Additional Protections for International Transfers Post-*Schrems II*

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Agenda

1) Introduction
2) Background of the *Schrems II* case
3) Panel Discussion
4) Audience Q&A
5) Close

Schrems II case

Background & Summary

Background (1/2)

- Key issue: EU data protection law prohibits transfers of personal data to third countries that do not provide an "adequate" level of data protection

- ***Schrems I* (2015)**

  - 2013: Max Schrems brings case against Facebook Ireland about transfers of his personal data to the U.S.; case receives added attention due to concurrent Edward Snowden revelations

  - Since 2000, transfers of personal data from the EU to the U.S. had been considered lawful under the EU-U.S. Safe Harbor Principles, an executive decision of the European Commission

  - Irish High Court referred questions to the CJEU, as EU law preempted Irish law, and the core issue related to the applicability of Art. 8 of the EU Charter of Fundamental Rights

  - October 2015: CJEU issues decision that (1) invalidates the Safe Harbor; and (2) clarifies that national supervisory authorities maintain discretion to examine EU-U.S. data transfers in spite of an existing decision of the Commission

Background (2/2)

- ***Schrems II* (2020)**
  - Upon remand, Irish High Court referred Schrems' case back to the CJEU, this time with 11 questions about the validity of Standard Contractual Clauses ("**SCCs**") approved by the European Commission
  - Meanwhile, after *Schrems I*, U.S. and EU negotiate the Privacy Shield Framework in 2016 – a replacement to the Safe Harbor
  - July 2020: CJEU issues decision that (1) invalidates the EU-U.S. Privacy Shield, which it found did not provide protections "essentially equivalent" to EU privacy law; and (2) clarified the obligations applicable to parties seeking to transfer personal data from the EU to the U.S. under SCCs and other transfer mechanisms

Schrems II Ruling – A Closer Look

- **Privacy Shield**: Invalidated because features of U.S. legal regime were not sufficiently offset by guarantees under the framework – *i.e.*, broad U.S. government access to data coupled with insufficient controls and a lack of independent supervision.
- **SCCs**: Not invalidated, but provide a generic level of protection that must be assessed on a case-by case basis in light of (i) the circumstances of the transfer, and (ii) the third country of destination
  - Potentially leads to one of three outcomes:
    - Scenario 1: SCCs are fine as-is
    - Scenario 2: SCCs must be supplemented with additional clauses or technical protections
    - Scenario 3: Where residual high risks remain that cannot be mitigated, SCCs cannot be used
- Supervisory Authorities must act in the event of complaints – no discretion to reject and may have no choice but to block transfers as a result of a complaint

Post-*Schrems II* Developments

- European Commission publishes **new template SCCs in draft form** (November 2020)
  - Commission was already in the process of updating SCCs since the GDPR began to apply in 2018, as they were last revised in 2004 (C2C clauses) and 2010 (C2P clauses)
  - Commission took the opportunity to add factors for parties implementing the SCCs to take into account, in light of the *Schrems II* decision
  - Publication of final version of new SCCs is imminent
- European Data Protection Board publishes **draft recommendations on supplemental measures** to ensure compliance of international transfers (November 2020)
  - Discusses a variety of technical, organizational and contractual measures to protect transfers
  - Recommendations call for an "objective" assessment of transfers and likelihood of government access in a third country, whereas draft SCCs allow for a "subjective" analysis of these factors
  - Publication of final version of recommendations is imminent

Panel Discussion

Audience Q&A

End

Thank You for Joining!