

E-ALERT | Privacy & Data Security

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THE FUTURE OF THE SAFE HARBOR AGREEMENT

Recent events in the European Parliament (EP) and European Council show that concerns over the U.S.-EU Safe Harbor Agreement (the Safe Harbor) are continuing to gather pace in the European institutions, in ways that could lead to the reform or revocation of the Safe Harbor and alter the landscape on European policy issues even beyond data protection.

- **European Parliament.** Last week a debate took place in the EP about the future of the Safe Harbor Agreement, in which key Members of the European Parliament (MEPs) from across the political spectrum – driven by press revelations about the scope of surveillance by the U.S. National Security Agency (NSA) – called for the immediate suspension of the Safe Harbor Agreement and the negotiation of new rules to replace the Safe Harbor.

In the debate, the influential Vice-Chair of the Civil Liberties Committee (LIBE Committee), Sophia In't Veld, ALDE (Liberals), declared that “enforcement by the U.S. has been clearly insufficient for years and the Safe Harbor privacy trust mark has been structurally abused”, and called on the Commission to find a solution before the EP elections take place (in May 2014). The Vice-Chair for Data Protection, Christian-Democrat Manfred Weber, shared his view that the Safe Harbor must now be renegotiated, as “it is only possible to collaborate in a spirit of mutual trust”, which has not been “possible under the recent U.S. approach”.

Last week's debate follows a more focused discussion earlier in the week in the LIBE Committee on the Moraes report – which was also very critical of the Safe Harbor and which also called for its suspension.

- **European Council.** The Safe Harbor will also be a main topic of discussion tomorrow when the Justice Ministers of the EU's Member States meet in Greece. The Council is expected to discuss the Commission's proposal for the reform of the Safe Harbor (which were released by EU Commissioner Viviane Reding in November 2013 and which are generally perceived by many MEPs as too-moderate), as well as other matters concerning the draft General Data Protection Regulation.

These developments, which now threaten the future of the existing Safe Harbor, are being shaped by a political atmosphere created by a “perfect storm” in the European institutions, as campaigning for EP elections intensifies against a backdrop of press revelations about NSA surveillance and recent and high-profile data protection enforcement cases against U.S. companies. Despite reforms of U.S. intelligence practices announced last week by President Obama (which included promises to extend certain privacy protections to non-U.S. citizens for the first time) and this week's enforcement action against 12 companies with lapsed Safe Harbor certifications by the U.S. Federal Trade Commission based on allegations that they misrepresented their Safe Harbor compliance, the dynamic shows little sign of subsiding in the near future. Instead, MEPs are now actively making long-term strategic plans to keep the Safe Harbor issue on the front burner, in order to use it as leverage to interfere with key decision-making points in the legislative process months to come.

As a result, this development now threatens to impact EU policy issues beyond data protection. In particular, MEPs are now expected to use the Safe Harbor issue as a “litmus test” in the upcoming selection and appointments of new European Commissioners, to extract commitments from future Commissioners in ways that could impact the direction of Commission policy for years to come. In

addition, the ongoing Transatlantic Trade and Investment Partnership (TTIP) negotiations have already been affected by the new mood, and will almost certainly face further headwinds from a new wave of EP demands, all fuelled by the Safe Harbor, in the coming months.

A suspension of the Safe Harbor – which at this stage has not yet occurred, despite pressure from the EP – would disrupt the operations of both U.S. and European businesses. This is because many European businesses have affiliates, vendors, or other service providers, that are based in the United States and that rely on the Safe Harbor. Depending on what – if anything – would replace the Safe Harbor if it is suspended, a suspension could generate legal uncertainty for these European businesses, as well as for thousands of American businesses operating in and across the EU. Future options to transfer data between the world’s two largest trading markets could be significantly limited as a result, with a concomitant impact to trade.

Covington & Burling will continue to monitor EU developments closely and will keep you informed of the political and practical implications of the latest developments. Should you be interested in participating in Covington’s initiatives in this area, please contact a member of our team as listed below.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our privacy & data security practice group:

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