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Privacy Shield: keep calm and carry on

In February we told you about the new EU-US Privacy Shield which was announced by the EU Commission. The Article 29 Working Party (which represents European data protection regulators) (the "**Working Party**") has just released its opinion (the "**Opinion**") on the Shield.

In a somewhat surprising decision, the Working Party has rejected the Privacy Shield, noting that it was an improvement on Safe Harbor but concluding that it did not meet EU data protection standards. In this article we examine why the Working Party objected to the Shield, and look at what businesses should be doing in the meantime until the Shield is finalised.

WHY WAS THE PRIVACY SHIELD REJECTED?

The Working Party said that its key objective in formulating the Opinion was to make sure that an essentially equivalent level of protection to EU data protection law was maintained in respect of European personal data when that data was processed in the United States under the provisions of the Privacy Shield.

Whilst it was noted that the Privacy Shield was an improvement on the Safe Harbor regime, concerns about some commercial aspects of the Shield prevented the Working Party from accepting it. The Working

Privacy Shield: a reminder of the background

EU data protection law provides that personal data must not be transferred to a country or territory outside the EEA unless that country or territory ensures an adequate level of protection. The European Commission may make a positive finding of adequacy in relation to a third party country (which is then binding on Member States). If a country has not been found adequate, a transfer of personal data may still be lawful on a number of other grounds, but they are beyond the scope of this briefing.

No general finding of adequacy has ever been made in relation to the US, so instead the Safe Harbor program was approved in 2000 as a method of providing adequate protection for data transfers to the US. (Other methods also exist).

On 6 October 2015, the Court of Justice of the European Union in Maximillian Schrems v Data Protection Commissioner, declared the Safe Harbor framework invalid. The case stemmed from a complaint filed by privacy campaigner Max Schrems at the Irish DPA, in respect of the transfer of his data by Facebook Ireland to Facebook Inc, located in the US.

On 2 February 2016, the Commission and the US Department of Commerce reached a political agreement on a new framework to replace Safe Harbor. Whilst the agreement followed more than two years of negotiation its timing was clearly influenced by the Schrems judgment and it reflected the requirements set out by the CJEU in the judgment. On 29 February 2016, the European Commission published its draft adequacy decision and other legal texts that comprise the Privacy Shield.

Party considered certain key EU data protection principles to have been omitted from the Privacy Shield and others substituted by inadequate alternative notions. The Working Party was also concerned with derogations for national security reasons that permitted US public bodies to undertake massive and indiscriminate collection of personal data originating from the EU.

The Opinion finished by urging the Commission to resolve the highlighted concerns and identify appropriate solutions or provide clarifications to make the Privacy Shield essentially equivalent to the protection offered by EU data protection law.

WHAT HAPPENS NEXT?

The Working Party is considered highly influential but its purpose is to provide the Commission with independent advice on data protection law. It has no law making function. As such, notwithstanding the opinion, the decision as to whether the Privacy Shield is granted an adequacy determination (in other words, adopted as a means of legitimising transfers of personal data from the EU to the US) remains with the Commission.

The Commission must now decide whether to adopt the Privacy Shield in its current form or make amendments to address the Working Party's concerns. Amending the Privacy Shield would require agreement from the US and is therefore not straightforward (especially given that it took two years to reach political agreement on the current iteration). Any further attempts to curtail US surveillance activities would be particularly contentious.

It may well be September before the Commission is able to get a revised draft of the Privacy Shield in place – if that is the intention. It could of course choose to ignore the Working Party, but this would increase the likelihood of the Privacy Shield being subjected to legal action from an individual (like Mr Schrems – see background) or perhaps a Member State regulator, challenging any finding by the Commission that the Privacy Shield offers adequate protection. The complainant in any such action could well look to or even cite the Opinion as evidence to support its case.

As such, businesses which wish to rely on the Privacy Shield face a period of uncertainty whilst we await the Commission's next steps.

WHAT CAN BUSINESSES DO IN THE MEANTIME?

For the moment, the existing alternative data transfer mechanisms (namely, Standard Contractual Clauses and Binding Corporate rules) remain valid.

UK based businesses may also still refer to (and draw some comfort from) the ICO's interim guidance on 'Data transfers to the US and Safe Harbor' (published 10 February 2016), in which it stated *"[The ICO] are not rushing to use our enforcement powers. There is no new and immediate threat to individuals' personal data that has suddenly arisen that we need to act quickly to prevent"*.

HOW WE CAN HELP

If you would like to discuss any of the issues raised in this briefing, please speak to one of the contacts listed below or on our covering email, who are all experts in technology and data privacy law.

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