

## EU-U.S. Privacy Shield

Author: Meghan Farmer, Kilpatrick Townsend

### Overview

On February 2, 2016, EU and U.S. officials announced that they have reached a political agreement on a new data transfer mechanism known as the “EU-U.S. Privacy Shield.” This new framework is intended to replace the EU-U.S. Safe Harbor Framework which was declared invalid in an European Court of Justice decision on October 6, 2015.

Although full details of the agreement have not yet been released, the Commission said in a statement that it would require U.S. companies to publish commitments to “robust obligations on how personal data is processed and individual rights are guaranteed.” In addition to these robust obligations, the February 2<sup>nd</sup> press release by the European Commission indicated that the Privacy Shield will also include:

- **An annual joint review** of the of the program performed by the European Commission and the U.S. Department of Commerce to ensure its proper functioning. European Data Protection authorities and U.S. national intelligence experts will be invited to these reviews.
- **Enhanced rights of redress for European data subjects** including: (i) firmer deadlines for U.S. companies when responding to complaints, (ii) allowing EU data protection authorities to refer complaints to the U.S. Department of Commerce and the U.S. Federal Trade Commission, (iii) establishing a new alternative dispute resolution mechanism to resolve complaints that will be free to data subjects, and (iv) creating a new “Ombudsperson” within the U.S. Department of State to handle complaints that relate to U.S. intelligence agencies’ access to data.
- **Stronger monitoring and enforcement** by the U.S. Department of Commerce and the FTC.
- **Safeguards and transparency obligations on U.S. government access** including commitment by the U.S. “that possibilities under U.S. law for public authorities to access personal data transferred under the new arrangement will be subject to clear conditions, limitations and oversight, preventing generalized access.”

### Registration

The process by which US companies register for the Privacy Shield program is expected to be similar to the Safe Harbor self-certification process. However, significantly greater scrutiny is also to be expected.

### Enforcement

The FTC will retain its enforcement role and has doubled the number of staff responsible for administering the Privacy Shield. According to a statement by FTC Commissioner Julie Brill, the FTC “will strongly enforce entities that self-certify that they will be part of the Privacy Shield, and will ensure that they live up to the principles, which will be more robust.” The commission’s enforcement efforts will include investigating complaints brought to the agency by DPAs as well as looking for data transfer violations.

The U.S. Department of Commerce will be responsible for monitoring that companies publish their commitments under the framework, thereby making them enforceable by the FTC. Commissioner Julie Brill indicated that the U.S. Department of Commerce will also have responsibility for ensuring that complaint referrals are handled efficiently and effectively and may play a role in addressing some of the easier complaints.

### Next Steps

The following additional steps must occur before the E.U.-US Privacy Shield can be finalized:

- Additional Details
  - The Commission must provide additional details about the Privacy Shield.
  - The Article 29 Working Party has called for the Commission to communicate all documents related to the new arrangement by the end of February.
  - On February 8, 2016, Jourová, Commissioner in charge of Safe Harbor replacement negotiations, announced that the text of the Privacy Shield would be unveiled during the second half of February.
- Draft Adequacy Decision
  - The EU College of Commissioners has mandated that Vice-President Ansip and Commissioner Jourová prepare a draft adequacy decision in the coming weeks that could be adopted by the College after obtaining the advice of the Article 29 Working Party and consulting a committee composed of representatives of Member States.
- Formal Adoption
  - The adequacy decision will be adopted following the “comitology procedure” which requires a proposal from the Commission and opinions from the Article 29 Working Party and the Article 31 Committee.
- Article 29 Working Party
  - The Article 29 Working Party must render an opinion as to the validity of the transfer mechanism.
  - The Working Party will complete its assessment of the new framework at an extraordinary plenary meeting that will be organized in the coming weeks.
  - The Working Party will also consider whether other transfer mechanisms, such as Standard Contractual Clauses and Binding Corporate Rules, can still be used for personal data transfers to the U.S.
  - The Working Party has announced it will issue its opinion by the end of March.
- In the United States
  - The U.S. must make preparations to implement the new framework, monitoring mechanism, and new Ombudsperson.
  - The US approval process will be similar to that used to approve the Safe Harbor Framework in 2000. Commitment letters from the relevant Departments/Agencies will be executed by cabinet-level representatives.

#### **Additional Considerations**

- Some data protection authorities, especially in Germany and France, are likely to be critical of the new framework.
- The agreement may be challenged in courts in the future by privacy activists, where it could face the same type of judicial scrutiny that led to the invalidation of the original Safe Harbor agreement.
- The U.S. Congress has recently passed the Judicial Redress Act (it is on its way to Obama’s desk as of February 10, 2016), which is seen as a key element in the negotiations. This law allows Europeans to sue in the US if their privacy rights are violated by the U.S. government if the other country allows data to flow to the US.
- FTC may bring enforcement actions against companies that make false promises that they are abiding by the invalidated Safe Harbor provisions. Speaking with Information Technology and Innovation Foundation President, Robert D. Atkinson, Brill said “even if Safe Harbor is not a valid transfer mechanism, companies can still say we’re abiding by these principles.... And if someone is going to say they’re abiding by the principles, we’re going to hold them to that.”