

# Safe Harbor Invalidated – What Next?

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# Background of the case (I)

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- Original complaint by Max Schrems to Irish DPC (June 2013)
  - Against Facebook Ireland for transfers to the U.S.
  - Data not adequately protected by Facebook Inc.
- Irish DPC rejected complaint (July 2013)
  - Frivolous and vexatious
  - Bound by European Commission's adequacy finding of Safe Harbor

## Background of the case (II)

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- Schrems challenged Irish DPC decision in High Court of Ireland (October 2013)
- High Court of Ireland referred question to CJEU regarding interpretation of Data Protection Directive (June 2014)
  - Is Irish DPC bound by European Commission's adequacy finding of Safe Harbor?
- Hearing before CJEU (March 2015)
  - Schrems argued invalidity of Safe Harbor
  - European Commission conceded that Safe Harbor was unable to guarantee data protection

# Judgment of Schrems v. Irish DPC (Case C-362/14)

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- Opinion of Advocate General (23 September 2015)
- Judgment of the CJEU (6 October 2015)

**Data Protection Authorities not bound by  
adequacy findings**

**Safe Harbor is invalid**

# Why are data transfers to the U.S. restricted?

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- Art. 25 of Data Protection Directive
- Attempt to preserve European level of privacy protection
- Limited adequate jurisdictions
- Need for mechanism to legitimize data transfers

# Role of Safe Harbor

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- Lack of comprehensive data protection framework for personal data in the United States
- Need to maintain vital data flows from EU to U.S.
- Negotiations between European Commission and U.S. Department of Commerce resulted in voluntary framework found by Commission to provide an adequate level of protection (2000)
- Over 4,000 U.S. companies maintain a Safe Harbor certification

# Perceived shortcomings of Safe Harbor

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- Commission's 13 recommendations (Nov 27, 2013)
  - Transparency
  - Redress (ADR mechanism)
  - Improve enforcement
  - Access by U.S. authorities

**Heavily criticized by European Parliament and some data protection authorities**

# CJEU criticism of Safe Harbor

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- Court criticized Commission's original decision because it
  - "did not state...that the United States in fact 'ensures' an adequate level of protection by reason of its domestic law or its international commitments." (para. 97)
  - How should 'adequacy' be considered in the U.S. context?
- Court's ruling relied solely on the wording contained in the European Commission's own documents
  - No independent fact-finding re PRISM
- Safe Harbor allows law enforcement access to data beyond what is "strictly necessary and proportionate"
- Lack of judicial redress for EU citizens = fatal flaw

# What's the CJEU's bottom line?

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- Safe Harbor decision invalid, does not afford an adequate level of data protection
- EU DPAs and courts can independently determine whether cross-border data transfer mechanisms comply with EU requirements, regardless of a finding by the European Commission

# Consequences of invalidity of Safe Harbor (I)

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- Transfers of personal data from the EU to the U.S. currently covered by Safe Harbor will be unlawful
  - unless suitably authorized by data protection authorities or fit within one of the legal exemptions
- Multinationals relying on Safe Harbor to legitimize data transfers from EU subsidiaries to their U.S. parent company or other U.S.-based entities
  - need to implement an alternative mechanism
- U.S.-based service providers certified under Safe Harbor
  - need to provide alternative guarantees for customers to engage their services lawfully

# Consequences of invalidity of Safe Harbor (II)

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- What to do with data already in the U.S.?
  - continue to treat in accordance with Safe Harbor policy until new mechanism in place
- Should U.S. companies take down their Safe Harbor policy and any compliance seals? What about pending re-certifications?
  - proceed as usual pending instructions from U.S. authorities, although likely no need to re-certify
- Is there risk of FTC enforcement?
  - likely only for substantive misrepresentations about data practices

# Prospects of an easy solution?

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- Ongoing negotiations of Safe Harbor 2.0
  - US government says it has responded to Commission's 13 concerns
  - "Redress" question requires new U.S. legislation: Judicial Redress Bill. Adoption by Congress uncertain before US elections
  - Obama Policy Directive 28 limits some NSA practices (Jan 2014)
  - Need to meet data protection authorities' expectations
- New Data Protection Regulation
  - Data transfer restrictions set to continue

# Recommended course of action

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- Carry out a data transfers assessment to identify data transfers legitimized by Safe Harbor
  - Prioritize key transfers for the business
- For intra-group transfers, consider interim contractual solution and BCR as a long-term solution
  - Model clauses impose tough onward transfer standards
- For transfers to service providers, review any existing contracts and seek vendor guarantees
- U.S.-based service providers should consider mechanisms to enable customers to continue to use their services
- Consider existing filings and registrations

# Risk of enforcement (I)

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- In short-term, not likely to be immediate enforcement
- Likely position of Article 29 Working Party
  - Preeminent role of DPAs in authorising transfers
  - Crucial importance of maintaining European standards
  - Collaboration amongst DPAs – Italian Garante suggests coordinated approach
- Data transfers to become greater priority
  - Influence of "data localization" politics

## Risk of enforcement (II)

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- ICO prepared to give some time
- CNIL Chairwoman also chairs Art. 29 WP, so CNIL likely to support harmonized approach
- German DPAs will co-ordinate for a harmonized approach, on German and European level

# Life after Safe Harbor

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- Political solution to surveillance v. privacy needed
- Decision will still be relevant under new Regulation
- European Commission will seek to regain credibility
  - Guidance document for DPAs
  - Commission to publish guidance for enterprises on website
- Are model clauses and BCR involving U.S. companies truly safe?
  - For model clauses, CJEU decision changes little since DPAs already had power to suspend, though DPAs may be emboldened
- 'Adequate protection' requires high standards

# Questions?

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