



Accepted Papers

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Casually escaping the shipwreck of time? - Consent to cross-border data transfers post-Schrems

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In October 2015, the CJEU held in a preliminary ruling to the Irish High Court that Commission Decision 2000/520/EC on the EU-US Safe Harbor framework is invalid (*Maximillian Schrems v Data Protection Commissioner*, Case C-362/14, 6 October 2015). The framework, which enabled EU data controllers to transfer personal data to US entities that had signed up to the Safe harbor principles, was seen to violate the fundamental rights and freedoms set out in the EU Charter because US law and practice do not ensure an adequate level of protection within the meaning of Article 25 of the Data Protection Directive (1995/46/EC).

The judgment leaves both EU data controllers and US recipients of data flows that have relied on the Safe Harbor in an immediately precarious situation. Without Decision 2000/520, businesses have had to rely on other derogations and exemptions contained in the Directive like the use of standard contractual clauses and Binding Corporate Rules (BCRs). However, it has already become apparent that both of those methods are equally vulnerable to judicial review and a potential declaration of invalidity. It has therefore been mooted that EU data controllers should consider relying on the data subject's consent, a derogation set out in Article 26(1)(a) of the Directive. The attraction to data controllers of a consent solution is easy to see as it does not require a legislative act by the European Commission (that may now be subject to judicial review) and can, in practice, be obtained simply by including relevant wording on the data controller's website or in the data controller's terms of business or privacy policy.

There are known procedural limitations to the usefulness of consent in a data protection context, like the exacting way in which it must be obtained to be valid and the fact that data subjects can withdraw their consent at any time. But there is also a more fundamental question mark over whether a derogation like that set out in Article 26(1)(a) of the Directive is in fact compatible data subjects' Charter rights, given that it has essentially allowed data controllers to make it a - in practice often non-negotiable - contractual requirement for data subjects to consent to a transfer of their data to a potentially unsafe jurisdiction. This paper will specifically examine the concept of consent in the context of the requirement in Article 8(2) of the Charter that personal data must be processed "fairly". It will look at the way in which courts in some member states have already started to review privacy policies under their national consumer protection regimes and the extent to which the general fairness requirement in both data protection and consumer protection law could prevent consent from becoming the de facto standard for the transfer of personal data to non-EEA jurisdictions.