Expert comment

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In an extraordinary few weeks for data protection in Europe, there has been not one but two significant judgments from the Court of Justice of the European Union ('CJEU') which have thrust data protection into the spotlight. The effect of these judgments will be felt for some time to come.

In *Schrems v Data Protection Commissioner,* discussed in more detail on pages 3-5 of this edition, the CJEU declared that EU Data Protection Authorities ('DPAs') have the power to investigate and to suspend international data transfers, even where those transfers are based on an adequacy finding of the European Commission. In addition, the Court declared the EU-US Safe Harbor to be invalid, sending shockwaves across the Atlantic.

At a practical level, the Schrems case has created a compliance headache for trans-Atlantic trade, a great deal of which relies on the Safe Harbor. Some 4,000 companies are part of the Safe Harbor. Add to this the affiliates and customers of those 4,000 Safe Harbor certified companies that rely on their Safe Harbor status, and the individual transfers made in reliance on Safe Harbor, and the true size of the problem becomes apparent.

At a political level, much has been made of the need for Safe Harbor 2.0 to be fast tracked in order to solve the problem. Unfortunately, this may be some time in coming. A political solution is likely to be the only way to resolve the real issues raised by this case, namely, allegations of indiscriminate access to data by US intelligence agencies and a lack of redress for EU citizens before the US courts. These are not issues that DPAs can resolve in isolation.

In the shadow of *Schrems*, but potentially of greater significance, the CJEU has also delivered its judgment in *Weltimmo.* In focusing on applicable law and the scope of a DPA's territorial powers, this case may well influence current trilogue discussions for the proposed General Data Protection Regulation. The facts of *Weltimmo* are straightforward: a Slovakian-registered company operated property dealing websites advertising Hungarian properties for sale. The websites targeted the Hungarian market: all the properties were located in Hungary and the websites used the Hungarian language.

Hungarian advertisers lodged complaints about *Weltimmo*'s practices with the Hungarian DPA, which fined *Weltimmo.* At issue in the case was whether the Hungarian DPA had jurisdiction over a Slovakian registered company. The Court found that it did, relying on the establishment test in Article 4(1)(a) of the Directive. The Court emphasised that the Directive has a 'particularly broad territorial scope'. To determine whether a company is 'established' in a Member State (other than the Member State in which it is registered), the 'degree of stability of the arrangements and the effective exercise of activities in that other Member State must be interpreted in light of the specific nature of the economic activities and the provision of the services concerned'.

The Court noted that the presence of only one representative in a Member State might be enough to constitute a 'stable arrangement'. In addition, there must be activity, exercised through the 'stable arrangement'. Here the Court noted that the activity could be 'minimal'. In *Weltimmo*'s case, the activity was the operation of websites concerning Hungarian properties, written in Hungarian, and ultimately supported by Hungarian advertising.

Unsurprisingly, the Court found that while the Hungarian DPA had jurisdiction to investigate the complaint, the exercise of its power was subject to the laws of Hungary, and it could only impose a fine in Hungary. The Hungarian DPA would need to ask the Slovenian DPA to take any further action. At the heart of *Weltimmo* lie issues that have been a key focus of the GDPR reforms, namely applicable law, territorial scope, and the one stop shop. Those issues are currently under scrutiny within the trilogue, and the CJEU's views will no doubt be taken into account in the trilogue discussions.

Until recently it was common to lament the absence of EU data protection jurisprudence. The position is changing rapidly as data protection rights are challenged. With a stronger data protection framework in the pipeline, and tougher penalties at stake, the courts are likely to be asked more frequently to adjudicate on data protection issues. And as we have seen recently, some of those judgments will fundamentally change the data protection landscape.

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