Transfer of personal data to the United States – Safe Harbor Privacy Principles invalidated

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On 6 October 2015, the European Court of Justice issued a judgment that has since attracted extensive coverage in Swedish and foreign media. As this judgment has declared the Safe Harbor Privacy Principles invalid, the principles can no longer be used when transferring personal data to the US. But what exactly does this mean and what can we expect in the future?

Background

According to the principal rule of the Swedish Personal Data Act, the transfer of personal data to countries outside the EU/EEA is prohibited. However, there are several exceptions from this rule and the Safe Harbor Privacy Principles have been one of the more frequently used exceptions.

The exception was based on a decision of the European Commission from 20 July 2000, which established that it was permissible to transfer personal data to organizations and companies in the US that adhered to the Safe Harbor Privacy Principles, as these would ensure an adequate level of protection. On 6 October 2015, the decision of the European Commission was invalidated, which means that transfer of personal data to the US solely on the basis of the Safe Harbor Privacy Principles is no longer permitted.

The Safe Harbor Privacy Principles are regulations pertaining to personal integrity and data protection that have been submitted by the US Department of Commerce. Adherence to these principles is non-compulsory and those who wish to adhere must notify the department. Under US legislation, the regulations are binding for companies and organizations that have adhered to the principles. However, the regulations are not binding for US authorities, which means that disclosure of information can still be required under other regulation.

Invalidation of the principles – what does it mean?

The Safe Harbor Privacy Principles do not represent the only exception for transfer of personal data to the US, but the exception has been effective and has therefore been frequently applied by many companies and organizations. According to the Swedish newspaper "Dagens Industri" (here and here) the Safe Harbor Privacy Principles are applied by more than 4,000 US companies including Google, Apple, Facebook, Microsoft and Twitter. In other words, the possibility to transfer personal data from the EU to the US is of vital importance to international trade.

With this judgment controllers are no longer permitted to transfer personal data to the US solely on the basis of the Safe Harbor Privacy Principles. This might affect companies in various situations, e.g. when Swedish parent companies transfer personal data to US subsidiaries or when Swedish companies use cloud services that store personal data on servers located in the US.

Although the Safe Harbor Privacy Principles have been invalidated, there are still other exceptions available that permit transfer of personal data to the US. Transfer is still permitted if:

- any of the European Commission Standard Contractual Clauses are applied; or

- the recipient company adopts Binding Corporate Rules. Binding Corporate Rules may only be used for transfers within the same corporate group and must be approved by the Swedish Data Protection Authority (Sw. Datainspektionen) if the data is to be transferred from Sweden.

Pursuant to Article 34 of the Swedish Personal Data Act, personal data may also be transferred to countries outside the EU/EEA, e.g. the US, if:

- the data subject has consented to the transfer;
- the transfer is necessary for the performance of a contract between the data subject and the controller or for implementation of pre-contractual measures taken in response to the data subject's request;
- the transfer is necessary for the conclusion or performance of a contract between the controller and a third party in the interest of the data subject;
- the transfer is necessary for the establishment, exercise or defence of legal claims;
- the transfer is necessary in order to protect the vital interests of the data subject.

In view of the fact that consent can always be withdrawn, it may be less appropriate to apply this exception for long-term and repeated transfers. Furthermore, for consent to be valid, it is necessary to provide adequate information regarding the personal data processing to the data subject, which poses a challenge to notify the data subject of all risks involved in transferring personal data to the US. The other exceptions in Article 34 of the Swedish Personal Data Act are to be interpreted restrictively and are not, therefore, generally applicable to transfers that might be qualified as repeated, mass or structural, e.g. when using cloud services.

Consequently, the remaining main alternatives are the European Commission Standard Contractual Clauses and Binding Corporate Rules. However, it has been debated amongst lawyers lately how long it will be possible to apply these exceptions. Indeed, the exceptions are fundamentally based on the same idea as the Safe Harbor Privacy Principles, and like the Safe Harbor Privacy Principles, the adequacy of the European Commission Standard Contractual Clauses and Binding Corporate Rules may be reviewed and potentially invalidated. In other words, there is an imminent risk that these exceptions may also be invalidated in the future. The Article 29 Working Party, which is a group of representatives from all national data protection authorities of the EU Member States, has declared that the exceptions can be applied for the time being, but the group will continue to analyze the judgment's effect on the exceptions.

What comes next?

Already in 2013 the European Commission called attention to a number of shortcomings in the Safe Harbor Privacy Principles. In light of this, the European Commission and US authorities have been engaged in discussions since January 2014 with a view to obtaining a new and more robust alternative to the Safe Harbor Privacy Principles. The European Court of Justice's judgment makes the need to find a new solution more urgent and the European Commission declared in a press release on 6 November 2015 that the discussions with the US have intensified in order to quickly find a solution that meets the European Court of Justice's requirements. The aim of the European Commission is to conclude the discussions by the end of January 2016.

In addition to the above-mentioned discussions, the Article 29 Working Group has urged the EU Member States and EU institutions to initiate talks with the US to find appropriate legal and technical solutions to the problem. The group considers the European Commission's work with a new Safe Harbor an integral part of such discussions, but it also maintains that discussions should be conducted in a broader context to reach sustainable solutions.

The Article 29 Working Group has also stated that the national data protection authorities, including the Swedish Data Protection Authority, will not take any measures due to the judgment until after 31 January 2016. This will provide respite to the concerned controllers and assistants as well as the EU, the EU Member States and the US to find alternative solutions to the Safe Harbor Privacy Principles.

It is also conceivable that the judgment of the European Court of Justice may, for example, result in US companies purchasing server halls within the EU in order to guarantee their European customers an adequate level of protection. An on-going lawsuit in the US will determine whether or not US companies will be obligated to disclose personal data to US authorities even where that have sited servers within the EU. This ruling may, in other words, launch even more creative solutions to circumvent the strict data protection rules of the EU.

Solutions based on US companies moving their processing of personal data to the EU and possibly also all monitoring thereof to European companies will probably entail increased costs, which will, of course, have an impact on customers in the end.

Conclusion

As a result of the ruling of the European Court of Justice on 6 October 2015, it is no longer permitted to transfer personal data to the US under the Safe Harbor Privacy Principles. It is, however, still permissible to apply Binding Corporate Rules as well as the Standard Contractual Clauses of the European Commission, although it is debatable how long these exceptions will be applicable.

The Swedish Data Protection Authority will not take any measures in this area until after 31 January 2016, and hopefully the EU and the US will have reached agreement on one or more new solutions to replace the Safe Harbor-exception before then. Thus, we will have reason to revert to this issue in the immediate future.