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CJEU: C-311/18 („*SCHREMS II*“)

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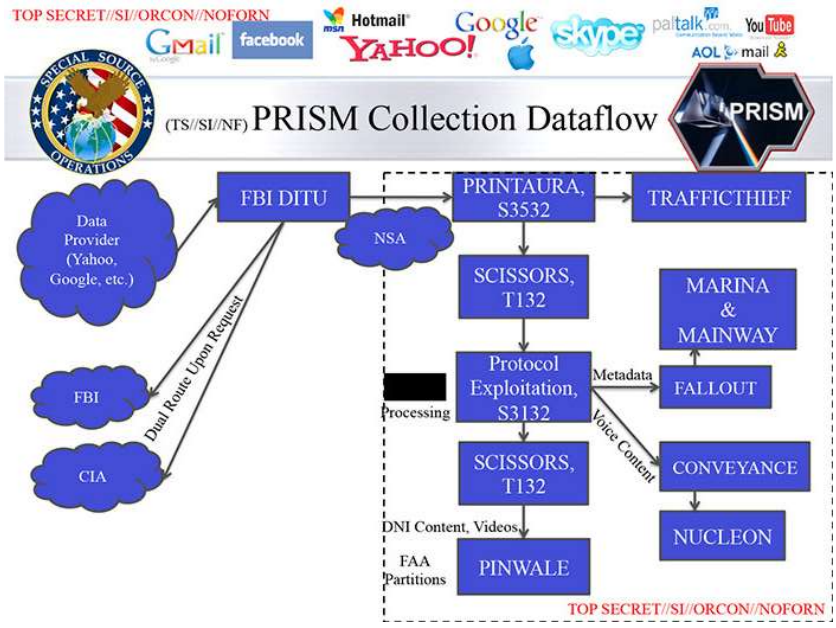
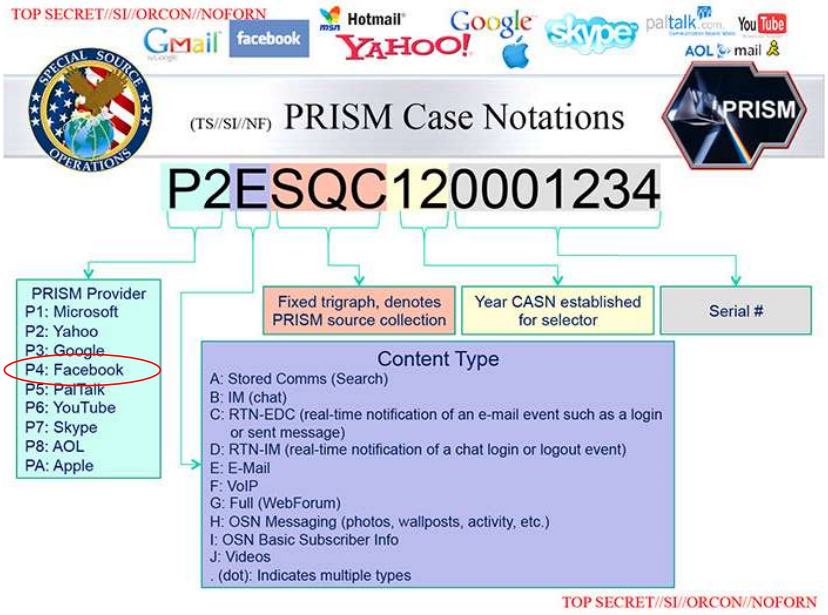
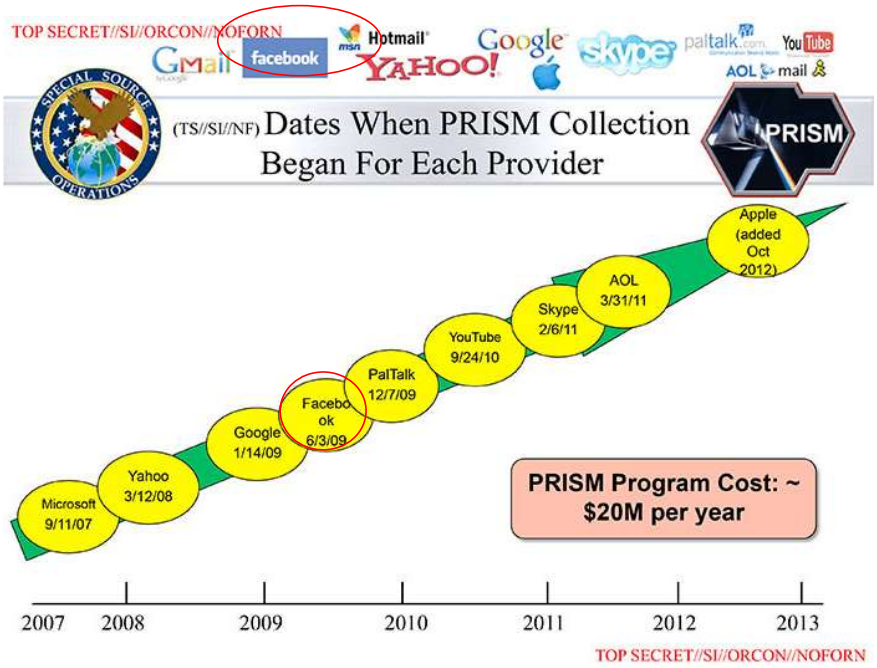
@maxschrems


TOP SECRET//SI//ORCON//NOFORN
(TS//SI//NF) PRISM Collection Dataflow
PRISM
Data Provider (Yahoo, Google, etc.)
FBI DITU
NSA
PRINTAURA, S3532
TRAFFICTHIEF
SCISSORS, T132
MARINA & MAINWAY
Protocol Exploitation, S3132
Metadata
FALLOUT
Processing
Voice Content
SCISSORS, T132
CONVEYANCE
DNI Content, Videos
NUCLEON
FAA Partitions
PINWALE
FBI
CIA
Dual Route Upon Request
TOP SECRET//SI//ORCON//NOFORN


TOP SECRET//SI//ORCON//NOFORN
(TS//SI//NF) PRISM Case Notations
PRISM
P2ESQC120001234
PRISM Provider
P1: Microsoft
P2: Yahoo
P3: Google
P4: Facebook
P5: PalTalk
P6: YouTube
P7: Skype
P8: AOL
PA: Apple
Fixed trigraph, denotes PRISM source collection
Year CASN established for selector
Serial #
Content Type
A: Stored Comms (Search)
B: IM (chat)
C: RTN-EDC (real-time notification of an e-mail event such as a login or sent message)
D: RTN-IM (real-time notification of a chat login or logout event)
E: E-Mail
F: VoIP
G: Full (WebForum)
H: OSN Messaging (photos, wallposts, activity, etc.)
I: OSN Basic Subscriber Info
J: Videos
. (dot): Indicates multiple types
TOP SECRET//SI//ORCON//NOFORN



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FISA 702 (= 50 USC § 1881a)

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- **Electronic Communication Service Provider**
- **"Foreign Intelligence Information"**

- **"Certification" for one year** *(„FISA Court")*
  - Minimizing / Targeting procedures (US persons)
- **"Directive" to the Service Provider**
  - API (?)

DATA TRANSFERS

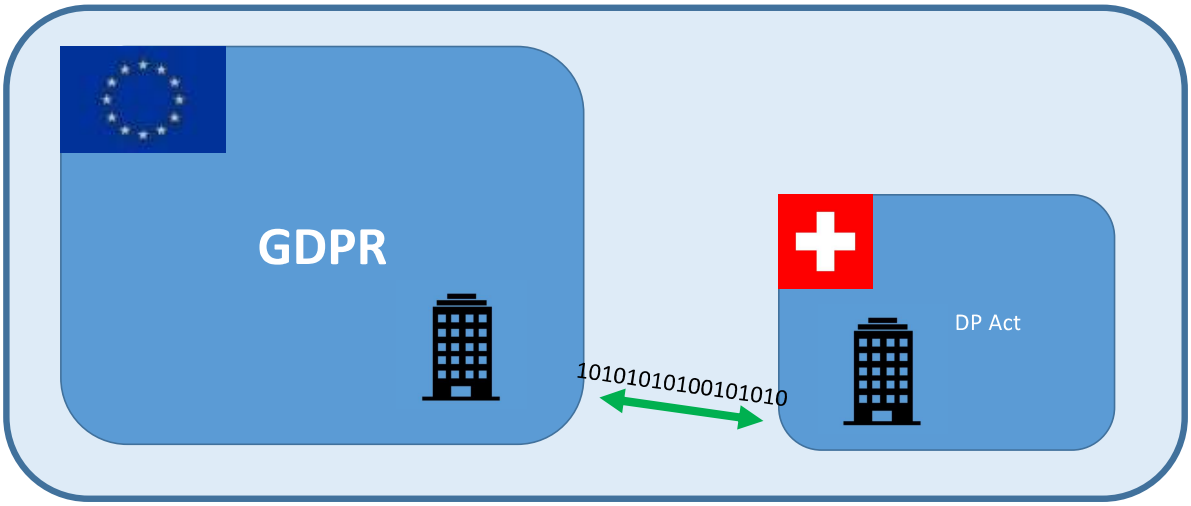
noyb

- **General Rule:** Export Prohibition on Personal Data
- **Derogations:** "Necessary transfers", non-structural (Art 49)

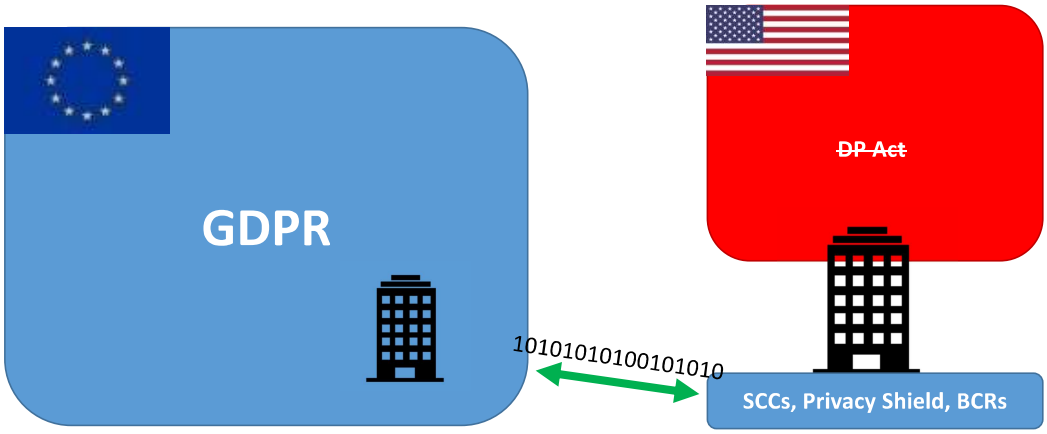
- **Outsourcing:**
  - Adequacy (Art 45)
  - Standard Contractual Clause / Model Clauses (Art 46)
  - Binding Corporate Rules (Art 47)

Expansion of GDPR rules in non-EU country

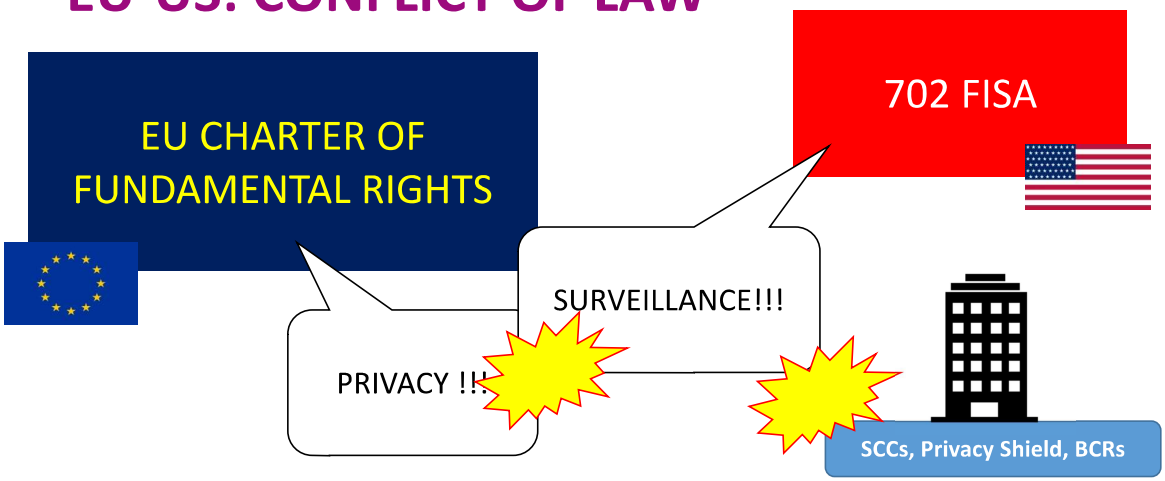
PRIVACY "BUBBLE": SWITZERLAND

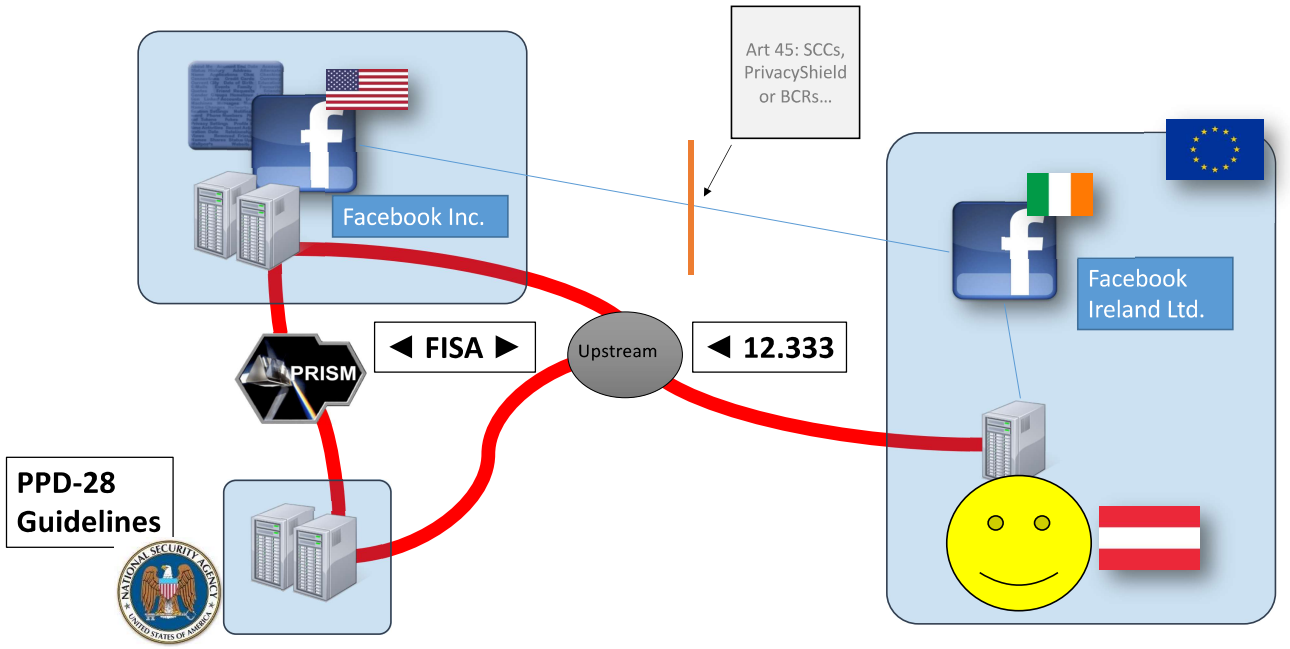


PRIVACY "BUBBLE": CONTRACTUAL



EU-US: CONFLICT OF LAW





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FIRST ROUND: „SCHREMS I“

RTÉ

noyb

„I don't think it will come as much of a surprise that in fact US intelligence services do have access from US companies"

@maxschrems

Dear Mr. Schrems,

With reference to your letter of 29th July 2013, please see the following points.

As previously stated, we consider that we have set out our position clearly in previous correspondence and the fact that we choose not to comment on all arguments you have presented should not be taken to mean that we agree with them. We therefore reserve the right to argue them as necessary in the course of judicial review proceedings.

„shall"= „may"

„frivolous"

To be clear we remain of the position that there is a basis within the Data Protection Acts 1988 and 2003 for the Commissioner to make a determination not to investigate a complaint and that in Judicial Review proceedings we reserve the right to seek to rely on Sections 10 (1) (a), 10 (1) (b) (i), or a combination thereof or indeed any other relevant legal basis, including previous High Court decisions, in defending our position on this point or, should it arise, defending our position that there is no basis for an investigation of this complaint ("Complaint 23").

Please be advised that we can no longer respond in detail to further correspondence where you seek to summarise or limit our position in this matter and instead we will refer you to our correspondence to date on this matter.

Yours sincerely,

Ciara O'Sullivan
Senior Compliance Officer

@maxschrems

“ESSENCE”

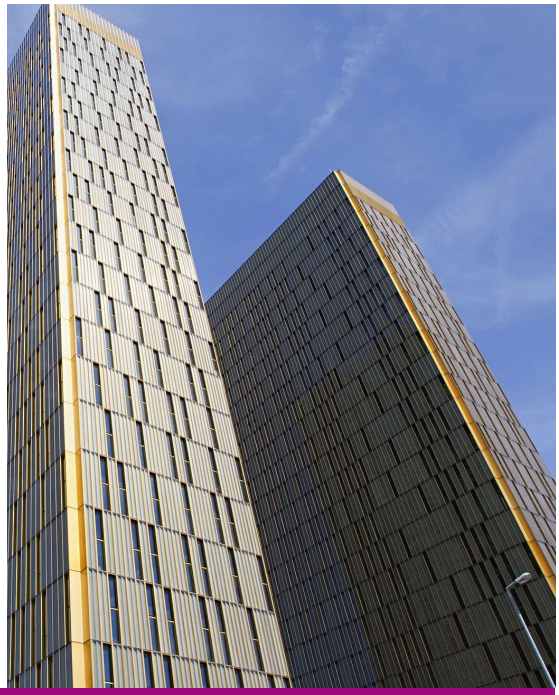
noyb

1. Legitimate aim for the measure
2. Measure suitable to achieve the aim
3. Measure must be necessary to achieve the aim (Less onerous way?)
4. Measure must be reasonable, considering the competing interests of different groups at hand

OTHER FINDINGS

- "Essentially Equivalent" Protection in 3rd Country
- Effective Detection and Supervision Mechanisms
- Legal Redress in Line with Art 47 CFR

...higher standard than many MS?



≈ GDPR

Art 44-50 of GDPR
„Ess. Equivalent"

= CFR

CFR
Art 7, 8 & 47

noyb

PRIVACY SHIELD

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- **Commercial data use**
  - Material legal upgrades *(minimal)*
  - Administrative upgrades

- **Government data use**
  - Review and description of US law *(missing before, as from 2000)*
  - NEW: Ombudsperson *(Art 47 CFR)*

noyb

"The US authorities ... assured there is no indiscriminate or mass surveillance by national security authorities."

noyb

ANNEX VI, PAGE 4

PPD-28 also provides that signals intelligence collected in bulk can only be used for six specific purposes: detecting and countering certain activities of foreign powers; counterterrorism; counter-proliferation; cybersecurity; detecting and countering threats to U.S. or allied armed forces; and combating transnational criminal threats, including sanctions evasion. The President's National Security Advisor, in consultation with the Director for National Intelligence (DNI), will annually review these permissible uses of signals intelligence collected in bulk to see whether they should be changed. The DNI will make this list publicly available to the maximum extent feasible, consistent with national security. This provides an important and transparent limitation on the use of bulk signals intelligence collection.

PPD-28, PAGE 3

noyb

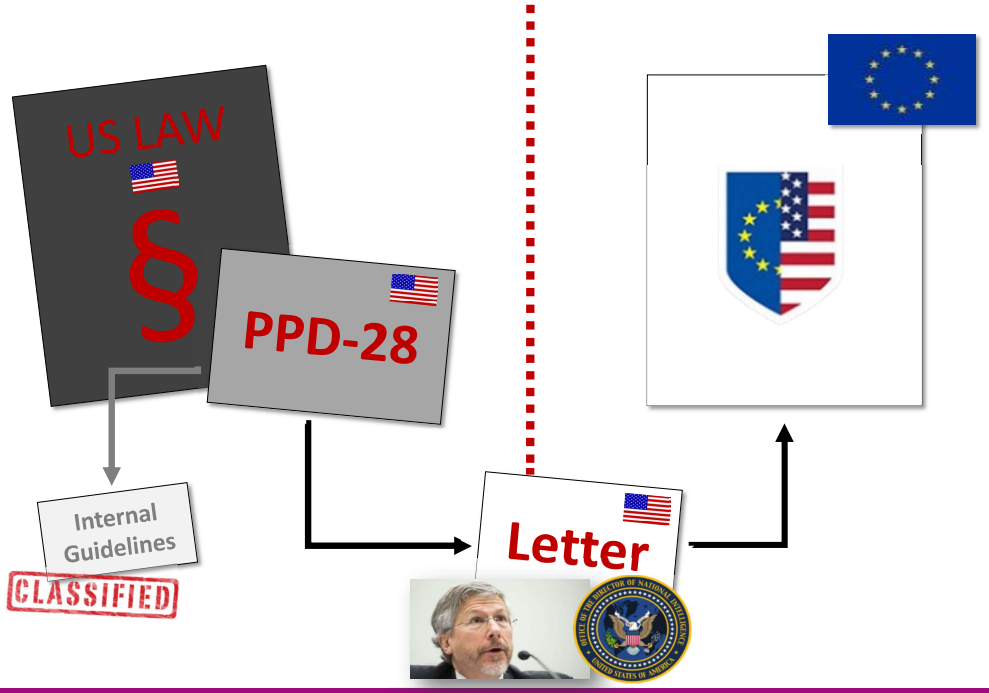
Sec. 2. Limitations on the Use of Signals Intelligence Collected in Bulk.

Locating new or emerging threats and other vital national security information is difficult, as such information is often hidden within the large and complex system of modern global communications. The United States must consequently collect signals intelligence in bulk[5] in certain circumstances in order to identify these threats. Routine communications and communications of national security interest increasingly

PPD-28, PAGE 3, FN 5

noyb

[5] The limitations contained in this section do not apply to signals intelligence data that is temporarily acquired to facilitate targeted collection. References to signals intelligence collected in "bulk" mean the authorized collection of large quantities of signals intelligence data which, due to technical or operational considerations, is acquired without the use of discriminants (e.g., specific identifiers, selection terms, etc.).


US LAW
§
PPD-28
Internal Guidelines
CLASSIFIED
Letter

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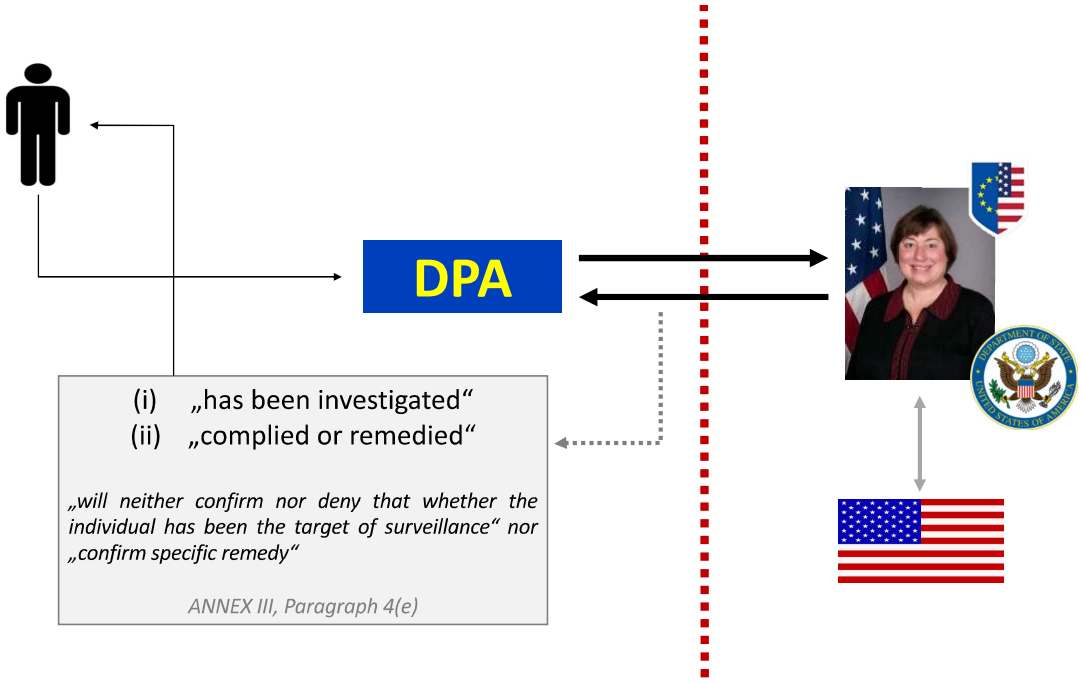

DPA
(i) „has been investigated“
(ii) „complied or remedied“
„will neither confirm nor deny that whether the individual has been the target of surveillance“ nor „confirm specific remedy“
ANNEX III, Paragraph 4(e)

noyb

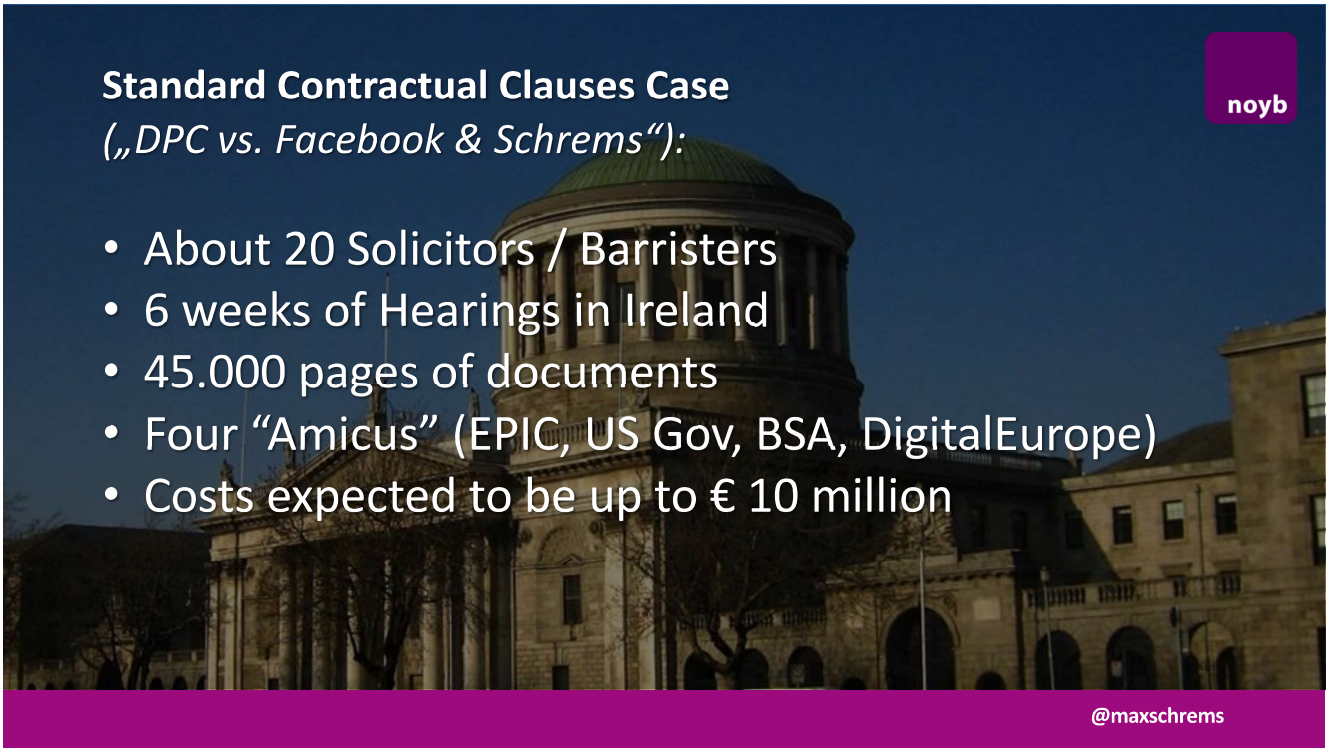
PRIVACY SHIELD - LIPSTICK ON A PIG?!

noyb

noyb

SECOND ROUND: „SCHREMS II“

@maxschrems



CORE ARGUMENTS

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- Facebook said it never used Safe Harbor, but SCCs

  ➔ **No Surveillance beyond EU Law / No Problem** ***(“Go away!)***

- Schrems demanded the Irish DPC to make use of Article 4 of the SCCs for Facebook only

  ➔ **Targeted Solution for FISA companies only** ***(“Use Art 4!”)***

- Irish DPC identified a “systematic” problem and took the view the SCCs are invalid as a whole

  ➔ **Invalidation of SCCs worldwide** ***(“Nuclear Option”)***

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OUTCOME: CJEU

OUTCOME: PROCEDURAL LAW

noyb

The "solution" is Article 4 of the SCCs *(everyone but the DPC)*

- Individual enforcement action on "FISA" companies
- Invalidation of SCCs not relevant anymore

Duty of DPAs to enforce the GDPR

@maxschrems

OUTCOMES: MATERIAL LAW

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Facts: "Mass Surveillance" became "Mass Processing"

US Surveillance Law is not "proportionate" ***(less than in Schrems I)***

US Redress is a violation of the "essence" ***(as in Schrems I)***

noyb

OUTCOME: PRACTICAL CONSEQUENCES

@maxschrems

DATA TRANSFERS

noyb

- **General Rule:** Export Prohibition on Personal Data
- **Derogations:** “Necessary transfers”, non-structural (Art 49)
- **Outsourcing:**
  - Adequ (Art 45)
  - Stand rd C tractu l Clause / Model Clauses (Art 46)
  - Bindi Corpo ules (Art 47)

Expansion of GDPR rules in non-EU country

TRANSFERS: NON-PERSONAL DATA

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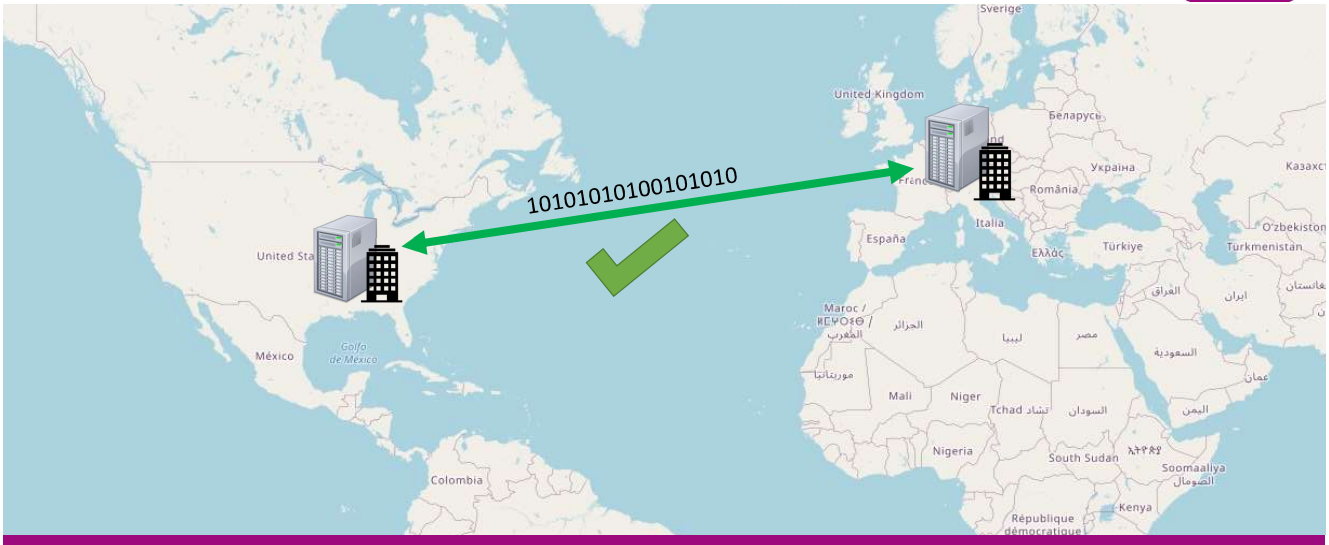

TRANSFERS: NECESSARY TRANSFERS

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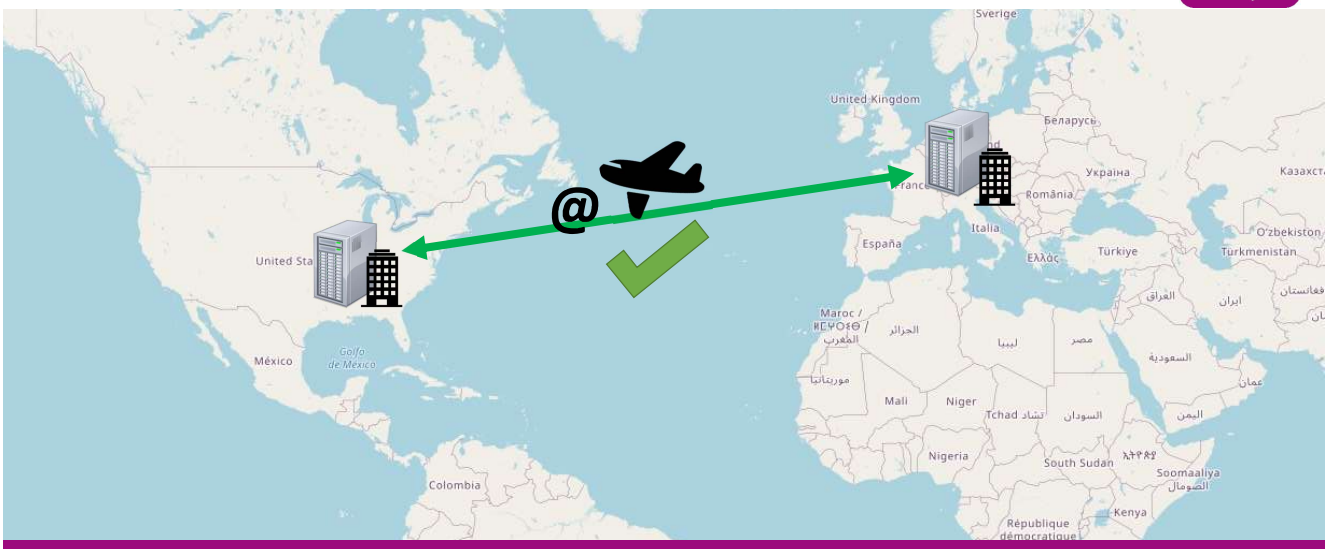

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TRANSFERS: "OUTSOURCING" (FISA) - USA

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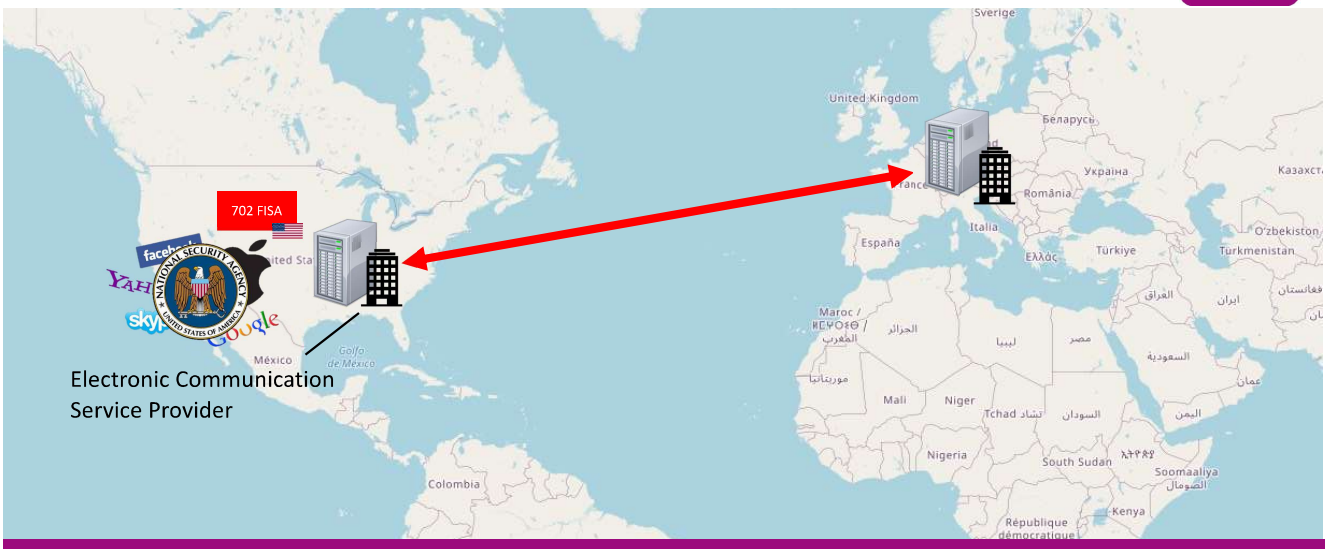
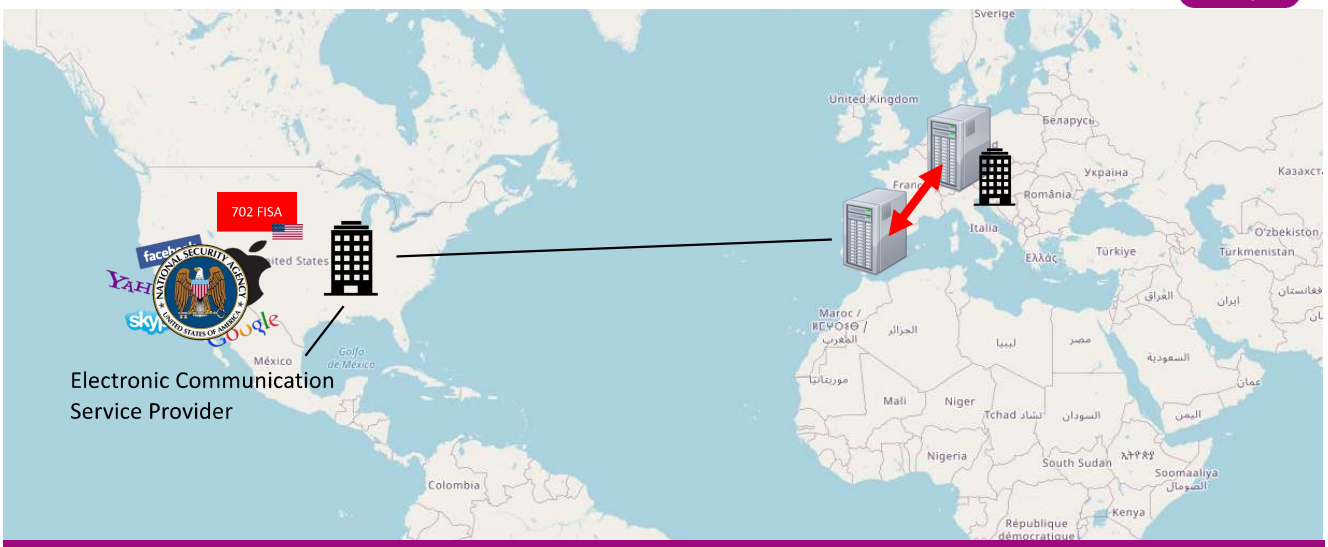


@maxschrems

TRANSFERS: “OUTSOURCING” (FISA) - EU

noyb



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TRANSFERS: NON-FISA

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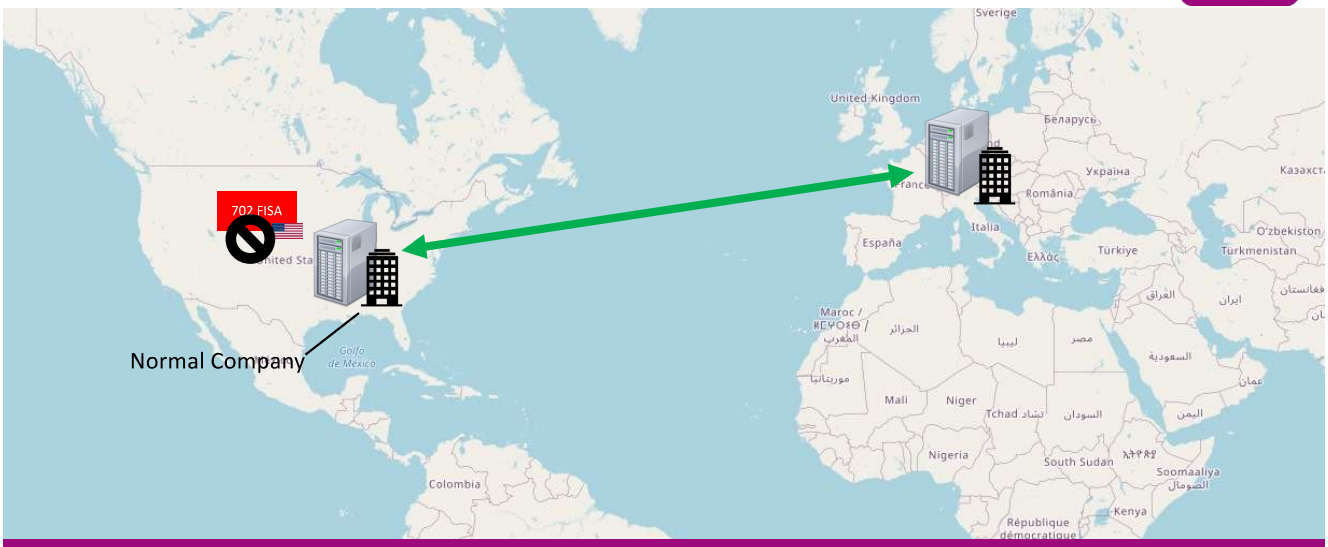

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SOLUTION: „SUPPLEMENTARY MEASURES“

SUPPLEMENTARY MEASURES

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- **Technical**
  - Encryption („Transit“)
  - Encryption (Backups)
  - „Zero Knowledge“

- **Contractual**
  - Disclosure
  - Information
  - „Resistance“

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Scenarios in which *no effective* measures could be found

87. The measures described below under certain scenarios would not be effective in ensuring an essentially equivalent level of protection for the data transferred to the third country. Therefore, they would not qualify as supplementary measures.

Use Case 6: Transfer to cloud services providers or other processors which require access to data in the clear

88. A data exporter uses a cloud service provider or other processor to have personal data processed according to its instructions in a third country.

If

1. a controller transfers data to a cloud service provider or other processor,
2. the cloud service provider or other processor needs access to the data in the clear in order to execute the task assigned, and
3. the power granted to public authorities of the recipient country to access the transferred data goes beyond what is necessary and proportionate in a democratic society,[71]

[71] See Articles 47 and 52 of the EU Charter of Fundamental Rights, Article 23.1 GDPR, and EDPB Recommendations on the European Essential Guarantees for Surveillance Measures.

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Use Case 7: Remote access to data for business purposes

90. A data exporter makes personal data available to entities in a third country to be used for shared business purposes. A typical constellation may consist of a controller or processor established on the territory of a Member State transferring personal data to a controller or processor in a third country belonging to the same group of undertakings, or group of enterprises engaged in a joint economic activity. The data importer may, for example, use the data it receives to provide personnel services for the data exporter for which it needs human resources data, or to communicate with customers of the data exporter who live in the European Union by phone or email.

If

1. a data exporter transfers personal data to a data importer in a third country by making it available in a commonly used information system in a way that allows the importer direct access of data of its own choice, or by transferring it directly, individually or in bulk, through use of a communication service,
2. the importer uses the data in the clear for its own purposes,
3. the power granted to public authorities of the recipient country to access the transferred data goes beyond what is necessary and proportionate in a democratic society,

then the EDPB is incapable of envisioning an effective technical measure to prevent that access from infringing on data subject rights.

91. In the given scenarios, where unencrypted personal data is technically necessary for the provision of the service by the processor, transport encryption and data-at-rest encryption even taken together, do not constitute a supplementary measure that ensures an essentially equivalent level of protection if the data importer is in possession of the cryptographic keys.


Max Schrems
@maxschrems
The #Microsoft "supplementary measures" on #SchremsII / #FISA702 in a 5 minute legal bullsh*t analysis (powered by Microsoft PowerPoint)..
(free to copy/used - especially for any legal department)
Duty under Article 6(1)(c) – if there is no duty to comply (illegal request) then you can't provide the data... Challinging it is the logical consquence - nothing new...
Duty under Article 82 GDPR, but without all the limits (no class action, burden of proof on the user, etc) that Microsoft put into it's contract and that would actually limit (!) data subjects' (third party) rights!
Required under Article 32 GDPR - big News.
Yeah, so Microsoft complies with FISA 702 which is the „legal process".
Yeah, so you even disclose that you provided the data of 28.500 to 29.998 accounts in 2019.
Congrats, good job on SCA – but frankly overturend by the Cloud Act and irrelevant when this is about FISA 702.

facebook®

noyb

dsb
Republik Österreich
Datenschutz
behörde

AUTORITEIT
PERSOONSGEGEVENS

EDPS
EUROPEAN DATA PROTECTION SUPERVISOR
The EU's independent data protection authority

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SOLUTION: PRIVACY = FREE FLOW OF DATA

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QUESTIONS & ANSWERS

@maxschrems