

# AMERICAN ACTION FORUM

Douglas Holtz-Eakin  
President, American Action Forum  
November 2, 2015

Statement for the House of Representatives Subcommittee on Commerce, Manufacturing, and Trade and the Subcommittee on Communications and Technology Joint Hearing entitled “Examining the EU Safe Harbor Decision and Impacts for Transatlantic Data Flows”<sup>1</sup>

The Safe Harbor program has been a key component of global Internet commerce and has facilitated frictionless transfer of commercial information between the United State and Europe. The European Court of Justice’s (ECJ) decision to nullify the arrangement throws digital trade into turmoil. For the over 4,400 U.S. businesses and the millions of jobs that relied on this agreement as a means of moving information, the absence of a data transfer regime will be costly; the Internet could be balkanized and transatlantic digital competition could suffer from being frozen in place.

To ensure this isn’t the case, both Congress and the White House should take very seriously the task of reestablishing the free flow of data between to the two regions via a Safe Harbor 2.0. Fortunately, the affected parties have until January 2016 to negotiate a new set of protocols. At the same time, Congress and the Administration should resist demands for broader privacy regulation. Such regulation is at odds with the timetable and misses the reality that U.S. system is more robust and beneficial than it is often perceived to be.

The stakes are high. The ECJ decision affects a trading block that accounts for a third of all world trade and nearly half of global economic output. While it is still in the early phase, the impact could reverberate throughout digital trade, which has been growing steadily. In 2012, the U.S. exported “\$140.6 billion worth of digitally deliverable services to the EU and imported \$86.3 billion worth,” for a total of \$227 billion.<sup>2</sup> As a practical matter, U.S. companies might soon have to localize data on European servers and limit transfers of data between the U.S. and the EU, thus fracturing the open Internet. This will also ensure that the biggest players in the tech economy face reduced competition from newcomers since the compliance costs of this new and complicated legal regime will hinder startups.<sup>3</sup>

There are other means to ensure compliance with European laws, including model contract clauses and binding corporate rules, for example. However, a key part of the model contract clauses still

---

<sup>1</sup> The opinions expressed herein are mine alone and do not represent the position of the American Action Forum.

<sup>2</sup> Joshua P. Meltzer, *The Importance of the Internet and Transatlantic Data Flows for U.S. and EU Trade and Investment*, <http://www.brookings.edu/~media/research/files/papers/2014/10/internet-transatlantic-data-flows-meltzer/internet-transatlantic-data-flows-version-2.pdf>.

<sup>3</sup> Adam Thierer, *Unintended Consequences of the EU Safe Harbor Ruling*, <http://techliberation.com/2015/10/06/unintended-consequences-of-the-eu-safe-harbor-ruling/>.

# AMERICAN ACTION FORUM

hasn't been fully recognized for use,<sup>4</sup> while binding corporate rules would take some time to implement across businesses and would be burdensome to small and medium sized companies.<sup>5</sup> Safe Harbor 2.0 should meet the legal needs of both sides of the Atlantic without being burdensome to either side.

There has been progress already. Congress should be lauded for its quick action to pass the Judicial Redress Act to address the Court's concern that aspects of the law compromise "the essence of the fundamental right to effective judicial protection." The Federal Trade Commission (FTC) has worked hand in hand with the European regulators to address "issues such as the FTC's enforcement powers; jurisdiction over employment data; the sectoral exemptions to our jurisdiction; and educating European Union consumers on Safe Harbor."<sup>6</sup> The Department of Commerce should be lauded as well for its quick response to this decision in securing a basic set of working principles on which both sides could agree.<sup>7</sup>

There is danger from overreach as well. Some have used the ECJ decision as a justification to call for broader privacy regulation. Broad privacy regulation is inconsistent with the January 2016 timetable, running the risk of leaving commercial needs unaddressed. But such a call misinterprets what is needed for the next version of Safe Harbor.

The U.S. system does not rely on pure procedures of the type the ECJ highlighted in its decision, a fact that would be revealed by a thorough examination of the privacy practices on the ground.<sup>8</sup> The U.S. privacy policy is characterized by a robust ecosystem of substantive, sectoral protections that allow U.S. companies to compete. As part of getting the balance right between privacy protection and competitive commerce, the FTC has tried a number of cases and secured 20-year consent decrees with some of the largest Internet-based firms, which requires that they submit to independent audits. While the Commission has sustained its fair share of criticism for these actions – ranging from insufficiently concerned with privacy to overly zealous – the overall record is one in

---

<sup>4</sup> Melinda L. McLellan and William W. Hellmuth, *Safe Harbor Is Dead, Long Live Standard Contractual Clauses?*, <http://www.dataprivacymonitor.com/enforcement/safe-harbor-is-dead-long-live-standard-contractual-clauses/>.

<sup>5</sup> Tanya Forsheit and Melinda L. McLellan, *What Now? What Next? FAQs and Answers Regarding the Safe Harbor Decision*, <http://www.dataprivacymonitor.com/enforcement/what-now-what-next-faqs-and-answers-regarding-the-safe-harbor-decision/>.

<sup>6</sup> Federal Trade Commission Staff, *Privacy Enforcement and Safe Harbor: Comments of FTC Staff to European Commission Review of the U.S.-EU Safe Harbor Framework*, [https://www.ftc.gov/sites/default/files/documents/public\\_statements/privacy-enforcement-safe-harbor-comments-ftc-staff-european-commission-review-u.s.eu-safe-harbor-framework/131112europeancommissionsafeharbor.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/privacy-enforcement-safe-harbor-comments-ftc-staff-european-commission-review-u.s.eu-safe-harbor-framework/131112europeancommissionsafeharbor.pdf).

<sup>7</sup> Natalia Drozdiak, *EU, U.S. Agree in Principle on New Data-Transfer Pact*, <http://www.wsj.com/articles/eu-u-s-agree-in-principle-on-data-pact-1445889819>.

<sup>8</sup> Kenneth A. Bamberger and Deirdre K. Mulligan, *Privacy on the Books and on the Ground*, <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2305&context=facpubs>.

# **A M E R I C A N   A C T I O N**

---

## **F O R U M**

which commercial activity has been supported at the same time that the FTC has acted proactively (albeit often spurred on by privacy advocates) for privacy protection.

The Internet has been a positive economic and social force because of its openness, which should be a central plank of the discussion moving forward. A failure to recognize what is at stake could put the trade of digital goods at risk. Similarly, a failure to recognize that the U.S. privacy regime has been an important component in developing globally competitive companies could be detrimental to negotiations as well. As with many other areas, negotiations for the new Safe Harbor will need a balanced approach.