

Safe Harbor out, Privacy Shield in

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IP & IT analysis: Will the Privacy Shield be able to rectify the weaknesses in the now invalidated Safe Harbor regime? Daniel Cooper, a partner at Covington and Burling, highlights the enhanced protections it is intended to offer, but warns that it will not come into effect immediately, and organisations must not be complacent in the meantime.

Original news

New stronger framework to protect EU personal data when transferred to US, LNB News 03/02/2016 106

A new framework for transatlantic data flow between the EU and the US has been designed to protect the fundamental rights of Europeans where their data is transferred to the US, and ensure legal certainty for businesses. The 'EU-US Privacy Shield' was agreed by the European Commission and the United States on 2 February 2016.

What have the Commission announced?

The Commission, through Commissioner Jourová, announced on 2 February 2016 that a 'political agreement' on trans-Atlantic data flows was reached with the US Government, referred to as the 'EU-US Privacy Shield'. The agreement is intended to serve as a legal basis for future transfers of personal data from the EEA to US organisations participating in the Privacy Shield program.

Both US and EU representatives were highly incentivised to agree the terms of the Privacy Shield following the invalidation of the EU-US Safe Harbor framework by the Court of Justice of the European Union in October 2015, in C-362/14: *Schrems v Data Protection Commissioner* [2015] All ER (D) 34 (Oct) which caused many US and European organisations to be in breach of EU rules relating to cross-border transfer of personal data.

Negotiators also had a further incentive to reach this agreement. A self-imposed moratorium on enforcement, agreed by European data protection regulators following the *Schrems* ruling, has expired and the risk of enforcement remains uncertain.

How different is the Privacy Shield to the Safe Harbor arrangement?

Much to the frustration of industry and data protection authorities, EU and US authorities have refrained from releasing the actual text of the Privacy Shield, so its terms remain opaque. That said, the Commission's press statement, along with a fact sheet issued by the US Department of Commerce, clarify at least certain aspects of the new legal framework.

For instance, in addition to subjecting participating US companies to certain as-yet unspecified safeguards, the Privacy Shield will also introduce an annual joint review of the program by the EU Commission and US Department of Commerce—to which EU data protection authorities will be invited—to ensure its proper functioning. This will include a review of access by US intelligence agencies to EU-originating data.

It will also include enhanced rights of redress for EU data subjects, including:

- o subjecting US organisations to firmer deadlines when responding to complaints
- o allowing EU citizens and EU data protection authorities to refer complaints to the US Department of Commerce and the US Federal Trade Commission
- o establishing, as a last resort, a new binding alternative dispute resolution mechanism to resolve complaints that will be voluntary and free to data subjects, capable of issuing binding injunctive orders, and subject to judicial review consistent with the US Federal Arbitration Act
- o creating a new Ombudsperson within the US State Department to handle complaints—channelled through EU Member State representatives—that relate to US intelligence agencies' access to data

Moreover, it is reported that the US Director of National Intelligence will provide written assurances to the EU that US intelligence agencies do not engage in 'indiscriminate mass surveillance' of data transferred under the new arrangement.

Disputes relating to human resources or employee data, however, will remain subject to an alternative process that entails somewhat closer involvement of EU data protection authorities, similar to those arising under the original Safe Harbor.

Is it likely that the Privacy Shield could also be successfully challenged in the courts?

It certainly remains possible that the Privacy Shield could be challenged, in the same manner that Safe Harbor was challenged, which involved a European citizen launching a complaint with a national data protection authority that eventually made its way up to the Court of Justice.

Assessing whether such a challenge is likely to succeed is much more difficult, particularly without knowing the precise terms of the agreement. However, many of the known elements of the Privacy Shield plainly are intended to be responsive to the concerns raised by the Court of Justice in *Schrems*, and so it can be expected that the Privacy Shield will be less vulnerable to a legal challenge as a result.

When can we expect a draft agreement and how long before it takes effect?

Statement of the Article 29 Working Party on the consequences of the Schrems judgment

The Commission and US authorities have not committed to the release of the agreement within a specific timeframe. However, it is anticipated that this will occur in the coming days or weeks, particularly since the Article 29 Working Party, in a press statement issued on 3 February 2016, expressed a desire to see the agreement no later than the end of February 2016.

The EU College of Commissioners has mandated Vice-President Ansip and Commissioner Jourová to prepare a draft 'adequacy decision' declaring the Privacy Shield to ensure an adequate level of protection. The adoption of such a decision by the Commission depends upon a comitology procedure which will involve:

- o a proposal from the Commission
- o an opinion by EU Member States' data protection authorities and the European Data Protection Supervisor, in the framework of the Article 29 Working Party
- o an approval from the Article 31 Committee, composed of representatives of Member States, under the comitology examination procedure
- o the formal adoption of the Decision by the College of Commissioners

The exact timeframe for this is not confirmed, but Commissioner Jourová has expressed the wish that the Privacy Shield will be in effect within the next three months.

What should organisations do in the meantime?

Given the paucity of information regarding the actual terms of the Privacy Shield, organisations should certainly monitor developments and anticipate the release of the agreement in the near future. Companies that were transitioning from the original Safe Harbor to alternative compliance mechanisms, such as model clauses, should continue with that strategy now the official grace period on enforcement has expired. European data protection authorities could, if they see fit, launch enforcement actions against companies that have not implemented alternative, compliant data transfer mechanisms. Meanwhile, the Privacy Shield still must be formally adopted on both sides of the Atlantic, a process that could take months.

PSL practical point: *What most businesses really want to know is: what's the risk of ICO enforcement action if we wait for further domestic or EU guidance before taking any action on US data transfers? While there was a great deal of immediate scaremongering in the media and in the legal press in the wake of the Schrems decision, the ICO has consistently maintained the mantra of 'keep calm'. As yet the ICO has not commented on the Privacy Shield—we expect a press release from the ICO in the coming days and will provide further analysis once the position of the ICO is made clear.*

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Interviewed by Jake Arnott.

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