

# The End of “Safe Harbor” for E.U./U.S. Data Transfer: How Can Companies Transfer Personal Data and Remain Compliant?

*Presented by:*

The FACC-NY, Foley Hoag LLP and the Consulate General of France in New York

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# The End of "Safe Harbor" for E.U./U.S. Data Transfer: How Did We Get There?

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## Articles 25 and 26

The transfer of personal data to a third country is allowed:

- if the third country ensures an adequate level of protection; the Commission can assess this, enter into negotiations to remedy the situation and issue an "adequacy decision";
- if the third country does not ensure an adequate level of protection but:
  - certain conditions are fulfilled (e.g. consent) or
  - the controller adduces adequate safeguards (e.g. appropriate contractual clauses).

- Commission decision 2000/520 of 26 July 2000 on the adequation of the protection provided by the safe harbour privacy principles.
- Commission decisions on Standard Contractual Clauses (SCC)
- Working papers of the WP on Binding Corporate Rules (BCR)
- Commission decisions relating to countries that ensure adequate protection (Canada, Switzerland, Israel etc...)

Edward Snowden



Maximilian Schrems



Schrems Decision of the CJEU of October 6, 2015:

- the Safe Harbour Commission decision is invalid,
- an adequacy decision issued by the Commission « *does not prevent a national DPA from finding that the law and practices in force in the third country do not ensure an adequate level of protection* ».

Commission draft adequacy decision released on February 29, 2016

- Same mechanism as the Safe Harbor scheme (self certification).
- Stronger obligations on US companies.
- New means of redress for European citizens.
- Letters explaining rules on the access to Europeans data by US public authorities for national security purposes.

WP has « strong concerns:

Commercial aspects:

- application of the purpose limitation principle is unclear,
- data retention principle is not expressly mentioned,
- no specific wording on protection against automated individual decisions based solely on automated processing,
- onwards transfers to third countries should provide the same level of protection,
- new redress mechanisms are too complex and ineffective.

Access by US public authorities:

- massive and indiscriminate collection of data originating from the EU is not excluded.



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# The End of the “Safe Harbor” Rule for E.U./U.S. Data Transfer: EU v. U.S. Cultural/Political/Legal Differences and Why They Matter

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- What are the differences?
- Can the U.S. and EU mesh despite these differences?
  - Reactions to the Privacy Shield
  - Next steps:
    - for EU and U.S. authorities
    - for businesses



## ■ Civilian Regulators

- EU is consolidated, with individual data protection authorities for enforcement; U.S. is fragmented, both by state and federal, and by type of data.
- These differences reflect fundamental legal and cultural differences in the approach toward individual privacy.

- **Pros:** mainly EU and U.S. officials and certain professional organizations
  - Vera Jourova (EU Justice Commissioner)
  - Penny Pritzker (U.S. Secretary of Commerce)
  - John Higgins (Director general of trade association DigitalEurope)
- **Cons:**
  - Max Schrems (the Austrian lawyer/plaintiff)
  - Members of the European Parliament:
    - Jan Phillipp Albrecht (German Green who participated in the elaboration of the GDPR)
    - Sophie in't Veld (Dutch)
- **Mixed:**
  - Article 29 Working Party, the body of European Data Protection Authorities.

## ■ Privacy Shield

- The EU Privacy Directive states that a committee composed of representatives of all Member States must also issue an opinion on the Privacy Shield.
- The opinions of that Committee and of the Article 29 Working Party are not binding, so the European Commission could still issue a favorable adequacy decision on the current version of the Privacy Shield.
- However, the ECJ also ruled in the Schrems case that EU member DPAs are not bound by the Commission's adequacy decisions.
- The Privacy Shield is likely to be challenged in the ECJ even if the Commission approves it (which could come in June).

## ■ Other Transfer Mechanisms?

- Article 29 Working Party must still consider whether transfer mechanisms such as Standard Contractual Clauses and Binding Corporate Rules can still be used.



Thank you!