

Schrems vs. Safe Harbour

D&I Alert
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» Data Protection, Marketing & Consumers

> SCHREMS VS. SAFE HARBOUR

Transfers from the EU to the USA based solely on the Safe Harbour system may be deemed unlawful

In its decision today in Schrems vs. Data Protection Commissioner, the European Union's Court of Justice has declared the Commission's US Safe Harbour Decision invalid. As a result of the decision, transfers of personal data from the EU to the USA that have been based solely on the Safe Harbour system may be deemed unlawful. In practice, the decision is likely to have a massive impact on the global data processing business, in addition to substantially affecting the data transfers of individual companies.

Although the decision did not come completely out of the blue for those who follow data protection news closely, it is our understanding at D&I that Finnish companies in general have not actively prepared for the possibility of the Commission's Safe Harbour decision being found invalid. Therefore, the effect of the decision on individual companies may be substantial in practice. The fact that the Finnish system only recognizes personal criminal liability (instead of administrative or corporate sanctions) with regard to data protection offences, gives an additional alarming touch to the matter.

D&I consulted the Finnish Data Protection Authority on the matter earlier today. Based on our brief discussion, the Finnish Authority was inclined to refrain from taking a powerful stance on the matter at this point. Instead, it seems that they will first discuss the matter thoroughly with other European data protection authorities. This is likely to buy companies time to put alternative data transfer means in place.

First steps forward to ensure the lawfulness of your business's vital data flow

As first steps forward, it is essential for companies to ensure the lawfulness of their vital multijurisdictional business activities and data flow. In order to do so, you should:

1. **Identify** what data is transferred from the EU to the US, whether such transfers have been based on Safe Harbour and your company's role in the data processing chain. Are you the data controller or processor?
2. **Prioritise** the transfers and contractual relationships including the most business crucial data.
3. **Execute** alternative means for lawful transfers. Timely solutions could entail a bilateral data transfer agreement, based on the Standard Contractual Clauses issued by the Commission, between you and the US processor.
4. **Review** your data processing agreements and ensure that transfers carried out by your processors and sub-processors on your behalf are

lawful. If necessary, contact your service provider in order to establish suitable means of transfer.

5. **Inform** business customers and consumers on the amendments made and the ways how the data protection requirements have been taken into account.

For more information and guidance on the decision's implications on your company, please contact the head of our Data Protection, Marketing & Consumers practice group, [Jukka Lång](#).

The decision of the Court of Justice can be found [at the website of the Court of Justice](#).

> BACKGROUND

The lawfulness of data transfers can be established through the use of transfer specific adequacy or the listed exceptions

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 that, among others, the 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 Harbour system has been based on such a Commission decision.

In addition to general adequacy, transfers can be based 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.

As Safe Harbour has been the sole means of general adequacy with regard to transfers of personal data from Finland to the US, for the time being, the lawfulness of data transfers can be established through the use of transfer specific adequacy or the listed exceptions.

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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Before joining D&I, Iiris gained experience working at the Finnish Data Protection Authority.

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