

Expert comment

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In the latest twist in its on-going battle with Microsoft, the US government has failed to compel the company to hand over customer emails stored on Microsoft's servers in Ireland.

Commentators have noted the importance of this judgment in enhancing the trust that consumers place in cloud-based services, providing very welcome support for the cloud industry as a whole. However, there is a gentle irony in the timing of it: the judgment comes as some of Europe's politicians, regulators and privacy activists continue to harbour concern that the US's privacy safeguards may not be sufficiently protective of individual rights.

Complaints about the EU-US Privacy Shield (approved on 12th July) have focused on perceived failures to regulate access by US government agencies to personal data of EU citizens — yet that is what the US court has achieved in this case.

The Microsoft case has been closely watched by privacy advocates and the tech industry from the outset. Several large tech companies, together with the Irish government, filed amicus briefs in support of Microsoft's position.

On 14th July 2016, the Court of Appeals for the Second Circuit in New York concluded that the US government could not rely on a warrant issued under the Stored Communications Act to compel a service provider to disclose the communications of one of its customers stored exclusively on foreign servers.

Crucially, the Court noted that there was no indication that the Stored Communications Act was ever intended to have extra-territorial effect. Rather, the focus of the statute (part of the Electronic Communications Privacy Act 1986) was to promote privacy, not to facilitate disclosure of information.

The Court referred to the fact that the US government could have applied for access to the emails under a mutual legal assistance treaty, albeit involving a more cumbersome process, to access the information.

Acknowledging the longevity of the Stored Communications Act, the Court noted that both technology and society have changed significantly since it was passed. At the time of its inception, cross border data

transfers were far from routine, and jurisdictional considerations in privacy disputes were rare. In contrast, service providers now 'rely on worldwide networks of hardware to satisfy users' 21st Century demands for access and speed and their related, evolving expectations of privacy'. These expectations include concerns by individuals about government surveillance, and the safeguards that should be imposed to ensure that such access to personal data is not unfettered.

As we have seen during the UK's current debate on the draft Investigatory Powers Bill, these concerns are not merely US concerns. Our own debate in the UK demonstrates how difficult and nuanced these issues are, and how difficult it is to ensure an appropriate balance between privacy and law enforcement considerations.

Concern about surveillance is not the only area in which expectations of privacy have evolved. In recent years, complaints have focused on data collection practices, re-use of personal data and use for related purposes, direct marketing activities, and data retention, in addition to cross border data transfer concerns and government access to personal data. The General Data Protection Regulation ('GDPR') represents Europe's efforts to ensure that privacy laws remain current, reflecting technological changes, and evolving expectations of privacy.

While we wait to see whether there will be a further appeal in the Microsoft case, it is worth reflecting on the US Court's recognition that the relevant data sought from Microsoft 'lies within the jurisdiction of a foreign sovereign'. Issues of applicable law and jurisdiction will be some of the key areas of dispute in the near future, not least under the GDPR which seeks to impose European privacy standards on non-EU controllers and processors. Whether a European court would have regard to considerations of comity, as the US court did in the Microsoft case, makes for interesting discussion.

Bridget is Chairing the 15th Annual Data Protection Compliance Conference, taking place in London on 13th and 14th October 2016.

See the website www.pdpconferences.com for information and to make a booking.

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