in which the CJEU struck down the Privacy Shield agreement between the EU and the UK, which many thousands of companies used as their legal umbrella to transfer personal data from the EU to the US.

The CJEU struck down Privacy Shield because it said that the transferred data could be indiscriminately hoovered up by US intelligence agencies under relevant US laws. (See this [note](#) from the European Parliament Research Service).

While the CJEU did not strike down SCCs in the Privacy Shield judgement, it made it clear that their use was subject to additional safeguards to be agreed between EU data exporters and US data importers which would ensure that the privacy and security of the data was protected when it landed in the US.

But, as we wrote at the time, it was difficult to see how any company based in the US could agree that it would ignore valid, legal orders from US intelligence agencies to hand over requested data. US companies are subject to the laws of the US, whether they agree with those laws or not. What is at the root of this issue is a clash between US and EU laws and there is no judicial way of resolving this clash.

For this reason, data protection authorities across the EU have in recent months become more and more hawkish about EU-US data transfers. In April, Portugal’s privacy regulator ordered the national statistics agency to stop sending census data to the U.S., where it was being processed by Cloudflare Inc. Earlier in the year the state-level data protection authority for Bavaria (BDPA) issued a decision stating that the transfer of

personal data to the US-based email marketing platform Mailchimp, by a company (which has not been officially named but which is believed to be a fashion magazine), was unlawful.

By way of contrast, a [decision](#) by the highest administrative court in France, Conseil d'État, rejected complaints that data held by AWS (Amazon Cloud Services) on servers in Luxembourg was at risk of being either transferred to the US or obtained by US intelligence services under Article 702 of the Foreign Intelligence Surveillance Act or Executive Order 12333.

US law allows the intelligence services to instruct US companies to give them access to data held on foreign servers. But note, the complainants in this case were concerned about the potential transfer of data to the US, not its actual transfer as was the case in the other two decisions mentioned above.

Timescale

How long before the Irish DPC issues her final Facebook decision?

We think it may only be a matter of months. Of course, her final decision could again be legally challenged but such challenges are unlikely to succeed. At best they could buy time while politicians try to work out a longer-term solution. But any such solution would require either the CJEU taking a more relaxed view of the right of intelligence agencies in democratic countries, such as the US, accessing the personal data of EU citizens that is transferred, which is unlikely, or, the US amending its security laws, which is also unlikely in the short-term.

Further, the more hawkish positions being taken by EU data protection authorities is also likely to have implications for the proposed EU/UK data adequacy decision, especially in light of the views of the EU Parliament on the matter. The Parliament will be voting this week on a resolution for the Justice Committee calling on the Commission to toughen up considerably terms of the proposed UK adequacy decision.

Comment

It is our view that the fundamentalist position on data privacy that has been taken by the CJEU is untenable. If it stands, then the EU will increasingly become a “data island” cutting itself off from the rest of the world at a time when data flows are becoming more and more central to businesses, both big and small.

The comments of Alexandre Roure, quoted earlier, are not wide of the mark.

In a recent article in Politico, Alex Voss, MEP, a member of the centre-right EPP, commented:

...the creation of our golden standard of data protection is a great achievement... but that it has come to be seen as something untouchable that ranks above all other legal interests and fundamental rights, with no exception

He added:

...data protection has evolved into an absolute right For many political players that outweighs all other interests. They argue that even small and proportionate privacy interferences for the good of all — like distributing the coronavirus vaccine — are unjustified

Voss expanded on these comments in a recent **BEERG Byte** (link below)

It is hard to disagree with what Voss says. Data protection and data privacy are important. But they are not the only matters of importance.

The hundreds of thousands of jobs depending on trans-Atlantic data flows are also important. Are they to be sacrificed in the name of an absolutist version of data privacy?

Conclusion

This note is about the Facebook judgement and the issue of EU/US (and maybe, EU/UK) data transfers. But there are widespread concerns among the business community about the operation of the GDPR. It seems that too many data protection authorities across Europe see the GDPR as a mechanism for persecuting companies and fining them as much as possible.

They appear to work off the assumption that companies, and other organisations, are always guilty until proven innocent, even where data breaches are genuine errors, or result from malicious hacking, and not the result of some deliberate management decision.

And now the EU wants to go down the same road with the proposed Artificial Intelligence Regulation?

It simply cannot be good for European economic development and business creativity that entrepreneurs and innovators will forever have to work in the shadow of overbearing regulators.

We need to find a better balance. As Voss has said about the GDPR, it is time for a rethink.

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Informal discussions for an current
issues in employee relations
Hosted by Tom Hayes of BEERG

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