



The US « Safe Harbor Principles » in the E.U. regulatory Privacy environment

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I. The EU TBDF : regulation : art. 25 and 26 of the Directive 95/46 EC

1. Its justification

From art. 8 ECHR to a positive obligation for the EU states to protect personal data of EU residents

- > *The European Court of Justice in the Loizidou case has explicitly recognized the European Convention as a “constitutional instrument of the EU public order”, having according to ECJ decision in the Matthews case the priority on all other international (e.g. the WTO Agreements) and national European or foreign countries legislations.*



2. Its limits

- only for activities relative to the 1st pillar (the famous PNR decision of the ECJ (May 30 2006, C-317/04 et C-318/04): distinction between pillars available for EU Directive but not for the national DP legislations....
 - ***to be expected : A Framework Decision on Data Protection within the third Pillar (See the draft in discussion today at the EU Council of Ministers:(COM (2005) 475 final)(2006/C 47/12) with the risk of a double assessment of the TBDF.***

- not available as regards the consultation of websites located in EU (The Lingvist case (ECJ Nov.6 2003))



3. The system put into place

A. The principle : the « adequate protection » offered by the regulatory environment in vigor within the third country

a. Adequate is not equivalente

Adequate is not sufficient

b. Main characteristics of the EU approach

- a case by case approach
- a « pragmatiscal » and « fonctionnal » approach
- No european Imperialism
(selfregulatory (US) or coregulatory (Japan)
system might be regarded as adequate
- a (unsufficient?) coordinated approach



c. The concrete significance of the adequate protection :
the **W.P 12 : « Transfers of personal data: applying art.25 and 26 of the EU DP Directive » of the Art. 29 W.G.– 24/7/98**

- the « content » criteria (access, security, notice, etc.)
- the « enforcement » criteria

Do we need a reevaluation of these criteria ?



B. The alternative proposed by the art. 26

a. the « adequate » protection offered by the specificities of the end purposes of the TBDF : art. 26.1.

e.g. explicit consent to the TBDF

.... To be interpreted very narrowly

b. the « adequate » protection offered by the contract concluded between the E.U. sender and the recipient located in the third country: art. 26.2.

- Applicable law !!
- Mandatory content
- « Third beneficiary » clause



c. the protection offered by the B.C.R. put into place by multinational companies

- Combination between « legally » and « organisationally » binding rules.
- liability of the Group entity located inside the E.U.
- unique lock system



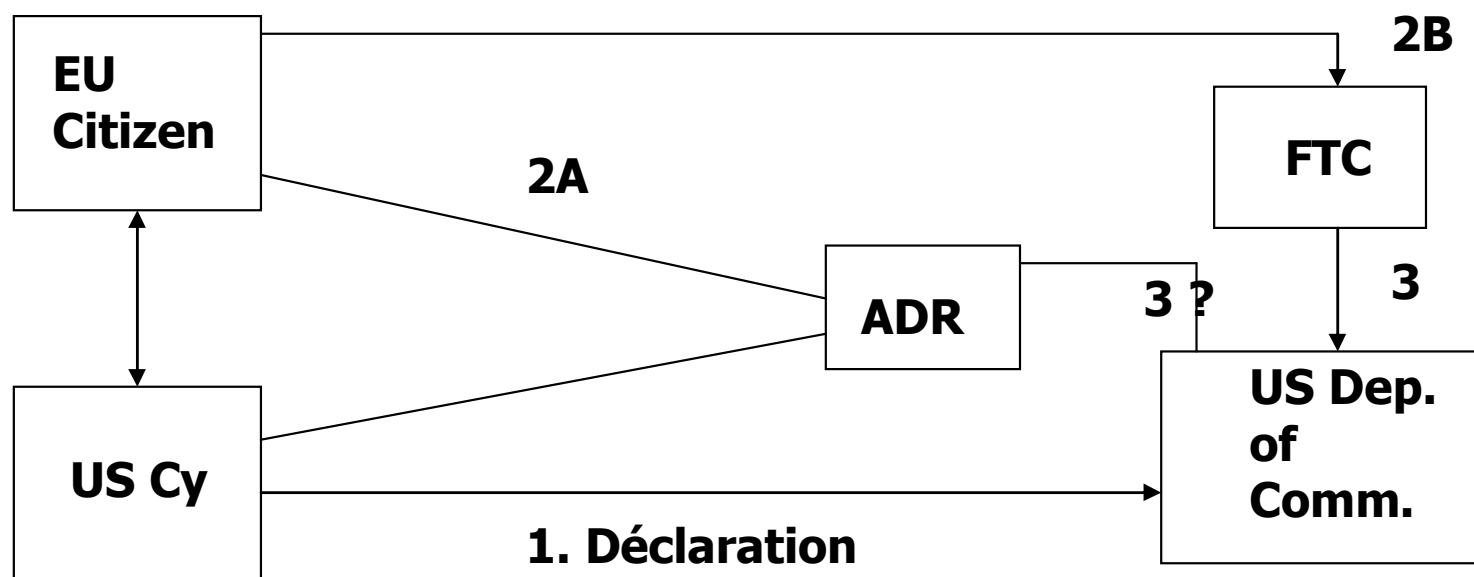
The « Safe Harbor Principles » (June 2000)

[http : //www.export.gov/safeharbor.htm](http://www.export.gov/safeharbor.htm))

- Is the content adequate ? Some discrepancies and overall the difficulty linked with the cultural differences... No legitimacy principle,... Possible limits due to the US public security requirements.
- What's about the adequacy of the procedure put into place?



- ~~The procedure:~~
The procedure:





- **Advantages:**
 - Internal procedure to be followed by the Company but generally no real control
 - A real success : from 400 registered companies at the end of 2003 to more than 1100 ones today
- **Deficiencies:**
 - No recourse till today ... Why?
 - No standardisation both as regards the registration formalities and their content and as regards the Privacy policies (format, place of publication,...)
 - The lack of control from the US Department and from the DPA Panel. What's about the ADR?

CONCLUSIONS



- We need a global (including the 3d pillars matters) agreement between US and EU...
 - As regards the 1st pillar matters, self-regulatory measures might be a good way to achieve D.P requirements if they are effective...and taken seriously by our US partners.
 - As regards the 2d and 3d pillar matters (more and more interconnected with the 1st pillar ones), need to respect fully the EU sovereignty through a mutual agreement on the cooperation between law enforcement authorities (duty to inform, serious threats to the public security,...) (See Interpol regulations).