Safe Harbor — is the EU guilty of double standards?

The Court of Justice of the EU’s recent decision invalidating Safe Harbor presents a real challenge as to how we should view ‘lawful’ governmental surveillance against a backdrop of supporting the fundamental right to privacy. Whilst it is broadly agreed that we need to strike a balance, we don’t seem to be able to agree on where exactly the balance should lie. Adding to the complexity, our sense of balance is a moving target, influenced by subjective views as to how we perceive dangers to society, and how far we should go to restrict freedoms in order to protect against those dangers.

The issue came into sharp focus for Americans following the 9/11 terrorist attacks in New York in 2001. Sadly, the attacks in Paris in January 2015 and on 13th November 2015 have Europeans revisiting the same issues. Some well-informed commentators in the US have expressed frustration and annoyance at the Schrems decision on the basis that the European Court failed to acknowledge the checks and balances in place within the US PRISM system. The Opinion of Advocate General Bot (given prior to the Court’s judgment) was particularly criticised as being based on a premise that personal data transferred by undertakings such as Facebook Ireland to their US-based parent company are then capable of being accessed by the NSA and by other United States security agencies in the course of a mass and indiscriminate surveillance and interception of such data. While the final Court decision did not express the same view, it was influenced by Snowden, leading some US commentators to question whether the US was being held to a higher standard on national security than exists in the EU. In a New York Times opinion post on 27th October 2015 (‘Europe Is Spying on You’), the Council of Europe Commissioner for Human Rights, Nils Muiznieks, pointed out that European governments in France, Germany, Austria, the UK, Netherlands and Finland are all adopting more extensive surveillance laws, and that by ‘shifting from targeted to mass surveillance, governments risk undermining democracy while pretending to protect it’.

Ironically, France was specifically mentioned as a country that was overstepping the mark when it adopted its new law permitting the indiscriminate analysis of metadata to detect suspicious patterns. The law was criticised by the French Data Protection Supervisory Authority (the CNIL) and by a bipartisan advisory commission to the French National Assembly. Yet, as pointed out by commentators, the French law on surveillance was adopted almost unanimously by the French Parliament.

After the unspeakable horror of another atrocity in Paris, it seems likely that our sense of balance will swing further again. Already some of the commentary in the immediate aftermath of the attacks has gone so far as to blame Edward Snowden for encouraging terrorists to use more sophisticated encryption technologies to avoid detection.

It is difficult to see how Europe can sustain a reasoned objection to US surveillance laws in the context of Safe Harbor without openly confronting its own sense of where privacy sits in a surveillance context. Or maybe the more honest response is to stop criticising the US, Edward Snowden, Facebook or anyone else and just acknowledge that effective anti-terror measures require surveillance by governments, which in turn requires transnational cooperation on a scale not previously achieved.

It would be gratifying if the proposed discussions about Safe Harbor II could find some of this ‘transnational’ middle ground, so that somehow we could strike an approximate balance.

Rob Corbet, Partner at Arthur Cox (Dublin), gives a fresh take on Safe Harbor