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## Safe Harbor overturned

Reasons and ramifications of the European Court of Justice's decision on the invalidity of Safe Harbor

The European Court of Justice (ECJ) ruled on 6 October 2015 that the European Commission's decision, according to which the USA ensures an adequate level of protection for personal data transmitted from the EU, is invalid. On 21 October 2015, German supervisory authorities for data protection published their position regarding the Safe Harbor decision which implies that current options for transferring data to the US are very limited. Many companies are now worrying that they will draw the attention of regulators and could face significant fines. But if companies want to continue transferring personal data to the US, alternatives are limited.

### Background

A basic principle of European data protection legislation is that the transmission of personal data to third countries (e.g. the United States) is allowed only when the transmitted data is at least as well protected there as it is within the jurisdiction of EU's Data Protection Directive. The European Commission can "determine" an adequate level of data protection if the third country can ensure a reasonable level of data protection through national law or international commitments. The Commission did so in its Safe Harbor decision on 26 July 2000, when it allowed companies to transmit personal data from the EU to the United States, provided these receiving companies publicly commit to the Federal Trade Commission to adhere to the principles laid down in the Safe Harbor Agreement, and thus guarantee a "safe harbor" for European data. With the ECJ verdict, this decision is no longer valid.

### ECJ decision

The ECJ pointed out that the Commission failed to examine key items when determining the US's adequate level of data protection according to the Safe Harbor Agreement. This includes, among other issues, questions as to whether and under what circumstances government bodies in accordance with US law can demand access to personal data, and whether affected parties can avail themselves of legal protection. The ECJ ultimately did not determine whether there is an adequate level of data protection in the US. However, the mere fact that the aforementioned items were not examined led the Court to view the Safe Harbor decision as being invalid.

## Position of German supervisory authorities

On 21 October 2015, German supervisory authorities for data protection have published their [position regarding the Safe Harbor decision](#). In this position they draw consequences from the safe harbor decisions and lay out their perspective on the limited amount of alternatives for transferring personal data to the US:

- In accordance with the ECJ's decision, the Safe Harbor mechanism is no longer applicable; accordingly, supervisory authorities have announced immediate prohibition orders for the transfer of personal data.
- Binding corporate rules will no longer be approved if they concern transferring data to the US. The same is true for data export agreements subject to approval. The supervisory authorities have thus far not announced any intentions to revoke existing rules. What remains unclear is how the German supervisory authorities plan to work with the binding corporate rules approved by other member states following the Safe Harbor decision.
- Standard Contractual Clauses are being scrutinized as well, but with regards to [the statement made by the Article 29 Working Party](#), consisting of representatives of the national data protection authorities of the EU member states, it can be assumed that until 31 January 2016 extensive enforcement measures will not be implemented. Until then, Standard Contractual Clauses can conceivably be used as a legal basis for transferring personal data to the US.
- Consents to transferring personal data are assessed as an admissible legal basis only in very exceptional cases. However, these will not justify long-term or regular data transfer.

The supervisory authorities for data protection are calling on companies "to promptly set up their data transfer procedures in line with data protection requirements."

## Ramifications

Each company must now ask the following questions:

- Is personal data being transferred to the US?
- If so, on what legal basis?
- What are the possible courses of action?

All companies first need to check whether and which personal data is being transferred to the United States on the basis of the Safe Harbor Agreement. In doing so, they need to consider any transfers by third parties, such as cloud providers or other external data processors. Companies must work together with their US partners to come up with alternatives if data is being transferred to the United States.

Those companies without binding corporate rules or approved data export agreements will be able to fall back temporarily on Standard Contractual Clauses until the end of January 2016 and, in exceptional cases, on granted consents. However, based on statements issued by the German supervisory authorities, it is also clear that companies currently no longer have a robust legal basis. In light of the German supervisory authority's clear position, companies are well advised to keep the transfer of personal data to the US to a minimum, even if just in the interim, and possibly redesign existing data transfers. Legal certainty can only be achieved by way of a political solution with the US, which is being called for by all sides. Until then, German companies cannot rely on being granted a grace period by the German authorities; rather, they must proactively ensure data protection compliance, also for data transferred to the US.

We will be glad to discuss with you the right measures for your company and how you can efficiently implement these in a timely fashion. Please feel free to contact us to discuss further actions and individual solutions.

For continuously updated information please visit [www.kpmg.de/safeharbor](http://www.kpmg.de/safeharbor)

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