

# FINDING A NEW SAFE HARBOR

## International Data Transfers and Recent EU/US Negotiations – The EU/US Privacy Shield



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European data protection law prohibits the transfer of personal data from the European Union to any country outside the European Economic Area unless that country is deemed to have adequate protection for personal data or another exemption under European data protection law applies. In the case of Ireland, Section 11 of the Data Protection Acts, 1988 and 2003 sets out the relevant prohibition, and the exceptions to that prohibition. The prohibition applies not only to data transfers to countries outside of the EEA, but also to circumstances where an entity outside the EEA has remote access to personal data hosted within the EU.

In the case of US companies seeking to process EU personal data in the United States one of the main options was to adhere to the “Safe Harbor” scheme

### WHAT IS SAFE HARBOR?

The Safe Harbor scheme was a framework agreed between the United States and the EU Commission whereby personal data may be transferred to the United States. US companies which agreed to adhere to the Safe Harbor scheme were deemed to provide an adequate level of protection for personal data for these purposes.

As such, EU companies using service providers based in the US, or EU-based subsidiaries of US companies, could transfer personal data to their Safe Harbor certified service providers or parent companies in compliance with European data protection laws.

### THE SCHREMS CASE

Schrems –v– Data Protection Commissioner concerned a High Court case taken by the Austrian privacy campaigner Max Schrems against the Irish Data Protection Commissioner. Schrems had complained to the Irish Data Protection Commissioner about Facebook Ireland transferring subscriber personal data to the United States, in circumstances where, he claimed, the laws and practices of the United States offered no real protection against State surveillance.

The Irish Data Protection Commissioner refused to investigate Schrems’ complaint on a number of grounds,

including that it was prevented from investigating allegations challenging a binding decision of the European Commission (Decision 2000/520) as to the adequacy of the protection for personal data under the Safe Harbor scheme.

The Irish High Court sought a preliminary ruling from the Court of Justice of the European Union (“CJEU”) on the matter.

The CJEU delivered its much anticipated ruling on 6 October last. The CJEU found, in essence, that the existence of Commission Decision 2000/520/EC approving Safe Harbor did not prevent the Irish Data Protection Commissioner from investigating a claim as to the adequacy of the level of protection for personal data transferred by Facebook Ireland under that scheme to the United States.

More significantly, however, the CJEU declared the Safe Harbor scheme invalid and thereby followed the preliminary opinion which had been issued by Advocate General Bot. A.G. Bot commented that:

“the revelations about the practices of the United States intelligence services as regards the generalised surveillance of data transferred under the safe harbour scheme have shed light on certain insufficiencies specific to Decision 2000/520”.

The CJEU noted that the access/surveillance complained of was, in fact, permitted by the broad wording of the derogations to the privacy requirements set out in Decision 2000/520. On that basis, the CJEU, following AG Bot’s opinion, concluded that the Safe Harbor scheme could not be regarded as ensuring an adequate level of protection for personal data transferred from the EU to the US, and therefore that the Safe Harbor scheme was invalid.

### ALTERNATIVES TO SAFE HARBOR

Since the CJEU decision last October, there has been significant concern and uncertainty in relation to the continued ability of US companies to process personal data received from companies in the EU. It is estimated



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that more than 4,000 organisations had signed up to the Safe Harbor scheme.

Pending a successor to safe harbour, any on-going or intended transfers instead need to be based on one of the alternative grounds for transferring personal data outside of the EEA. These include:

- The execution of data transfer agreements, based on the EU Commission approved “model clauses” between the relevant EU transferor and US transferee entities; or
- in the case of multinational organisations, putting in place “binding corporate rules” (i.e. rules agreed between members of the group which facilitate the transfer of personal data from group companies based in the EEA to group companies located in countries outside the EEA; or
- relying on the unambiguous, freely given and fully informed consent of the person whose personal data is to be transferred (not generally recommended, as it can be difficult to satisfy the requirements for a valid consent).

## POTENTIAL SUCCESSOR TO SAFE HARBOR – THE EU/US PRIVACY SHIELD

Following an intense three month period of negotiations, the US and EU authorities announced on 2 February an agreement on a proposed successor to Safe Harbor, known as the EU-US Privacy Shield.

The main features of the high level agreement are as follows:

- **Strong obligations on companies handling Europeans’ personal data and robust enforcement:** US companies wishing to import personal data from Europe will need to commit to robust obligations on how personal data is processed and to ensure that individual rights are protected. The US Department of Commerce will monitor that companies publish their commitments, which makes them enforceable under US law by the US Federal Trade Commission.

- **Safeguards and transparency obligations on US Government access:**

Access by US public authorities to EU personal data for law enforcement and national security purposes will be subject to clear limitations, safeguards and oversight mechanisms. In addition, data transferred to the United States will not be subject to indiscriminate mass surveillance. The European Commission and the US Department of Commerce will conduct an annual joint review to monitor the operation of the EU/US Privacy Shield.

- **Protection of EU citizens’ rights -**

**Redress possibilities:** US Companies will be obliged to reply to EU citizen complaints within specified time frames. European Data Protection Authorities will be able to refer complaints to the US Department of Commerce and the Federal Trade Commission. Alternative Dispute Resolution will be free of charge to the individual. A new US Ombudsman will review complaints relating to possible access by national intelligence authorities.

The EU and US authorities are now focused on the preparation of the detailed text of the new agreement.

The European Commission is preparing a draft “adequacy decision”, which could be adopted after obtaining the advice of the Article 29 Working Party (a body consisting of the national data protection regulators in each EU member state) and after consulting with a committee composed of representatives of EU Member States.

The US authorities are due to finalise the necessary preparations to put in place the new framework, monitoring mechanisms and the new Ombudsman.

At its meeting on 3 February, the Article 29 Working Party was cautious in its reaction to the new agreement. It welcomed the conclusion of EU-US negotiations, but reserved its opinion until it has received and considered the relevant documents in order to assess whether the new EU-US Privacy Shield fully deals with the issues raised by

the CJEU decision which invalidated the Safe Harbor scheme.

The Article 29 Working Party indicated that it would also examine the extent to which the new agreement will provide a legal basis for the continued use of other means of transferring personal data from the EU to US, including the use of model clauses and binding corporate rules. The Article 29 Working Party indicated that, pending the outcome of its assessment, model clauses and binding corporate rules can still be used for personal data transfers from the EU to the US.

## CONCLUSION

Given the uncertainty which resulted from the CJEU decision invalidating the safe harbor scheme, the agreement reached between the EU and US authorities is a welcome development. However, it is still likely to be some months before companies will be able to rely on the new EU-US Privacy Shield to facilitate personal data transfers from the EU to the US.

Once full details of the new scheme are released, US companies which were already self-certified under the old Safe Harbor scheme will need to determine any additional actions which may be required to comply with the new EU-US Privacy Shield.

In the meantime, US companies which had previously relied exclusively on Safe Harbor as a means of transferring personal data from the EU should consider alternative options including using the EU approved model clauses in agreements with the EU based companies from whom they are receiving personal data.

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