



The European Commission adopts the EU-US Privacy Shield

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On 12 July 2016, the European Commission (the “Commission”) adopted the EU-US Privacy Shield, bringing to an end (at least temporarily) a period of uncertainty over the framework under which EU-US data transfers should be lawfully effected.

Background

In our previous briefing note on this topic, we set out in detail the new measures contained in the draft Privacy Shield. We also set out in detail the reaction of the Article 29 Working Party (the “Working Party”), comprising representatives of the supervisory authority of each Member State and the EU institutions. The Working Party welcomed significant improvements in the arrangements for the transfer of data from European Union Member States to the US, but had several key concerns. The European Data Protection Supervisor also welcomed the improved arrangements, but considered that it still did not offer sufficient protection of the privacy and data protection rights of EU citizens.

In light of these concerns, the Commission has now adopted a slightly amended but substantially similar version of the Privacy Shield to that proposed and published in February 2016. The final version of the Privacy Shield includes additional clarifications on the bulk collection of data, a strengthening of the Ombudsman’s powers and the creation of more explicit obligations on companies in relation to limits on the retention and onward transfer of data. There have also been written assurances from the US government that access by public authorities for purposes of law enforcement and national security will be subject to clear limitations, safeguards and oversight mechanisms.

The implementation of Privacy Shield has been welcomed in a number of quarters, bringing some stability to an issue that has been subject to great uncertainty since the Safe Harbor regime was invalidated in October 2015 ([read more here](#)). However, it may yet be subject to a legal challenge, as some campaigners (and EU data protection authorities) consider that it does not go far enough in terms of the protection of rights and in particular, the prevention of indiscriminate mass surveillance by the US authorities.

The detail

The adopted Privacy Shield is now based on the following principles:

- Strong obligations on companies handling data: including regular updates and reviews by the US Department of Commerce (the “Department”) and the tightening of conditions for the onward transfers of data to third parties to guarantee the same level of protection that applies to a transfer to a Privacy Shield company.
- Clear safeguards and transparency obligations on US government access: the US authorities have given assurances that access by public bodies will be subject to clear limitations and oversight mechanisms. There will be no indiscriminate mass surveillance of personal data and the Director of National Intelligence has stated that the bulk collection of data will only be used according to specific preconditions. EU Member State citizens will benefit from enhanced redress mechanisms including a Privacy Shield Ombudsperson within the US Department of State. Under Secretary of State Catherine A. Novelli has been appointed to this role by the current administration.

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- Effective protection of individual rights: comprising several accessible and affordable options. These include (as a first step) direct resolution of a complaint by a Privacy Shield company, free of charge Alternative Dispute Resolution (including through national data protection authorities working with the Federal Trade Commission), and arbitration before the Privacy Shield Panel, which could award non-monetary equitable relief (such as correction, access, deletion).
- An annual joint review mechanism: this creates monitoring of the functioning of the Privacy Shield, particularly commitments and assurances in relation to access to data for law enforcement and national security purposes. This review will be carried out by the Commission and the Department. The Commission will issue a report to the European Parliament and the European Council.

In Europe, the Privacy Shield was notified to Member States on 12 July 2016 and entered into force immediately. The Commission will also soon publish a short guide for citizens of EU Member States explaining what remedies exist for an individual who thinks that their data have been used in breach of the law.

In the US, the framework for the Privacy Shield will be published in the Federal Register and subsequently enter into force. US companies will be able to register with the Department as Privacy Shield companies from 1 August 2016. Companies wishing to benefit from the Privacy Shield will be required to self-certify their adherence to the Privacy Shield Principles (notice, choice, accountability for onward transfer, security, data integrity and purpose limitation, access and recourse, enforcement and liability). The Department will maintain a publicly available list (the "Privacy Shield List") which will be kept updated by self-certifications and proactive monitoring of compliance.

It is also worth noting that companies wishing to transfer human resources data will have to cooperate with EU Member States to ensure compliance with local laws regarding the treatment of such data. They may also be exempt from certain of the Privacy Shield Principles (such as access obligations in the context of employee security investigations, where such would otherwise prejudice "sound management". Those companies should provide a copy of their Privacy Policy to the Department and ensure that it is accessible to employees.

What happens next?

Companies wishing to take advantage of the Privacy Shield regime should review the framework and ensure that relevant personnel within the business are aware of the requirements and the need for compliance. They should also review data flows and assess which transfers require safeguarding and the most appropriate way of achieving that protection.

Despite the strengthening of Privacy Shield, many expect there to be a legal challenge based on the effectiveness of the measures designed to protect against mass surveillance by the US government. Despite the written assurances provided by the US authorities, there are many privacy campaigners whose view is that such assurances are too vague and do not go far enough, given that they are not legally binding. In addition, the Irish Data Protection Commissioner indicated that it would be bringing a legal challenge to the enforceability of Model Clauses, given that similar concerns exist insofar as they are used as transfer mechanisms.

In short, whilst the implementation of Privacy Shield is to be welcomed as providing some certainty in what had been a confusing period following Schrems (read more here), it is by no means clear as to whether Privacy Shield will survive in the long term in its current format. The General Data Protection Regulation is also looming on the horizon (companies controlling or processing the data of EU citizens will be expected to be compliant by May 2018) and it will likely cast a shadow over the long term future of Privacy Shield, given the strengthening of individual rights that it entails.



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