

ECJ: AG's opinion on NSA PRISM spy scandal will be delivered on Sept 23rd Facebook's EU-US data transfers under "Safe Harbor" on the table

The Advocate General (AG) at European Court of Justice (ECJ) will deliver his legal opinion on the NSA/PRISM spy scandal, which may have major implications for EU-US data flows and US internet companies operating in Europe (ECJ Case Number C-362/14 *Schrems*). In the majority of cases the ECJ follows the AG's non-binding opinion. The final ruling by 15 judges of the highest court in the European Union is expected later this year. The initial date for the delivery of the AG's opinion on June 24th was delayed until now for unknown reasons.

Facebook & PRISM. Large internet companies (in the current case Facebook) have, pursuant to US law, allowed the US government to access European user data on a mass scale for law enforcement, espionage and anti-terror purposes.¹ Aiding these forms of US mass surveillance may however violate EU privacy laws and fundamental rights. Like Facebook, Apple, Google, Yahoo, Skype or Microsoft all relevant participants of the PRISM program ([Wikipedia](#)) have outsourced their international operations to Ireland or Luxemburg. Consequently EU law applies to these companies. The current case deals with "Facebook Ireland Ltd" and its involvement in the PRISM spy scandal, but will be relevant for all other companies that aid US mass surveillance. Facebook has routinely denied any involvement in the PRISM scandal, however the Irish High Court has found as a fact that Facebook did participate in mass surveillance. The existence of the programs and Facebook's involvement was basically seen as undisputed before the ECJ.

"Data Export" to NSA legal? The European subsidiaries of US tech giants collect personal information within the EU and then forward ("export") EU data to the United States, where it is further used by programs such as the NSA's PRISM spy program. Under EU law such a "data export" to a third country is only legal if the exporting company (in this case "Facebook Ireland Ltd") can ensure "*adequate protection*" in the US.² In the current case, the plaintiff claims that the NSA's PRISM program and other forms of US surveillance are the exact antithesis of "adequate protection".

"Safe Harbor" still valid? Many US companies rely on the so-called "Safe Harbor decision" by the European Commission to transfer personal data from the EU to the US. The decision declares US companies that "self-certify" within the US to provide "adequate protection". However, during the day-long hearing before the Grand Chamber of 15 judges of the EU's top court on March 23rd the European Commission had to admit, that its "Safe Harbor" decision does not provide "adequate protection" as required by EU law.

The "Safe Harbor" system, grants US companies a special privilege to self-certify compliance with EU law, while companies in almost all other non-EU countries need to rely on individual legal guarantees overlooked by European data protection authorities. This system was introduced in 1999, but has since then been harshly criticized for not providing proper protection of European data once it reaches the United States. German data protection authorities and the European Parliament have called for the suspension of the "Safe Harbor".^{3,4} The European Commission has repeatedly announces that the "Safe Harbor" will soon be updated – so far without results.

¹ e.g. 50 U.S. Code § 1881a or Executive Order 12333.

² Article 25 of Directive 95/46.

³ http://www.bfdi.bund.de/SharedDocs/Publikationen/Entschliessungssammlung/DSBundLaender/89DSK-SafeHarbor.pdf?__blob=publicationFile&v=2

Possible Outcomes. While the court and the AG were rather critical of the “Safe Harbor” and the role of the Irish Data Protection Commissioner during the hearing on March 23rd of this year, the final outcome is hard to predict and could range e.g. from narrowing the interpretation of the “Safe Harbor” in the light of higher ranking law, an invalidation of the “Safe Harbor” decision or an even broader ruling on international data transfers taking into consideration the European Union’s fundamental right to data protection in Article 8 of the Charter of Fundamental Rights of the European Union (CFREU).

ECJ track record. The ECJ is the supreme court of the European Union. The court’s rulings are binding in all member states of the European Union. In a very recent case concerning “data retention”, the ECJ has ruled that “mass storage” of so called ‘meta data’ for a period of between six months to two years is in violation of the fundamental right to privacy and hence illegal. In view of the data retention case, it would appear basically impossible not to draw the parallel to the PRISM program conducted by the United States government. PRISM allows access on a mass scale even to content data and without any judicial redress for non-US persons. The court also made headlines with the recent “Google Spain” decision, where it ruled that EU citizens have a right to have obsolete search results removed (dubbed “right to be forgotten”). In the very similar “SWIFT” situation ([Wikipedia](#)), a Belgian financial services provider decided to stop data flows to the US in the light of US laws and keep all EU data within Europe.

AG’s opinion. One of the advocate generals at the ECJ prepares an independent, legal opinion on each case that comes, like the *Schrems* case, before the Grand Chamber formation of Europe’s top court. The opinion is not binding for the court, but is typically a strong indicator as to the outcome of the case, since, in many cases, the court reaches a similar outcome as the AG. In this case the AG is Mr. Yves Bot from France, ([Wikipedia](#)).

Further Background. The case is the result of an Austrian Facebook user (Max Schrems) who filed a complaint against Facebook with the Irish Data Protection Commissioner (DPC).

The Irish Data Protection Commissioner (DPC), in charge of enforcing EU data protection laws in Ireland, has refused to investigate a complaint, claiming that the legal arguments by the claimant were “*frivolous and vexatious*”. The DPC claimed that it is “absolutely bound” by the “Safe Harbor” decision from 1999. This decision was taken despite the fact that legal arguments similar to those advanced by Mr. Schrems before the DPC were made not only by many other EU data protection authorities, but also the European Parliament and others. Mr. Schrems challenged the refusal of the DPC at Irish High Court, which referred the matter to the ECJ in June of last year.

“Facebook Ireland Ltd” has not joined the proceedings before the Irish High Court or the ECJ, but a decision by the ECJ will very likely directly affect not only Facebook, but all companies aiding the NSA “PRISM” program and similar forms of “mass surveillance”.

Crowd Funded. The procedure is “crowd funded” by more than 2000 donors that have so far donated more than € 60.000 on www.crowd4privacy.org.

The plaintiff is being represented by an international team of lawyers including Prof. Herwig Hofmann (University of Luxemburg), Noel Travers (Senior Counsel at the Irish Bar) and Gerard Rudden of Ahren Rudden Solicitors, Dublin, and assisted by data protection law expert, Prof. Franziska Boehm (University of Münster).

⁴ <http://www.europarl.europa.eu/news/en/news-room/content/20140307IPR38203/html/US-NSA-stop-mass-surveillance-now-or-face-consequences-MEPs-say>