RPC

The future of "Safe Harbor"

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The future of the "Safe Harbor" is uncertain. Questions about its effectiveness have been brought to the fore in the wake of the privacy and data security scandal that followed Edward Snowden's revelations about surveillance by US government agencies. The Article 29 Working Party (WP29), a European advisory body on data protection and privacy issues, is the latest organisation to wade into the debate.

The Safe Harbor regime (Safe Harbor) is a hot topic in Europe due to the extensive data flows between Europe and the US and the extent to which so many international organisations rely upon them. But what was once a reassuringly straightforward way to organise the transfer of data between Europe and the US now faces an uncertain future as an increasingly pro-privacy Europe holds a mirror up to some of Safe Harbor's weaknesses.

Acknowledging its practical importance to both the US and Europe, the European Commission started to take steps to rebuild trust in Safe Harbor last year. In November 2013, the Commission published 13 key recommendations to reform Safe Harbor and improve its perceived deficiencies[1].

Broadly, the Commission is looking for improvements in the following areas:

- Transparency: with organisations being obliged to move towards greater public disclosure of relevant privacy policies.
- Redress: including affordable alternate dispute resolution (ADR) and the continued investigation of false claims of Safe Harbor adherence.
- Better enforcement: with a greater onus on the US Department of Commerce (DOC) to police and investigate any failing.
- Curbs on access by US authorities: to ensure that the national security exceptions permitted under Safe Harbor are only used to an extent that is strictly necessary or proportionate.

While the WP29 broadly supports all 13 of the key reform recommendations of the Commission, it argues that that the Commission's proposals do not go far enough[2].

The WP29 published its own opinion on Safe Harbor in an open letter to the Commission. In it, the WP23 warns that if the revision process currently being undertaken by the Commission does not lead to a positive outcome, then the Safe Harbor agreement should be suspended.

Any comments or queries?

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1. *Communication from the Commission to the European Parliament and the Council on the Functioning of the Safe Harbour from the Perspective of EU Citizens and Companies Established in the EU* (COM (2013) 847).
2. Click here to view opinion.

In addition to some technical clarifications over whether requirements should be contained within the Safe Harbor principles or FAQs, the WP29 echoes the Commission's implication that a lot more could be done to ensure that the principles are explained more clearly to data subjects and that more should be done to engage with the spirit, and not just the letter, of the Safe Harbor regime.

Key additional recommendations of the WP29 follow similar themes to the Commission's recommendations, and are as follows:

Transparency

- More clarity over the categories of organisations that can participate in Safe Harbor and more detail to be published on the DOC website about the scope of the data covered. For example, if group companies are covered, the legal entities that form part of the group should be made clear. Similarly, if multiple categories of data are covered by the Safe Harbor certification then these should be stated (eg HR or customer data).
- The WP29 essentially wants a more "European" attitude to data protection policies, with policies that are clear and easily found online, with the DOC taking responsibility for publishing guidelines for drafting such polices.
- More clarity over the current validity of Safe Harbor certification (and who is no longer valid), allowing a clearer audit trail of the entities that are (or have been) Safe Harbor certified.

Redress

- Instead of just having ADR "readily available and affordable" for the data subject as the Commission proposes, the WP29 would go further and would like this to mean that US Safe Harbor organisations choose ADR suppliers based in the EU (rather than US-based ADR as is the current typical practice). The WP29 believe that this will make it easier for data subjects to have a practical means of redress.
- The WP29 also suggests that data subjects should be granted the right to lodge a claim before a competent EU national court, in the same way as enabled by the current EU Model Clauses.

Data Security

- Safe Harbor currently requires that organisations take "reasonable precautions" in terms of data security. The WP29 would like this to be increased to a European standard of security measures that are "appropriate to the state of the art and the risks represented by the processing and nature of the data to be protected".

Access to data by US authorities

- The WP29 reiterates that this should be limited (and therefore surveillance minimised) by submitting requests to the "proportionality" and "necessity" principles that underpin European law.
- The WP29 also believes that Safe Harbor certified organisations should be allowed to inform data subjects of such surveillance and EU data subjects should be granted the same data protection rights as US data subjects.

So what does this all mean for those companies that rely on Safe Harbor now?

The need to clarify the position is becoming increasingly important. Organisations that rely on Safe Harbor need to be aware that using it as the sole basis to legitimise transfers of data to the US might be on shaky ground.

Organisations currently participating in Safe Harbor will need to keep up to date on the proposed changes. If the changes are implemented, organisations will need time to adopt measures to ensure compliance and they may be required to draft new policies and set up new regulatory structures and safeguards.

Unsurprisingly, the WP29's recommendations reflect a very strong European data protection sensibility. However, despite recent calls for more general privacy reforms in the US itself, it is not yet clear whether the DOC has the resources, or inclination, to drive these changes forward. Certainly it seems unlikely that the US will make any changes in relation to how US authorities access data unless these changes are driven primarily by voter concerns within the US.

Suspension of Safe Harbor would be a huge step for the Commission and is unlikely in the short term. However, the mood is not conciliatory in Brussels at the moment with various pro-privacy champions riding a wave of optimism after the recent controversial decision in *Google v González*[3]. This case has been widely viewed as a major step towards entrenchment of new and stronger privacy rights through the European courts. The case clearly impacts on the search engine industry and observers are eagerly waiting to see how the tech sector (and particularly the big US firms) respond. This, combined with the antagonism over the proposed new General Data Protection Regulation shows that the relationship between the EU and the US in relation to data protection and privacy is in danger of becoming increasingly polarised. This uncertainty has the potential to significantly damage confidence in Safe Harbor.

As a pragmatic move, it may be that European firms contracting with the US will choose to avoid the uncertainty altogether by moving to the EU's "Model Clause" arrangements (or perhaps the more limited scope of Binding Corporate Rules). These already serve well in other major outsourcing markets such as India, South Africa and the Philippines. However, the Model Clauses provide practical hurdles for many large companies, and do not provide the flexibility of Safe Harbor. The Commission gives the example of global companies, such as MasterCard, which is based in the US but has many clients in the EU. Safe Harbor is a very useful option for it because transfers based on the Model Clauses would require thousands of contracts with different financial institutions, and Binding Corporate Rules would be of limited use since they only validate intra-group transfers.

Organisations will clearly lose out if they can't share data easily with US organisations but there is clearly a desire in Europe to get the right balance between privacy and pragmatism, particularly in light of the Snowden scandal. Tightening up Safe Harbor will increase the regulatory burden, particularly on US firms, but it remains to be seen if there is a real appetite in the US to adopt European standards in order to do business in Europe.

3. *Case C-131/12 Google Spain SL, Google Inc. v Agencia Española de Protección de Datos and Mario Costeja González.*

The Future of the US – EU Safe Harbor Program was first published in World Data Protection Report Volume 14, Number 6 in June 2014.

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