European academics file Amicus brief with the Supreme Court in US Warrant case

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A group of European academics, experts in the field of privacy and data protection, have filed an Amicus Brief with the US Supreme court in the US Warrant case, also known as the Microsoft Ireland-case. The amici are represented pro bono by the law firm Holwell Shuster & Goldberg.

The experts are concerned about the consequences for European citizens if the Supreme Court were to follow the position of US government in the case. It would allow the US government to directly claim access to data stored in other countries. According to the experts, this would create various conflicts between U.S. and foreign law.

Because the Government has conceded that the statute under which the warrant issued does not apply abroad, the issue before the Court is whether enforcement of the requested warrant in this case would result in an extraterritorial application. Where an application of a statute would result in conflicts with law in other countries, the application is likely extraterritorial.

This case presents just such a situation. Enforcing the requested warrant would require Microsoft to transfer its customer's data from Ireland to the United States. The European Union's General Data Protection Regulation (GDPR) regulates this transfer, imposing detailed requirements that Microsoft must follow, and that the US warrant does not satisfy. In particular, the GDPR prohibits data transfers that are based solely on a foreign government's unilateral demand. Instead, the GDPR requires the use of the Mutual Legal Assistance Treaty (MLAT) between the United States and Ireland, one of a system of bilateral treaties designed to aid law enforcement in exactly the circumstances present here. But the Government has chosen not to proceed through the MLAT. Microsoft, therefore, cannot produce the data the Government seeks without violating the GDPR.

Furthermore, the experts argue that US government cannot rely on the Council of Europe Convention on Cybercrime (also known as the Budapest Convention). Consistent with EU data protection law, this Convention does not authorize countries to unilaterally collect data stored in other countries.

Finally, the judiciary is not well-situated to anticipate and address the international discord that could result from a conflict between US regulation and the GDPR. It is rather the political branches that have the expertise in foreign relations necessary to weigh the competing considerations involved. The Court should therefore interpret the US regulation to apply only to data stored within the United States, leaving to Congress the decision whether and under what circumstances to authorize the collection of data stored in other countries.

Not for publication: the names of the signatories can be found in the annex to the brief. The brief has been coordinated by Prof. dr. Nico van Eijk from the Institute for Information Law (University of Amsterdam). He and Prof. dr. Prof. Dr. Nikolaus Forgó, who was also part of the group preparing the brief, are available for comments. The group thanks the Lawyers from Holwell Shuster & Goldberg LLP (Dan Sullivan, Kevin Banish, Matt Noller and Vincent Levy) for their pro bono representation.

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