PROTECTION DES DONNÉES À CARACTÈRE PERSONNEL

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Schrems I, Schrems II, …: End of Season 2, Beginning of Season 3?

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Le 16 juillet 2020, dans le très attendu arrêt *Schrems II*, la Cour de Justice de l'Union européenne s'est prononcée sur deux points en déclarant (i) invalide le *Privacy Shield*, un mécanisme permettant aux entreprises américaines de s'auto-certifier conformes aux principes de protection des données personnelles européens et de recevoir de telles données depuis l'Union européenne, et (ii) valides les clauses contractuelles types de la Commission européenne pour encadrer les transferts de données personnelles à destination de tout pays non-européen, en imposant toutefois de réaliser une analyse préalable de la législation du pays destinataire. L'arrêt *Schrems II* implique donc pour toute entreprise transférant des données personnelles, que ce soit aux États-Unis ou dans un autre pays non-européen, de revoir promptement les modalités de ces transferts, aucune période de grâce n'ayant été prévue.

CJUE, 16 juill. 2020, aff. C-311/18, Data Protection Commissioner c/ M. Schrems et Facebook Ireland (arrêt Schrems II) : JurisData n° 2020-010181

The *Schrems* series has known a new season this summer as the Court of Justice of the European Union (CJEU) issued the *Schrems II* judgment. This judgment was long-awaited as it is part of a series of turnarounds regarding personal data transfers outside the EU and immediately impacts US and EU companies.

The synopsis of the series is as follows: Maximilien Schrems, an Austrian resident, is an activist fighting for more protection of personal data. He uses the social network Facebook and is unsatisfied by legal mechanisms framing some transfers of personal data outside the European Union (EU). He therefore decides to engage actions to obtain more equity in data protection.

1. Season 1: Safe Harbor

Episode 1: where it all began. - The first season centers on the Safe Harbor. As a little background, back in 1998, right after the EU 1995 Directive about protection of personal data came into force, the EU and the US achieved an agreement on the Safe Habor principles. These are 7 principles, equivalent to EU data protection standards, US companies could declare they comply with and, consequently, lawfully receive personal data from EU companies.

In 2013, Maximilian Schrems, whose personal data is legally transferred to the US when he is using Facebook, on the basis of the Safe Harbor, lodged a complaint with the Irish Data Protection Authority (DPA) to request the prohibition of such transfers, on the ground that the US laws and practices did not ensure a sufficient protection of personal data. Mr Schrems' complaint was denied in particular on the ground that Decision 2000/520 of the European Commission on the Safe Harbor program ensured to the US an adequate level of protection to personal data coming from the EU.

Episode 2: the fall. - However, on 6 October 2015, the CJEU offered a significant twist in the plot by declaring invalid the Safe Harbor Decision; this is the so-called "*Schrems I* judgment". This unprecedent decision first led the Irish DPA to ask Mr Schrems to reformulate his complaint. Mr Schrems claims in his revised complaint that the US did still not offer sufficient protection of personal data transferred to that country, even if Facebook relied on another safeguard: the Standard Contractual Clauses (SCCs) of the European Commission.

Episode 3: the renewal. - The CJEU's decision also created a legal and financial seism in the business world, as a lot of international transfers to

the US were immediately considered unlawful. The European Commission worked quickly on finding a solution for commercial agreements already in place between EU and US companies: the "new" Safe Harbor, the Privacy Shield, adopted by the Decision 2016/250, was born.

2. Season 2: Privacy Shield's Fate and Sacrament of the SCCs

Episode 1: right back where we started. - Luxembourg, 5 years later. On 16 July 2020, the judges of the CJEU dropped a new bombshell as they reiterated their case law and the Privacy Shield decision itself knew the same destiny as the Safe Harbor's one, constituting the "*Schrems II* judgment".

The CJEU indeed stated that the Privacy Shield decision was invalid as the current US domestic law and surveillance programmes are not proportionate enough to satisfy EU data protection standards.

More precisely, the Court pointed out that:
- some US surveillance programs did not contain any limitations or sufficient guarantees for non-US persons whom personal data had been transferred to the US;
- these persons did not have actionable rights regarding the access to their personal data by the US surveillance programs; and,
- these persons did not benefit from any action before a body which offers sufficient guarantees equivalent to EU data protection law.

At the same time, the CJEU also assessed the validity of the SCCs. It considered such clauses valid provided that EU and non-EU companies assess, before transferring the data, the level of personal data protection in the country receiving the data, requiring in particular any access by the public authority of this country to be examined through analysis of its legal and regulatory framework.

Episode 2: crossover episode. - This was without counting with the EU DPAs which, following the *Schrems II* judgment, entered into the game by publishing statements on the judgment and its consequences, some of them even advising halting transfers to the US. They all insisted on the role to be played by the DPAs and the common position to be found. This common position is highly expected as the *Schrems II* judgment also requires the DPAs to suspend or prohibit any transfer of personal data to a country outside the EU when they estimate that the SCCs are not or cannot be complied with in that country, and that protection of personal data required by EU law cannot be ensured by other means.

Other actors such as the European Data Protection Board (EDPB) published a FAQs to help understand the judgment. The Civil Liberties Committee in addition stated that the judgment may also affect the "Umbrella Agreement" and the on-going negotiating EU-US cloud evidence agreement, and requested a federal data protection law to be adopted by the US Congress to implement a strong data protection framework in the US.

Episode 3: **plot twist. -** The consequences of the *Schrems II* judgment did not stop here as a new development in the series appeared, one month later, with the 101 complaints filed by the None Of Your Business (NYOB) association, led by Mr Schrems. The complaints were filed against companies in 30 EU and EEA Member States that still forward to the US data of their websites' visitors, without complying with the judgment conclusions. The list of concerned companies has been made public and this is not a spoiler that 6 French companies are on the list.

These complaints are intended to urge companies to comply with the new framework for their data transfers. Some US major cloud-services providers have already adapted their privacy statements and communications and are updating their data processing agreements. However, the judgment is quite recent and no common position by the DPAs has been published yet.

Episode 4: panic within companies. - While expecting the common position of the DPAs, companies are wondering what are the next steps to be taken to ensure their personal data transfers outside the EU are still valid.

Companies should start assessing and planning the best strategies they could adopt regarding their transfers, for example performing a case-by-case risks assessments for countries receiving their data, drafting additional provisions to the SCCs or even their own clauses, adopting Binding Corporate Rules (BCRs) for intragroup transfers, performing due diligence on their vendors, etc.

Episode 5: season finale: whac-a-mole game. - NOYB revealed that the Irish DPA sent to Facebook, in late August, a preliminary order to stop data transfers based on the SCCs from the EU to the US. This order is actually based on Mr Schrems' complaint of 2013 and only focuses on SCCs, which is only one part of the transfers' issue. Indeed, Facebook intends now to rely on another basis for the transfer which is that this latest is necessary for the performance of a contract with the concerned individual. Facebook initiated a judicial review which has been granted.

3. What to Expect in Next Season?

The next season has not been released yet but the teaser is already promising: expectation of the common position of the European DPAs, decision of the DPAs to provide (or not) companies with an "implementation period", results of the 101 complaints of the NYOB association, further legal action by NYOB against EU and US companies as well as the DPAs not enforcing the judgment, impact of the judgment on the BCRs[1], outcome of the preliminary order issued by the Irish DPA to Facebook, etc.

An intervention of the European Commission must also be kept in mind: the SCCs were already expected to be updated based on the General Data Protection Regulation (GDPR) and now also further to the *Schrems II* judgment's conclusions.

One other consequence of the judgment is the impact on countries also having surveillance programs and laws. This, for example, concerns the United Kingdom, whose adequacy decision needs to be evaluated further to the Brexit to ensure personal data can still be transferred to that country. No wonder that the next season is long-awaited!

To be continued…

1 The EDPB already referenced the *Schrems II* judgment into opinions on BCR draft decisions of the Swedish and Norwegian authorities.