Update Data Protection

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CJEU declares Safe Harbor invalid; far-reaching consequences for all data transfer to third countries

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In its judgment dated October 6, 2015 (case C-362/14), the CJEU declared Safe Harbor for invalid. This makes the transfer of personal data to the USA massively more difficult. The judgment affects not only providers such as Google, Apple and Facebook, but also the use of Cloud services by companies, as well as the group-wide transfer of data. Companies that have placed their faith in the privileged position created by Safe Harbor must now rethink their policies as a matter of urgency.

Fundamental rule: data export only to countries with appropriate level of protection

The transfer of personal data to countries outside Europe where there is no adequate level of data protection – for example the USA, but also Asian countries – is generally prohibited without the consent of the data subjects or approval by the responsible supervisory authorities. There is an exception to this basic rule if an adequate level of data protection can be ensured in another manner. On a general level, the European Commission has published so-called model contract clauses ("EU Model Contract Clauses") for this purpose. These can be concluded between companies exporting data and companies importing the data, and are intended to ensure the adequate level of data protection.

EU Model Contract Clauses

In addition, the European Union and the United States of America concluded the Safe Harbor Agreement in 2010 for the special case of transfer of personal data to the US. This enables companies in the USA to commit to a specific level of data protection within by way of self-certification. This was intended to ensure that the European level of data protection is also adhered to by companies certified in this manner. Companies such as

The Safe Harbor Agreement

Facebook and Google as well as many Cloud providers make use of this solution.

Safe Harbor a reliable Model solution up until October 6, 2015

To date, the ruling applicable to both data transfers to companies in the USA with Safe Harbor certification, as well as when using the EU Model Contract Clauses, has been that consent of the party concerned or approval from the supervisory authority was not required. The CJEU's judgment dated October 6, 2015, has ended this practice, at least for Safe Harbor.

Their inability to act against the transfer of personal data to the USA as a result of existing rulings of the European Commission on Safe Harbor and the EU Model Contract Clauses, has long been a thorn in the side of the supervisory authorities in the light of the Snowden revelations.

Supervisory authorities can now evaluate data transfer to third countries on their own authority

This inactivity is now likely to be confined to history for two reasons: on the one hand, Safe Harbor is now invalid with immediate effect, and can no longer be used to circumvent the requirement of approval. On the other hand, the CJEU has also granted the supervisory authorities an extensive right of audit, to the effect that they can also challenge data transfers even given the existence of a generally approving ruling of the European Commission, as is the case for example with the EU Model Contract Clauses. The reason for its decision is that the national security services in the USA have extensive access to personal data stored in the USA, against which the parties concerned have hardly any possibility of defending themselves in rule of law proceedings.

Data transfer to the USA can result in fines or a prohibition order

Companies that have placed their faith in Safe Harbor for their data transfers to the USA – whether within their group or to service providers – must now immediately check and implement alternatives. Otherwise, they could render themselves liable to fines, or the authorities could issue a prohibition order concerning transfer to the USA or another country affected. In case of intentional non-compliance, and if money is to be earned through the transmission of data to a third country, the unjustified data transfer can be traced as a criminal offense, if an respective criminal complaint was filed.

Even EU Model Contract Clauses are no longer secure

But even if the EU Model Contract Clauses are used, increased diligence is called for. It is very likely, in particular on the basis of earlier comments, that the German authorities will also challenge the use of the EU Model Contract Clauses. This is to be expected not only for data transfers to the USA, but also to all non-European countries in which the security authorities have extensive rights of access, i.e. in particular China, Russia and the Arab States.

Practical tip: Companies must now review the practice of transferring data abroad, whether this is for purposes of human resources management, customer care or the use of IT or Cloud services. In particular, they should check whether there are European alternatives available, especially as regards IT services.

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