

9 November 2015

The Future of Data Transfers to the US – German Position.

Roundtable with German Data Protection Authorities.

Linklaters' data protection specialists have met representatives of most of the German data protection authorities to discuss the impacts of the Safe-Harbor decision of the European Court of Justice on transfers of personal data to the US

- based on EU Model Clauses, Binding Corporate Rules (BCRs) and Intra-Group Agreements (IGAs); and
- requested by US authorities in the context of investigations.

What has happened so far?

On 6 October 2015 the European Court of Justice declared the Safe-Harbor decision of the European Commission (2000) invalid. Immediately thereafter, the question was raised whether this decision has an impact on other legal instruments originally designed to transfer personal data to the US (i.e. EU Model Clauses, BCRs and IGAs).

To provide some guidelines, the **Art. 29 Working Party** (a group consisting of representatives from all EU data protection authorities, the European Data Protection Supervisor as well as the European Commission) met on 16 October 2015 and published the following core statements in a **position paper**:

- Discussions with US authorities are to be opened immediately to discuss *inter alia* a new Safe-Harbor framework respecting fundamental data protection rights;
- EU Model Clauses and BCRs may still be used until the Art. 29 Working Party has assessed their validity (expected by the end of January 2016); and
- Data protection authorities may, however, investigate where it is necessary to protect individuals (e.g. in case of complaints).

Subsequent to the publication of this position paper, the **German data protection authorities** met and published a separate **position paper** on 26 October 2015. Their core statements are:

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Position Paper of the Art. 29 Working Party

- The validity of EU Model Clauses and BCRs is “in question”;
- For the time being, no “new approvals” of BCRs or other “data transfer contracts” will be granted by German data protection authorities; and
- Companies should rethink their existing cross-border data transfers to the US and other non-EEA countries.

Roundtable with German Data Protection Authorities

As to international data transfers, German data protection authorities have set up a specialists group for which each of the German data protection authorities has appointed specialists. In the aftermath of their last meeting in Berlin, we met the respective specialists of most of the German data protection authorities on 6 November 2015 and discussed the impact of the Safe-Harbor decision on data transfers to the US.

Impacts on EU Model Clauses, BCRs and IGAs

With regard to the future use of EU Model Clauses, BCRs and IGAs, German data protection authorities made the following oral statements:

- The validity of data transfers under EU Model Clauses and BCRs is still being assessed by German data protection authorities;
- German data protection authorities endeavour to come to a harmonized position with other EU data protection authorities as to the future position on EU Model Clauses, BCRs and IGAs;
- **Until their decision** (probably in January 2016), transfers based on EU Model Clauses, BCRs or IGAs will **not be investigated** by German data protection authorities. However, German data protection authorities have the (theoretical) power to prohibit data transfers;
- Rather than simply deciding whether or not EU Model Clauses, BCRs and IGAs will survive as legal instruments, it appears that the German data protection authorities are working on a **solution** based on these existing instruments, potentially **amending the wording** of the instruments or requesting “**add-ons**”.
- It was mentioned that such amendments / “add-ons” could potentially consist of the following (non-exhaustive examples):
 - Amended wording of EU Model Clauses;
 - Oblige the data importer to implement certain technical and organizational measures (TOMs);
 - Impose encryption to the data being transferred;
 - Oblige data importers to seek legal action in court in case of an access request by US surveillance agencies or if a gagging order has been imposed; and/or

- Differentiation between various typical scenarios regarding data transfers and/or data importers;
- Only data transfers from the EU to the US are currently assessed by the German data protection authorities. The discussion has not yet been extended to other non-EEA countries;
- **Ongoing approval procedures** regarding BCRs **may still be** completed using the Mutual Recognition Procedure (MRP);
 - I.e. notwithstanding the position paper of the German data protection authorities, approvals of BCRs may still be possible, including approval of (minor) modifications to already approved BCRs;
 - However, the formal approval is likely to contain a reservation as to the outcome of the January 2016 decision;
 - Furthermore, to the extent local data protection authorities request an additional approval of data transfers occurring under approved BCRs, such additional approval would no longer be granted for data transfers to the US for the time being. Such additional approvals are required for example in Lower Saxony but not in Hesse and Bavaria;
- German data protection authorities did not comment on the approval of IGAs, but it appears likely that the above principles on BCRs are to be applied correspondingly;
- As a preparatory act ahead of the January 2016 decision, businesses should assess whether alternative statutory justifications of data transfers beyond EU Model Clauses, BCRs and IGAs may exist.

Impacts on Data Transfers to US Authorities

As to potential data transfers to US authorities in the context of investigations, the represented German data protection authorities stated the following orally:

- No direct impact of the Safe-Harbor decision on data transfers to US authorities in the context of their investigations was identified during the meeting;
- The German data protection authorities reinforced their restrictive approach as to transfers of employees data (in particular e-mails) to US authorities;
- No general guidelines for a permitted transfer of such data was provided. Businesses may decide on a case-by-case-basis only;
- German data protection authorities could assist businesses in their decision, underlining however that detailed facts and circumstances of the investigation and the requested data would have to be provided;

ed by businesses to the competent data protection authorities for their assessment;

- Transfer of “anonymised” / “pseudonymised” data was considered as not providing sufficient safeguards in each case;
- Asking for informed consent, at least from higher level / white collar employees, was seen as a feasible basis for the transfer of data;
- As best practice, the German data protection authorities stated that businesses should generally seek for intergovernmental letters rogatory under existing law enforcement treaties (*Rechtshilfeersuchen*), e.g. in case of SEC requests.

Statements of EU Commission of 6 November 2015

The same day as the meeting with the German data protection authorities, the EU Commission made a public statement saying that:

- They have started negotiations with US governmental authorities to reach to a new “safer” Safe Harbor framework within three months; and
- Businesses may continue using EU Model Clauses and BCRs for the time being.

Takeaways

The various statements show the following baseline position:

The EU Commission seeks to resolve the issue of data transfer to the US on a political level.

A decision by EU / German data protection authorities is set for the end of January 2016.

It is intended to come to a harmonised solution across the EU.

For the time being, EU Model Clauses, BCRs and IGAs can still be used.

Whilst changes to these instruments may come up, it appears to be rather unlikely that these instruments may no longer be used following the January 2016-decision.

The German data protection authorities expect businesses to make “serious efforts” to review and, where necessary, to re-organize data transfers to the US.

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