

European Commission avoids privacy dispute with the USA

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AS A LEADING AUTHORITY on Safe Harbor, Professor Reidenberg considers the Commission's report has seriously understated the flaws in the scheme.

The European Commission's Staff Working Paper on the implementation of the US-EU Safe Harbor Agreement is striving to avoid a privacy dispute with the US in the aftermath of September 11th. Whilst September 11th has focused attention on government access to personal data, Safe Harbor addresses a different set of issues.

The agreement itself was an attempt to solve the obvious legal conflict between the principles in the European Directive and the lack of rules and standards in the US for the treatment of European personal data by US companies. The political hope was that Safe Harbor would create a substitute for missing US legal protections for European data. Because the European Parliament was critical of the acceptance of a prospective arrangement, the Commission committed to an assessment of the agreement's implementation.

This resulting paper tries to put a positive spin on the first 18 months of Safe Harbor, but clearly illustrates that compliance with the arrangement falls short of the expected level of data protection. The paper looks at the implementation by US companies of the Safe Harbor principles based on an independent consultant's study of "visible compliance" as of June 2001, and on information gathered by the Commission. The Commission also had responses from the US Department of Commerce.

On the positive side, the report emphasises that Safe Harbor simplifies data exports to the US, that few complaints have been filed thus far, and that various dispute resolution groups in the

US might meet the requirements of the Safe Harbor. The report also praises the US Department of Commerce for its efforts to develop compliance workbooks for US companies and the Federal Trade Commission (FTC) for its responsiveness to the European Commission.

Nevertheless, the reported compliance deficiencies are significant. First, only a trivial number of US companies were participating in the Safe Harbor, and only a few of those were major corporations engaged in international data flows.

Second, the Staff Paper notes that "a substantial number" of participating companies have failed to provide the required transparency. This failure shows that corporate compliance with one of the most basic principles of the Safe Harbor is seriously lacking. US companies are not accustomed to publicly describing their data processing practices. The significant level of non-transparency suggests participants are trying to create an appearance of data protection and that they do not foresee any real consequences for deficiencies.

Third, and equally troubling, the paper observes that fewer than 50 per cent of the participating companies complied with all of the required Safe Harbor principles. While the report attributes some of the non-compliance to "teething problems", this extraordinary failure rate calls into question the very legitimacy of the current agreement as a substitute for missing legal protection.

Lastly, the validity of the entire Safe Harbor arrangement rests on the commitment by the FTC to bring enforcement actions against breaching

participants. The Staff Paper notes an assertion by the FTC that the lack of transparency would be actionable as an "unfair and deceptive trade practice".

But, despite transparency failures and widespread omissions in privacy policies, the paper also shows that no company has been pursued for making a false self-certification to the US Department of Commerce. Indeed, there is no support in American law for the dubious assertion by the FTC that it has enforcement powers against companies that fail to make certain privacy statements for their European data.

While the Staff Paper is optimistic with respect to private dispute settlement mechanisms such as BBBOnline, the FTC's role remains a clear and important weakness in the enforcement mechanism. Rather than demand that the US prosecutes companies for these fundamental implementation deficiencies or challenge the continued existence of Safe Harbor, the paper chooses only to identify these issues and to stress the European Commission's continued desire to work with the US government for future compliance. In effect, the paper reflects a significant political decision by the European Commission to avoid confrontation with the US over privacy issues at this juncture and to avoid revisiting the question of "adequacy". With the continuing threat of terrorism and the public focus on security, this choice defers a renewed debate on trans-Atlantic private sector data processing.

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