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EU to review 'safe harbour' data privacy rule for US companies

By Joshua Chaffin in Brussels



EU commissioner Viviane Reding

The EU will review a key provision in its data protection rules that US technology companies have relied on to move data across borders without European oversight, in a sign of more fallout from the spying scandal sparked by US whistleblower Edward Snowden.

Viviane Reding, the commissioner overseeing data protection, told ministers on Friday that her office had begun an assessment of the "safe harbour" used by Google and Facebook, as well as thousands of smaller US tech companies.

The safe-harbour provision, in place since the early years of the tech boom in the late 1990s, allows US companies to satisfy EU rules by signing up to a self-reporting scheme, supervised by the US federal trade commission. It is based on the principle that US data privacy standards are equivalent to those in Europe.

"The safe-harbour agreement may not be so safe after all," Ms Reding said, arguing "it could be a loophole" that allowed companies to shift data to the US where "data protection standards are lower than our European ones".

The commissioner is expected to propose recommendations before the end of the year, such as scrapping the provision altogether, adding fresh conditions or leaving it intact – although an aide said the third option was unlikely.

The Obama administration and an energetic tech industry lobby have fought to defend the safe harbour after Brussels moved to tighten its data privacy rules last year, arguing that its elimination would damage the internet economy. An open data channel is also vital for the US to maintain internet surveillance programmes for national security.

But the recent revelations about the scale of those National Security Agency programmes – some targeting the EU – have stoked outrage across Europe and changed the debate.

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Data protection has been seized on by the European parliament and thrust into the German election campaign. Angela Merkel, German chancellor, this week urged the adoption of EU-wide rules that would require all internet service providers to reveal what personal information they have stored, and to whom they have made it available.

"Prism has been a wake-up call," Ms Reding said on Friday, referring to one of the NSA programmes revealed by Mr Snowden, a former NSA contractor. "The data protection reform is Europe's answer."

Eduardo Ustaran, a privacy lawyer at Field Fisher Waterhouse, said a reassessment of the safe harbour was inevitable given that the EU was strengthening its rules. "Any change to it will have an impact on the companies involved," he said, calling the NSA scandal "an unrelated but convenient reason to add to [the commission's] case".

Ms Reding's stance could complicate recently launched negotiations for a transatlantic trade agreement that Washington and Brussels have both identified as a top priority. Data protection was expected to be a potential sticking point in those talks even before the NSA scandal.

US officials had been hoping that they could succeed in using the pact to give the safe harbour a stronger legal basis while their EU counterparts have insisted they would not compromise on their standards.

At issue is the reach of the draft EU legislation. It would require non-European companies to comply with EU laws in full when serving European customers – something that US officials argue is extraterritorial. It would also allow Brussels to fine companies that did not comply up to 2 per cent of their total annual turnover.

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