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NEW TRENDS IN THE INTERNATIONAL DATA TRANSFER – COOPERATION OF THE EU AND THE USA AFTER THE SCHREMS DECISION

The transfortier transfer of data is unquestionably useful nowadays, in the time of the globalisation, but more and more often occure situations where the privacy of the data subject get in danger.

The flow of information forms the basis of the social-economical growth: the transfer of personal datas is a very important part of the transatlantic commercial relations, think of the social media or the digital clouds. [1]

The flow of datas and informations is untrackably swift: there are no financial or technical difficulties to transfer the datas over bordiers in a few minutes. What happens if the personal datas end up in a country where the adequate level of protection of personal data is not guaranteed? The data subject loses his/her control and the right of self-determination.

The Single Market requires that the personal datas can stream inside of the European Union without any difficulties in connection with the so called „four basic freedom”. The Directive of Data Protection (hereinafter referred to as: Direction) ensured, that the countries in the European Economic Area (hereinafter referred to as: EEA) use an adequate level of protection of personal

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datas, which means that the EEA-countries shall be regarded as so called safe countries. Inside of the European Economic Area the data transfers shall be regarded as internal transfers.

Countries outside of the European Economic Area can be divided in two categories: safe countries who provide the adequate level of data protection and not-safe countries wo do not provide it. Data transfers to not-safe countries is forbidden by the Directive except in some extraordinary cases defined by law.

The Commission of the European Union (hereinafter referred to as: Commission) decides wether a country is safe or not, according to the Essentially Equivalent Test and after consultation with the Article 29 Working Party. The country has to provide substantive (e. g. personal datas may be processed only for specified and explicit purposes, transparency of processing, ensure the rights of data subjects, etc.) and procedural rules (e. g. adequate legal remedies, surveillance authority, etc.) of data privacy to pass the Essentially Equivalent Test.

As safe country counts nowadays: Andorra, Argentina, Australia, Canada, Man-islands, Jersey, Guernsey, Feör-islands, Israel, and Switzerland. In connection with the United States of America the Commission decided in two cases that data transfer to the USA is safe: to transfer the passenger-records to the U.S. Customs and Border Protection Office and to transfer personal datas to companies on the so called Safe Harbour list.

Safe Harbour

The aim of the Safe Harbour Privacy Principles was to facilitate, promote and support the international commercial relations. On 21th July 2000 the U.S. Department of Commerce developed the privacy principles in its commitment No. A5-0177/2000. The framework of the privacy principles enabled the US companies after self-certification to comply with privacy law of the European

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Union. The Commission made a decision – the so called Safe Harbour Decision – in 2000 that the Safe Harbour principles complied with the EU Directive. The Safe Harbour principles were used by the biggest American data processers like Facebook, Yahoo, Google, eBay or Amazon. The self-certification created the legal basis to transfer personal datas from the Europen Union to the U.S companies.

The framework of the Safe Harbour principles operated for almost 15 years – the decision No. C-362/14. (hereinafter referred to as: Schrem's Decision or EJC's Decision) of the European Court of Justice ended it.

The Case Maximillian Schrems contra Data Protection Commissioner

In 2013 Maximillian Schrems – an Austrian law student – turned to the Data Protection Commissioner with the complaint that the Facebook stored personal datas of its users on servers based in the USA. He argued that the law and practice of the United States do not provide an adequate level of data protection against the state supervision. He explained his statement with the case of Edward Snowden.

Edward Snowden leaked classified information from the National Security Ageny (hereinafter referred to as: NSA) in 2013. Snowden revealed global surveillance programs. With the help of the so called *Prism* program the NSA got top secret mass, direct and free access to datas stored on servers in the USA. Those servers were in the property and use of companies and internet giants like Facebook, Apple or Google, which meant that on the servers the personal datas of EU citizens could be found as well. The Prism allowed officials to collect material including search history, the content of e-mails, file transfers and live-chats.[2]

Although the national security could be a reason to derogate the Safe Harbour principles – *under the provision, '[a]dherence to [the Safe Harbour]*

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Principles may be limited: (a) to the extent necessary to meet national security, public interest, or law enforcement requirements; (b) by statute, government regulation, or case-law that create conflicting obligations or explicit authorisations, provided that, in exercising any such authorisation, an organisation can demonstrate that its non-compliance with the Principles is limited to the extent necessary to meet the overriding legitimate interests furthered by such authorisation', [3] – the mass and promiscuous surveillance of personal datas is unadmittable, inherently disproportionate and constitutes an unwarranted interference with the rights guaranteed by the Directive.

The Data Protection Commissioner rejected the claim of Maximillian Schrems, because in his opinion it could not be proved that the NSA got access to Schrem's personal datas. The Commissioner considered that he was not required to investigate the complaint, since it was unsustainable in law.The Commissioner stated, that the Commission of the European Union declared the Safe Harbour program safe in its decision No. 2000/520/EC.

Maximillian Schrems appealed to the High Court of Ireland against the rejection of the Data Protection Commissioner. The High Court of Ireland said, that the Data Protection Commissioner should have investigated the case. The High court of Ireland appointed that the claim of Maximillian Schrems is not against the behaviour of Facebook, but against the law and practice of the United States. The High Court decided to refer the following questions to the European Court of Justice for a preliminary ruling:

„Whether in the course of determining a complaint which has been made to [the Commissioner] that personal data is being transferred to another third country (in this case, the United States of America) the laws and practices of which, it is claimed, do not contain adequate protections for the data subject, [the Commissioner] is absolutely bound by the Community finding to the

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contrary contained in [Decision 2000/520] having regard to Article 7, Article 8 and Article 47 of [the Charter], the provisions of Article 25(6) of Directive [95/46] notwithstanding?

Or, alternatively, may and/or must the [Commissioner] conduct his or her own investigation of the matter in the light of factual developments in the meantime since [Decision 2000/520] was first published?" [4]

Advocate General Yves Bot analysed the case and appointed the following: the EU citizens were not informed during the registration on Facebook that their personal datas could be transferred to a third country where the datas are generally accesible for national security agencies according to the law there. The rights of the data subjects were not guaranteed: they could not request information, rectification, erasure or blocking of their personal datas. [5] The citizens of the Union have no appropriate remedy against the processing of their personal data for purposes other than those for which it was initially collected and then transferred to the United States. Such mass, indiscriminate surveillance is inherently disproportionate: the personal datas of the EU citizens are generally accesible for the Prism program: not only the personal datas of those people who might be a danger to the national security, but the personal datas of every people who consume electronic communication services.

The Grand Chamber of the European Court of Justice declared the Safe Harbour invalid in its decision. The decision declared the relation between the Commission of the European Union and the national supervisory authorities.The Commission's adequacy decision (e. g. the 2000/520/EC about the Safe Harbour) can not prohibit the national supervisory authority to investigate the case if it receives a complaint challenging the finding that a third country ensures an adequate level of protection for the transferred data. The adequacy decision of the Commission binds the national supervisory authority until the

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European Court of Justice do not invalidate or countermand it. If the national supervisory authority finds out that a third country do not ensure an adequate level of protection, it has to turn to the European Court of Justice. [6]

According to the Schrem's Decision the data transfers between the European Union and the United States of America shall be basically re-regulated. A legal and political solution should be found which enables the data transfers in accordance with the basic privacy rights of the data subjects. The new regulation has to provide the adeqate level of data protection, transparency, proportionality, and appropriate remedies.

The transitional period – possible solutions to transfer personal datas from the EU to the USA

Although the Safe Harbour arrangement can no longer serve as a legal basis of the data transfers, the life has not stopped with the Schrem's Decision. The Commission continued and finalised negotiations for a renewed framework for transatlantic transfers of personal data which meet the requirements identified in the Court ruling and issued guidance for the data protection authorities.

In the meantime companies and operators need to comply with the ECJ's decision and rely on alternative transfer tools where available. The Commission issued a guidance for the companies as well ont he possibilities of transatlantic data transfers following the ruling until a new framework is put in place.

The Article 29 working Party issued a statement on the 16. October 2015 and urged the EU data protection authorities to have a robust, collective and common position on the implementation of the judgment. [7] The Commissione and the Article 29 Working Party considered that the so called Standard Contractual Clauses (hereinafter referred to as: SCC or model clauses) and the Binding Corporate Rules (hereinafter referred to as: BCR) can still be used.

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The Standard Contractual Clauses (or model clauses) are conractual solutions. The Commission of the European Union issued four „packages" of model clauses: two SCC between data controllers and two SCC between data controller and data processor.

The Binding Corporate Rules can be solutions for intra-group data transfers: they allow personal data to move freely mong the different branches of a worldwide corporation. The have to be authorizes by the data protection authorities in each member state from which the multinational wishes to transfer data.

The Article 29Working Party stressed the need for the member states to coordinate their responses to the decision, but in the reality the data protection authorities reacted in many different ways to the situation: there were real differences of attitude amongst the individual DPAs.

The Information Commissioner's Office (ICO) int he United Kingdom issued a statement that the ruling „does not mean that there is an increase in the threat to people's personal data, but it does make clear the important obligation on organisations to protect people's data when it leaves the UK. The judgment means that businesses that use Safe Harbor will need to review how they ensure that data transferred to the US is transferred in line with the law. We recognise that it will take them some time for them to do this." [8]

In Germany the *Datenschutzkonferenz der Datenschutzbeauftragten des Bundes und der Länder* transmitted a very different attitude: they threated the companies with penalty and stictly prohibited the use of Safe Harbour. The DPA of the German state of Schleswig-Holstein issued a written opinion concluding thath by the application of the reasoning in the Schrem's Decision, even express consent of the data subjects or contractual guarantees or BCRs could not make data transfers to the United States lawful. [9]

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In Belgium, Netherlands and Luxembourg the data protection authorities declared BCR and SCC relyable. In Switzerland it was required that the companies enter into contracs and the data subjects have to be duly informed that the US authorities may have access to their personal datas. [10]

In Central-Eastern-Europe Bulgaria, Czech Republic, Slovakia, Poland, Romania and Hungary [11] consider BCR, model clauses and express consent of the data subject applicable.

As we can see, the practice in the field of data privacy and data transfer crashed. The companies got a moratory from the data protection authorities: the DPAs did not investigate the legal basis of the data transfers until the end of January, 2016.

The EU-US Privacy Shield

The European Commission presented the EU-US Privacy Shield as restoring the trust in transatlantic data flows on 29th Februray, 2016. [12]

The Commission of the European Union and the government of the United States entered into an agreement on 2nd February, 2016 which will be implemented in three months. The EU-US Privacy Shield serves as a „second Safe Harbour". Its text is analysed by the Article 29 Working Party and the national data protection authorities.

The EU-US Privacy Shield imposes stronger obligations on US companies to protect European's personal data. It reflects the requirements of the European Court of Justice which ruled the Safe Harbour invalid on 6. October, 2015. The Privacy Shield requires the U.S. to monitor and enforce more robustly, and cooperate more with European Data Protection Authorities. It includes, for the first time, written commitments and assurance regarding access to data by public authorities.

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In the commercial sector it ensures great transparency, Oversight mechanisms to ensure companies abide by the rules, Sanctions or exclusion of companies if they do not comply and Tightened conditions for onward transfers.

For the first time, there is written assurance from the U.S. government that any access of public authorities to personal data will be subject to clear limitations, safeguards, and oversight mechanisms. The U.S authorities affirm absence of indiscriminate or mass surveillance, and companies will be able to report approximate number of access requests.

There will be new redress possibility through EU-U.S. Privacy Shield Ombudsperson mechanism, independent from the intelligence community, handling and solving complaints from individuals. Other redress possibilities will be available for EU citizens: Companies must reply to complaints from individuals within 45 days, Alternative Dispute Resolution, the Data Protection Authority will work with U.S. Department of Commerce and Federal Trade Commission to ensure unresolved complaints by EU citizens are investigated and swiftly resolved. As a last resort, there will be an arbitration mechanism to ensure an enforceable decision (the Privacy Shield Panel).

The Privacy Shield will be the subject of an annual joint review mechanism, monitoring the functioning of the Privacy Shield and U.S. commitments, including as regards access to data for law enforcement and national security purposes. [13]

The Privacy Shield is rather a political than a legal solution to the problem of transatlantic data transfers. Only with legal tools it was insolvable: the legal system of the USA itself was the problem (namely the possibility to mass surveillance) which could not be solved by legal instruments. It will mean in practice more transparency about transfers of personal data and stronger protection of personal data, and easier and cheaperredress possibilities in case of

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complaints. The Privacy Shield is an epoch-making achievement in the field of data protection.

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New trends in the international data transfer – cooperation of the EU and the USA after the Schrems Decision

On the 6th of October, 2015 the Court of Justice of the European Union decided in the case No. C-362/14. (Maximillian Schrems contra Data Protection Commissioner) that the Safe Harbor Commission Decision 2000/520/EC is invalid. The Safe Harbor created a legal basis for transferring personal datas to

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the United States of America from the European Union based on voluntary self-certification of companies. The Safe Harbour Program allowed US companies to receive and use personal data origination from the European Economic Area without being in breach of EU data protection law.

The most important reason of the invalidating decision was that the law and practice of the USA did not ensure the adequate level of data protection for the personal datas of the citizen of the European Union.

The author deals with the legal tools of data transfer after the Schrems Decision and presents the new tendencies in data protection, in particular the EU-US Privacy Shield.

Key words: data privacy, data transfer, European Court of Justice, USA, European Union, Commission.

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