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## **Court of Justice of the European Union declares EU Commission's U.S. Safe Harbor Decision invalid**

The Court of Justice of the European Union (the "CJEU" or the "Court") today invalidated the European Commission's decision on the adequacy of the protection provided by the safe harbor privacy principles (the "Safe Harbor Decision") of July 26, 2000.<sup>1</sup>

The case arises out of a complaint by Maximilian Schrems, a Facebook user, to the Irish Data Protection Commissioner, arguing that the transfer of his personal data from Facebook's servers in Ireland to servers located in the United States should be prohibited because U.S. law and practice do not ensure adequate protection of personal data held in its territory. Mr. Schrems claimed that his fundamental privacy rights were insufficiently protected in the United States as a result of the U.S. Intelligence services' unrestricted access, as revealed by Edward Snowden. The Commissioner rejected the complaint as unfounded and declined to investigate, on grounds that the Safe Harbor Decision established that the United States ensured an adequate level of protection and was binding on the national data protection authority.

Mr. Schrems then turned to the Irish High Court for judicial review of the Irish Commissioner's refusal to investigate. The Irish High Court stayed the proceedings and referred two questions to the CJEU for clarification:

- whether a national supervisory authority, in the course of determining a complaint that personal data is being transferred to a third country the laws and practices of which are claimed by the complainant not to contain adequate protections for the data subject, is absolutely bound by the Commission's finding to the contrary contained in the Safe Harbor Decision; or alternatively
- whether the national supervisory authority may and/or must conduct its own investigation of the matter in the light of factual developments since the Safe Harbor Decision was published.

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<sup>1</sup> Commission Decision 2000/520/EC of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbor privacy principles and related frequently asked questions issued by the US Department of Commerce.

Under the EU Data Protection Directive<sup>2</sup> the transfer of personal data from the EU to a country outside the EU/EEA may only take place if that third country ensures an adequate level of protection of the data. Article 25(6) of the Data Protection Directive enables the European Commission to adopt a decision on whether “a third country ensures an adequate level of protection ... by reason of its domestic law or of the international commitments it has entered into ... for the protection of the private lives and basic freedoms and rights of individuals. Member States shall take the measures necessary to comply with the Commission's decision.”

The 2000 Safe Harbor Decision was such an adequacy decision, designed to facilitate the transfer of personal data between the EU and the United States by creating a presumption of equivalent protection by U.S. companies self-certified under the safe harbor scheme set up by the U.S. Department of Commerce.<sup>3</sup>

Today the CJEU held that the Commission did not comply with the requirements of Article 25(6) of the Data Protection Directive when adopting the Safe Harbor Decision. According to the Court, the Decision does not contain any statement on whether the United States itself ensures an adequate level of protection by reason of either domestic law or international commitments. Additionally, the safe harbor scheme is only applicable to U.S. firms, but does not bind U.S. public authorities. Under U.S. law, national security, public interest, and law enforcement requirements would prevail over the safe harbor principles, and in case of conflict between the two, U.S. firms would have to disregard the protective rules of the safe harbor scheme. The Court concluded that this would allow U.S. public authorities to interfere with the fundamental rights of persons whose data was transferred to the United States, and held that “legislation permitting the public authorities to have access on a generalised basis to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life.”

While the Court acknowledged that an “adequate level of protection” is not tantamount to an “identical” level, it found that the wide derogations allowed for national security, public interest, or law enforcement requirements in the Safe Harbor Decision do not provide the required adequate level of protection for personal data transferred from the EU/EEA, as protected by the Directive and Articles 7 and 8 of the Charter of Fundamental Rights.

The Court further held that the Decision does not indicate that U.S. law provides individuals with access to sufficient legal remedies in the event of a potential violation of

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<sup>2</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

<sup>3</sup> <http://www.export.gov/safeharbor/index.asp>.

their privacy rights after a transfer, contrary to the fundamental right of effective judicial protection.

On the question of the powers of national supervisory authorities, the Court took the view that a Commission adequacy decision does not eliminate or reduce the powers of the national supervisory authorities to oversee personal data transfers to third countries. In particular, the Court held that transfers of personal data to third countries that have been the subject of a Commission decision are not excluded from “*the national supervisory authorities’ sphere of competence.*” National data protection authorities are therefore able “*to examine with complete independence*” whether a transfer of personal data respects the requirements of the Data Protection Directive. While the Court stressed that it alone had jurisdiction to declare that a Commission decision under the Data Protection Directive was invalid, the national supervisory authorities must be able to object before the national courts to the validity of Commission adequacy decisions; the courts could then make a reference for a preliminary ruling if deemed appropriate.

In a press conference this afternoon<sup>4</sup>, the European Commission’s First Vice-President Frans Timmermans described the Court’s judgment as an important step towards upholding the European citizens’ fundamental rights to data protection. Mr Timmermans noted that the European Commission continues to work closely with the U.S. authorities on a renewed and safe framework for the transatlantic transfer of personal data. He was joined by Commissioner Vera Jourovà, who stated that transatlantic data flows can continue without the safe harbor scheme, since the EU data protection rules provide for alternative mechanisms, such as standard contractual clauses<sup>5</sup> or binding corporate rules.<sup>6</sup>

It now becomes urgent for EU and U.S. authorities to advance on their plans of 2013 to put the transatlantic transfer of personal data on a solid legal footing. For now, data controllers established in EU/EEA can no longer rely on the safe harbor certification of any data recipient established in the United States. Standard contractual clauses and binding corporate rules do provide alternative transfer mechanisms for EU/EEA data controllers.

Further detailed reporting on the judgment and its legal implications will follow. We will monitor further developments and explore how transatlantic data flows will be affected by today’s judgment.

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<sup>4</sup> Speaking points available at [http://europa.eu/rapid/press-release\\_STATEMENT-15-5782\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-15-5782_en.htm).

<sup>5</sup> See [http://ec.europa.eu/justice/data-protection/international-transfers/transfer/index\\_en.htm](http://ec.europa.eu/justice/data-protection/international-transfers/transfer/index_en.htm).

<sup>6</sup> See [http://ec.europa.eu/justice/data-protection/international-transfers/binding-corporate-rules/index\\_en.htm](http://ec.europa.eu/justice/data-protection/international-transfers/binding-corporate-rules/index_en.htm).

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