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**Practical and Strategic Considerations in
Today's EU Data Transfer Landscape
28 January 2016**

Working Party on Schrems



European Union: Article 29 Working Party Statement On Schrems Case

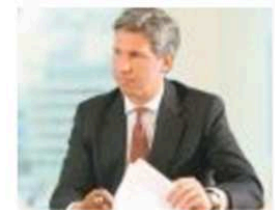
Last Updated: 27 October 2015

Article by [John O'Connor](#)

Matheson



Most Read Contributor in Ireland, December 2015



Commission Statement on Schrems

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European Commission - Press release

Commission issues guidance on transatlantic data transfers and urges the swift establishment of a new framework following the ruling in the Schrems case

Brussels, 6 November 2015

The GDPR Is Happening . . .

CRUNCH NETWORK

General Data Protection Regulation: A Milestone Of The Digital Age

Posted Jan 10, 2016 by [J. Trevor Hughes \(@jtrevorhughes\)](#)

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The NIS Directive (in case you missed it)

Business ▶ Law

The Network and Information Security Directive – who is in and who is out?

Do new spring 2016 rules consider YOU to be a 'digital service provider'?



7 Jan 2016 at 09:36, OUT-LAW.COM



34



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What about the DPAs?

After Safe Harbor: The Role of the DPA



Denis Kelleher

The Privacy Advisor | Oct 30, 2015



Safe Harbor 2.0 / Related Discussions

December 17, 2015

US Surveillance Law, Safe Harbor, and Reforms Since 2013

Peter Swire¹

Executive Summary:

This White Paper is a submission to the Belgian Privacy Authority for its December 18, 2015 Forum on “The Consequences of the Judgment in the *Schrems* Case.”² The Forum discusses the decision by the European Court of Justice in *Schrems v. Data Protection Commissioner*³ that the EU/US Safe Harbor was unlawful under the EU Data Protection Directive, particularly due to concerns about US surveillance law.

For the Forum, I have been asked to comment on two issues:

- 1) Is US surveillance law fundamentally compatible with E.U. data protection law?
- 2) What actions and reforms has the US taken since the Snowden revelations began in June 2013?

Will there be SH2.0, and if so, when?

Max Schrems, Who Torpedoed Safe Harbor 1, Sees No Safe Harbor 2

ARTICLE

COMMENTS

DATA-PRIVACY ECJ SAFE HARBOR TRANSATLANTIC RELATIONS

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By NATALIA DROZDIK



Austrian privacy activist Max Schrems pictured in April talking to journalists in Vienna. — Christian Bruna for Agence France Press/Getty Images

What do we “know” about SH2.0?

- Effective redress and installation of ombudsman
- Umbrella Agreement issued by the DOJ
- Annual review of SH 2.0. framework
- Reluctance of US to make promises about foreign intelligence activities in an agreement about commercial trans-border data flows

Practical Developments Since October 6

- DPAs have invited companies to remediate Safe Harbor transfers:
 - Czech Republic
 - Spain
 - Portugal
 - France
- Many companies updated Notifications and submitted Transfer Agreements

Post Schrems Issues / Friction

- Pre Schrems – Model Clauses were previously disfavored by certain vendors
 - Post Schrems – voila! . . . Sign our form and our addendum . . .
- Some vendors offer data storage in the EU
- Navigating between DPO and Works Council Options
- Model Clauses are not appropriate for every situation
- Information Security requirements in Controller-Processor Agreements
- Volume of Work for all parties

What will happen next?

- Commission and WP29 assess the situation/US law
- WP29 February 2 meeting:
 - Will review draft findings on “essential equivalence” of US legal order for surveillance
 - Securing adequacy findings
 - Addressing powers of DPAs to suspend data streams
 - Securing Model Clauses
 - Arguably not that vulnerable – strong DPA oversight as emphasized by the ECJ in Schrems
 - But DPAs could in theory suspend data streams to the US in reaction to complaints
 - Importance of political agreement between US/EU

What might happen next?

- DPA can knock on your door...
- WP29 threatens with enforcement actions in its October 16 statement
- Complaints that were on hold may be investigated as of February
- New complaints may be filed

What Should Companies Do to Prepare?

- If SH2.0 – relief will not be immediate
 - Good faith temporary enforcement delay?
- Continue to implement alternative transfer solutions for Short / Intermediate Term
 - Focus on most critical / most sensitive data flows
 - Additional frenzy of Model Clause execution
 - Additional Notification updates

Balancing Risk Factors

- Practical risk mitigation
 - Document post-Schrems efforts, even if you were not 100% successful
- Works Councils
- Positions of individual DPAs in relevant countries
- Scale of data: Data driven companies (B2B v. B2C)
- Type of data: sensitive v. non-sensitive

Additional Safeguards

- EC Communication specifically contemplated “additional safeguards”
 - Strong argument can be made that US surveillance framework does not constitute “disproportionate mass surveillance”
 - Consider documenting analysis of proportionality

Is All of this a Waste if SH2.0. Is Adopted?



- No – always a danger that enforcement actions were to be launched as of next month
- Start a Broader Conversation with Executives
 - BCRs
 - GDPR Preparation and Planning

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