



WOJCIECH RAFAŁ WIEWIÓROWSKI
ASSISTANT SUPERVISOR

Data Protection Officer
Agency for the Cooperation of Energy
Regulators
Trg republike 3
1000 Ljubljana
SLOVENIA

Brussels, 27 July 2016

C 2016-0628

Please use edps@edps.europa.eu for all correspondence

Subject: Request for the EDPS' opinion on transfer of personal data to a processor established in the United States - Case 2016-0628

By letter dated 7 July 2016, you have consulted the EDPS on the lawfulness of transfer of personal data to a US based company, SurveyMonkey Inc., which would act as a processor providing survey related services in the framework of the activities of the Market Monitoring Department ("MMD") of the Agency for the Cooperation of Energy Regulators ("ACER").

In your letter, you correctly point out that since the Court of Justice has declared the Safe Harbour decision invalid¹, other adequate safeguards must be considered for transferring personal data to the US. After having analysed the matter, you have come to the conclusion that adequate safeguards could be adduced through Standard Contractual Clauses ("SCC") to ensure that the processing operation is in line with Regulation (EC) 45/2001.

The EDPS has already received consultations on the consequences of the Safe Harbour ruling.² As regards the use of other safeguards, the EDPS took the view that SCC and Binding Corporate Rules were not as such affected by the invalidity of the Safe Harbour Decision and could therefore theoretically be an option. This is consistent with the analysis of the WP29, according to which

¹ Judgment of the Court of 6 October 2015 — Maximillian Schrems v Data Protection Commissioner, Case C-362/14, (ECLI:EU:C:2015:650)

² See [EDPS consultation of 15 December 2015 regarding the impact of the Safe Harbour ruling on the transfer of personal data in the framework of the "360° Feedback Leadership Circle" at DG MARE \(Case 2015-0924\)](#) and [EDPS consultation of 10 March 2016 regarding the use of a US-based company for sending out alerts and newsletters at EEAS](#)

existing transfer mechanisms remain for the time being a valid legal basis for carrying out transfers to the US.³

The EDPS takes note that ACER intends to use the SCC as adopted by the Commission for transfer of personal data to processors established in third countries which do not ensure an adequate level of data protection.⁴ However, when EU institutions and bodies use one of the Commission's sets of SCC, reference to Directive 95/46/EC or national legislation implementing it must be replaced by reference to Regulation (EC) 45/2001 where appropriate.⁵ The EDPS would thus advise ACER to amend the agreement accordingly. In this context, the EDPS would also like to recall that the use of SCC is not subject to prior authorisation by the EDPS.⁶

The EDPS would, however, be very cautious with regard to the use of SCC and the controller should keep in mind that derogations to the applicable law that go beyond restrictions necessary in a democratic society (Article 4 of SCC decision) might give room to the exercise of the EDPS' powers to block or suspend transfers (Article 47(1)(f) of Regulation (EC) 45/2001). The EDPS would thus invite you to reflect on the possibility of choosing a service provider established within the EU instead, for instance EUSurvey, which is a free online survey tool developed specifically for EU institutions and bodies by DG DIGIT.⁷

Yours sincerely,

(signed)

Wojciech Rafał WIEWIÓROWSKI

³ http://ec.europa.eu/justice/data-protection/article-29/press-material/press-release/art29_press_material/2016/20160203_statement_consequences_schrems_judgement_en.pdf

⁴ Decision 2010/87/EU

⁵ See [EDPS Position Paper on the Transfer of personal data to third countries and international organisations by EU institutions and bodies](#), point 6.2.2.

⁶ See point 6.3. of the Position Paper.

⁷ <https://ec.europa.eu/eusurvey/home/welcome>