



Consultation by the DPO of the European Commission on the impact of the Safe Harbour ruling on the transfer of personal data carried out by DG MARE in the framework of the "360° Feedback Leadership Circle" (Case 2015-0924)

Brussels, 15 December 2015

Background

DG MARE has put in place a development programme for middle management called "360° Feedback Leadership Circle", which is a feedback tool aimed at further developing an effective management culture within the DG. The programme is entirely voluntary; managers can choose not to participate and if they do, they can withdraw from the programme at any time. The processing operations required by the Programme are carried out by a processor (BICK Consortium) and a sub-processor (The Leadership Circle), located in the US. The framework service contract between the Commission (represented by EAS) and BICK Consortium contains a standard clause on data protection (Article I.9) providing *inter alia* that the Regulation applies to any processing of personal data in relation to the contract and that, in the case of sub-contracting in cascade, the Commission must be consulted in advance so that it may verify if the subcontractors satisfy the requirements of the EU legislation on protection of personal data.

The processing operation was submitted to the EDPS for prior checking on 25 September 2014 and the EDPS issued its opinion on 12 December 2014. In its opinion, the EDPS paid particular attention to the proposed transfer to a third country and recalled that pursuant to Article 9 of Regulation 45/2001 an adequate level of protection must be ensured within the recipient's (the Leadership Circle's) legal framework. At the time of the opinion, The Leadership Circle was in the process of becoming self-certified under the Safe Harbour Agreement. The EDPS concluded that such certification would allow the company, once certified, to meet the adequacy requirement of Article 9, and that DG MARE must not resume the processing until The Leadership Circle was fully certified under the Safe Harbour and respected its principles.

Following the Court's ruling in C-362/14 that the Safe Harbour decision (Decision 2000/520) is invalid, the DPC of DG MARE has submitted several questions to the Commission's DPO with regard to the processing of personal data carried out in the abovementioned development programme. As a precautionary measure she has decided to request the controller to suspend any processing operations that may result in transferring personal data to the US-based subcontractor. The DPO of the Commission has in turn consulted the EDPS on the issues raised by the DPC by email of 21 October 2015.

The following questions have been raised by the DPC of DG MARE:

- *Do you agree with the precautionary measure of putting on hold further processing of personal data by the subcontractor? Would you recommend other measures?*
- *Under what conditions could DG MARE resume the transfers of data to the US-based subcontractor? Needless to say, DG MARE is under the obligation to pay for the services*

provided by the contractor and not being able to proceed with the evaluation of middle managers exercise could result in incurring substantial costs.

- *What should be done with the personal data recently collected and processed by the subcontractor? Should we ask the US-based company to erase such personal data? What is the limit date?*
- *Should DG MARE request the EDPS for authorization according to Article 9(7) of Regulation No 45/2001 for further processing of data linked to the notification in question?*

Meeting DG MARE - EDPS 19 November 2015

At a meeting on working level between DG MARE and the EDPS that took place on 19 November 2015, DG MARE explained more in detail the processing operation and the transfers that have or were scheduled to take place within the 360° evaluation system. There is currently one ongoing evaluation which would be directly affected if the blocked transfers cannot be resumed. There are other evaluations in the pipeline, but where the data have not yet been collected. In principle, the US-based subcontractor deletes the data three months after processing, which would mean that older evaluations would not be affected. The EDPS explained its position as outlined below. The possibilities of continuing the processing operation but with a subcontractor based within the EU, or terminate the contract on grounds of force majeure, were also discussed in this context.

Analysis

Firstly, it should be clarified that notwithstanding the contractual situation between the Commission, the contractor and the subcontractor, the Commission is the controller of the processing operation and the transfers are therefore to be considered as being carried out on its behalf.

According to Article 9.1 of the Regulation, transfers to third countries can only take place if an **adequate level of protection** is ensured in the country of the recipient. Since the recent ruling of the Court has rendered the Safe Harbour decision invalid, there is no adequacy decision in force and the controller must in principle conduct a specific adequacy assessment of the data protection system, taking into account all the circumstances of the case. Given the position of the Court in the above ruling, and recent revelations of mass-surveillance carried out by US authorities, the controller could in this case hardly come to the conclusion that the level of protection is adequate.

It is therefore relevant to examine whether one of the **specific derogations** listed in Article 9.6 could apply. In this case, according to the information received (communication from DG MARE, notification and privacy statement), the data subject participates in the programme on a voluntary basis and has given his/her consent to the transfer (Article 9.6(a)). However, these derogations cannot apply to transfers of personal data which might be qualified as "repeated, mass or structural"¹. Such transfers should rather be carried out within a specific legal framework. The transfer in the case at hand seems to be repeated and structural and cannot therefore qualify for the derogation provided for in Article 9.6(a). Furthermore, in the field of employment, the "freely given" consent has to be safeguarded based on strict criteria.

¹ Opinion of the EPDS on the data protection reform package, adopted on 7 March 2012.

In cases where there is not an adequate level of protection in the country and where specific derogations as provided in Article 9.6 do not apply, the data controller should introduce safeguards to ensure the protection of personal data in accordance with Article 9.7 of the Regulation. “**Adequate safeguards**” should be understood as data protection guarantees which are created for specific situations and which do not already exist in the recipient’s legal system. Typical examples of adequate safeguards are the Standard Contractual Clauses (SCC)² or Binding Corporate Rules (BCR). Any instrument created to serve as an adequate safeguard should clearly include a description of the data protection principles that have to be respected by the recipient as well as the means to ensure the necessary mechanism to make this protection effective.

According to the information received, no SCC or BCR or any other instrument of this kind has been put in place. The standard data protection clause in the framework service contract cannot be considered a SCC, as it only covers the processing of personal data in general and not the transfer to a third country as such. Furthermore, it does not include all the requirements as set out above.

According to Article 9.8 the institution shall inform the EDPS of categories of cases where they have applied paragraphs 6 and 7 of Article 9. There is no need for **prior authorisation** by the EDPS where SCC are used. However, it is necessary to obtain prior authorisation where the transfers are based on specific safeguards and are not incorporated in a legally binding instrument.

In light of the above, please find below our replies to the questions raised by the DPC of DG MARE:

1. Do you agree with the precautionary measure of putting on hold further processing of personal data by the subcontractor? Would you recommend other measures?

Yes, the Court has declared the Safe Harbour decision invalid, therefore transfers from the EU to the US can no longer be carried out on the basis of that decision. Transfers still taking place under the Safe Harbour decision after the judgment are unlawful. Until there are other safeguards in place, the transfers cannot continue and putting on hold such processing therefore seems appropriate and justified.

2. Under what conditions could DG MARE resume the transfers of data to the US-based subcontractor?

Other means of ensuring a lawful transfer, such as SCC and BCR, are not as such affected by the invalidity of the Safe Harbour Decision and basing the transfer on a SCC could therefore theoretically be an option. However, although these other instruments have not been declared invalid, the EDPS would be very cautious in this regard and the controller should keep in mind that derogations to the applicable law that go beyond restrictions necessary in a democratic society (Article 4 of SCC decision) might give room to the exercise of the EDPS’ powers to block or suspend transfers (Article 47.1(f) of the Regulation). In any event, the controller should conduct an assessment in accordance with Article 9.

² Commission Decision 2002/16/EC

3. *What should be done with the personal data recently collected and processed by the subcontractor? Should we ask the US-based company to erase such personal data? What is the limit date?*

The Court has declared Safe Harbour invalid with retroactive effect. Therefore, the decision is considered to never have been valid. However, as regards transfers based on the Safe Harbour decision and where the institution acted in good faith, there is a presumption that the institution acted lawfully, because, as the Court points out in the judgment, "*Measures of the EU institutions are in principle presumed to be lawful and accordingly produce legal effects until such time as they are withdrawn, annulled in an action for annulment or declared invalid following a reference for a preliminary ruling or a plea of illegality*". However, the fact that the Commission acted in good faith at the time of the transfer, does not exempt it from taking action to rectify the situation now that the transfers carried out have been declared unlawful. Consequently, the data already collected and processed by the US-based company should in principle be deleted.

4. *Should DG MARE request the EDPS for authorization according to Article 9(7) of Regulation No 45/2001 for further processing of data linked to the notification in question?*

As explained above, if the controller decides to put in place a SCC, prior authorisation by the EDPS is not necessary. However, such authorisation should be obtained where the transfers are based on specific safeguards and are not incorporated in a legally binding instrument.

Conclusion

Since the Court has declared the Safe Harbour decision invalid, transfers from the EU to the US can no longer be carried out on the basis of that decision. Transfers still taking place under the Safe Harbour decision after the judgment are unlawful and until there are other safeguards in place, the transfers cannot continue.

The EDPS therefore agrees with the decision to block the processing following the Safe Harbour judgment. Even though other instruments, such as SCC or BCR, have not been declared invalid, the EDPS would not recommend using them (cf. Article 4 of SCC decision - derogations to the applicable law that go beyond restrictions necessary in a democratic society). The controller should be aware that there is always a risk that they will face a complaint with regard to these transfers if they decide to continue.

Furthermore, the controller should ensure that the data already transferred to the US-based subcontractor are deleted.

As regards the resuming of the processing operation, the EDPS recommends the controller to explore the possibilities of using an EU-based subcontractor instead.