

International Data Transfers

Considering your options

The recent decision invalidating the adequacy of the EU-US Safe Harbor framework has left a considerable gap in the options available to organisations seeking to legitimize data transfers to the US. However, the EU data protection authorities have made it clear that they expect those organisations to ensure an adequate level of protection for European data at all times.

Here is our high level analysis of the possible options available and our recommendations for choosing the right one:

Standard Contractual Clauses (SCC)

PROS

- Freely available and no substantial drafting required
- Pre-approved as lawful transfer method across the EU
- Filing formalities relatively straightforward
- Suitable for one-off transfers

CONS

- Cumbersome as very strict non-negotiable requirements
- Unworkable for multiple and evolving transfers
- Subject to administrative requirements in most of the EU
- Risk of non-observance by data importers

Our verdict: A relatively 'quick-fix' which is widely used and accepted, but unlikely to be suitable for dynamic organizations seeking a long-term solution. Potentially subject to the same challenges that caused the invalidation of Safe Harbor.

Intra-Group Agreements and ad-hoc contracts

PROS

- Greater flexibility than SCC
- If mirroring SCC, less likely to be challenged
- Greater likelihood of compliance with requirements
- Suitable for evolving transfers

CONS

- Greater expenditure due to bespoke drafting
- More cumbersome filing and authorisation requirements
- Delay caused by dialogue with data protection regulators
- Risk of eventual non-approval

Our verdict: A more realistic solution than SCC with welcomed flexibility, but requiring a greater effort in terms of drafting and interaction with regulators. A good interim option to avoid legal uncertainty in the medium term.

Binding Corporate Rules (BCR)

PROS

- Globally regarded as the 'gold standard' of compliance
- Obvious choice for flexibility and legal certainty
- Perfect model for meeting accountability obligations
- Natural evolution from Safe Harbor compliance programs

CONS

- Cumbersome and demanding approval process
- Lack of regulators' resources can delay approval
- Top management buy-in is essential
- Need for sufficient internal resources

Our verdict: Growing support of BCR by law makers and regulators worldwide have turned it into an ideal framework for global privacy compliance, but it should be seen as an investment more than a simple mechanism to overcome transfers restrictions.

Safe Harbor

PROS

- Safe Harbor framework is still maintained by the US Department of Commerce
- European Commission and US Government are currently working on a revised version of Safe Harbor
- It remains a basis for global compliance programs

CONS

- 'Adequacy finding' invalidated by Court of Justice of the European Union in non-appealable judgment
- European data protection authorities unlikely to regard it as providing an adequate level of protection
- Credibility of Safe Harbor has been severely damaged

Our verdict: While it is technically possible that a Safe Harbor 2.0 will be agreed, currently there is much uncertainty as to its viability to offer a solid solution. However, Safe Harbor compliance programs may serve as a basis for BCR or similar solutions.

Consent

PROS

- Derogation expressly mentioned by the Directive
- No compliance mechanisms by importer required

CONS

- Practical impossibility of obtaining consent in this context that is:
 - informed
 - specific
 - freely given

Our verdict: Like any of the other derogations, it is only a 'last resort' option where providing an adequate level of protection is not possible, as the ability to rely on it in practice is extremely limited and unlikely to be accepted by regulators.

For more detailed advice on how to proceed and assess the risk of non-compliance please contact:



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