

A New Safe Harbor? The "EU-US Privacy Shield"

On 2 February, the European Commission's College of Commissioners approved a new political agreement in relation to the export of data to the US, the "EU-US Privacy Shield".

Background

Following the decision of the European Court of Justice on the 6 October 2015 to declare the old EU/US Safe Harbor Framework invalid, representatives of the European Commission and the US Department of Commerce have been negotiating, and consulting with business and industry representatives, to reach a new agreement which would adequately address concerns in relation to the protection of data transferred from the EU to the US.

EU data protection laws prohibit transfers of personal data to countries outside the European Economic Area which do not ensure "adequate" protection for such transferred data. The Safe Harbor Framework had been a key tool used by businesses to address this prohibition and the decision rendered a significant number of on-going data transfers potentially unlawful.

The New Arrangement

The new arrangement contains enhanced obligations on companies in the US to protect the personal data

of EU citizens and further monitoring and enforcement powers for the US Department of Commerce and Federal Trade Commission, including increased cooperation with European Data Protection Authorities.

In particular, the US has committed to restricting public authorities' general access to personal data transferred from the EU by imposing clear conditions of access, set limitations and increased oversight. Individuals will also have the right to raise any questions or issues with a new dedicated Ombudsman based in the US.

Key Developments for US Based Companies Importing Data from Europe

- Rigorous obligations on how personal data will be processed and how individual rights are guaranteed
- Requirement to publish protection commitments, which will be enforceable by the US Federal Trade Commission

- Compliance with decisions of European Data Protection Authorities
- Time limits to respond to complaints from European citizens

Conclusions

A draft "adequacy decision" is to be delivered by the European Commission in the next few weeks, the next stage being the adoption by the Commission's College of Commissioners following input from the Article 29 Working Party and consultation with the Article 31 Committee. In the interim it is likely that companies cannot safely rely on Safe Harbor and must rely on other forms of protection such as model contracts and binding corporate rules.

The US will make preparations to implement the new framework including monitoring mechanisms and the new Ombudsman.

The agreement has faced criticism from privacy activists and further legal challenge may follow.

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