BUSINESSEUROPE

THE SPIRIT OF ENTERPRISE
U.S. CHAMBER OF COMMERCE

Ms Isabelle Falque-Pierrotin
Chairman of the Art. 29 Working Party
Chairman of CNIL
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FRANCE

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Dear Chairman,

The U.S. Chamber of Commerce and BUSINESSEUROPE are deeply concerned about the impact of the recent European Court of Justice Judgement invalidating Safe Harbor.

In this context, we urge you to expeditiously reach agreement on a strengthened Safe Harbor framework that takes into account the concerns raised by the ECJ ruling and enables data transfers between the EU and US. We further note the recent statement by the Article 29 Working Party, calling for a resolution by end January 2016 and emphasising the need to finalise discussions and announce a resolution without undue delay, as well as the recent Communication by the European Commission aiming to provide guidance on transatlantic data transfers.

Safe Harbor

Safe Harbor is a key instrument for companies of every size and sector, particularly SMEs, to transfer data from Europe to the US. The immediate invalidation of the agreement and the reaction of certain DPAs not aligned with the Article 29 Working Party's statement create a situation of great uncertainty for businesses, leaving end users likely to face a disruption in the products and services they rely upon. In the absence of an appropriate transition period and without clear, consistent and coordinated guidance for realistic substitute compliance methods, everyday business occurrences, such as managing a global supply chain or processing employee payroll for EU-based subsidiaries could be discontinued. Furthermore, Safe Harbor is a key instrument to companies involved directly or indirectly in critical infrastructure (i.e. healthcare, safety), and disruptions to these critical services may have an adverse effect on European citizens relying on them.

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In its ruling the ECJ raises a number of concerns with regard to surveillance practices and data protection rules in the US. However, the ECJ did not examine or assess current US rules and practices in depth or any changes made since the European Commission Communication on the Functioning of Safe Harbor of 27 November 2013. Numerous changes have already occurred such as President Obama's January 2014 Presidential Directive, the findings of the Privacy and Civil Liberties Oversight Board, the June passage of the Freedom Act, all of which significantly clarify and tighten controls over electronic surveillance in the United States. In addition, we have also supported the adoption of the Judicial Redress Act and are hopeful that the Senate will soon follow the lead of the House of Representative in approving legislation.

Following the ECJ ruling, a very large number of agreements enabling transfer to the US under Safe Harbor for all industries active in Europe will have to be re-assessed to ensure compliance. It will be a big chain reaction of modifications in the global digital economy value chains. This will require significant time and costs, with a particularly negative impact for SMEs. Some agreements, such as those for non EU-based sub-processors, may not have legal substitutes.

Even companies not directly using Safe Harbor will be affected, as their suppliers using the mechanism will have to change to alternative transfer instruments.

Broader impact on international data transfers from Europe

The ECJ ruling also calls into question (I) the use of all transfers mechanisms, **including binding Corporate Rules (BCRs) and Standard Contract Clauses** (SCCs), and (II) to all other countries, including those done under Commission adequacy decisions for countries such as Canada and Switzerland. The recent statement by the Working Party 29 group that transfers will not be allowed where "the powers of state authorities to access information go beyond what is necessary in a democratic society" underscores this problem, not least given the extensive surveillance programs in some EU Member States. **We are seriously concerned by the risk of fragmentation stemming from different assessments by DPAs on transfer mechanisms.** Some DPAs have already differentiated their position and cast uncertainty over all data transfer mechanisms putting companies active in these Member States in serious difficulty vis-a-vis their customers. In this respect, we strongly recommend a coordinated European approach to international data transfers.

In addition, while alternative mechanisms can in principle be used to transfer data instead of Safe Harbor, those methods are quite costly and time-consuming to implement. Furthermore, it is difficult for a company to begin the burdensome process

of switching transfer methods given uncertainty regarding these other methods' future viability, following statements by a number of DPAs in this regard.

Standard Contractual Clauses may not offer the flexibility required in the increasingly complex value chains of the data-driven economy (with multi-layered chains of responsibility in transferring data, different contractors and sub-contractors and therefore complex chains of controllers, processors and sub-processors).

Transfers under Binding Corporate Rules could also be a partial alternative. However, they mainly apply to intra-group transfers and are mainly suitable for multinationals due to complexity, additional workload, length and cost of implementation. Besides, it may take up to 2 years to get approval by all DPAs and about 1 million EUR in legal fees and translations. It is clear to us that for months many companies won't be able to use other mechanisms and will operate in a legal vacuum. In addition, some DPAs (e.g. Portugal and Germany) have already announced to no longer authorise further applications for data transfers to the U.S. on the basis of BCRs.

In conclusion, the immediate invalidation of Safe Harbor renders doing business across the Atlantic, and indeed with any third country outside Europe, more burdensome at a minimum and in some cases impossible.

In this context, BUSINESSEUROPE and the US Chamber urgently call for:

1. Timely conclusion of the negotiations between the EU and US on a revised Safe Harbor. **Restoring mutual confidence** in the digital world **is a joint responsibility** of EU and US authorities. In order to find suitable solutions to continue data transfer between the EU and US both sides of the Atlantic must make efforts to compromise.

2. **Joint guidance** from the European Commission and Art. 29 Working Party on how to move forward and deal with the legal uncertainty. Neither the 16 October statement by the Art. 29 Working Party nor the Commission Communication of 6 November did enough to settle the current confusion; they demonstrated the need for coordinated action, as the Commission and DPAs each have complementary, but distinct competencies.

3. **Guarantees for consistent treatment** by national DPAs of international data transfers, to avoid disruptions in the EU digital single market. If national DPAs start providing individual guidance without consistency – as was already the case in the last weeks – the complexity and fragmentation of the process will become unmanageable.

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4. **An adequate transition period** (of at least 6 months but preferably longer (instead of a mention of an assessment of the situation in 3 months as communicated by the Art. 29 Working Party) in the enforcement approach to allow companies to move to alternative methods to permit data transfers. This should run as of the moment that adequacy mechanisms are agreed upon among EU DPAs. We also suggest allowing companies a longer period in complex situations, provided they can document due diligence in executing a strategy towards implementing internal changes.

5. Assurance that negotiations on the proposed EU general data protection regulation (GDPR) deliver a **regulation that provides sound and predictable transfer mechanisms that avoid fragmentation**. This should not be implemented through delegated acts or specific decisions of national DPAs. In this context, the ECJ ruling demonstrates the need to finalise negotiations on the EU GDPR providing rules equally and directly applicable throughout all Member States. The new consistency mechanism could then provide a tool to harmonise national DPAs' approaches on this and many other implementations issues. At the same time, the GDPR negotiations must properly address the concerns and demands of businesses in order to strike the right balance between the importance of protecting citizens' data and ensuring their free flow in the European Single Market and beyond.

We are sending similar letters to Penny Pritzker, US Secretary of Commerce; Caroline Atkinson, Deputy National Security Advisor for International Economic Affairs; Edith Ramirez, Chairwoman of the US Federal Trade Commission; Julie Brill, Commissioner of the US Federal Trade Commission. On the EU side, we are sending similar letters to European Commission Vice-President Andrus Ansip, Commissioner Věra Jourová and Commissioner Günther Oettinger.

We trust you will take our concerns into account and look forward to continuing the dialogue with you on these issues.

Yours sincerely,

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Director General
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