

TACD

TRANS ATLANTIC
CONSUMER DIALOGUE

DIALOGUE TRANSATLANTIQUE
DES CONSOMMATEURS

DOC No. ECOM-18-00

DATE ISSUED: FEBRUARY, 2000

SAFE HARBOR

(See papers Ecom-8-99 and Ecom-11-99)

Status of the Safe Harbor negotiations:

The Safe Harbor negotiations between the US Department of Commerce and the European Commission, begun in April 1998, continue despite earlier optimism that an agreement would be reached late 1999. While progress has been made, both sides remain sufficiently apart on substantial issues that no agreement was made by the EU-US summit held in mid-December 1999. Both sides of the negotiating table are now operating on a working deadline of March 2000. On December 3, 1999, the TACD submitted formal comments to US Ambassador David Aaron on the latest draft of the Safe Harbor Principles from November 15, 1999. The November 15 draft was the third such draft of the Safe Harbor Principles; previous versions of the Safe Harbor Principles were released in November 1998 and April 1999.

Also, during January 18-20, EU and US representatives met solely with US industry groups in Washington DC. The TACD reprimands both the US Department of Commerce and the European Commission for conducting meetings with US industry representatives without the presence of consumer groups. To ensure balance between the interests of consumers and business, both sides should be included in such future meetings.

TACD appraisal of the Safe Harbor Principles:

On December 3, 1999, the TACD submitted formal comments (available at <http://www.tacd.org/aaron.html>) on the November 15, 1999 version of the Safe Harbor Principles. A summary version of the formal comments is listed below.

1. The most significant shortfall of the Safe Harbor Principles is the lack of enforcement and accountability. Without enforcement and clear disincentives, there are no satisfactory guarantees that American companies may not violate their declared privacy practices. In addition to these objections, the latest proposal inadequately establishes Fair Information Practices over data belonging to European citizens.

Under the latest draft of the Safe Harbor Principles:

- a. Notice will not always take place before the collection of data.
- b. Personal information is not always collected and used with the affirmative consent of the data subject.
- c. There is insufficient purpose specification and use limitation, especially with regards to how those may include data transfer to third parties.
- d. There are unacceptably broad instances in which the data subject may be refused

access to his or her own information.

- e. There is no protection from companies who choose to discriminate against data subjects who refuse to comply with unnecessary disclosure of their data.
2. The Safe Harbor agreement will provide limited data protection for individuals residing in EU member countries. Under the Safe Harbor Principles, European citizens will enjoy greater privacy protections from US companies than any US citizen.
3. Rather than eroding the principles of the Directive, the Safe Harbor Principles should seek to ensure to reinforce data protection for all individuals. The Safe Harbor Principles offer an inadequate amount of protection to European citizens than demanded by the laws of their own countries.
4. Privacy is a human right not subject to commercial concerns. While the EU Data Protection Directive explicitly recognizes that right, the Safe Harbor Principles do not.

Adding to the above points of disagreement, the TACD would encourage the inclusion of the following:

1. **Mandatory registration.** The current version of the Safe Harbor Proposal would allow for companies signing on to the Principles to voluntarily enter themselves on a public register. Mandatory registration would be necessary for consumer protection given the lack of other strong enforcement provisions.
2. **Systematic auditing of companies.** The latest Principles do not have any regular method for checking compliance with Safe Harbor. Again, given the lack of enforcement, such audits -- including publicly posted results of the investigations -- are necessary to make the consumer aware of the disposition of their personal information.

Recommendations:

1. The TACD urges the US Department of Commerce to incorporate the comments submitted on December 3 and to implement the suggestions for mandatory registration and systematic auditing. As it currently stands, the proposal subverts the purpose of the EU Data Directive and compromises the privacy interests of European citizens. Furthermore, the TACD should be given an opportunity to comment on the next draft of the Safe Harbor Proposal before any final decision is made.
2. The TACD urges national governments to ensure that consumer organizations are given a more central role the future development of international privacy policies and practices that affect consumer interests.
3. The TACD urges the development and adoption of an International Convention on Privacy Protection that will help safeguard the privacy interests of consumers and citizens in the twenty-first century.
4. The TACD urges the US to immediately draft and adopt comprehensive privacy legislation that conforms to the protections of the EU Data Protection Directive. Such legislation would protect US citizens and those of other countries doing business in the US.

5. The TACD urges all US agencies negotiating over or with jurisdiction on consumer privacy protection to adopt the 1980 Organization for Economic Cooperation and Development (OECD) Privacy Guidelines (available at [http://www.oecd.org//dsti/sti/it/secur/prod/PRIV - EN.HTM](http://www.oecd.org//dsti/sti/it/secur/prod/PRIV-EN.HTM)) as the proper framework and structure for adequate privacy protection. These guidelines were adopted by the US in 1980 and continue to serve as a robust model for guarding consumer privacy.