



October 2015

## Data protection: "safe harbor" no longer safe

As widely reported in the press, the Court of Justice of the European Union (CJEU) has declared invalid the European Commission's earlier decision approving the existing data transfer "safe harbor" arrangements with the US. EU data protection regulators have recently provided further guidance on what this means for EU businesses.

Safe harbor arrangements are important because the EU Data Protection Directive prohibits the transfer of personal data to countries outside the EEA without consent of the data subject unless certain conditions are met – but many European businesses need to be able to transfer data to the US (for example, because they use cloud storage services which are based on servers located in the US).

### Is there a way around it?

**Other methods of legally transferring personal data** outside the EEA include signing up to "binding corporate rules" for intra-group transfers, entering into an agreement with the transferee based on model clauses approved by the European Commission, obtaining consent from the individual data subject, or making the data anonymous (so that it can no longer be linked to particular individuals). Binding corporate rules must be approved by national data protection regulators, which takes time; they therefore only offer a solution in the longer term and only in relation to intra-group transfers (not, for example, for European businesses which use third parties based in the US to process their data). Getting consent (probably by building it into terms of trade with customers) is unlikely to provide a quick fix and anonymising data is not always possible (although it is worth exploring where practicable).

In view of these difficulties and unless it is practical to simply stop transferring personal data to the US altogether, most businesses affected

### What's the problem?

In the US, laws protecting personal data vary widely from state to state.

As a result, the European Commission has not felt able to declare that US law provides equivalent protection to that which exists within the EEA (although it has done this for a small number of other non-EEA countries). It therefore negotiated arrangements with the US government to create the "safe harbor" regime.

Until the CJEU's ruling on 6 October 2015, this allowed European businesses to transfer personal data to the US legally in cases where the transferee had signed up to the scheme (as many businesses have, particularly in the IT sector).

However, the CJEU's decision means that this transfer mechanism is no longer valid – so businesses which have been relying on it will now have to find other ways of ensuring that they comply with EU data protection law.

# TRAVERS SMITH

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by the safe harbor decision are likely to put in place agreements using the Commission's model clauses in order to achieve compliance. Some businesses might consider this to be an administrative burden, but for most it is relatively straightforward. Keep in mind that the model clauses may be vulnerable to the same objections which caused the CJEU to declare the safe harbor arrangements invalid. (The CJEU was referred to the issues flagged by Edward Snowden regarding the surveillance activities of the US government. These could apply just as much to the model clauses). But for the time being the EU data protection regulators recommend their use. In some cases, there may also be exceptions in the legislation which help; for example, personal data can be transferred where it is necessary for the performance of a contract.

## Is there a deadline to act?

EU data protection regulators have made clear that the safe harbor arrangements are not currently usable, and that businesses need to put in place a viable alternative now, though co-ordinated enforcement action won't be taken until the end of January 2016. But this won't protect you if someone complains in the meantime and you haven't got that alternative in place. This doesn't just stop at putting the necessary paperwork in place – it also means complying with the clauses in real terms. The more you can demonstrate at a practical level, a commitment to effective data security, the better placed you will be for dealing with complaints of any nature.

It is also worth bearing in mind that the entire EU data protection framework is also under review, with new legislation expected to be agreed next year for implementation in 2017/18. The new laws are anticipated to increase the burden on businesses to ensure data security compliance, so any measures which you take now to ensure data security, both at home and when transferring personal data outside the EEA, should only help to put you in a better position to comply with new laws going forward.

## HOW WE CAN HELP

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If you would like to discuss the issues raised in this briefing please speak to one of the contacts listed below, who are experts in data privacy law.

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