

# Safe Harbor 2.0 on it's Way

D&I Alert

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» Data Protection, Marketing & Consumers

## > SAFE HARBOR 2.0 ON ITS WAY

**The EU Commission and the United States have reached an agreement on a new legal framework for international data flows.**

**The new framework, called the EU-US Privacy Shield (the "Privacy Shield"), still requires political approval. Once in force, the Privacy Shield will simplify transatlantic data transfers. What is even more important, especially in the short term, the Privacy Shield eases companies' concerns regarding the legality of their data transfers to US based service providers.**

### > NEW DATA TRANSFER FRAMEWORK TO DISPEL UNCERTAINTY FOLLOWING FAILED SAFE HARBOR

Yesterday's "Safe Harbor 2.0" agreement has been received with mixed feelings. While privacy lobbyists have expressed doubts regarding the validity of the achieved agreement, it is clear that the Privacy Shield is good news for companies worldwide.

After the original Safe Harbor Decision was found unlawful by the European Union's Court of Justice on 6 October 2015, a large amount of transatlantic data transfers have been subject to uncertainty – to say the least. The new Privacy Shield simplifies international data flows by setting out clear rules for data transfers across the Atlantic.

### > CLEAR LIMITATIONS AND NEW OBLIGATIONS TO THE U.S. – ENHANCED PROTECTION OF EUROPEANS' RIGHTS

The new arrangement includes elements such as transparency obligations on U.S. government access, EU citizens' redress options, and robust obligations for companies importing EU personal data.

As with Safe Harbor, Privacy Shield enforcement and monitoring will be carried out by the U.S. Department of Commerce and the Federal Trade Commission. Additionally, Europeans will be able to turn to a new Ombudsman – to be established within the U.S. State Department – with any complaints or enquiries they might have.

What all this means for EU and U.S. based companies will be clarified as more information on the agreement is released.

## > WHAT NEXT?

The agreement will be put in force in the form of an "adequacy decision" by the EU Commission. The Commission has stated it will prepare the decision in the coming weeks and adopt it after consulting representatives of EU data protection authorities and Member States. Meanwhile, preparatory measures will also be taken on the U.S. side.

Representatives of the EU Commission have estimated that the Privacy Shield may be in force as quickly as within 3 months time.

The Privacy Shield does not eliminate the need to establish legal basis for data transfers being currently carried out. Therefore, if, for your company, Safe Harbor has been the sole means of adequacy with regard to transatlantic data transfers, while waiting for the Privacy Shield, the lawfulness of such data transfers can be established through the use of, among others, the Standard Contractual Clauses issued by the EU Commission.

We at D&I will keep you up to date on future developments.

## > BACKGROUND

### Schrems vs Data Protection Commissioner

*In its judgement of 6 October 2015 in Schrems vs. Data Protection Commissioner, the European Union's Court of Justice declared the Commission's US Safe Harbor Decision invalid. As a result of the decision, transfers of personal data from the EU to the USA that had been based solely on the Safe Harbor system were generally deemed unlawful.*

### Transfer of Personal Data to the US

*The Personal Data Act (523/1999) ("PDA") implements the Data Protection Directive in Finland. The PDA provides a number of transfer mechanism that enable transfers of personal data out of the European Union. These transfer mechanisms can be divided into three groups.*

*The transfer prerequisite of choice, according to the PDA, is that the transfer is made possible by the adequate level of data protection provided in the country of destination ("general adequacy"). The PDA provides, among others, that the EU Commission may find that a third country ensures an adequate level of protection by reason of its domestic law or its international commitments. The Safe Harbor system had been based on such a Commission decision.*

*In addition to general adequacy, transfers can be based on an adequate level being provided in an individual transfer or group of transfers ("transfer specific adequacy"), or on the exceptions listed exhaustively in the PDA. Transfer specific adequacy is provided by, among others, the use of the Standard Contractual*

*Clauses issued by the Commission, whereas the listed exceptions include, among others, that each data subject consents to transferring personal data on them.*

*Unlawful Transfers Subject to Criminal Sanctions*

*The penalty for a personal data offence, such as unlawful data transfers, is a fine or up to one year imprisonment for the person or persons responsible. Finnish data protection law does not recognize the possibility of corporate sanctions (e.g. a corporate fine or an administrative fine) in connection with data protection offences.*

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*Jukka was recently elected as a member of a working party of the Ministry of Transport and Communications planning the national data security strategy and enhancing competitiveness of digitised business.*

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