

Safe Harbor declared invalid – the fall-out

On 6 October we reported on the EU Court of Justice's (CJEU's) declaration that the European Commission's decision on the EU/US "safe harbor" arrangement is invalid – see [Safe Harbor declared invalid – what it means for your business](#).

The working party of representatives of the EU data protection authorities appointed under article 29 of the EU Data Protection Directive (WP29) has now published a statement on the short to medium term consequences of the judgment.

The judgment

The CJEU's judgment found that:

- The European Commission's decision approving the US "safe harbor" scheme is invalid, so businesses can no longer rely on it to allow transfer of personal data to the US.
- European data protection authorities can assess the adequacy of third party data protection regimes, even where the Commission has decided that they are adequate, but only the CJEU can overturn the Commission's decisions.

This leaves many European businesses looking for alternative means to justify their transfers to US safe harbor participants, and in the meantime exposed in theory to the risk of sanctions while their transfers continue.

The WP29 Statement

WP29 has moved quickly to publish its statement, but it does not provide the clarity that the data exporting community will be seeking in the short to medium term.

WP29's key conclusions are as follows:

On-going safe harbor transfers

- Consistent with the judgment, transfers relying on the safe harbour are immediately unlawful.
- WP29 does not refer to a possible argument that the safe harbor might still amount to adequate protection for some particular transferred data – reliance on this argument would, therefore, be high risk going forward.
- There is no promise of leniency in the short term, while data exporters assess their options,

Headlines

- US safe harbor invalid.
- Enforcement action unlikely (only) in the very short term.
- Model contracts and binding corporate rules an effective alternative for the time being.
- US suppliers offering model contracts to their customers.
- Review transfers and address the issue quickly.
- EU to seek a longer term solution through negotiation with the US.
- Implications unclear if a political solution cannot be found.

but a statement that exporters should "consider" alternative solutions "in a timely manner" suggests a lenient approach.

Alternative solutions – the short term

- The statement identifies an initial period, which one might call a

"fairly safe harbour", running until the end of January 2016.

- During that period, WP29 takes the view that model contracts and binding corporate rules can still be used to justify transfers to the US.
- Even over this timescale, however, there is a qualification: authorities may still investigate particular cases and exercise their powers to protect individuals. Presumably, however, they will do so only where real prejudice is shown.

The longer term

- The statement encourages the member states and the EU institutions to negotiate with the US to find a long term solution.
- The current negotiations towards a replacement for the safe harbour could be "a part of the solution".
- The issue identified by the CJEU – relatively indiscriminate access by US governmental agencies to EU data – would need to be addressed.
- It is not clear what will happen at the end of the "fairly safe harbour" period if no EU / US agreement is reached. The statement refers to "all necessary and appropriate actions", possibly including "coordinated enforcement actions".
- The statement leaves open the question of the medium to long term validity of the model clauses and binding corporate rules.

Co-ordinated approach

- The authorities will seek to adopt a "robust, collective and common" position on the implications of the judgment.

The German position

In the meantime, the data protection authority of Schleswig-Holstein, which takes the lead on international transfer issues in Germany, has issued its own, more conservative, position paper, concluding that:

- According to the logic of the CJEU judgment, the Commission's model contracts cannot be regarded as adducing adequate safeguards to protect transferred data, since they do not prevent US authorities from exercising their access rights.
- While data protection authorities cannot overturn the Commission's decisions on the model contracts, they can (under the decisions themselves) decide that US law frustrates the protection provided by the model contracts.
- The German authorities should therefore consider orders prohibiting transfers to the US on the basis of the model contracts.

Longer term implications

The EU will be striving over the coming months to reach a new deal with the US. It is difficult to see, however, what concessions the US might realistically make to address the CJEU's concerns regarding access to European data. The US security agencies are not going to be quick to give up their relatively generous data access rights.

A political solution of some kind will have to be reached. The EU authorities and courts may ultimately

conclude that the model contracts and binding corporate rules are not sufficient to allow data transfer to the US. If they do, and no alternative solution is provided, the implications for international trade, and the political fall-out, will be serious.

For the longer term, the legislators may seek to address the issue through changes to the proposed EU Data Protection Regulation – likely to come into effect in 2018. Even this may be difficult however, since the CJEU's analysis focussed on the EU Charter of Fundamental Rights as much as on the Data Protection Directive. A change to the Charter would be difficult and, to put it mildly, politically controversial.

What to do now

For the time being, European businesses need to:

- identify the transfers that they make to US "safe harbor" participants;
- put in place model contracts (or other arrangements) to justify those transfers; and
- where necessary (e.g. in France and Spain) seek regulatory approval of the use of the model contracts.

Many of the major US service providers have already taken steps to help their customers to address the issue. Salesforce, for example, has published an "addendum" incorporating the model contracts into its customer contracts. Amazon and Microsoft already offered model contracts to their European customers. And in the medium term, watch developments...

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Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

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