The aftermath of Schrems II; still issues with the transfer of personal data from the EU to the United States

As of 17 September 2020, and 3 March 2021 Zellberg Advokatbyrå wrote an article about Schrems II and its effects in Sweden. From the announcement of the court's ruling in July 2020, there have been a lot of European decisions establishing and identifying the problems with the transfer of personal data from European citizens to the United States. For example, the Austrian Data Protection Authority has recently ruled a decision stating a warning for the routine use of tools that require European citizens' personal data to be transferred to the United States for processing, for example, via digital tools such as Google Analytics. The decision from Austria states that IP addresses and identifications via cookie data can be equated with personal data for website visitors, which means that these transmissions fall within the scope of EU data protection legislation (GDPR). An IP address must properly implement an "anonymization feature" on the current web site. If this is not done correctly, IP address data together with "other digital data" can identify visitors and thus it can be considered personal data within the meaning of the GDPR. In this case, those companies processing these IP addresses must take protective measures in order to protect the personal data in accordance with the GDPR since the data risks ending up in the cloud services in the United States. Unless adequate protection is guaranteed, these transfers are not considered to meet the requirements of the GDPR for the processing of personal data – which was the case in the Austrian decision.

The problem can generally be summed up briefly by the fact that there is a clear conflict between European privacy rights and US surveillance legislation. The problem has been going on for a long time, but a lot has happened in this area as well, i.a. through the fact that both Safe Harbor and Privacy Shields have been declared invalid. With Schrems II, the court ruled that the transfer of personal data from the EU may still be possible, provided that the personal data transferred are protected at the same level as if they had been transferred within the EU. One problem, however, is that many US based companies such as Google and other comparable companies have business models based on accessing people's different personal data. The question is how the transfer to these companies should be adapted to compliance with the judgment when it would radically limit these companies' businesses.

Even though the court's ruling in Schrems II is applicable law, no actual rules have yet been implemented on how to compliance with the court's ruling, which is why the problem currently seems to be in some kind of a grey area. European companies need to ensure

compliance to the ruling, but for the effects to really be effective it should also be required an adapted legislation in the United States, where US authorities can guarantee that they do not have access to European citizens' personal data when transferring personal data from EU to US companies. More judgments from several countries, such as in Austria, will be ruled and it also shows that there are still major problems in this area. The difficulty is also that Schrems II is only applicable on EU-based companies and hence the incentive from the United States to protect personal data from supervision form the US authorities may be less as they cannot be sanctioned for receiving illegally transferred personal data. The problem of opposing interests seems to be difficult to solve. How, and whether the problem will be resolved in the future, remains unclear.

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