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European Commission Upholds EU-US Privacy Shield

On October 18, 2017, the European Commission (commission or EU commission) announced its conclusion that that EU-U.S. Privacy Shield arrangement does provide a valid mechanism for enabling organizations to transfer personal information from the EU to the United States.¹ As a variety of organizations had expressed concern that the commission would invalidate, seek to amend or simply sharply criticize the Privacy Shield regime, the commission's conclusion should provide some stability to an uncertain privacy environment.

Background on the Current Privacy Framework

In 2016, the United States and the European Commission adopted the EU-U.S. Privacy Shield, a self-certification framework designed to enable companies to transfer personal data from the EU and the three European Economic Area member states — Norway, Liechtenstein and Iceland — to the U.S. Under the EU Data Protection Directive, personal data about EU citizens can only be transferred to countries with “adequate” data protection laws in place. Notably, only a few countries satisfy this standard, and the U.S. is not one of them. However, under the Privacy Shield Framework, companies that self-certify their adherence to seven broad data privacy principles may transfer personal data outside of the EU to the U.S.

The Privacy Shield replaced the previous framework between the EU and U.S. known as the Safe Harbor Privacy Principles, which the Court of Justice of the European Union invalidated in October 2015 in the *Schrems v. Data Protection Commissioner* case. In the *Schrems* decision, the court found that the Safe Harbor failed to adequately protect the privacy of EU citizens, mainly due to the U.S. government's ability to access personal data for national security purposes. The Privacy Shield aimed to remedy the inadequacies of the Safe Harbor, however, after the Privacy Shield's adoption, many privacy advocates criticized the replacement framework for failing to address the government's surveillance concerns raised in *Schrems*.²

The recent review of the Privacy Shield followed on the heels of a resolution adopted by the European Parliament on April 6, 2017, which formally raised concerns about the Privacy Shield and called for a closer review of the adequacy of the protections it affords EU citizens. As a general theme, the resolution expressed, among other issues, a deep concern that bulk surveillance by the U.S. government is not prohibited outright under the current framework.

The commission reached its conclusion after conducting the first annual official review of the EU-U.S. Privacy Shield on September 18 and 19, 2017, in Washington, D.C. The Privacy Shield agreement requires such a review each year, so organizations that seek to export data from the

¹ For the full report issued by the European Commission, see [here](#).

² For more information regarding criticism of the Privacy Shield, see our April 2017 [Privacy and Cybersecurity Update](#).

EU to the U.S. should be mindful of these reviews and any proposed revisions to the arrangement that may result.

Privacy Shield Review: Key Findings and Recommendations

Despite the concerns raised by the European Parliament, the commission found that “the United States continues to ensure an adequate level of protection for personal data transferred under the Privacy Shield from the Union to organizations in the United States.” In support of its conclusion, the commission made the following key findings:

Increased Governmental Oversight: The commission found that the current Privacy Shield framework addresses several concerning elements raised in the *Schrems* case, particularly, that the Privacy Shield “provides for more regular and rigorous monitoring by the Department of Commerce.”

Availability of Redress Mechanisms: In response to an additional concern from the *Schrems* case, the commission found that the Privacy Shield “significantly strengthens the possibilities for EU individuals to obtain redress,” and pointed to the American Arbitration Association’s Privacy Shield Arbitration Panel and the ombudsperson mechanism.³

Limiting Access by Government Agencies: The commission further found that safeguards have been implemented to limit access to personal data by national security agencies and specifically have called attention to the Presidential Policy Directive 28, which applies to the personal data of individuals regardless of nationality.

Satisfactory Certification Process: With buy-in from 2,400 companies, the commission found that the certification process has been “handled in an overall satisfactory manner.”

Increased Cooperation: Finally, the commission pointed to the increased “cooperation [between U.S. and] European data protection authorities,” citing as examples the Staff Working Document on the Privacy Shield Annual Review and the formation of an informal panel of data protection authorities (DPAs).

In addition to its key findings, the commission also used its first annual review to outline several recommendations for how the Privacy Shield could be improved. Generally, the commission recommended that U.S. authorities give “more timely and comprehensive information about developments relevant to the Privacy Shield, or anything that might jeopardize the protections it provides,” as well as bolster awareness of how EU citizens can exercise their rights under the Privacy Shield. In addition, the commission made the following specific recommendations:

Preventing False Privacy Shield Claims: The commission has recommended that the U.S. Department of Commerce (DoC) take the following actions: (1) prohibit companies awaiting designation under the Privacy Shield from publicly referring to their certification until it has been finalized by the DoC and included on the Privacy Shield list; and (2) regularly and proactively “conduct [Internet] searches for false claims,” which undermine the credibility of the system as a whole.

³Concerns over the adequacy of the redress mechanism form part of the basis for a pending challenge to the EU’s “standard contractual clauses” for transferring data, which has been submitted to the Court of Justice of the European Union for review. A further discussion of this case is included in this edition of the *Privacy and Cybersecurity Update*.

Researching Automated Decision-Making: The commission has recommended further research on the use of personal data for automated decision-making, a concern that was raised under the April 2017 resolution.

Preserving Protections Under PPD-28: In response to Section 702 of the U.S. Foreign Intelligence Surveillance Act's pending expiration in December 2017, the commission has recommended preserving the protections of PPD-28 in future reforms.

Filling Posts in Executive Branch: Several concerns in the April 2017 resolution stemmed from the substantial number of unfilled roles in President Trump's executive branch tasked with enforcing the Privacy Shield. With this in mind, the commission has called for the "swift appointment" of a permanent Privacy Shield Ombudsperson and any missing members of the Privacy and Civil Liberties Oversight Board.

Increasing Cooperation: The commission also has recommended an increase in cooperation between the DoC and European DPAs in an effort to develop "convergence in the interpretation" of the Privacy Shield, which will provide stakeholders and companies with "greater legal certainty."

Application to GDPR Unclear

The commission conducted its review of the Privacy Shield based on the current EU privacy law, Data Protection Directive 95/46/EC. Despite encouragement from members of the European Parliament, the commission did not evaluate the adequacy of the Privacy Shield under the EU's new General Data Protection Regulation (GDPR), which replaces the current law and will go into effect in May 2018. It is possible, therefore, that the commission will at a later date determine that the Privacy Shield provides inadequate protection under the more stringent GDPR.

Key Takeaways

While concerns that the Privacy Shield might be invalidated have subsided for the time being, the recommendations issued by the European Commission identify significant areas for improvement that, if left unaddressed, may revive anxieties surrounding the framework's future. Moreover, the commission has not expressed a view of the Privacy Shield's adequacy under the GDPR. As a result, while it appears the Privacy Shield is a reliable basis for transferring personal data from the EU to the U.S. for the time being, it is possible that will change in the future.