

Newsletter

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Contacts

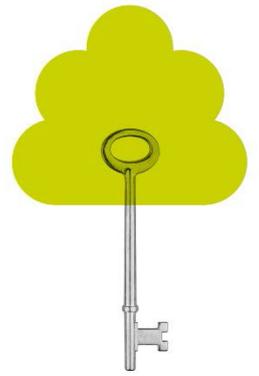
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What to do now there is no Safe Harbour

From 2000 and up until just yesterday, thousands of companies have relied upon the [Safe Harbour Agreement](#) to transfer personal data to the United States and process such data there.

As of today, this is not possible anymore. Yesterday, thousands of international data transfers to the US became illegal due to a ruling of the European Court of Justice (ECJ), as did the operation of companies representing a good chunk of both Nasdaq and the transatlantic balance of payments.

I.- What was the scenario until yesterday?

The [46/95 Directive](#) sets forth the safeguards every European memberstate must adopt to ensure privacy is respected. This harmonized framework is the basis for free intra-community circulation of personal data and facilitates operations of social networks and other services (digital or otherwise).

The Directive establishes several options to transfer data outside the EU. As a general rule, it only allows transfers authorized by the regulator (the [Spanish Data Protection Agency](#) or "SDPA"). But in some instances it is not necessary to request such authorization (which takes months). This is the case of transfers made towards countries that grant "equivalent protection" for privacy in accordance with the assessment of competent authorities (whether national or European).

The state of affairs regarding privacy laws in the US disavows any statement that it grants "equivalent protection". But allowing data transfers between the EU and the US is essential for an important part of the economy (especially, digital economy). So a deal was stricken: the US would establish a program of safeguards that its companies could voluntarily adopt and Europe would recognize transfers to such companies as made "towards a country of equivalent protection".

The [Safe Harbour Agreement](#) was then born and engraved through the [2000/520 Decision of the European Commission](#), serving for more than 10 years as basis for the transatlantic operation of online stores, social networks, recruitment companies and activities of all sorts.

II.- What happened yesterday?

The [Snowden scandal](#) had confirmed what many already feared: that the safeguards offered by Safe Harbour are more apparent than real and that the US government (through the [NSA](#) and the [Department of Homeland Security](#)) regularly accesses personal data in indiscriminate fashion. This concerned the EU and, also, a Facebook user (Schrems) for whom this revelation implied invalidity of both the Safe Harbour arrangement and the data transfer Facebook was carrying out thereunder.

Schrems filed a claim in this sense and the [ECJ ruling of October 6th](#), solving a prejudicial question, has upheld his views (as anticipated by the [advocate general](#)). According to the ECJ, the [2000/520 Decision](#) is null and void insofar as it enables the US government to access personal data without the corresponding judicial overview and insofar it curtails the authority of national regulators (the SDPA). The ECJ further considers such regulators are bound by law to investigate any claim in this regard, even when they cannot by themselves render the Decision null (without an ECJ ruling).

III.- What should be done now?

In theory, once the Decision became null, every transfer the same enabled also became illegal and should cease. But it is not conceivable that transfers be suspended overnight nor is it possible, within such short deadline, to do what is needed in order to make the transfers legal under any of the other tools provided for by the Directive. The Commission knows this [and has announced a meeting of European privacy authorities to decide what to do in practice](#). The SPDA knows it too and is informally recommending that nothing be done until a formal recommendation is released.

It is undoubtful measures will have to be undertaken to legalize existing transfers under any of the other instances legally provided for (for example, by adopting "[model-clause arrangements](#)" and requesting appropriate authorization). But we also believe, under the case-law establishing the [principle of legitimate expectations](#), that the SPDA is obliged to permit a transitory period to make any such changes without fear to fines.

And we at Eversheds Nicea may help you through this transition.

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