

# Client Alert

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## EU Court: Advocate General Opinion Finds Commission's Safe Harbor Decision Invalid

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The EU-US Safe Harbor Program, facilitating the exchange of personal data between the EU and the US, has been in the limelight in recent years as it is facing challenges that may shake the very core of its existence. In response to growing concerns with public opinion with regard to surveillance and implementation of data protection laws, the EU prompted negotiations with the U.S. Department of Commerce in late 2013 to make the program more transparent, improve enforcement and enhance dispute resolution. Progress in regard of the negotiations was signified earlier this month with the conclusion of the EU-US "Umbrella Agreement" on law enforcement cooperation. More or less simultaneous with the negotiations, there was a case (brought in July 2014) before the highest court in the EU, the European Court of Justice ("ECJ"), on the question whether national EU data protection authorities are permitted to suspend transfers to the United States based on Safe Harbor. A development in these proceedings was reached on 23 September 2015, when the Advocate General ("AG") issued his Opinion in the matter of *Schrems v. Data Protection Commissioner* (Case C-362/14, also referred to as *Europe v. Facebook*) on a request for a preliminary ruling.

In summary, the AG opines that:

- The European Commission's Safe Harbor Decision 2000/520 (on the adequacy of the protection provided by the Safe Harbor privacy principles and related frequently asked questions issued by the U.S. Department of Commerce) (the "Decision") does *not* preclude national data protection authorities ("DPAs") from investigating EU citizens' complaints or from suspending data transfers to Safe Harbor-certified recipients in the United States if such transfers are in violation of European data protection law.
- The Safe Harbor Decision is furthermore invalid because it fails to offer sufficient guarantees in light of fundamental rights recognized in EU law. The AG notes that the ECJ should either declare the Safe Harbor Decision invalid, or ask the Commission to amend or repeal the Decision.

### OVERVIEW AND PRACTICAL FINDINGS

The most catching aspect of the Opinion is that the AG went beyond the initial request for a preliminary ruling submitted by the High Court of Ireland, which was confined to whether or not national DPAs are bound by the Decision. Mr. Schrems also did not request invalidation of the Decision. The justification used by the AG to examine the validity of the Decision is thin – invoking the High Court's implicit "doubts" about such validity – and the conclusion that the Decision is altogether invalid is, in any event, unusual and unexpected.

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Also, the Opinion of the AG comes at a time of ongoing discussions at transatlantic level seeking to maintain the Safe Harbor program afloat in the wake of growing criticism of the merits of the program as well as its enforcement. The Opinion was initially expected in June 2015 and was postponed for unknown reasons, although some observers believe it was meant to give more time for the negotiations to make progress.

Although an opinion from the AG is not binding on the Court, the ECJ generally follows opinions delivered by Advocate Generals. While the Court is therefore still to render its judgement, the AG Opinion is considered a strong indication as to how the ECJ will ultimately rule. Also, a ruling by the ECJ would not automatically invalidate the Safe Harbor Decision. As pursuant to case law, the Commission would then still have the option to either amend the Decision or to repeal it.

## FACTS OF THE CASE

In June 2013, Max Schrems, an Austrian national and a registered user of Facebook, lodged a complaint with the Irish DPA claiming that, in light of the Snowden revelations regarding the practices of U.S. intelligence services (the PRISM program), United States law offers no real protection of personal data transferred to the United States (in this case, by Facebook Ireland to Facebook in the United States). The DPA rejected the claim stating that there was no evidence that the NSA had in fact accessed Mr. Schrems data, and that the European Commission (the "Commission") had already made the determination that the United States does ensure an 'adequate' level of protection of personal data through the Safe Harbor program.

Schrems challenged the DPA's decision before the High Court of Ireland, which in turn submitted a request for a preliminary ruling to the ECJ. The request was to determine whether the European Commission's Safe Harbor Decision prevents a national DPA from investigating a complaint alleging that a third country does not ensure an adequate level of protection and suspending data transfers in light thereof (Opinion, para. 51).

## THE AG'S OPINION: REASONING

In its Opinion, the AG spends considerable time discussing and answering two questions: (i) whether a national DPA may evaluate the adequacy of data protection in a third country and (ii) the validity of the Safe Harbor Decision as such. As noted, this second question – on the validity of the Safe Harbor decision – was not in the initial request submitted to the ECJ.

### **(i) National DPAs may evaluate the adequacy of data protection in a third country**

On a DPA's competence to evaluate a third country's adequacy, the AG stated that the existence of the Safe Harbor Decision "cannot eliminate or even reduce" the DPAs' powers under the Data Protection Directive. More specifically, by virtue of their extensive investigative powers, as well as their independence, the DPAs must be able to form their own opinion on the general level of protection ensured by a third country and to draw the appropriate conclusion when they determine individual cases, including suspending data transfers, irrespective of the Decision (Opinion, para. 61).

The AG stresses the importance of the DPAs' *independence* and their role as "guardians of the fundamental rights and freedoms of individuals with respect to the processing of personal data," as consecrated by the ECJ's existing case law. If DPAs would definitively be bound by Commission decisions, their independence would

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inevitably be undermined. Also, although the Safe Harbor Decision has a binding effect on national DPAs, this does not mean that every complaint must be rejected summarily without examination of its merits. In this sense, the AG considers that making an adequacy determination is a shared competence between the Commission and Member States (Opinion, paras. 86-89). The AG believes that EU law must be interpreted in light of fundamental rights and that such interpretation cannot be overridden by the strict application of instruments of secondary legislation, such as decisions of the Commission.

In practical terms, the AG opines that the Safe Harbor Decision thus constitutes a “rebuttable presumption” that a third country’s law is ‘adequate’. Considerations pertaining to the right to respect for private and family life and the right to the protection of personal data must allow national DPAs to challenge that presumption.

Importantly, based on the AG’s argumentation, DPAs may at any time depart from “adequacy determinations” under Article 25 of the Data Protection Directive and suspend transfers to Safe Harbor-certified recipients, as well as recipients based in countries the Commission initially considered “adequate”<sup>1</sup>. The AG argues that an adequacy determination is not static in time (which means that it must be assessed in light of new factual and legal developments) and could open the door to national DPAs being able to challenge or put in question the Commission’s adequacy determinations for countries other than the United States. Thus, a national DPA would have the power to assess and question whether a third country offers sufficient protection of personal data based, for instance, on a level of enforcement that it could deem to be too low. This would lead to a great deal of uncertainty for companies that transfer data based on existing adequacy findings and the countries which the Commission has determined provide an adequate level of protection. It also seems somewhat arbitrary to make a distinction in acts of secondary legislation between adequacy findings on the one hand and, for example, Standard Contractual Clauses on the other.

## **(ii) The Safe Harbor Decision is invalid in light of EU law**

The AG Opinion goes on to consider the validity of the Safe Harbor Decision as such. Because the initial complaint and the request from the Irish High Court for a preliminary ruling cast “doubts” on the validity of the Decision, the AG suggests that the Decision is likely invalid:

- The “law and practice of the United States allow the large-scale collection of the personal data of citizens of the Union which is transferred under the safe harbour scheme, without those citizens benefiting from effective judicial protection.” Such lack of a right to judicial redress for EU citizens demonstrates that the Decision does not offer sufficient safeguards in light of EU law.
- According to the AG, the Safe Harbor Decision, in fact inherently allows for the indiscriminate, generalized and systematic mass surveillance by the U.S. government by means of Annex I to the Decision, which limits adherence to the principles where necessary for national security, public interest and law enforcement purposes. The wording of these derogations is too general and goes beyond what would be “strictly necessary”. The “general and imprecise terms” of the derogations would therefore allow

<sup>1</sup> The full list of Commission decisions on the adequacy of the protection of personal data in third countries is available at [http://ec.europa.eu/justice/data-protection/international-transfers/adequacy/index\\_en.htm](http://ec.europa.eu/justice/data-protection/international-transfers/adequacy/index_en.htm).

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for the Safe Harbor scheme to be disregarded and, as such, undermine the adequate level of protection that Safe Harbor is intended to ensure.

- Furthermore, the AG states that “there is no independent authority capable of verifying that the implementation of the derogations from the safe harbour principles is limited to what is strictly necessary. Yet such control by an independent authority is, from the point of view of EU law, an essential component of the protection of individuals with regard to the processing of personal data.”

Finally, the AG notes that the Commission had knowledge of the Safe Harbor Program’s challenges and potential shortcomings. The AG concludes that the Commission should have therefore suspended the application of the Decision, despite ongoing negotiations with the U.S. government to address such challenges.

The Advocate General’s Opinion is available [here](#). The ECJ’s Press Release is available [here](#).

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