



EU-US data transfers : Better Safe than Sorry !

“The end of January 2016”: this is the self-imposed deadline from national data protection authorities (DPAs), whose representative appeared in Parliament on 10 November, to assess whether EU provisions to transfer EU data to the US are safe enough. If not, and if a new agreement to ensure an essentially equivalent level of data protection in the EU and the US is not found, DPAs will take “enforcement action”, such as blocking all data transfers. A threat many multinational companies fear.

This is the latest seismic wave provoked by the **European Court of Justice (ECJ) Schrems’ ruling** on 6 October 2015 which states that:

- The 2000 [“Safe Harbour” adequacy decision](#) - by which the European Commission acknowledged that the US level of data protection is sufficient to authorise European data transfers - does not prevent DPAs from investigating and suspending these transfers.
- Due to the US massive and indiscriminate surveillance, this decision violates the European Charter of fundamental rights. It is thus invalid and the Commission should have suspended it.



Aware of EU demands, the US proposed in March 2015 a bill to grant EU citizens the right to lodge a

complaint with a US Court of justice. It was passed in the House of Representatives in October but not yet in the Senate.

The Commission took action as well: it urged DPAs to come up with a **common interpretation** of the ECJ ruling and it published on 6 November a twofold [communication](#) on its implications for companies.

Firstly, it makes clear the ruling does not question the Commission’s power to adopt adequacy decisions and it calls for the conclusion of a revised Safe Harbour. Justice Commissioner Jourova will go to Washington in November to speed up the negotiations opened since Edward Snowden’s revelations on the NSA surveillance in 2013. Ruling out some Members of the European Parliament’s (MEPs) demand to re-start these negotiations from scratch, Commissioner Jourova asserted the EU can pressure the US because this is a matter of mutual trust. An opinion not shared by a US official who [declared](#) the US would not change its laws on electronic surveillance to have a new Safe Harbour.

Secondly, and this is where the Commission and DPAs differ, the communication recalls that EU-US data transfers can still occur under the 1995 data protection directive through **“safe” alternative tools** such as derogations (e.g. data subject’s consent) or “adequate safeguards” from data processors (e.g. binding corporate rules or standard contractual clauses). This second option could vanish in two-month time if DPAs consider that the derogations offer insufficient data protection safeguards.

Anyhow, the 1995 directive should be replaced by the [new data protection package](#) the Parliament and the Council committed to adopt before the end of 2015. The Commission pressed them to do so as soon as possible but **rushing data protection legislation** could backfire. The ECJ already challenged EU institutions twice last year when it invalidated the 2006 directive on data retention and when it reaffirmed the right to be forgotten on the Internet.

In addition, MEPs and DPAs’ repeated warnings about the Safe Harbour’s risks did not entice the Commission to revise its decision. This led an MEP to ask that the Juncker’s Commission’s “better regulation” agenda also includes “better law-making”. ●

The 2016 Commission work programme: “No time for business as usual”?

On 27 October 2015, the European Commission published one of the end-of-the-year most awaited documents: its actions and initiatives list for 2016.

This [second Work Program](#) (WP) under Jean-Claude Juncker’s mandate is consistent with the 10 initial political priorities the Parliament elected him for in July 2014. In a nutshell, the Commission intends to focus on 5 priorities in the upcoming months:

1. Manage the **migration** and refugee crisis
2. Increase growth, jobs and investment : two **Space** and **Defence** strategies will add up to the **Single Market** and **Digital Single Market** ones
3. Follow-up the **Energy Union**
4. Advance **social** rights
5. Ensure **tax** fairness

Like the previous WP, these issues will be tackled through **23 key initiatives**. The real change lies in the emphasis on the **international context** and **the economic situation**. The migration challenge, which initially ranked 8th, has now gone up to the 1st position as a direct consequence of the Commission’s commitment to address the growing flow of refugees coming from the Middle East. Tax matters now appear as a stand-alone priority due to the “Luxleaks” revelations while it was only a subsection of the Internal Market chapter in the 10 political priorities. Another innovative feature of the WP is the defence initiative. Traditionally dealt with on an intergovern-

mental basis, this issue is not totally disconnected from the migration one.

All in all, this WP echoes quite well MEPs’ main demands, as stated in a [Parliament’s resolution](#) adopted last September. It requested to focus on growth, investment, unemployment, tax fraud and called for a holistic approach to migration as well as for an ambitious security and defence policy. It also pointed out that “better law making” and the review of EU legislation to ensure it remains appropriate (the REFIT programme) must not be used to lower European social and environmental standards.

This warning was a direct reaction to some **controversial withdrawals or modifications** of pending proposals scheduled by the previous WP. Among them, the replacement of the Waste Package by the upcoming initiative on Circular Economy raised an outcry from MEPs and EU Ministers of Environment. Interestingly, the new program lists only 20 withdrawals or modifications and 40 REFIT actions for 2016, compared to respectively 80 and 79 in 2015.

So far, the European Parliament has welcomed this new program while the Council has not commented on it yet. This **relatively successful announcement** is a good start but it will certainly be the easiest part of the Commission’s action, since the current situation allows “No time for business as usual”! ●

Public consultations *

Policy field	Title	Deadline
Taxation	Modernising VAT for cross-border e-commerce	18.12.2015
	Common Consolidated Corporate Tax Base (CCCTB)	08.01.2016
Communications Networks	Needs for Internet speed and quality beyond 2020	07.12.2015
	Evaluation and review of the regulatory framework for electronic communications networks and services	07.12.2015
	Geo-blocking and other geographically-based restrictions	28.12.2015
	Regulatory environment for platforms	30.12.2015
Climate Action	Evaluation of the car labelling directive	15.01.2016
Competition	Empowering the national competition authorities	12.02.2016

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