

Decision by the supreme supervisory authorities for data protection in the nonpublic sector on 28/29 April 2010 in Hannover
[revised version of 23 August 2010]

Examination of the data importer's self-certification according to the Safe-Harbor-Agreement by the company exporting data

Since 26 July 2000 there exists an agreement between the EU and the US Department of Commerce on the principles of the so-called "Safe Harbor."¹ This agreement is intended to ensure an adequate level of data protection at those US companies who are committing themselves to complying with the principles of the Safe-Harbor-Agreement. By the commitment and a notice to the Federal Trade Commission (FTC) companies can certify themselves. US companies which are certified this way principally establish the requirements for making it possible that personal data from Europe are transferred to them under the same conditions which apply to transfers within the European Economic Area (EU/EEA). The Department of Commerce publishes a Safe-Harbor-list of all certified companies on the Internet.

As long as a comprehensive control of US-American companies' self-certifications by supervisory authorities in Europe and in the US is not guaranteed, also the companies in Germany are obliged to check certain minimum criteria before transferring personal data to a US company placed on the Safe-Harbor-list.

In this connection the supreme supervisory authorities for data protection in the nonpublic sector point out that when it comes to data transfers to US bodies, companies exporting data cannot merely rely on the statement of the data importer claiming that he has a Safe-Harbor-certification. On the contrary, the company exporting data has to obtain evidence that the Safe-Harbor-self-certifications exist and that their principles are complied with. The exporting company has to clarify at least whether the importer's Safe-Harbor-certification is still valid. Moreover, the company exporting data has to obtain evidence showing how the importing company, pursuant to the Safe-Harbor-Agreement, fulfils its duties to provide information to the persons concerned by the data processing². This is important, not least because this enables the importing company to provide this information to persons concerned by the data transfer.

The exporting companies have to document this minimum check and at the request of the supervisory authorities, they have to be able to prove this check. After the check, if there should be doubts as concerns compliance with the Safe-Harbor criteria by US companies, the supervisory authorities recommend to prefer the use of standard contractual clauses or of binding corporate rules in order to guarantee an adequate level of data protection at the data importer's side.

If a company exporting data finds out during its check that a certification of the importing company is no longer valid or that data subjects are not provided with the necessary information, or if other violations of the Safe-Harbor-principles come to light, the competent data protection supervisory authority should also be informed.

¹ 2000/520/EC: Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce, OJ L 215 of 25/8/2000, p.7

² Organizations must notify individuals about the purposes for which they collect and use information about them. They must provide information about how individuals can contact the organization with any inquiries or complaints, the types of third parties to which it discloses the information and the choices and means the organization offers for limiting its use and disclosure. This information has to be provided in a clear and unambiguous way to data subjects when they are asked for the first time to provide personal data to the organisation, or as soon as possible afterwards, however, in any case before the organisation uses the data for purposes other than the ones for which they were originally collected or processed by the transferring organisation, or before it transfers data to a third party for the first time.

In view of improving the compliance with the principles the co-operation of the FTC with the European data protection authorities plays a key role. For this purpose it is necessary that the FTC and the European data protection authorities intensify the control of compliance with the Safe-Harbor-principles. It is only possible to achieve the legal certainty for the transatlantic data traffic intended by the Safe-Harbor-Agreement if the principles are also effectively enforced in practice.