

Stichting Vrijchrift

26 October 2015

Safe Harbour invalidation and EU-Singapore FTA;
CJEU Opinion

Dear Members of the LIBE committee,

The CJEU has invalidated the Safe Harbour agreement with the US; this raises the question whether the draft EU-Singapore free trade agreement is compatible with the EU Treaties and Charter of fundamental rights. This question is important as incompatibility would expose our privacy to interference and the EU to damages awards; would compromise the independence of our authorities and the effectiveness of the CJEU. The upcoming CJEU Opinion offers an opportunity to scrutinise the agreement.

Singapore reportedly has a high level of surveillance.¹ Using the legal remedies the Court prescribes in its Safe Harbour judgment citizens can challenge data transfers to Singapore, claiming Singapore's domestic law and its international commitments do not ensure a level of protection essentially equivalent to that guaranteed within the European Union.

If competent authorities suspend data transfers to Singapore, Singapore could, after conclusion of the trade agreement, initiate arbitration against the EU and Singaporean investors could start investor-to-state dispute settlement (ISDS) cases. The trade agreement would leave ground to argue that the EU applied a higher standard on data transfers than agreed.² Hence, tribunals could find suspension of data transfers in violation of the agreement.³

¹ “[B]y U.S. standards, Singapore’s privacy laws are virtually nonexistent” <http://foreignpolicy.com/2014/07/29/the-social-laboratory/> ; Singapore is not a party to the International Covenant on Civil and Political Rights https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en

² EUSFTA Chapter 8 article 8.57(4) “international standards of data protection” versus CJEU Safe Harbour paragraph 74 “essentially equivalent to that guaranteed within the European Union”: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961> and <http://curia.europa.eu/juris/celex.jsf?celex=62014CJ0362&lang1=en&type=TEXT&ancre=>

³ Both state-state and investor-state arbitration tribunals could for instance refer to EUSFTA Chapter 9 article 9.4.2 (c) “manifestly arbitrary conduct” or article 9.6 in conjunction with Annex 9-A “the impact of a measure or series of measures is so severe

ISDS tribunals could award damages including expected profits and interests against the EU; this would put pressure on the authorities competent to suspend data transfers and compromise their independence.

Lack of impartiality of the ISDS mechanism provided by the trade agreement would increase the EU's exposure and further compromise the independence of our authorities.⁴ The agreement would also undermine the Court's effectiveness. After termination of the agreement the investment chapter would continue to be effective for a further period of twenty years.⁵ If the Court would invalidate parts of the investment chapter of the agreement, for instance because the Court finds it compromises the independence of our authorities, the negative effects on the EU would continue for twenty years.

The European Commission has asked the Court whether the EU has exclusive competence to conclude the trade agreement. We suggest that through a written submission or a separate referral the Parliament broaden the question to the Court to include compatibility of the trade agreement's standard for data transfers and its enforcement mechanisms with the EU Treaties and Charter.⁶

Yours sincerely,
on behalf of Stichting Vrijschrift,

Ante Wessels

in light of its purpose that it appears manifestly excessive" or "legitimate"; see url above.

⁴On EUSFTA's ISDS section, see Van Harten http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2613544 and FFII <https://blog.ffii.org/seven-things-you-should-know-about-eu-singapore-isds/>

⁵EUSFTA, Chapter 9, article 9.9; url at footnote 2

⁶On compatibility of ISDS with the Treaties see: <http://www.clientearth.org/health-environment/health-environment-publications/legality-of-investor-state-dispute-settlement-under-eu-law-3020>