

Safe Harbor Ruling

Case C-362/14 - 6th October 2015

The European Union Court of Justice (CJEU) has declared that the European Commission's Safe Harbor decision is invalid.

What is Safe Harbor

Safe Harbor is a scheme agreed between the European Commission and US Department of Commerce under which personal data could be transferred from a data controller in the European Union to a data controller located in the US and, provided the US data controller had agreed to follow the provisions of Safe Harbor, be considered to be adequately protected as required by the Eighth Data Protection Principle and further set out in Article 25 of the European Data Protection Directive 95/46/EC (Directive).

The CJEU Ruling

In summary the judgment makes two significant findings:-

1. National supervisory authorities when dealing with a claim (complaint) must be able to examine with complete independence whether or not the transfer of a particular individual's personal data to a third country complies with the requirements of the Directive. In other words although the Commission may have made an "adequacy finding" in respect of a third country the supervisory authority, regardless of that finding, is able to assess whether or not a specific transfer of personal data has been processed in accordance with the requirements set out in the Directive.
2. The Directive provides for the Commission to make decisions as to whether a third country offers a level of protection equivalent to that provided within the EU. The CJEU found that the Commission did not examine the laws of the US as it was required to do but instead examined the scheme and therefore the Commission's decision was invalid. In addition, the CJEU examined the scheme and found for several reasons that it did not provide an equivalent level of protection.

The press release (No 117/15) can be found at:

<http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-10/cp150117en.pdf>

and the full text of the CJEU judgment can be found at:

<http://curia.europa.eu/juris/documents.jsf?num=C-362/14>

How the CJEU ruling affects the Island

Adequacy Decision

The ruling does not affect the Commission's "adequacy finding" for the Isle of Man.

That decision was made in accordance with Article 25 of the Directive which included an examination of the Island's domestic law and international commitments. A copy of the decision can be found at:

<https://www.gov.im/lib/docs/odps/adequacydecision1.pdf>

Transfers from the Island to the US

As the ruling invalidates the Safe Harbor decision, businesses that relied upon Safe Harbor to transfer personal data from the Island to a data controller in the US will need to review the arrangements they have in place to ensure the personal data is adequately protected.

The requirement for an adequate level of protection derives from the eighth data protection principle and the factors a data controller must consider are set out in paragraph 21 of Schedule 1 to the Act which states:

"An adequate level of protection is one which is adequate in all the circumstances of the case, having regard in particular to —

- (a) the nature of the personal data,
- (b) the country or territory of origin of the information contained in the data,
- (c) the country or territory of final destination of that information,
- (d) the purposes for which and period during which the data are intended to be processed,
- (e) the law in force in the country or territory in question,
- (f) the international obligations of that country or territory,
- (g) any relevant codes of conduct or other rules which are enforceable in that country or territory (whether generally or by arrangement in particular cases), and
- (h) any security measures taken in respect of the data in that country or territory."

In the absence of an "adequacy finding" and having considered the above factors a data controller can use model clauses to ensure an adequate level of protection for personal data that is transferred to a data controller in the US.

Further information and copies of the model clauses can be found at:

<https://www.gov.im/odps/businessAdvice/businessAdvice4/eighthprinciple.xml>

EU Member State Supervisory Authorities

If a supervisory authority in an EU member state received a complaint concerning the transfer of personal data to a data controller in the Island then the ruling makes it clear that the supervisory authority may make enquiries about that particular transfer.

It is likely that initial enquiries would be made of the data controller in the EU member state from where the personal data was transferred but enquiries could be made directly to the data controller in the Island.

However, when a cross-jurisdictional concern arises the usual practice is to seek assistance from the supervisory authority in the other jurisdiction. International co-operation is provided for under section 49 of the Data Protection Act 2002. Other instruments provide for mutual assistance between designated authorities, in particular Council of Europe Convention 108

<https://www.gov.im/lib/docs/odps/convention108.pdf>

The Information Commissioner anticipates that other supervisory authorities will continue to seek assistance from the Information Commissioner rather than undertake its own enquiries.

The future

Issues concerning the level of protection afforded by Safe Harbor are not new and the European Commission and US authorities have been in discussion for some time.

A new scheme is anticipated and could be provided for in the proposed General Data Protection Regulation which is expected to replace the current European Data Protection Directive next year.

**Isle of Man Information Commissioner
October 2015**