

When data travels: The Commission's objective of making EU data protection travel across the Atlantics.

No. 35 February 2016

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While the EU Charter of Fundamental Rights states in Article 8(1) that everyone has the right to the protection of his personal data, the US view stringent data protection as a potential threat to innovation and its national champions Google/Alphabet, Facebook and Apple. These companies, the US government and its agencies invest huge amounts of time, effort and money into collecting a wealth of data, that they consider truths, to profile every one of us for commercial and national security purposes. New data protection rules for the EU have only recently been agreed on by the Commission, Council and European Parliament in trilogue negotiations and the new General Data Protection Regulation (GDPR) that is set to replace the outdated 1995 data protection directive provides for strict rules on data protection and high sanctions in case of breaches of the data protection obligations. The GDPR will most probably be formally passed and published in April/May 2016 and enter into force two years after in 2018. On the other side of the Atlantic, the US remains less stringent on data protection and has only recently passed the Cyber-Security Information Sharing Act (CISA), which makes data transfers between companies and the US government even easier. Therefore, there seems to be a certain level of divergence between the approach to data protection in the EU and US.

This short article will not and cannot provide an in-depth assessment of the different approaches to data protection on both sides of the Atlantic, it will solely investigate the current legal framework on data that travels through the various transatlantic submarine cables and in how far the EU Commission has achieved its goal of obtaining guarantees that US government agencies and companies adequately protect EU citizens' personal data.

In the pre-Schrems era, data transferred from the EU arrived in a safe harbor in the US. This safe harbor was contested by Austrian data protection activist Maximilian Schrems in a case concerning the treatment of personal data by Facebook¹. After the invalidation of the safe harbor decision by the Court of Justice of the EU (CJEU), based on the finding that data transfers under the safe harbor decision do not guarantee an adequate level of protection of the data in the US and underlining the importance of the fundamental right to data protection, this safe harbor has ceased to exist. However, there are alternative ways of legally transferring data from the EU to the US. Data transfers from the EU to the US are still possible in many cases. The use of standard contractual clauses approved by the Commission in contracts with transatlantic companies that specify data protection obligations is one way of

allowing for these data transfers to still take place. Another way to make data transfers happen are binding corporate rules which are approved by national data protection authorities (DPAs) for transfers of data within multinational groups of companies. In addition, many data transfers fall within derogations specified by current EU legislation and are therefore still possible. These possibilities were expressly mentioned in a statement² of the Article 29 Working Party, which consists of representatives of all European DPAs, and it was clearly set out that the safe harbor decision is not a valid legal basis for EU-US data transfers anymore. However, standard contractual clauses and binding corporate rules will also be reconsidered by the Article 29 Working Party as expressed in a recent statement of the 3rd of February 2016³. The Article 29 Working Party had also provided the Commission with a deadline until the 31st of January 2016 to conclude a new agreement with the US on EU-US data transfers. Obtaining guarantees that US government agencies and companies adequately protect EU citizens' personal data is also one of the objectives of the Juncker Commission. The invalidation of the safe harbor decision by the CJEU and the deadline for an agreement to be concluded with the US set by the Article 29 Working Party seemed to be the last push that Commissioner Vera Jourová needed to conclude an agreement with the US.

Agreement on a new data transfer framework between the EU and US was reached after the deadline on the 2nd of February 2016. However, the final text of the agreement has not been published, nor finalised yet. The agreement that has been named the EU-US Privacy Shield according to a European Commission press release provides for strong obligations for US companies dealing with data of EU citizens, clear safeguards and transparency obligations on US government access to data, a yearly review of the framework

for EU-US data transfers and the creation of an ombudsperson⁴. Whether these measures can survive scrutiny by the CJEU remains to be seen and can only be reasonably assessed once the final text of the EU-US Privacy Shield is published.

The importance of a free flow of data for international trade is expressly mentioned in the recitals of the GDPR. It is, however, also clear from the proposal of the GDPR that the strict rules contained in it should be adhered to when transferring data across the Atlantic. Assessing whether the Commission has reached the goal it has set itself of obtaining the guarantees from the US on data protection will hinge essentially on how the EU-US Privacy Shield agreement between the US and the EU on data transfers will be worded. While this may at some point be scrutinised by the CJEU, it may fail to survive the strict test of the CJEU. This potential future case law should not lead the current legal discussion, as in the meantime data will be transferred under the EU-US Privacy Shield, which may prove to breach of EU citizens' rights to the protection of their privacy. Once data has crossed the Atlantic, future invalidation of the EU-US Privacy Shield will provide little comfort to EU citizens worried about the protection of their data and privacy.

Therefore, it is only to be hoped that the EU-US Privacy Shield will guarantee adequate protection of data. While businesses stress the importance of a quick agreement on EU-US data transfers for commercial purposes, from a legal point of view, it is essential that the fundamental right to data protection is not compromised for commercial objectives. The agreement that has been agreed on will only gain in importance once the negotiations on TTIP come to a conclusion. With increased trade with the US, Europeans will not only suffer from chlorine chicken, but citizens will also have to face an ever increased flow of personal data through the transatlantic submarine cables.

Therefore, it can only be hoped for EU citizens that Commissioner Jourová's words "when data travels, the protection has to travel with it" will be achieved for EU-US data transfers⁵.

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