

DSK Position Paper

1. Following the CJEU's ruling on Safe Harbor of 6 October 2015, data transfer exclusively on the basis of the Commission's Safe Harbor Decision of 26 July 2000 (2000/520/EC) is inadmissible.

2. In the light of the CJEU's ruling, the admissibility of data transfers to the US based on other instruments, such as standard contractual clauses or binding corporate rules (BCR), is also questionable.

3. The CJEU has specified that, regardless of decisions by the European Commission, the EU member states' data protection authorities are free to examine, with complete independence, whether data protection levels in third countries are appropriate.

4. The CJEU has called upon the European Commission and the data protection authorities to examine the level of data protection in the US and other third countries (legal situation and practice) and has provided a specific framework for such an examination with strict requirements.

5. If data protection authorities are informed about transfers of data to the US exclusively based on Safe Harbor they will prohibit such transfers.

6. When exercising their supervisory powers pursuant to Article 4 of the European Commission's Decisions on standard contractual clauses of 27 December 2004 (2004/915/EC) and of 5 February 2010 (2010/87/EU), data protection authorities will use the principles laid down in the CJEU ruling, particularly in paragraphs 94 and 95.

7. For the time being, data protection authorities will not issue any new permission for data transfers to the US based on binding corporate rules (BCR) or data export contracts.

Special meeting of the Conference of Data Protection Commissioners (DSK) in
Frankfurt on 21 October 2015

8. For this reason, businesses are called upon to ensure without delay that their data transfer procedures comply with data protection law. Businesses wishing to export data to the US or other third countries should also take the DSK decision of 27 March 2014 on protecting human rights in electronic communication (*Gewährleistung der Menschenrechte bei der elektronischen Kommunikation*) and the comments on cloud computing of 9 October 2014 into account.

9. Under strict conditions, consent to the transfer of personal data may be a viable basis. As a rule, such data transfer must not occur repeatedly, on a mass scale or routinely.

10. For the export of employee data or if data of third parties are affected at the same time, such consent may be the basis for data transfers to the US only in exceptional cases.

11. The data protection authorities call upon lawmakers to provide them with the power to engage in legal proceedings in line with the CJEU's ruling.

12. The European Commission is asked to insist on creating sufficiently broad guarantees for the protection of privacy in its negotiations with the US. This includes in particular the right to legal redress, material data protection rights and the principle of proportionality. Furthermore, the decisions on standard contractual clauses must soon be adapted to the requirements laid down in the CJEU's ruling.

Namely for this reason the DSK welcomes the deadline of 31 January 2016 set by the Article 29 Working Party.

13. The DSK calls upon the Federal Government to insist on compliance with an adequate standard of fundamental rights in terms of privacy and data protection in direct negotiations with the US administration.

14. The DSK calls upon the European Commission, the European Council and the European Parliament to ensure in the ongoing trilogue negotiations that the strict criteria of the CJEU's ruling are fully implemented in chapter V of the General Data Protection Regulation.