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# ECJ declares Data Transfer to US Illegal

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**Arnd Böken, Lawyer**

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### The court ruling

On 6 October 2015, the Court of Justice of the European Union (ECJ) ruled that the Irish Data Protection Commissioner is obliged to investigate Facebook's data transfer from Ireland to the US. In addition, the court held that the EU Commission's "Safe Harbor" decision (Decision 2000/520) was invalid, making the majority of data transfers from the EU to the US illegal (*Court of Justice of the European Union, judgment of 6 October 2015, Schrems vs. Irish Data Protection Commissioner, C-362/14*).

In 2013, the Austrian student, Maximilian Schrems, asked the Irish data protection commissioner to investigate Facebook's data transfer to the US. The commissioner refused, saying data transfers to the US were covered by the EU Commission's Safe Harbor decision. Schrems brought suit to the Irish High Court, which referred the matter to the ECJ. In its judgment rendered on 6 October 2015, the ECJ not only ruled that the data protection commissioner has to investigate Facebook's data transfer, but that the whole EU Commission's decision "Safe Harbor" was invalid, saying that EU citizens' personal data transferred to the US would become subject to intelligence agencies' excessive surveillance measures. The EU Commission's Safe Harbor decision from 2000 violated EU citizens' fundamental rights by not taking into account US security agencies' massive surveillance.

### What is Safe Harbor?

EU law only allows the export of personal data to other countries outside the EU if those countries provide adequate privacy protection. According to EU law, the US in general does not provide such adequate protection. In contrast to the EU, data privacy is not a fundamental right in the US and there are no comprehensive laws protecting privacy. To facilitate data transfer to the US, the EU Commission rendered the Safe Harbor decision in 2000 consisting of seven principles US companies must adhere to. Safe Harbor requires self-certification by the US company and registration with the Federal Trade Commission. To date, more than 5,000 US companies have made use of this self-certification to facilitate transfer of personal data.

### **What is the impact of the ECJ ruling?**

Although the Court requires the Irish Data Protection Commissioner to investigate Facebook's data transfer, the ECJ ruling is unlikely to have much impact on Facebook. Facebook's data transfer to the US is not based on Safe Harbor, but user consent. The ruling mostly affects companies from other business sectors. Safe Harbor is by far the most important legal means to enable data transfer to the US. Many US companies with branches in Europe or European companies with subsidiaries in the US rely on this very practical and easy-to-handle programme. Moreover, many mid-sized companies doing business with the US rely on the US company's Safe Harbor certification to transfer personal data.

Also affected are small- and medium-sized German and other European companies using the services of big US cloud providers. Such services are often based on the providers' Safe Harbor certificate allowing data flows to the US.

From 6 October 2015 onwards, Safe Harbor is no longer a legal basis for such data processing.

### **The ruling's immediate effect**

The ECJ ruling came as a surprise. Schrems, in his lawsuit before the Irish High Court, only implicitly challenged the Safe Harbor decision, but wanted the data commissioner to investigate Facebook's data transfer in general. Following the court hearing in March 2015, the Advocate General in his opinion issued on 23 September 2015 moved to declare the Safe Harbor decision invalid.

Although the ruling came as a surprise, German data protection authorities are expected to apply it immediately. For one thing, the ECJ ruling is binding, making all such data transfer as of 6 October 2015 illegal; for another, German data protection authorities could refer to their own declaration issued in July 2013, criticising Safe Harbor and calling on the EU Commission to suspend it following the Snowden revelations.

### **Legal means to transfer data**

All companies transferring data to the US have to review their data transfer policy immediately. All data transfer based on the Safe Harbor decision is now illegal and could result in hefty fines.

Instead of relying on Safe Harbor, companies could enter into EU Model Clauses. Model Clauses are standardised contracts issued by the EU Commission. The parties to such contracts must detail, inter alia, the kind of transferred data, the purposes of processing and the measures taken to protect such data. Several additional requirements have to be observed to allow data transfer to the US recipient.

Companies using such EU Model Clauses should be very careful when completing the standard agreements and should also check very carefully that all additional requirements are met.

US companies doing business in Europe, in Germany in particular, should prepare EU Model Clause Agreements and should be ready to enter into such to allow data export by their European trade partners. The same goes for US companies with European branches or subsidiaries.

For company groups, binding corporate rules could be another means to allow international data transfer. Until now, binding corporate rules have only been implemented by some big international groups, which requires longer preparation.

Data transfer is also allowed if the data subject agrees. The transfer of HR data is often based on employee consent. Transferring customer data is more difficult because customer's consent is difficult to obtain and the declaration of consent is invalid in some cases. Most recently, German courts have declared several clauses in Apple and Google's terms and conditions allowing data processing unlawful.

### **What now?**

Until 6 October 2015, many German and European companies transferring data to the US and their US recipients could rely on the US recipient's Safe Harbor certificate, allowing transfer of personal data.

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From now on, European and US companies as well as international groups have to completely review their data transfer policies to ensure all legal requirements for data transfer are met. Furthermore, they must determine whether to use EU Model Clauses, data subject consent or other legal means to allow data export.