EUROPEAN
COMMISSION

Brussels, 27.11.2013
COM(2013) 847 final

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

on the Functioning of the Safe Harbour from the Perspective of EU Citizens and Companies Established in the EU

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

on the Functioning of the Safe Harbour from the Perspective of EU Citizens and Companies Established in the EU

1. INTRODUCTION

Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (hereinafter "data protection Directive") sets the rules for transfers of personal data from EU Member States to other countries outside the EU[1] to the extent such transfers fall within the scope of this instrument[2].

Under the Directive, the Commission may find that a third country ensures an adequate level of protection by reason of its domestic law or of the international commitments it has entered into in order to protect rights of individuals in which case the specific limitations on data transfers to such a country would not apply. These decisions are commonly referred to as "**adequacy decisions**".

On 26 July 2000, the Commission adopted Decision 520/2000/EC[3] (hereafter "**Safe Harbour decision**") recognising the Safe Harbour Privacy Principles and Frequently Asked Questions (respectively "the Principles" and "FAQs"), issued by the Department of Commerce of the United States, as providing adequate protection for the purposes of personal data transfers from the EU. The Safe Harbour decision was taken following an opinion of the Article 29 Working Party and an opinion of the Article 31 Committee delivered by a qualified majority of Member States. In accordance with Council Decision 1999/468 the Safe Harbour Decision was subject to prior scrutiny by the European Parliament.

As a result, the current Safe Harbour decision allows free transfer[4] of personal information from EU Member States[5] to companies in the US which have signed up to the Principles in circumstances where the transfer would otherwise not meet the EU standards for adequate level of data protection given the substantial differences in privacy regimes between the two sides of Atlantic.

The functioning of the current Safe Harbour arrangement relies on commitments and self-certification of adhering companies. Signing up to these arrangements is voluntary, but the rules are binding for those who sign up. The fundamental principles of such an arrangement are:

a) Transparency of adhering companies' privacy policies,

b) Incorporation of the Safe Harbour principles in companies' privacy policies, and

---

1 Articles 25 and 26 of the data protection Directive set forth the legal framework for transfers of personal data from the EU to third countries outside the EEA.

2 Additional rules have been laid down in Article 13 of Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters to the extent such transfers concern personal data transmitted or made available by one Member State to another Member State, who subsequently intends to transfer those data to a third state or international body for the purpose of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal sanctions.

3 Commission decision 520/2000/EC of 26 July 2000 pursuant to Directive 95/46 of the European Parliament and of the Council on the adequacy of the protection provided by the Safe Harbour Privacy Principles and related FAQs issued by the US Department of Commerce in OJ 215 of 28 August 2000, page 7.

4 The above does not exclude the application to the data processing of other requirements that may exist under national legislation implementing the EU data protection directive.

5 Data transfers from the three States Parties to the EEA are similarly affected, following extension of Directive 95/46/EC to the EEA Agreement, Decision 38/1999 of 25 June 1999, OJ L 296/41, 23.11.2000.

c) Enforcement, including by public authorities.

This fundamental basis of the Safe Harbour has to be reviewed in the **new context** of:

a) the exponential increase in data flows which used to be ancillary but are now central to the rapid growth of the digital economy and the very significant developments in data collection, processing and use,

b) the critical importance of data flows notably for the transatlantic economy,[6]

c) the rapid growth of the number of companies in the US adhering to the Safe Harbour scheme which has increased by eight-fold since 2004 (from 400 in 2004 to 3,246 in 2013),

d) the information recently released on US surveillance programmes which raises new questions on the level of the protection the Safe Harbour arrangement is deemed to guarantee.

Against this background, this Communication takes stock of the functioning of the Safe Harbour scheme. It is **based on evidence** gathered by the Commission, the work of the EU-US Privacy Contact Group in 2009, a Study prepared by an independent contractor in 2008[7] and information received in the ad hoc EU-U.S Working Group (the "Working Group") established following the revelations on US surveillance programmes *(see a parallel Document)*. This Communication follows the two **Commission Assessment Reports** in the start-up period of the Safe Harbour arrangement, respectively in 2002[8] and 2004[9].

2. STRUCTURE AND FUNCTIONING OF SAFE HARBOUR

2.1. Structure of the Safe Harbour

A US company that wants to adhere to the Safe Harbour must: (a) identify in its publicly available privacy policy that it adheres to the Principles and actually does comply with the Principles, as well as (b) self-certify i.e., declare to the US Department of Commerce that it is in compliance with the Principles. The self-certification must be resubmitted on an annual basis. The Safe Harbour Privacy Principles attached in Annex I to the Safe Harbour Decision include requirements on both the substantive protection of personal data (data integrity, security, choice, and onward transfer principles) and the procedural rights of data subjects (notice, access, and enforcement principles).

As to the enforcement of the Safe Harbour scheme in the US, two US institutions play a major role: the US Department of Commerce and the US Federal Trade Commission.

The **Department of Commerce** reviews every Safe Harbour self-certification and every annual recertification submission that it receives from companies to ensure that they include

[6] According to some studies, if services and cross-border data flows were to be disrupted as a consequence of discontinuity of binding corporate rules, model contract clauses and the Safe Harbour, the negative impact on EU GDP could reach -0,8% to -1,3% and EU services exports to the US would drop by -6,7% due to loss of competitiveness. See: "The Economic Importance of Getting Data Protection Right", a study by the European Centre for International Political Economy for the US Chamber of Commerce, March 2013.

[7] Impact Assessment Study prepared for the European Commission in 2008 by the *Centre de Recherche Informatique et Droit* ('CRID') of the University of Namur.

[8] Commission Staff Working Paper "The application of Commission Decision 520/2000/EC of 26 July 2000 pursuant to Directive 95/46 of the European Parliament and of the Council on the adequate protection of personal data provided by the Safe Harbour Privacy Principles and related FAQs issued by the US Department of Commerce", SEC (2002) 196, 13.12.2002.

[9] Commission Staff Working Paper "The implementation of Commission Decision 520/2000/EC on the adequate protection of personal data provided by the Safe Harbour Privacy Principles and related FAQs issued by the US Department of Commerce", SEC (2004) 1323, 20.10.2004.

all the elements required to be a member of the scheme[10]. It updates a list of companies which have filed self-certification letters and publishes the list and letters on its website. Furthermore, it monitors the functioning of Safe Harbour and removes from the list companies not complying with the Principles.

The **Federal Trade Commission**, within its powers in the field of consumer protection, intervenes against unfair or deceptive practices pursuant to Section 5 of the Free Trade Commission Act. The Federal Trade Commission's enforcement actions include inquiries on false statements of adherence to Safe Harbour and non-compliance with these Principles by companies which are members of the scheme. In the specific cases of enforcing the Safe Harbour Principles against air carriers, the competent body is the US Department of Transportation[11].

The current Safe Harbour Decision is part of EU law which has to be applied by Member State Authorities. Under the Decision, the EU national **data protection authorities** (DPAs) have the right to suspend data transfers to Safe Harbour certified companies in specific cases[12]. The Commission is not aware of any cases of suspension by a national data protection authority since the establishment of Safe Harbour in 2000. Independently of the powers they enjoy under the Safe Harbour Decision, EU national data protection authorities are competent to intervene, including in the case of international transfers, in order to ensure compliance with the general principles of data protection set forth in the 1995 Data Protection Directive.

As recalled in the current Safe Harbour Decision, it is **the competence of the Commission** – acting in accordance with the examination procedure set out in Regulation 182/2011 – to adapt the Decision, to suspend it or limit its scope at any time, in the light of experience with its implementation. This is notably foreseen if there is a systemic failure on the US side, for example if a body responsible for ensuring compliance with the Safe Harbour Privacy Principles in the United States is not effectively fulfilling its role, or if the level of protection provided by the Safe Harbour Principles is overtaken by the requirements of US legislation. As with any other Commission decision, it can also be amended for other reasons or even revoked.

2.2. The functioning of the Safe Harbour

The **3246**[13] **certified companies** include both small and big companies[14]. While financial services and telecommunication industries are outside the Federal Trade Commission enforcement powers and therefore excluded from the Safe Harbour, many industry and services sectors are present among certified companies, including well known Internet companies and industries ranging from information and computer services to pharmaceuticals, travel and tourism services, healthcare or credit card services[15]. These are mainly US companies that provide services in the EU internal market. There are also subsidiaries of some

[10] If a company's certification or recertification fails to meet Safe Harbour requirements, the Department of Commerce notifies the company requesting steps to be taken (e.g., clarifications, changes in policy description) before the company's certification may be finalised.

[11] Under Title 49 of the US Code Section 41712.

[12] More specifically, suspension of transfers can be required in two situations, where:
(a) the government body in the US has determined that the company is violating the Safe Harbour Privacy Principles; or
(b) there is a substantial likelihood that the Safe Harbour Privacy Principles are being violated; there is a reasonable basis for believing that the enforcement mechanism concerned is not taking or will not take adequate and timely steps to settle the case at issue; the continuing transfer would create an imminent risk of grave harm to data subjects; and the competent authorities in the Member State have made reasonable efforts under the circumstances to provide the company with notice and an opportunity to respond.

[13] On 26 September 2013 the number of Safe Harbour organizations listed as "**current**" on the Safe Harbour List was **3246,** as "**not current**" **935.**

[14] Safe Harbour organizations with 250 or less employees: 60**%** (1925 of 3246). Safe Harbour organizations with 251 or more employees: **40%** (1295 of 3246).

[15] For example MasterCard deals with thousands of banks and the company is a clear example of a case where Safe Harbour cannot be replaced by other legal instruments for personal data transfers such as binding corporate rules or contractual arrangements.

EU firms such as Nokia or Bayer. 51% are firms that process data of employees in Europe transferred to the US for human resource purposes[16].

There has been a **growing concern** among some data protection authorities in the EU about data transfers under the current Safe Harbour scheme. Some Member States' data protection authorities have criticised the very general formulation of the principles and the high reliance on self-certification and self-regulation. Similar concerns have been raised by industry, referring to distortions of competition due to a lack of enforcement.

The current Safe Harbour arrangement is based on the voluntary adherence of companies, on self-certification by these adhering companies and on enforcement of the self-certification commitments by public authorities. In this context any lack of transparency and any shortcomings in enforcement undermine the foundations on which the Safe Harbour scheme is constructed.

Any gap in transparency or in enforcement on the US side results in responsibility being shifted to European data protection authorities and to the companies which use the scheme. On 29 April 2010 German data protection authorities issued a decision requesting companies transferring data from Europe to the US to actively check that companies in the US importing data actually comply with Safe Harbour Privacy Principles and recommending that "at least the exporting company must determine whether the Safe Harbour certification by the importer is still valid"[17].

On 24 July 2013, following the revelations on US surveillance programmes, German DPAs went a step further expressing concerns that "there is a substantial likelihood that the principles in the Commission's decisions are being violated"[18]. There are cases of some DPAs (e.g., Bremen DPA) that have requested a company transferring personal data to US providers to inform the DPA on whether and how the concerned providers prevent access by the National Security Agency. The Irish DPA has reported that it received two complaints recently which reference the Safe Harbour programme following coverage about the US Intelligence Agencies programmes but declined to investigate them on the basis that the transfer of personal data to a third country met the requirements of Irish data protection law. Following a similar complaint, the Luxembourg DPA has found that Microsoft and Skype have complied with the Luxembourg Data Protection Act when transferring data to US[19]. However, the Irish High Court has since granted an application for judicial review under which it will review the inaction of the Irish Data Protection Commissioner in relation to the US surveillance programmes. One of the two complaints was filed by a student group Europe v Facebook (EvF) which also filed similar complaint against Yahoo in Germany, which is being processed by the relevant data protection authorities.

These divergent responses of data protection authorities to the surveillance revelations demonstrate the real risk of the fragmentation of the Safe Harbour scheme and raise questions as to the extent to which it is enforced.

---

16 Safe Harbour organizations that cover organization human resources data under their Safe Harbour certification (and thereby have agreed to cooperate and comply with the EU data protection authorities): **51%** (1671 of 3246).

17 See Düsseldorfer Kreis decision of 28/29 April 2010 . See: Beschluss der obersten Aufsichtsbehörden für den Datenschutz im nicht-öffentlichen Bereich am 28./29. April 2010 in Hannover: http://www.bfdi.bund.de/SharedDocs/Publikationen/Entschliessungssammlung/DuesseldorferKreis/290410_SafeHarbor.pdf?__blob=publicationFile However, the European Data Protection Supervisor (EDPS) Peter Hustinx expressed an opinion at the European Parliament LIEBE Committee Inquiry on 7 October 2013 that "substantial improvements have been made and most issues now been settled" as far as Safe Harbour is concerned: https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Speeches/2013/13-10-07_Speech_LIBE_PH_EN.pdf

18 See a resolution of a German Conference of data protection commissioners underlying that intelligence services constitute a massive threat to data traffic between Germany and countries outside Europe: http://www.bfdi.bund.de/EN/Home/homepage_Kurzmeldungen/PMDSK_SafeHarbor.html?nn=408870

19 See the press statement of Luxemboug DPA on 18 November 2013.

3. TRANSPARENCY OF ADHERED COMPANIES' PRIVACY POLICIES

Under the FAQ 6 that is annexed to the Safe Harbour Decision (Annex II) companies interested in certifying under the Safe Harbour must provide to the Department of Commerce and make public their privacy policy. It must include a commitment to adhere to the Privacy Principles. The requirement to **make publicly available the privacy policies** of self-certified companies as well as their statement to adhere to the Privacy Principles is critical for the operation of the scheme.

Insufficient accessibility to privacy policies of such companies is to the detriment of individuals whose personal data is being collected and processed, and may constitute a **violation of the principle of notice**. In such cases, individuals whose data is being transferred from the EU may be unaware of their rights and the obligations to which a self-certified company is subjected.

Moreover, the commitment by companies to comply with the Privacy Principles **triggers the Federal Trade Commission's powers to enforce these principles** against companies in cases of non-compliance as an unfair or deceptive practice. Lack of transparency by companies in the US renders Federal Trade Commission oversight more difficult and undermines the effectiveness of enforcement.

Over the years a substantial number of self-certified companies had not made their privacy policy public and/or had not made a public statement of adherence to the Privacy Principles. The 2004 Safe Harbour report pointed to the necessity for the Department of Commerce to **adopt a more active stance in scrutinising compliance** with this requirement.

Since 2004, the Department of Commerce has developed **new information tools** aimed at helping companies to comply with their transparency obligations. The relevant information on the scheme is accessible on the Department of Commerce's website dedicated to the Safe Harbour[20] that also allows companies to upload their privacy policies. The Department of Commerce has reported that companies have made use of this feature and posted their privacy policies on the Department of Commerce website when applying to join the Safe Harbour[21]. In addition, the Department of Commerce published in 2009-2013 a series of guidelines for companies wishing to join Safe Harbour, such as a "Guide to Self-Certification" and "Helpful Hints on Self-Certifying Compliance"[22].

The degree of compliance with the transparency obligations varies amongst companies. Whereas certain companies limit themselves to notifying to the Department of Commerce a description of their privacy policy as part of the self-certification process, the majority make these policies public on their websites, in addition to uploading them on the Department of Commerce website. However, these **policies are not always presented in a consumer-friendly and easily readable form**. Hyperlinks to privacy policies do not always function properly nor do they always refer to the correct webpages.

It follows from the Decision and its annexes that the requirement that companies should publicly disclose their privacy policies **goes beyond mere notification** of self-certification to the Department of Commerce. The requirements for certification as set out in the FAQs include a description of the privacy policy and transparent information on where it is available for viewing by the public[23]. Privacy policy statements must be clear and easily accessible by

[20] http://www.export.gov/SafeHarbour/

[21] https://SafeHarbour.export.gov/list.aspx

[22] The Guide is available on the programme's website at: http://export.gov/SafeHarbour/ Helpful Hints: http://export.gov/SafeHarbour/eu/eg_main_018495.asp

[23] On 12 November 2013 the Department of Commerce has confirmed that "Today, companies that have public websites and cover consumer/client/visitor data must include a Safe Harbor-compliant privacy policy on their respective websites" (document: "U.S.-EU Cooperation to Implement the Safe Harbor Framework" of 12 Nov. 2013).

the public. They must include a hyperlink to the Department of Commerce Safe Harbour website which lists all the 'current' members of the scheme and a link to the alternative dispute resolution provider. However, a number of companies under the scheme in the period 2000-2013 failed to comply with these requirements. During working contacts with the Commission in February 2013 the Department of Commerce has acknowledged that up to 10% of certified companies may actually not have posted a privacy policy containing the Safe Harbour affirmative statement on their respective public websites.

Recent statistics demonstrate also a persisting problem of **false claims of Safe Harbour adherence**. About 10% of companies claiming membership in the Safe Harbour are not listed by the Department of Commerce as current members of the scheme[24]. Such false claims originate from both: companies which have never been participants of the Safe Harbour and companies which have once joined the scheme but then failed to resubmit their self-certification to the Department of Commerce at the yearly intervals. In this case they continue to be listed on the Safe Harbour website, but with certification status "not current", meaning that the company has been a member of the scheme and thus has an obligation to continue to provide protection to data already processed. The Federal Trade Commission is competent to intervene in cases of deceptive practices and non-compliance of the Safe Harbour principles (see Section 5.1). Unclarity over the "false claims" impacts the credibility of the scheme.

The European Commission alerted the Department of Commerce through regular contacts in 2012 and 2013 that, in order to comply with the transparency obligations, it is not sufficient for companies to only provide the Department of Commerce with a description of their privacy policy. Privacy policy statements must be made publicly available. The Department of Commerce was also asked to **intensify its periodic controls of companies' websites** subsequent to the verification procedure carried out in the context of the first self-certification process or its annual renewal and to take action against those companies which do not comply with the transparency requirements.

As a first answer to EU concerns, **the Department of Commerce has since March 2013 made it mandatory** for a Safe Harbour company with a public website to make its privacy policy for customer/user data readily available on its public website. At the same time, the Department of Commerce began notifying all companies whose privacy policy did not already include a link to Department of Commerce Safe Harbour website that one should be added, making the official Safe Harbour List and website directly accessible to consumers visiting a company's website. This will allow European data subjects to verify immediately, without additional searches in the web, a company's commitments submitted to the Department of Commerce. Additionally, the Department of Commerce started notifying companies that contact information for their independent dispute resolution provider should be included in their posted privacy policy[25].

This process needs to be speeded up to ensure that all certified companies fully meet Safe Harbour requirements not later than by March 2014 (i.e. by companies' yearly recertification deadline, counting from the introduction of new requirements in March 2013).

---

[24] In September 2013 an Australian consultancy Galexia compared Safe Harbour membership "false claims" in 2008 and 2013. Its main finding is that, in parallel to the increase of membership in the Safe Harbour between 2008 and 2013 (from 1,109 to 3,246), the number of false claims has increased from 206 to 427. http://www.galexia.com/public/about/news/about_news-id225.html

[25] Between March and September 2013 the Department of Commerce has:
• Notified the 101 companies *who had already uploaded their Safe Harbour compliant privacy policy to Safe Harbour website* that they must also post their privacy policy to their company websites;
• Notified the 154 companies that had not already done so, that they should include a link to Safe Harbour website in their privacy policy;
• Notified more than 600 companies that they should include contact information for their independent dispute resolution provider in their privacy policy.

Nevertheless, concerns remain as to whether all self-certified companies fully comply with the transparency requirements. Compliance with the obligations undertaken at the point of the initial self-certification and the annual renewal should be monitored and investigated more stringently by the Department of Commerce.

4. INTEGRATION OF THE SAFE HARBOUR PRIVACY PRINCIPLES IN COMPANIES' PRIVACY POLICIES

Self-certified companies must comply with the Privacy Principles set out in Annex I to the Decision in order to obtain and retain the benefit of the Safe Harbour.

In the 2004 report, the Commission found that a significant number of **companies had not correctly incorporated the Safe Harbour Privacy Principles** in their data processing policies. For example, individuals were not always given clear and transparent information about the purposes for which their data were processed or were not given the possibility to opt out if their data were to be disclosed to a third party or to be used for a purpose that was incompatible with the purposes for which it was originally collected. The 2004 Commission's report considered that the Department of Commerce*" should be more proactive with regard to access to the Safe Harbour and to awareness of the Principles"*[26].

There has been limited progress in that respect. Since 1 January 2009, any company seeking to renew its certification status for Safe Harbour – which must be renewed annually – has had its privacy policy evaluated by the Department of Commerce prior to the renewal. The evaluation is however limited in scope. There is **no full evaluation of the actual practice** in the self-certified companies which would significantly increase the credibility of the self-certification process.

Further to the Commission's requests for a more rigorous and systematic oversight of the self-certified companies by the Department of Commerce, **more attention is currently applied to new submissions**. The number of new submissions which have not been accepted, but are resent to companies for improvements in privacy policies has significantly increased between 2010 and 2013: doubled for re-certifying companies and tripled for the Safe Harbour newcomers[27]. The Department of Commerce has assured the Commission that any certification or recertification can be finalised only if the company's privacy policy fulfils all requirements, notably that it includes an affirmative commitment to adhere to the relevant set of Safe Harbour Privacy Principles and that the privacy policy is publicly available. A company is required to identify in its Safe Harbour List record the location of the relevant policy. It is also required to clearly identify on its website an Alternative Dispute Resolution provider and include a link to the Safe Harbour self-certification on the website of the Department of Commerce. However, it has been estimated that over 30% of Safe Harbour members do not provide dispute resolution information in the privacy policies on their websites[28].

A majority of the companies that the Department of Commerce has removed from the Safe Harbour List were removed at the express request of the relevant companies (e.g., companies that had merged or were acquired, had changed their lines of business or had gone out of business). A smaller number of records of lapsed companies have been removed when the

[26] See page 8 of the 2004 Report SEC (2004) 1323.

[27] According to statistics provided in September 2013 by the Department in Commerce, the DoC notified in 2010 18% (93) of the 512 first-time certifiers and 16% (231) of the 1,417 recertifiers to make improvements to their privacy policies and/or Safe Harbour applications. However, as a follow up to Commission requests for severe, diligent and systematic scrutiny of all submissions, through mid-Sep. 2013, DoC notified 56% (340) of the 602 first-time certifiers and 27% (493) of the 1,809 recertifiers asking them to make improvements to their privacy policies.

[28] Chris Connolly (Galexia) appearance before the European Parliament LIBE Committee inquiry on 7 Oct. 2013.

websites that were listed in the records appeared to be inoperative and the companies' certification status had been "Not current" for several years[29]. Importantly, none of these removals seems to have taken place because the Department of Commerce verification led to the identification of compliance problems.

The Safe Harbour List record serves as a public notice and as a record of a company's Safe Harbour commitments. **The commitment to adhere to the Safe Harbour Principles is not time-limited** with respect to data received during the period in which the company enjoys the benefit of the Safe Harbour, and the company must continue to apply the Principles to such data as long as it stores, uses or discloses them, even if it leaves the Safe Harbour for any reason.

The number of Safe Harbour **applicants that did not pass administrative review** by the Department of Commerce and therefore were never added to the Safe Harbour List is the following: **In 2010**, only **6%** (33) of the 513 first-time certifiers were never included in the Safe Harbour List because they did not comply with Department of Commerce standards for self-certification. In **2013, 12%** (75) of the 605 first-time certifiers were never included in the Safe Harbour List because they have not complied with Department of Commerce standards for self-certification.

As a minimum requirement to increase the transparency of the oversight, the Department of Commerce should list on its website all companies that have been removed from the Safe Harbour and indicate reasons for which the certification has not been renewed. The label "Not current" on the Department of Commerce list of Safe Harbour member companies should be regarded not just as information but should be accompanied by **a clear warning** – both verbal and graphical - that a company is currently not fulfilling Safe Harbour requirements.

Moreover, some companies still fall short of fully incorporating all Safe Harbour Principles. Apart from the issue of transparency addressed in Section 3 above, privacy policies of self-certified companies are often unclear as regards the purposes for which data is collected, and the right to choose whether or not data can be disclosed to third parties; thereby raising issues of compliance with the Privacy Principles of "Notice" and "Choice". Notice and choice are crucial to ensure control from data subjects over what happens to their personal information.

The critical first step in the compliance process, the incorporation of the Safe Harbour Privacy Principles in companies' privacy policies, is not sufficiently ensured. The Department of Commerce should address it as a matter of priority by developing a methodology of compliance in the operational practice of companies and their interaction with clients. **There must be an active follow up by the Department of Commerce on effective incorporation of the Safe Harbour principles in companies' privacy policies**, rather than leaving enforcement action only to be triggered by complaints of individuals.

5. ENFORCEMENT BY PUBLIC AUTHORITIES

A number of mechanisms are available to ensure effective enforcement of the Safe Harbour scheme and to offer recourse for individuals in cases where the protection of their personal information is affected by non-compliance with the Privacy Principles.

According to the "Enforcement" Principle, privacy policies of self-certified organizations must include effective compliance mechanisms. Pursuant to the "Enforcement" Privacy Principle as further clarified by FAQ 11, FAQ 5 and FAQ 6, this requirement can be met by

[29] As of December 2011, the US Department of Commerce had removed 323 companies from the Safe Harbour List: 94 companies were removed because they were no longer in business; 88 companies due to acquisition or merger, 95 at the requests of the parent company; 41 companies because repeated failure to ask for recertification and 5 companies for miscellaneous reasons.

adhering to **independent recourse mechanisms** that have publicly stated their competence to hear individual complaints for failure to abide by the Principles. Alternatively, this can be achieved through the organization's commitment to cooperate with the **EU Data Protection Panel**[30]**.** Moreover self-certified companies are subject to the jurisdiction of the Federal Trade Commission under Section 5 of the Federal Trade Commission Act which prohibits unfair or deceptive acts or practices in or affecting commerce[31].

The 2004 Report expressed concerns as regards the enforcement of the Safe Harbour scheme, namely that the Federal Trade Commission should be more proactive in launching investigations and raising awareness of individuals about their rights. Another area of concern was the lack of clarity in relation to the Federal Trade Commission's competence to enforce the Principles regarding human resources data.

The recourse body responsible for human resources data – the EU Data Protection Panel – has received one complaint concerning human resources data[32]. However, the absence of complaints does not allow conclusions to be drawn as to the full functioning of the scheme. Ex-officio checks of companies' compliance should be introduced to verify the actual implementation of data protection commitments. EU Data Protection Authorities should also undertake actions in order to raise awareness of the existence of the Panel.

Problems have been highlighted in relation to the way in which alternative recourse mechanisms function as enforcement bodies. A number of these bodies lack appropriate means to remedy cases of failure to comply with the Principles. This shortcoming needs to be addressed.

5.1. Federal Trade Commission

The Federal Trade Commission can take enforcement measures in case of violations of the Safe Harbour commitments that companies make. When Safe Harbour was established, the Federal Trade Commission committed to review on a priority basis all referrals from EU Member State authorities[33]. Since no complaints were received for the first ten years of the arrangement, the Federal Trade Commission decided to seek to identify any Safe Harbour violations in every privacy and data security investigation it conducts. Since 2009, the Federal Trade Commission has brought 10 enforcement actions against companies based on Safe Harbour violations. These actions notably resulted in settlement orders – subject to substantial penalties – prohibiting privacy misrepresentations, including of compliance with the Safe Harbour, and imposing on companies' comprehensive privacy programmes and audits for 20 years. The companies must accept independent assessments of their privacy programmes on the request of the Federal Trade Commission. These assessments are reported regularly to the Federal Trade Commission. The Federal Trade Commission's orders also prohibit these companies from misrepresenting their privacy practices and their participation in Safe Harbour or similar privacy schemes. This was the case for example in the Federal Trade

30 The EU Data Protection Panel is a body competent for investigating and resolving complaints lodged by individuals for alleged infringement of the Safe Harbour Principles by an US company member of the Safe Harbour. Companies that certify to the Safe Harbour Principles must choose to comply with independent recourse mechanism or to cooperate with the EU Data Protection Panel in order to remedy problems arising out of failure to comply with Safe Harbour Principles. Cooperation with the EU Data Protection Panel is nonetheless mandatory when the US company processes human resources personal data transferred from the EU in the context of an employment relationship. If the company commits itself to cooperate with the EU panel, it must also commit itself to comply with any advice given by the EU panel where it takes the view that the company needs to take specific action to comply with the Safe Harbour Principles, including remedial or compensatory measures.

31 The Department of Transportation exercises similar jurisdictions over air carriers under Title 49 United States Code Section 41712.

32 The complaint originated from a Swiss citizen and therefore has been referred by the EU Data Protection Panel to the Swiss data protection authority (US has a separate Safe Harbour scheme for Switzerland).

33 See Annex V to the Commission Decision 2000/520/EC of 26 July 2000.

Commission investigations against Google, Facebook and Myspace.[34] In 2012 Google agreed to pay a $22.5 million fine to settle allegations that it violated a consent order. In all privacy investigations the Federal Trade Commission ex officio examines whether there is Safe Harbour violation.

The Federal Trade Commission has reiterated recently its declarations and commitment to reviewing, on a priority basis, any referrals received from privacy self-regulatory companies and EU Member States that allege a company's non-compliance with Safe Harbour Principles.[35] The Federal Trade Commission has received only a few referrals from European data protection authorities over the past three years.

Transatlantic cooperation between data protection authorities started to develop in recent months. For example the Federal Trade Commission signed on 26 June 2013 with the Office of the Data Protection Commissioner of Ireland a Memorandum of Understanding on mutual assistance in the enforcement of laws protecting personal information in the private sector. The memorandum establishes a framework for increased, more streamlined, and more effective privacy enforcement cooperation[36].

In August 2013, the Federal Trade Commission announced a further reinforcement of the checks on companies with control over large databases of personal information. It has also created a portal where consumers can file a privacy complaint regarding a US company[37].

The Federal Trade Commission should also increase efforts to investigate false claims of Safe Harbour adherence. A company claiming on its website that it complies with the Safe Harbour requirements, but is not listed by the Department of Commerce as a 'current' member of the scheme, is misleading consumers and abusing their trust. False claims weaken the credibility of the system as a whole and therefore should be immediately removed from the companies' websites. The companies should be bound by an enforceable requirement not to mislead consumers. The Federal Trade Commission should continue seeking to identify Safe Harbour false claims as the one in the *Karnani* case, where the Federal Trade Commission shut down a California website for claiming a false Safe Harbour registration, and engaging in fraudulent e-commerce practices targeted at European consumers[38].

On 29 October 2013 the Federal Trade Commission announced that it had opened "numerous investigations into Safe Harbor compliance in recent months" and that more enforcement actions on this front can be expected "in the coming months". The Federal Trade Commission confirmed also that it is "committed to looking for ways to improve its efficacy" and would "continue to welcome any substantive leads, such as the complaint received in the past month from a European-based consumer advocate alleging a large number of Safe Harbor-related violations".[39] The agency committed also to "systematically monitor compliance with Safe Harbor orders, as we do with all our orders"[40].

---

34 Over the period 2009-2012 Federal Trade Commission has completed ten enforcement actions of Safe Harbour commitments: FTC v. Javian Karnani, and Balls of Kryptonite, LLC (2009), World Innovators, Inc. (2009), Expat Edge Partners, LLC (2009), Onyx Graphics, Inc. (2009), Directors Desk LLC (2009), Progressive Gaitways LLC (2009), Collectify LLC (2009), Google Inc. (2011), Facebook, Inc. (2011), Myspace LLC (2012). See: "Federal Trade Commission of Safe Harbour Commitments": http://export.gov/build/groups/public/@eg_main/@SafeHarbour/documents/webcontent/eg_main_052211.pdf See also: "Case Highlights": http://business.ftc.gov/us-eu-Safe-Harbour-framework. Most of these cases involved problems with companies that joined Safe Harbour but then continued to represent themselves as members without renewing the annual certification.

35 This commitment has been reiterated at a meeting of Federal Trade Commission Commissioner Julie Brill with EU Data protection Authorities (Article 29 Working Party) in Brussels on 17 April 2013.

36 http://www.dataprotection.ie/viewdoc.asp?Docid=1317&Catid=66&StartDate=1+January+2013&m=n

37 Consumers can file their complaints via the Federal Trade Commission Complaint Assistant (https://www.ftccomplaintassistant.gov/) and international consumers may file complaints via econsumer.gov (http://www.econsumer.gov).

38 http://www.ftc.gov/os/caselist/0923081/090806karnanicmpt.pdf

39 http://www.ftc.gov/speeches/brill/131029europeaninstituteremarks.pdf and http://www.ftc.gov/speeches/ramirez/131029tacdremarks.pdf

40 Letter of the Federal Trade Commission Chairwoman Edith Ramirez to Vice-President Viviane Reding.

On 12 November 2013, the Federal Trade Commission informed the European Commission that "**if a company's privacy policy promises Safe Harbor protections, that company's failure to make or maintain a registration, is not, by itself, likely to excuse that company from FTC enforcement of those Safe Harbor commitments**"[41].

In November 2013, the Department of Commerce informed the European Commission that "to help ensure that companies do not make 'false claims' of participation in Safe Harbor, the Department of Commerce will begin a process of contacting Safe Harbor participants one month prior to their recertification date to describe the steps they must follow should they chose not to recertify". **The Department of Commerce "will warn companies** in this category to remove all references to Safe Harbor participation, including use of Commerce's Safe Harbor certification mark, from the companies' privacy policies and websites, **and notify them clearly that failure to do so could subject the companies to FTC enforcement actions**"[42].

To combat false claims of Safe Harbour adherence, privacy policies of self-certified companies' websites should always include a link to the Department of Commerce Safe Harbour website where all the 'current' members of the scheme are listed. This will allow European data subjects to verify immediately, without additional searches whether a company is currently a member of the Safe Harbour. The Department of Commerce has started in March 2013 to request this from companies, but the process should be intensified.

The continuous monitoring and consequent enforcement by the Federal Trade Commission of actual compliance with the Safe Harbour Principles – in addition to the measures taken by the Department of Commerce as highlighted above – remains a key priority for ensuring proper and effective functioning of the scheme. It is necessary in particular to increase **ex-officio checks and investigations of companies' compliance** to the Safe Harbour principles. Complaints to the Federal Trade Commission relating violations should also be further facilitated.

5.2. EU Data Protection Panel

The EU Data Protection Panel is a body created under the Safe Harbour Decision. It is competent to investigate complaints lodged by individuals referring to personal data collected in the context of the employment relationship as well as cases relating to certified companies which have chosen this option for dispute resolution under the Safe Harbour (53% of all companies). It is composed of representatives of various EU data protection authorities.

To date, the Panel received four complaints (two in 2010 and two in 2013). It referred two complaints in 2010 to national data protection authorities (UK and Switzerland). The third and the fourth complaints are currently under examination. The low level of complaints can be explained by the fact that the powers of Panel are, as mentioned above, primarily limited to certain type of data.

The Panel's limited caseload could be also partly explained by the lack of awareness about the existence of the Panel. The Commission has, since 2004, made the information about the Panel more visible on its website[43].

---

41 Letter of the Federal Trade Commission Chairwoman Edith Ramirez to Vice-President Viviane Reding.

42 "U.S.-EU Cooperation to Implement the Safe Harbor Framework", 12 November 2013.

43 Pursuant to the 2004 report, an Information Notice in the form of Q&A of the EU Data Protection Panel has been published on the Commission's website (DG Justice) with the purpose of raising awareness of individuals and help them to file a complaint when they believe that their personal data has been processed in violation of the Safe Harbour: http://ec.europa.eu/justice/policies/privacy/docs/adequacy/information_Safe_harbour_en.pdf
The standard complaint form is available at http://ec.europa.eu/justice/policies/privacy/docs/adequacy/ complaint_form_en.pdf

To make a better use of the Panel, companies in the US which have chosen to cooperate with it and comply with its decisions, for some or all categories of personal data covered in their respective self-certifications, should clearly and prominently indicate it in their privacy policies commitments to allow the Department of Commerce to scrutinise this aspect. A dedicated page should be created on each EU data protection authority's website regarding Safe Harbour to raise Safe Harbour awareness with European companies and data subjects.

5.3. Improvement of enforcement

The weaknesses in transparency and weaknesses in enforcement that have been identified above, lead to concerns among European companies as regards the negative impact of the Safe Harbour scheme on European companies' competitiveness. Where a European company competes with a US company operating under Safe Harbour, but in practice not applying its principles, the European company is at a competitive disadvantage in relation to that US company.

Furthermore, the Federal Trade Commission's jurisdiction extends to unfair or deceptive acts or practices "in or affecting commerce". Section 5 of the Federal Trade Commission Act established exceptions to the Federal Trade Commission's authority over unfair or deceptive acts or practices with respect inter alia to **telecommunications.** Being outside Federal Trade Commission enforcement, telecom companies are not allowed to adhere to the Safe Harbour. However, with the growing convergence of technologies and services, many of their direct competitors in the US ICT sector are members of Safe Harbour. The exclusion of telecom companies from the data exchanges under the Safe Harbour scheme is a matter of concern to some European telecom operators. According to the European Telecommunications Network Operators' Association (ETNO) "this is in clear conflict to the most important plea of telecommunication operators regarding the need for a level playing field"[44].

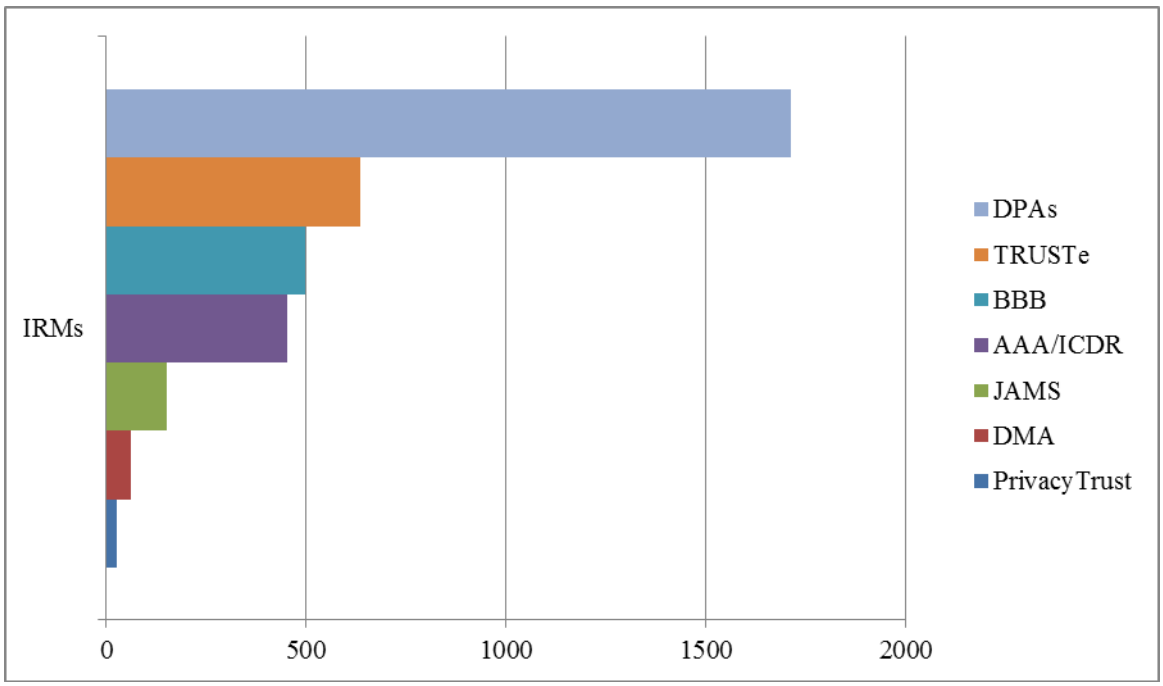
6. STRENGTHENING THE SAFE HARBOUR PRIVACY PRINCIPLES

6.1. Alternative Dispute Resolutions

The enforcement principle requires that there must be "**readily available and affordable recourse mechanisms** by which each individual's complaints and disputes are investigated". To that end the Safe Harbour scheme establishes a system of Alternative Dispute Resolution (ADR) by an independent third party[45] to provide individuals with rapid solutions. The three top recourse mechanisms bodies are the EU Data Protection Panel, BBB (Better Business Bureaus) and TRUSTe.

[44] "ETNO considerations" received by Commission services on 4 October 2013 discuss also 1) definition of personal data in Safe Harbour, 2) lack of monitoring of the Safe Harbour, 3) and the fact that "US companies can transfer data with much less restrictions than their European counterparts" which "constitutes a clear discrimination of European companies and is affecting the competitiveness of European companies". Under the Safe Harbour rules, to disclose information to a third party, organizations must apply the Notice and Choice Principles. Where an organization wishes to transfer information to a third party that is acting as an agent, it may do so if it first either ascertains that the third party subscribes to the Principles or is subject to the Directive or another adequacy finding or enters into a written agreement with such third party requiring that the third party provide at least the same level of privacy protection as is required by the relevant Principles.

[45] The EU Directive 2013/11/EU on consumer ADR underlines the importance of independent, impartial, transparent, effective, fast and fair alternative dispute resolution procedures.



The use of ADR has increased since 2004 and the Department of Commerce has strengthened the monitoring of American ADR providers to make sure that the information they offer about the complaint procedure is clear, accessible and understandable. However, the effectiveness of this system is yet to be proven due to the limited number of cases dealt with so far[46].

Though the Department of Commerce has been successful is reducing the fees charged by the ADRs, two out of seven major ADR providers continue to charge fees from individuals who file a complaint[47]. This represents the ADR providers used by about 20% of Safe Harbour companies. These companies have selected an ADR provider that charges a fee to consumers for filing a complaint. Such practices do not comply with the Enforcement Principle of Safe Harbour which gives individuals the right of access to a "readily available and affordable independent recourse mechanisms". In the European Union, access to an independent dispute resolution service provided by the EU Data Protection Panel is free for all data subjects.

On 12 November 2013 the Department of Commerce confirmed that it "will continue to advocate on behalf of EU citizens' privacy and work with ADR providers to determine whether their fees can be lowered further".

In relation to sanctions, not all ADR providers possess the necessary tools to remedy situations of failure to abide by the Privacy Principles. Moreover, the publication of findings

46 For example, one major service provider ("TRUSTe") reported that it received 881 requests in 2010, but that only three of them were considered admissible, and grounded, and led to the company concerned being required to change its privacy policy and website. In 2011, the number of complaints was 879, and in one case the company was required to change its privacy policy. According to the DoC, vast majority of the complaints to ADR are requests from consumers, for example users who have forgotten their password and were unable to obtain it from the internet service. Following Commission requests, the Department of Commerce developed new statistics reporting criteria to be used by all ADR. They distinguish between mere requests and complaints and they provide with further clarification of types of complaints received. These new criteria need however to be further discussed to make sure that new statistics in 2014 concern all ADR providers, are comparable and provide critical information to assess the effectiveness of the recourse mechanism.

47 International Centre for Dispute Resolution / American Arbitration Association (ICDR/AAA), charges $ 200 and JAMS $ 250 "filing fee". The Department of Commerce informed the Commission that it had worked with the AAA, the most costly dispute resolution provider for individuals, to develop a Safe Harbour-specific program which reduced the cost to consumers from several thousands of dollars to a flat rate of $ 200.

of non-compliance does not seem to be foreseen amongst the range of sanctions and measures of all ADR service providers.

ADR providers are also required to refer cases to the Federal Trade Commission where a company fails to comply with the outcome of the ADR process, or rejects the ADR provider's decision, so that the Federal Trade Commission can review and investigate and, if appropriate, take enforcement measures. However, to date, there have been no cases of referral from ADR providers to the Federal Trade Commission for non-compliance[48].

Alternative dispute resolution service providers maintain on their Websites lists of companies (Dispute Resolution Participants) which use their services. This allows consumers to easily verify if – in case of dispute with a company – an individual can submit a complaint to an identified dispute resolution provider. Thus, for example the BBB dispute resolution provider lists all companies which are under the BBB dispute resolution system. However, there are numerous companies claiming to be under a specific dispute resolution system but not listed by the ADR service providers as participants of their dispute resolution scheme[49].

ADR mechanisms should be easily accessible, independent and affordable for individuals. A data subject should be able to file a complaint without any excessive constraints. All ADR bodies should publish on their websites statistics about the complaints handled as well as specific information about their outcome. Finally, the ADR bodies should be further monitored to make sure that information they provide about the procedure and how to lodge a complaint is clear and understandable, so that the dispute resolution becomes an effective, trusted mechanism providing results. It should also be reiterated that publication of findings of non-compliance should be included within the range of mandatory sanctions of ADRs.

6.2. Onward transfer

With the exponential growth of data flows there is a need to ensure the continued protection of personal data at all stages of data processing, notably when data is transferred by a company adhering to the Safe Harbour to a **third party processor**. Therefore, the need for the better enforcement of the Safe Harbour concerns not only Safe Harbour members but also subcontractors.

The Safe Harbour scheme allows onward transfers to third parties acting as "agents" if the company – member of the Safe Harbour scheme – "ascertains that the third party subscribes to the Principles or is subject to the Directive or another adequacy finding or enters into a written agreement with such third party requiring that the third party provide at least the same level of privacy protection as is required by the Privacy Principles"[50]. For example, a cloud service provider is required by the Department of Commerce to enter into a contract even if it is "Safe Harbour-compliant" and it receives personal data for processing[51]. However, this provision is not clear in Annex II to the Safe Harbour Decision.

As the recourse to subcontractors has increased considerably over the past years, in particular in the context of cloud-computing, when entering such a contract, a Safe Harbour company

---

48 See FAQ 11.

49 Examples: Amazon has informed the DoC that it uses the BBB as its dispute resolution provider. However the BBB does not list Amazon among its dispute resolution participants. Vice versa, Arsalon Technologies (www.arsalon.net), a cloud hosting service provider, appears on the BBB Safe Harbour dispute resolution list but the company is not a current member of the Safe Harbour (situation as of 1 October 2013). BBB, TRUSTe and other ADR service providers should remove or correct the certification claims. They should be bound by an enforceable requirement to only certify companies who are members of the Safe Harbour.

50 See Commission Decision 2000/520/EC page 7 (onward transfer).

51 See: "Clarifications Regarding the U.S.-EU Safe Harbor Framework and Cloud Computing": http://export.gov/static/Safe%20Harbor%20and%20Cloud%20Computing%20Clarification_April%2012%202013_Latest_eg_main_060351.pdf

should notify the Department of Commerce and be obliged to make public the privacy safeguards[52].

The three above mentioned issues: the alternative dispute resolution mechanism, reinforced oversight and onward transfers of data should be further clarified.

7. ACCESS TO DATA TRANSFERRED IN THE FRAMEWORK OF THE SAFE HARBOUR SCHEME

In the course of 2013, information on the scale and scope of US surveillance programmes has raised concerns over the continuity of protection of personal data lawfully transferred to the US under the Safe Harbour scheme. For instance, all companies involved in the PRISM programme, and which grant access to US authorities to data stored and processed in the US, appear to be Safe Harbour certified. This has made the Safe Harbour scheme one of the conduits through which access is given to US intelligence authorities to collecting personal data initially processed in the EU.

The Safe Harbour Decision provides, in Annex 1, that adherence to the Privacy Principles may be limited, if justified by national security, public interest, or law enforcement requirements or by statute, government regulation or case-law. In order for limitations and restrictions on the enjoyment of fundamental rights to be valid, they must be narrowly construed; they must be set forth in a publicly accessible law and they must be necessary and proportionate in a democratic society. In particular, the Safe Harbour Decision specifies that such limitations are allowed only **"to the extent necessary"** to meet national security, public interest, or law enforcement requirements[53]. While the exceptional processing of data for the purposes of national security, public interest or law enforcement is provided under the Safe Harbour scheme, the large scale access by intelligence agencies to data transferred to the US in the context of commercial transactions was not foreseeable at the time of adopting the Safe Harbour.

Moreover, for reasons of transparency and legal certainty, the European Commission should be notified by the Department of Commerce of any statute or government regulations that would affect adherence to the Safe Harbour Privacy Principles[54]. The use of exceptions should be carefully monitored and the exceptions must not be used in a way that undermines the protection afforded by the **Principles**[55]**.** In particular, large scale access by US authorities to data processed by Safe Harbour self-certified companies risks undermining the confidentiality of electronic communications.

---

52 These remarks concern cloud providers which are not in the Safe Harbour. According to Galexia consultancy firm, "the level of Safe Harbour membership (and compliance) amongst cloud service providers is quite high. Cloud service providers typically have multiple layers of privacy protection, often combining direct contracts with clients and over-arching privacy policies. With one or two important exceptions, cloud service providers in the Safe Harbour are compliant with the key provisions relating to dispute resolution and enforcement. There are no major cloud service providers in the list of false membership claims at this time." (appearance of Chris Connolly from Galexia before the LIBE Committee inquiry on "Electronic mass surveillance of EU citizens").

53 See Annex 1 of the Safe Harbour Decision: "Adherence to these Principles may be limited: (a) to the extent necessary to meet national security, public interest, or law enforcement requirements; (b) by statute, government regulation, or case law that create conflicting obligations or explicit authorizations, provided that, in exercising any such authorization, an organization can demonstrate that its non-compliance with the Principles is limited to the extent necessary to meet the overriding legitimate interests furthered by such authorization; or (c) if the effect of the Directive of Member State law is to allow exceptions or derogations, provided such exceptions or derogations are applied in comparable contexts. Consistent with the goal of enhancing privacy protection, organizations should strive to implement these Principles fully and transparently, including indicating in their privacy policies where exceptions to the Principles permitted by (b) above will apply on a regular basis. For the same reason, where the option is allowable under the Principles and/or U.S. law, organizations are expected to opt for the higher protection where possible."

54 Opinion 4/2000 on the level of protection provided by the "Safe Harbour Principles", adopted by Article 29 Data Protection Working Party on 16 May 2000.

55 Opinion 4/2000 on the level of protection provided by the "Safe Harbour Principles", adopted by Article 29 Data Protection Working Party on 16 May 2000.

7.1. Proportionality and necessity

As results from the findings of the ad hoc EU-US Working Group on data protection, a number of legal bases under US law allow large-scale collection and processing of personal data that is stored or otherwise processed companies based in the US. This may include data previously transferred from the EU to the US under the Safe Harbour scheme, and it raises the question of continued compliance with the Safe Harbour principles. The large scale nature of these programmes may result in data transferred under Safe Harbour being accessed and further processed by US authorities beyond what is strictly necessary and proportionate to the protection of national security as foreseen under the exception provided in the Safe Harbour Decision.

7.2. Limitations and redress possibilities

As results from the findings of the ad hoc EU-US Working Group on data protection, safeguards that are provided under US law are mostly available to US citizens or legal residents. Moreover, there are no opportunities for either EU or US data subjects to obtain access, rectification or erasure of data, or administrative or judicial redress with regard to collection and further processing of their personal data taking place under the US surveillance programmes.

7.3. Transparency

Companies do not systematically indicate in their privacy policies when they apply exceptions to the Principles. The individuals and companies are thus not aware of what is being done with their data. This is particularly relevant in relation with the operation of the US surveillance programmes in question. As a result, Europeans whose data are transferred to a company in the US under Safe Harbour may not be made aware by those companies that their data may be subject to access[56]. This raises the question of compliance with the Safe Harbour principles on transparency. Transparency should be ensured to the greatest extent possible without jeopardising national security. In addition to existing requirements on companies to indicate in their privacy policies where the Principles may be limited by statute, government regulation or case law, companies should also be encouraged to indicate in their privacy policies when they apply exceptions to the Principles to meet national security, public interest or law enforcement requirements.

8. CONCLUSIONS AND RECOMMENDATIONS

Since its adoption in 2000, Safe Harbour has become a vehicle for EU-US flows of personal data. The importance of efficient protection in case of transfers of personal data has increased due to the exponential increase in data flows central to the digital economy and the very significant developments in data collection, processing and use. Web companies such as Google, Facebook, Microsoft, Apple, Yahoo have hundreds of millions of clients in Europe and transfer personal data for processing to the US on a scale inconceivable in the year 2000 when the Safe Harbour was created.

[56] Relatively transparent information in this respect is provided by some European companies in Safe Harbour. For example Nokia, which has operations in the US and is a Safe Harbour member provides a following notice in its privacy policy: *"We may be obligated by mandatory law to disclose your personal data to certain authorities or other third parties, for example, to law enforcement agencies in the countries where we or third parties acting on our behalf operate."*

Due to deficiencies in transparency and enforcement of the arrangement, specific problems still persist and should be addressed:

a) transparency of privacy policies of Safe Harbour members,

b) effective application of Privacy Principles by companies in the US, and

c) effectiveness of the enforcement.

Furthermore, the **large scale access by intelligence agencies to data transferred to the US by Safe Harbour certified companies** raises additional serious questions regarding the continuity of data protection rights of Europeans when their data in transferred to the US.

On the basis of the above, the Commission has identified the following **recommendations**:

Transparency

1. *Self-certified companies should publicly disclose their privacy policies.* It is not sufficient for companies to provide the Department of Commerce with a description of their privacy policy. Privacy policies should be made publicly available on the companies' websites, in clear and conspicuous language.

2. *Privacy policies of self-certified companies' websites should always include a link to the Department of Commerce Safe Harbour website which lists all the 'current' members of the scheme*. This will allow European data subjects to verify immediately, without additional searches whether a company is currently a member of the Safe Harbour. This would help increase the credibility of the scheme by reducing the possibilities for false claims of adherence to the Safe Harbour. The Department of Commerce has started in March 2013 to request this from companies, but the process should be intensified.

3. *Self-certified companies should publish privacy conditions of any contracts they conclude with subcontractors, e.g. cloud computing services*. Safe Harbour allows onward transfers from Safe Harbour self-certified companies to third parties acting as "agents", for example to cloud service providers. According to our understanding, in such cases the Department of Commerce requires from self-certified companies to enter into a contract. However, when entering such a contract, a Safe Harbour company should also notify the Department of Commerce and be obliged to make public the privacy safeguards.

4. *Clearly flag on the website of the Department of Commerce all companies which are not current members of the scheme.* The label "Not current" on the Department of Commerce list of Safe Harbour members should be accompanied by a clear warning that a company is currently not fulfilling Safe Harbour requirements. However, in the case of "Not current" the company is obliged to continue to apply the Safe Harbour requirements for the data that has been received under Safe Harbour.

Redress

5. *The privacy policies on companies' websites should include a link to the alternative dispute resolution (ADR) provider and/or EU panel.* This will allow European data subjects to contact immediately the ADR or EU panel in case of problems. Department of Commerce has started in March 2013 to request this from companies, but the process should be intensified.

6. *ADR should be readily available and affordable*. Some ADR bodies in the Safe Harbour scheme continue to charge fees from individuals – which can be quite costly for an individual user – for the handling of the complaint ($ 200-250). By contrast, in Europe access to the Data Protection Panel foreseen for solving complaints under the Safe Harbour, is free.

7. *Department of Commerce should monitor more systematically ADR providers regarding the transparency and accessibility of information they provide concerning the procedure they use and the follow-up they give to complaints.* This makes the dispute resolution an effective, trusted mechanism providing results. It should also be reiterated that publication of findings of non-compliance should be included within the range of mandatory sanctions of ADRs.

Enforcement

8. *Following the certification or recertification of companies under the Safe Harbour, a certain percentage of these companies should be subject to ex officio investigations of effective compliance of their privacy policies (going beyond control of compliance with formal requirements).*

9. *Whenever there has been a finding of non-compliance, following a complaint or an investigation, the company should be subject to follow-up specific investigation after 1 year.*

10. *In case of doubts about a company's compliance or pending complaints, the Department of Commerce should inform the competent EU data protection authority.*

11. *False claims of Safe Harbour adherence should continue to be investigated.* A company claiming on its website that it complies with the Safe Harbour requirements, but is not listed by the Department of Commerce as a 'current' member of the scheme, is misleading consumers and abusing their trust. False claims weaken the credibility of the system as a whole and therefore should be immediately removed from the companies' websites.

Access by US authorities

12. *Privacy policies of self-certified companies should include information on the extent to which US law allows public authorities to collect and process data transferred under the Safe Harbour. In particular companies should be encouraged to indicate in their privacy policies when they apply exceptions to the Principles to meet national security, public interest or law enforcement requirements.*

13. *It is important that the national security exception foreseen by the Safe Harbour Decision is used only to an extent that is strictly necessary or proportionate.*