欧米セーフハーバーに係る十分性認定無効判決に関する動向及び我が国プライバシー外交への影響

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自己紹介

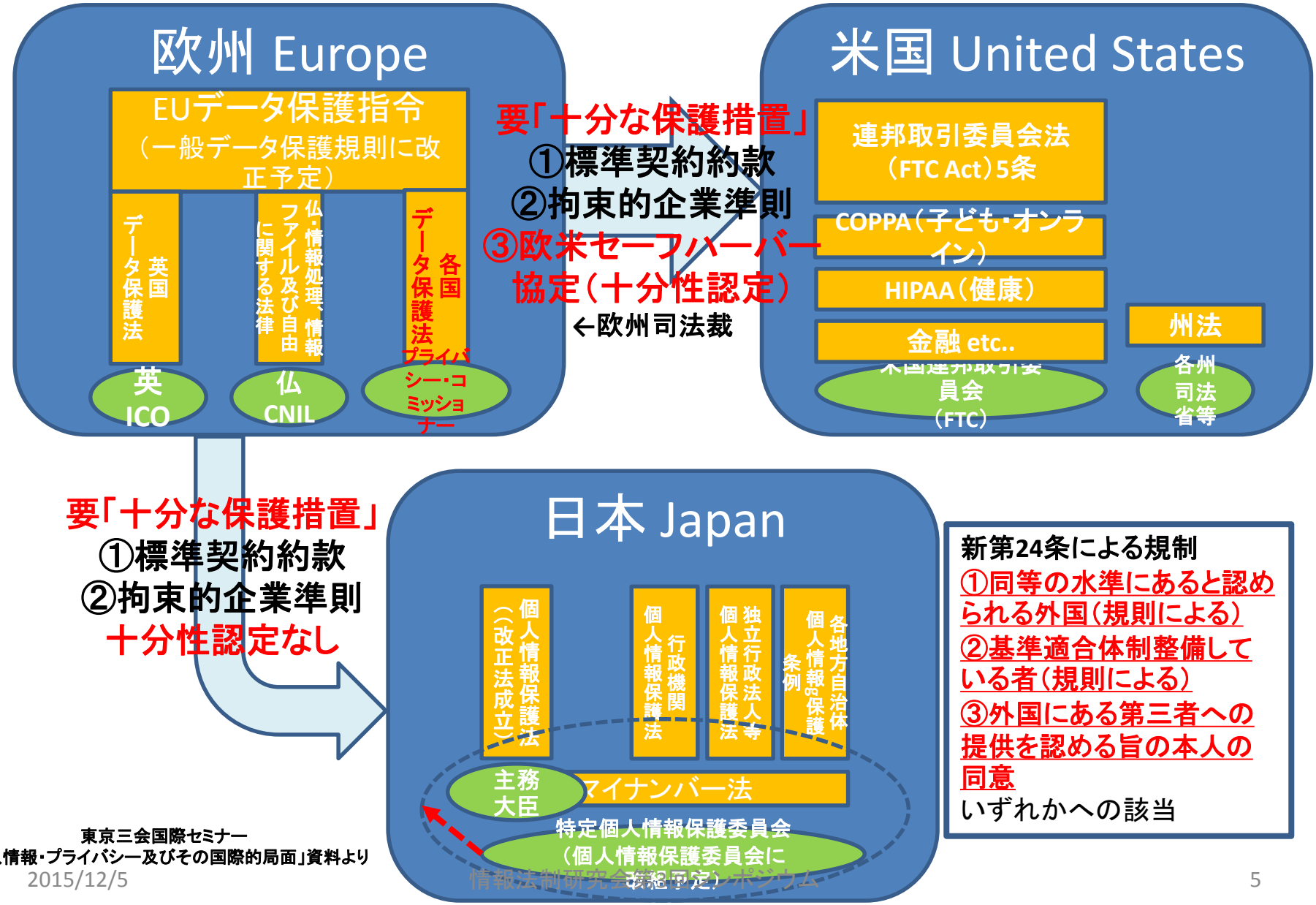
- 2002年慶應義塾大学総合政策学部卒、2004年京都大学大学院情報学研究科社会情報学専攻修士課程修了、2007年慶應義塾大学法務研究科（法科大学院）修了。弁護士（ひかり総合法律事務所）。
- 2010年4月より2012年12月まで消費者庁に出向（消費者制度課個人情報保護推進室政策企画専門官）。
- 情報ネットワーク法学会理事、情報処理学会電子化知的財産・社会基盤研究会幹事、第二東京弁護士会国際委員会副委員長、経済開発協力機構（OECD）プライバシー専門家会合構成員、経済産業省，総務省，観光庁等の有識者委員等を現任。
- 主な取扱分野はデータ保護法，IT関連法，知的財産権法等。

本日の内容

- 1　十分性認定とデータ保護指令の基礎知識
- 2　欧米セーフハーバーに係る十分性認定無効判決
- 3　関係各所の反応
- 4　我が国プライバシー外交への影響

1　十分性認定とデータ保護指令の基礎知識

日欧米の個人情報保護制度及び移転規制の概要



新第24条による規制

①同等の水準にあると認められる外国（規則による）

②基準適合体制整備している者（規則による）

③外国にある第三者への提供を認める旨の本人の同意

いずれかへの該当

東京三会国際セミナー
「個人情報・プライバシー及びその国際的局面」資料より

現行のEUデータ保護制度の概要

個人データの取扱いに係る個人の保護及び当該データの自由な移動に関する欧州議会及び理事会の指令（現行のEUデータ保護指令，1995年10月24日指令）

概要

・**目的**：個人データの取扱いに対する自然人の基本的権利及び自由，特にプライバシー権の保護。

・**対象**：EU構成国（27か国）。ただし，**「十分なレベルの保護措置」を確保していない第三国への個人データの移転を規制**する，いわゆる第三国条項を通じて，EU構成国以外の国にも大きな影響を与える。

・**拘束の程度**：EU構成国は，**指令を国内法化する義務を負う（全EU構成国で国内法化済み）**。

・**最近の取組**：**EUから十分な保護水準を確保していると認められた国・地域は，11***である（2015年12月現在）。

*スイス，カナダ（PIPEDA），アルゼンチン，ガーンジー島，マン島，ジャージー島，フェロー諸島，アンドラ，イスラエル，ウルグアイ，ニュージーランド。
~~これ以外に第29条作業部会が十分であるとしたものとしてモナコ，カナダ・ケベック州~~

※米国，オーストラリアのEUデータ保護指令への対応状況

①米国：包括法がないため，特定の認証基準を設け，その認証を受けた企業ごとに十分性を付与するセーフ・ハーバーの枠組みを2000年にEUと設定（形式的にはEUが十分性を認定）したが，**2015年10月6日の欧州司法裁判所判決（Maximillian Schrems v. Data Protection Commissioner, Case C-362/14）によって十分性認定は無効とされた**。

②オーストラリア：包括法である「プライバシー修正法」を2000年に施行したが，ア）**小規模事業者が規制対象外**，イ）一般に利用可能なデータが規制対象外，ウ）データの第三国移転が規制対象外等の理由により，第29条作業部会の意見書においては，保護水準が不十分とされた（2001年3月。**不十分との意見が出た唯一の例**）。*その後，複数回の改正を経ているが，直近の調査によると，十分性認定には拘っていないようである。

・**主な論点（第29条作業部会ワーキングドキュメントWP12より）**：
①内容の原則につき，
1）**「アクセス・訂正・異議申立の権利」**
2）**「移転の制限」**
3）**「センシティブ・データ」**
②手続・執行の構造につき，
1）**「（政府から）独立した機関の形態をなす外部監督」**
2）**「データの本人に対する支援と援助の提供」**
3）**「適切な救済の実施」**
その他，
欧州評議会108条約

・**十分性審査の（事実上の）流れ**：
①対象国から十分性審査の申出又は欧州委員会主導で十分性審査開始（**申出無くば始めないとのコメントあり**）
②ナミュール大学法・情報・社会研究所**等**の下審査（**"First Analysis"）⇒公表される場合がある**
③第29条作業部会（EU各国のプライバシーコミッショナーの集まり）の意見**⇒公表される**
④第31条委員会（各国政府代表の集まり）の意見
⑤欧州委員会による認定**⇒公表される**

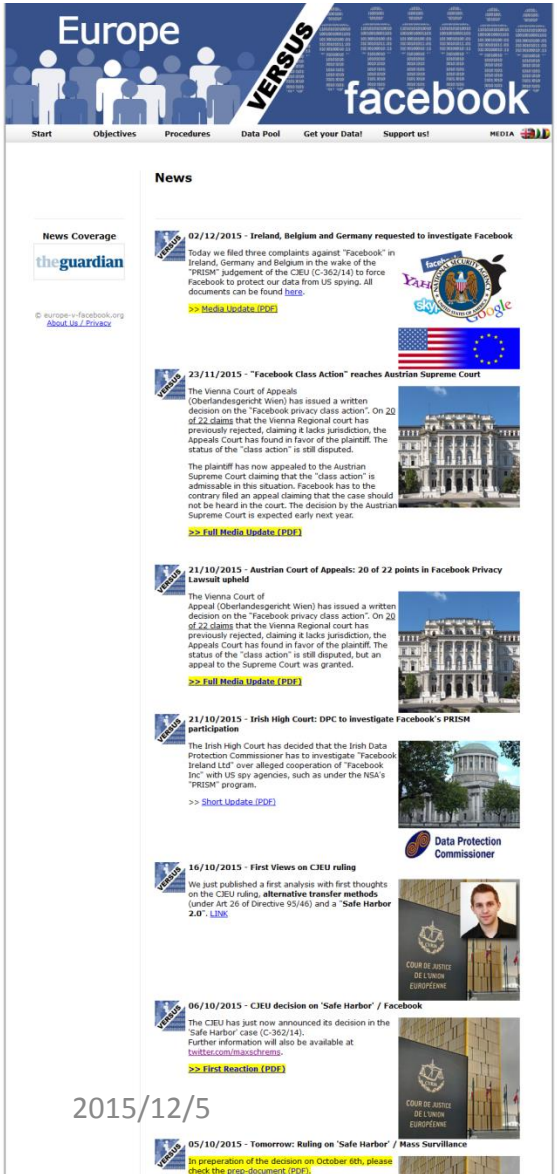
2　欧米セーフハーバーに係る十分性認定無効判決

Maximillian Schrems v. Data Protection Commissioner, Case C-362/14

- On those grounds, the Court (Grand Chamber) hereby rules:
- 1. **Article 25(6) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003（→EUデータ保護指令）, read in the light of Articles 7, 8 and 47 of the Charter of Fundamental Rights of the European Union（→欧州連合基本権憲章）, must be interpreted as meaning that a decision adopted pursuant to that provision, such as Commission Decision 2000/520/EC of 26 July 2000 pursuant to Directive 95/46 on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce（→欧米セーフハーバーについての十分性認定）, by which the European Commission finds that a third country ensures an adequate level of protection, does not prevent a supervisory authority of a Member State, within the meaning of Article 28 of that directive as amended, from examining the claim of a person concerning the protection of his rights and freedoms in regard to the processing of personal data relating to him which has been transferred from a Member State to that third country when that person contends that the law and practices in force in the third country do not ensure an adequate level of protection.**

- 2. **Decision 2000/520 is invalid.**

Maximilian Schrems



http://www.krone.at/Digital/Aktivist_Max_Schrems_zwingt_Facebook_in_die_Knie-EuGH-Showdown-Story-475495 より引用

なぜアイルランド？

- Facebook利用規約第18条（その他）
- 第1項　米国またはカナダに居住しているか、事業の主たる拠点を持っている場合、本規約は利用者とFacebook, Inc.の間で締結されます。**それ以外の場合、本規約は利用者とFacebook Ireland Limitedの間で締結されます**。「弊社」とはFacebook, Inc.またはFacebook Ireland Limitedのうちいずれか該当するものを指します。

欧州連合司法裁判所（1）

- １．名称
- The Court of Justice of the European Union
- ２．所在地
- ルクセンブルク市（ルクセンブルク大公国）
- ３．沿革
  - ・1952年に欧州石炭鉄鋼共同体司法裁判所として創立。
  - ・1958年に他の共同体の設立とともに、欧州共同体司法裁判所となった。
  - ・1989年には、第一審裁判所（現一般裁判所）が創設の上、併設されている。
  - ・2005年、欧州連合公務員裁判所が設置される。
  - ・2009年、リスボン条約の発効により、欧州連合司法裁判所となる。
- ４．機能
- ●欧州連合条約（以下、TEU）及び欧州連合の機能に関する条約（以下、TFEU）の解釈と適用における法の尊重の確保（TEU１９条１）
- ●TEU及びTFEUに従って
- (1)加盟国、EUの機関、法人又は自然人の行為について裁定
- (2)加盟国の裁判所の要請に基づき、EU法の解釈又はEUの機関の行為の有効性についての先決裁定
- (3)その他基本条約に規定する事件についての裁定
- （TEU１９条３）
- ５．構成
- 司法裁判所(Court of Justice)、一般裁判所(General Court)、専門裁判所(specialised court)からなる（TEU１９条１項）。

以下，在ルクセンブルク日本大使館の説明より
http://www.lu.emb-japan.go.jp/japanese/eu/justice.htm

欧州連合司法裁判所（2）

- **７．訴訟対象事項（類型）等**
- **（１）義務不履行訴訟（Actions for failure to fulfil obligations）**（TFEU258～260条）
- **（２）取消訴訟（Actions for Annulment）**（TFEU263、264条）
- **（３）不作為訴訟（Actions for failure to act）**（TFEU265条）
- **（４）補償（損害賠償請求）訴訟（Application for Compensation）**（TFEU268条）
- **（５）控訴（Appeals）**
- **（６）先行判決（先決的判決）（References for preliminary rulings）**（TFEU267条）
  - 欧州連合司法裁判所がEU法体系の最終的な番人としての役割を果たしており、先行判決制度は、EUに固有なものとなっている。
  - EU法、特に各種（設立）条約や下位法（理事会規則、（欧州）指令、決定等）については、加盟国の市民に直接に関わるものであり、右を管轄する個別の加盟各国裁判所もEU法の番人であると言える。しかしながら、EU法の効果的かつ統一的な適用の観点から、時として加盟国の国内裁判所はEU法の解釈の確認、明確化の観点から欧州連合司法裁判所に照会し、当該加盟国の国内法がEU法に適合しているかを確認することが必要となる。EU法上の行為の適法性審査を求める場合もある。
  - 同観点から国内裁判所が欧州連合司法裁判所に対してEUとの関係で照会を行い、同意見を下すことを先行判決（先決的判決）と呼んでいる。
  - なお、欧州連合司法裁判所によって、ある事項に対して判決（先行判決）がなされた場合には、照会を行った当該国裁判所が右に従うだけでなく、他の加盟国においても同様の事項については拘束されることとなる。

欧州連合司法裁判所（3）

- **＜裁量による付託と義務的付託＞**
- 【裁量】加盟国裁判所において判決を下すにあたり欧州連合司法裁判所の判断が必要と考える場合には、これを付託することができる（court or tribunal **may**～）。（TFEU267条2段）
- 【義務】国内法的に担保されない場合＝決定が国内法上、上訴を許さない時には、これを欧州連合司法裁判所に付託しなければならない。（**shall** bring the matter）（TFEU267条3段）

事実の経緯

- 2008年よりFB利用
- 2013年6月25日　アイルランドプライバシーコミッショナーへの転送禁止命令申立
  - 欧米セーフハーバー十分性認定により却下
    - SchremsのデータがNSAにアクセスされた証拠なし
- アイルランド高等法院に異議申立て
  - 欧米セーフハーバー十分性認定の有効性は問題にせず
- アイルランド高等法院，EU法の判断付託

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION
2012/C 326/02

- *Article 7*
- **Respect for private and family life**
- Everyone has the right to respect for his or her private and family life, home and communications.

- *Article 8*
- **Protection of personal data**
- 1. Everyone has the right to the protection of personal data concerning him or her.
- 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
- 3. Compliance with these rules shall be subject to control by an independent authority.

The requirements stemming from Article 25(6) of Directive 95/46

- 73 The word ‘adequate’ in Article 25(6) of Directive 95/46 admittedly signifies that a third country cannot be required to ensure a level of protection identical to that guaranteed in the EU legal order. However, as the Advocate General has observed in point 141 of his Opinion, the term ‘adequate level of protection’ must be understood as requiring the third country in fact to ensure, by reason of its domestic law or its international commitments, **a level of protection of fundamental rights and freedoms that is *essentially equivalent* to that guaranteed within the European Union by virtue of Directive 95/46 read in the light of the Charter**. If there were no such requirement, the objective referred to in the previous paragraph of the present judgment would be disregarded. Furthermore, the high level of protection guaranteed by Directive 95/46 read in the light of the Charter could easily be circumvented by transfers of personal data from the European Union to third countries for the purpose of being processed in those countries.

The requirements stemming from Article 25(6) of Directive 95/46(Cont.)

- 74 It is clear from the express wording of Article 25(6) of Directive 95/46 that it is the legal order of the third country covered by the Commission decision that must ensure an adequate level of protection. Even though the means to which that third country has recourse, in this connection, for the purpose of ensuring such a level of protection may differ from those employed within the European Union in order to ensure that the requirements stemming from Directive 95/46 read in the light of the Charter are complied with, those means must nevertheless prove, in practice, effective in order to ensure protection ***essentially equivalent*** to that guaranteed within the European Union.

Decision 2000/520 が無効になる論理

- セーフハーバーの例外（公益，法執行，国防等）
- 米国の国防や公共の利益のために一般的に制限される可能性→個人の基本的人権について米国政府が侵害することが可能
- セーフハーバーにおける紛争解決は米国政府が行う行為に対する紛争には適用されない
- 2013年欧州委員会意見書

評釈として岩村浩幸「欧州司法裁判所によるセーフハーバールール無効の判決とその日系企業への影響」NBL1061号4頁（2015年）

3　関係各所の反応

第29条作業部会（2015年10月16日声明）

- First, the Working Party underlines that **the question of massive and indiscriminate surveillance is a key element of the Court's analysis.** It recalls that it has consistently stated that such surveillance is incompatible with the EU legal framework and that existing transfer tools are not the solution to this issue. Furthermore, as already stated, transfers to third countries where the powers of state authorities to access information go beyond what is necessary in a democratic society will not be considered as safe destinations for transfers. In this regard, the Court's judgment requires that any adequacy decision implies a broad analysis of the third country domestic laws and international commitments.

- Therefore, **the Working Party is urgently calling on the Member States and the European institutions to open discussions with US authorities in order to find political, legal and technical solutions enabling data transfers to the territory of the United States that respect fundamental rights.** Such solutions could be found through the negotiations of an intergovernmental agreement providing stronger guarantees to EU data subjects. The current negotiations around a new Safe Harbour could be a part of the solution. In any case, these solutions should always be assisted by clear and binding mechanisms and include at least obligations on the necessary oversight of access by public authorities, on transparency, on proportionality, on redress mechanisms and on data protection rights.

- In the meantime, the Working Party will continue its analysis on the impact of the CJEU judgment on other transfer tools. During this period, data protection authorities consider that Standard Contractual Clauses and Binding Corporate Rules can still be used. In any case, this will not prevent data protection authorities to investigate particular cases, for instance on the basis of complaints, and to exercise their powers in order to protect individuals.
- **If by the end of January 2016, no appropriate solution is found with the US authorities and depending on the assessment of the transfer tools by the Working Party, EU data protection authorities are committed to take all necessary and appropriate actions, which may include coordinated enforcement actions.**

- Regarding the practical consequences of the CJEU judgment, the Working Party considers that it is clear that **transfers from the European Union to the United States can no longer be framed on the basis of the European Commission adequacy decision 2000/520/EC (the so-called "Safe Harbour decision"). In any case, transfers that are still taking place under the Safe Harbour decision after the CJEU judgment are unlawful.**
- In order to ensure that all stakeholders are sufficiently informed, EU data protection authorities will put in place **appropriate information campaigns at national level**. This may include direct information to all known companies that used to rely on the Safe Harbour decision as well as general messages on the authorities' websites.
- In conclusion, the Working Party insists on the shared responsibilities between data protection authorities, EU institutions, Member States and businesses to find sustainable solutions to implement the Court's judgment. In particular, in the context of the judgment, businesses should reflect on the eventual risks they take when transferring data and should consider putting in place any legal and technical solutions in a timely manner to mitigate those risks and respect the EU data protection acquis.

欧州委員会

- Brussels, **6.11.2015** COM(2015) 566 final COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the Transfer of Personal Data from the EU to the United States of America under Directive 95/46/EC following the Judgment by the Court of Justice in Case C-362/14 (Schrems)

COMMUNICATION

- **1. INTRODUCTION: THE ANNULMENT OF THE SAFE HARBOUR DECISION**
- **2. ALTERNATIVE BASES FOR TRANSFERS OF PERSONAL DATA TO THE U.S.**
  - **2.1. Contractual solutions**
  - **2.2. Intra-group transfers**
  - **2.3. Derogations**
    - **2.3.1. Transfers necessary for the performance of a contract or the implementation of pre-contractual measures taken in response to the data subject's request (Article 26(1)(b))**
    - **2.3.2. Transfers necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller or a third party (Article 26(1)(c))**
    - **2.3.3. Transfers necessary or legally required for the establishment, exercise or defence of legal claims (Article 26(1)(d))**
    - **2.3.4. Unambiguous prior consent by the data subject to the proposed transfer (Article 26(1)(a))**
  - **2.4. Summary on alternative bases for transfers of personal data**
- **3. THE CONSEQUENCES OF THE SCHREMS RULING ON ADEQUACY DECISIONS**
- **4. CONCLUSION**

European Justice Commissioner Vera Jourova

- "**We have to build a bridge between our data protection authorities and those of the USA and put it into a legally binding text**," Jourova told Austrian newspaper Wirtschaftsblatt in an interview published on Monday.

- "We should manage that by the next meeting on **Dec. 17**."

REUTERS, Mon Nov 30, 2015 5:05am EST

Export.gov

- **On October 6, 2015, the European Court of Justice issued a judgment declaring as "invalid" the European Commission's Decision 2000/520/EC of 26 July 2000 "on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce."**
- **In the current rapidly changing environment, the Department of Commerce will continue to administer the Safe Harbor program, including processing submissions for self-certification to the Safe Harbor Framework. If you have questions, please contact the European Commission, the appropriate European national data protection authority, or legal counsel.**

Safe Harbor solution not coming any time soon, says Dutch minister

A solution to the Safe Harbor data framework will not hit its January 2016 deadline, raising the possibility of large fines levied against companies like Facebook in the New Year.

That's according to Dutch justice minister Ard van der Steur, who has published a lengthy response to Parliamentary questions on the issue.

Van der Steur's response goes into some depth about the history of the framework, which covers data transfer across the Atlantic, and the decision and resulting impact of the European Court of Justice's ruling to effectively strike it down in October.

His response also goes into the EU's efforts to come up with a new solution with the US government, at which point van der Steur warns: "It is not expected that the negotiations with the US will be completed very shortly."

Critically, it appears that the EU has yet to even broach the issue that caused the framework to fall apart in the first place: mass surveillance of internet traffic by the NSA.

He notes: "Since the end of 2013, there have been ongoing negotiations ... However, the talks have yet to start on the two substantive issues concerning national security. The Commission sees the ruling of the ECJ as an important stimulus to accelerate those conversations."

That "stimulus" was received nearly two months ago. But despite calls from European politicians, American representatives, and businesses on both sides of the Atlantic to come up with a solution as fast as possible, it seems that the core issue has yet to be addressed.

http://www.theregister.co.uk/2015/12/01/safe_harbor_solution_not_soon/ より。
オランダ司法大臣の答弁原文は,
http://www.tweedekamer.nl/kamerstukken/brieven_regering/detail?id=2015Z23094&did=2015D46706

十分性認定を得ている国々は…

- スイス
- イスラエル
- ニュージーランド

Opinion of the FDPIC on the European Court of Justice Safe Harbor judgment

- **In its judgment issued on 6 October 2015, the European Court of Justice declared the Safe Harbor data protection agreement between Europe and the USA to be invalid. The ECJ held that the transmission of personal data to the USA under the Safe Harbor Agreement regime is problematic. The agreement between Switzerland and the USA is also called into question by this decision. As far as Switzerland is concerned, in the event of renegotiation, only an internationally coordinated approach that includes the EU is appropriate.**
- In the meantime, the FDPIC would stress that when dealing with modern means of communication, the use of certain tools and the disclosure of personal data should always be approached with caution. If data has to be stored externally, it should wherever possible be stored by European providers on servers in Europe. Swiss businesses and authorities that use products and services provided by American companies should enter into additional agreements to secure better protection for the persons concerned and their data.

Pursuant to the European Decision It Is No Longer Permissible to Rely on the Safe Harbor as a Basis for Transfers of Personal Data from Israel to the U.S

- However, the recent decision of the Court of Justice of the European Union (CJEU) invalidates the authorization to transfer personal data from Europe to companies committed to the Safe Harbor. Consequently, at this point, **the position of ILITA is that organizations can no longer rely on this derogation from the Regulations as a basis for the transfer of personal data from Israel to organizations in the United States**.

November 2015
October 2015
September 2015
August 2015
July 2015
June 2015
May 2015
April 2015
March 2015
February 2015
January 2015
December 2014
November 2014
October 2014
September 2014

EU Safe Harbour decision could impact on NZ

Charles Mabbett
7 October 2015

The impact of Edward Snowden's leaks on US government internet surveillance has claimed another casualty - the 'Safe Harbour' provisions that legitimise a significant volume of European Union personal data transferred to the United States for processing.

Under the US Safe Harbour arrangement that had been formally recognised by the European Commission, participating companies in effect have to commit to protecting personal data moved to the US as though the data were still in Europe.

These data flows between the EU and US are vital to the global economy and necessary for internet technology companies like Facebook, Google and Microsoft - and thousands of other companies - to efficiently operate in an EU-compliant manner.

The European Union's top court this week declared the European Commission's decision to recognise the Safe Harbour arrangement invalid. The decision comes on the back of leaks about US National Security Agency and its global mass surveillance programme.

The European Court of Justice's decision follows the opinion by EU Advocate General Yves Bot last month who said the Safe Harbour arrangement did not guarantee the protection of EU data from "mass and generalised access" after it had been transferred to the US.

In the European Union's 28 member states, data protection and privacy laws offer stronger and more comprehensive legal protections around personal data than is the case in the US. EU policy makers and regulators insist that these legal protections are an essential requirement of its terms of trade with the US. While it has not been possible to provide legal protections of that standard for the entire US economy, the Safe Harbour arrangement provided a feasible

4　我が国プライバシー外交への影響

十分性認定への影響

- “Adequate”といえるためには**欧州連合基本権憲章に照らして*essentially equivalent*（本質的に同等）**である必要があるとされた
- 国防等を理由とする例外により「本質的に同等」とはいえないとされた
- 大きなネックは二つ
  - 個人情報保護法1条及び3条＋行政機関等の監督権限
  - 個人情報保護法施行令3条3号4号＋行政機関個人情報保護法10条1号2号，11条2項1号，14条4号5号

同等性認定等，新24条の委員会規則事項への影響

- スイスやイスラエルが米国への包括的な移転を停止している
- 米国主導のCBPRで基準適合体制とすることのリスク

十分性認定とTPP

- 十分性認定は「欧州基本権憲章に照らして本質的に同等」である必要性
- TPPでは国内データ保持義務への牽制

- 今後の展開
  - 附則12条1項
  - 附則12条3項
  - 附則12条5項