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More Armour Required Before Putting Down Our Guard? European Data Protection Supervisor Issues Opinion on Privacy Shield

By Emma L. Flett and Shannon K. Yavorsky

On 30 May 2016, the European Data Protection Supervisor (EDPS), Giovanni Buttarelli said of the European Union-U.S. Privacy Shield, "*it's time to develop a longer term solution in the transatlantic dialogue*" (16 WDPR 06, 6/28/16). Although supportive of the painstaking attempts on both sides of the Atlantic to establish a trusted alternative solution to the U.S.-EU Safe Harbor regime which was invalidated by the Court of Justice of the European Union (CJEU) on 6 Oct. 2015 introducing an additional hurdle to the flow of personal data from Europe to the U.S., the EDPS concluded in his recently published *Opinion 4/2016 on the EU-U.S. Privacy Shield draft adequacy decision* (opinion) "*. . .the Privacy Shield as it stands is not robust enough to withstand future legal scrutiny before the Court.*" He further explained that, "*Significant improvements [to the Privacy Shield would be] needed should the European Commission wish to adopt an adequacy decision, [in order] to respect the essence of key data protection principles with particular regard to necessity, proportionality and redress mechanisms.*"

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Background

The Privacy Shield—the product of months of negotiations between the EU and the U.S., following *Case C-362/14 Maximillian Schrems v Data Protection Commissioner* (*Schrems*) which invalidated the European Commission's Safe Harbor Decision (2000/520/EC)—was published on 2 Feb. 2016 as a suggested way in which

personal data could be legitimately transferred across the pond in accordance with EU data protection legislation (16 WDPR 02, 2/25/16). The EDPS's recent opinion that the Privacy Shield needs to be further bolstered is based on his review of the draft adequacy decision which was published by the European Commission on 29 Feb. 2016 (the Draft Adequacy Decision) (16 WDPR 03, 3/24/16).

Following its announcement, the Privacy Shield, and its adequacy as an alternative solution for transatlantic data transfer, has been the subject of much scrutiny, debate and commentary by many industry players, including the Article 29 Working Party (WP29). The general view, which is also in line with the EDPS's recent opinion is that, although it is an improvement upon the previous Safe Harbor regime, the Privacy Shield still does not go far enough towards providing an adequate level of protection for the personal data of EU citizens for the transfer of such data to the U.S. Notably, Max Schrems himself also feels that the Privacy Shield, as currently drafted, would suffer the same fate as the Safe Harbor regime if it was to be considered by the CJEU. As such, the time has not yet come to let down our guard.

"The Privacy Shield as it stands is not robust enough to withstand future legal scrutiny before the Court."

European Data Protection Supervisor

Giovanni Buttarelli

The EDPS Opinion

EDPS's opinion acknowledges that the Privacy Shield is a significant improvement as compared to the Safe Harbor regime, and the EDPS applauded the involvement of key participants including the U.S. Department of State, the U.S. Department of Justice and the U.S. Office of the Director of National Intelligence in the negotiations. However, the opinion is very clear that "*progress compared to the earlier Safe Harbour Decision is not in itself sufficient. The correct benchmark is not a previously invalidated decision. . ..*" The EDPS also gave a series of further recommendations in his opinion, which we further explore below in conjunction with similar views expressed by the WP29.

Integrating All Main Data Protection Principles

The WP29, in its opinion 01/2016 on the Privacy Shield draft adequacy decision, published on 13 April 2016, stressed that any agreement "*should contain the substance of the fundamental principles [of EU data protection laws] and as a result, ensure an 'essentially equivalent' level of protection.*" The EDPS agrees with the WP29 and has echoed this position in his opinion. Unfortunately, both the EDPS and WP29 feel that the Privacy Shield, as currently drafted, fails to provide protection which is "essentially equivalent" to that under EU law, the requisite standard as stated by the court in *Schrems*. Furthermore, the WP29 commented in its opinion that certain "*key data protection principles as outlined in European law are not reflected in the [Commission's] draft adequacy decision and the annexes, or have been inadequately substituted by alternative notions.*" Continuing this theme, the EDPS's opinion also notes that the principles surrounding data retention and automated processing are omitted entirely, and that the "purpose limitation" principle is insufficiently clear. Furthermore, the Commission's Draft Adequacy Decision does not explain how these deficiencies would be remedied under the proposed new regime.

Limiting Derogations

The WP29 is also critical of the lack of clarity, stating that the "*principles and guarantees. . .[are] both difficult to find, and at times, inconsistent.*"This is likely due to the fact that the principles and guarantees are partly contained in the Privacy Shield, and partly in the Draft Adequacy Decision and its annexes. The WP29 is of the opinion that this would make "*accessibility for data subjects, organisations, and data protection authorities more difficult.*"

It appears therefore, that the Privacy Shield suffers from issues concerning both its form and its substance. Certain principles are difficult to discern, whilst others are simply not covered.

One of the key objections to the Safe Harbor regime was that it did not prevent collection of EU citizens' data in bulk by U.S. authorities (such as the National Security Agency); and this argument was given considerable weight by the CJEU in *Schrems*.

The general view is that, although it is an improvement upon Safe Harbor, the Privacy Shield doesn't go far enough towards providing an adequate level of protection for the personal data of EU citizens.

Under the proposed terms of the Privacy Shield, U.S. authorities can still collect data in bulk in many scenarios. These include "*detecting and countering certain activities of foreign powers; counterterrorism; counter-proliferation; cybersecurity; detecting and countering threats to U.S. or allied armed forces; and combating transnational criminal threats, including sanctions evasion.*" Max Schrems himself has strongly criticized the deal, and the "in bulk" exceptions in particular, saying that "*Basically the U.S. openly confirms that it violates EU fundamental rights in at least six cases. . ..*" Given these objections, it is possible that the CJEU may have to deal with challenges to the legality of the Privacy Shield in the future.

The EDPS's opinion similarly acknowledges that, "*notwithstanding recent trends to move from indiscriminate surveillance on a general basis to more targeted and selected approaches, the scale of signals intelligence and the volume of data transferred from the EU subject to potential collection once*

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transferred and notably when in transit, is likely to be still high and thus open to question." The EDPS is concerned that such mass collection is likely to be seen as legitimised should the EU-U.S. Privacy Shield be adopted as it currently stands and the Draft Adequacy Decision approved.

The precise limits of permissible derogations under the Privacy Shield are at present insufficiently defined. Furthermore, the EDPS has urged the European Commission to take a tougher line with its U.S. counterparts in order to ensure that U.S. public authorities can only access EU citizens' personal data "*as an exception and where indispensable for specified public interest purposes.*" In this light, the umbrella justification of "national security" appears to be unacceptably broad.

The European Data Protection Supervisor is concerned that mass collection is likely to be seen as legitimised should the EU-U.S. Privacy Shield be adopted as it currently stands and the Draft Adequacy Decision approved.

Similar concerns were voiced by the WP29, which feels that the Privacy Shield, and the commitments made on behalf of the Office of the Director of National Intelligence, "*do not exclude massive and indiscriminate collection of personal data originating from the EU.*" The WP29 also makes it very clear that "*massive and indiscriminate surveillance of individuals can never be considered as proportionate and strictly necessary in a democratic society.*" This approach, based on proportionality, is a key tenet of EU law. Given that it was this concern of mass collection of personal data by U.S. authorities which underpinned much of the Court's reasoning in the *Schrems* case, it seems likely that the highest court in the EU may view the Privacy Shield with similar distrust if such concerns still remain under the proposed new regime.

Improving Redress and Oversight Mechanisms

U.S. Secretary of State John Kerry committed as part of the Privacy Shield framework to establishing an Ombudsperson mechanism within the Department of State. This office is intended to be independent from U.S. national security services and will investigate complaints and enquiries by individuals and inform them whether the relevant data protection laws have been complied with. However, the independence and effectiveness of the proposed Ombudsperson has been questioned by many parties.

The WP29 raised its concerns that the proposed Ombudsperson "*is not sufficiently independent and is not vested with adequate powers to effectively exercise its duty and does not guarantee a satisfactory remedy in case of disagreement*" The EDPS appears to have similar concerns and has suggested that, instead of reporting to the Department of State, the Ombudsperson could report directly to Congress. The opinion also recommends that the European Commission should press for "*specific commitments*" that "*all competent agencies and bodies*" in the U.S. will respect and cooperate with the requests of the Ombudsperson. The Inspectors-General could also be asked to "*prioritise coordination with the Ombudsperson.*"

As a general comment, the WP29 felt that "*the new redress mechanism in practice may prove to be too complex, difficult to use for EU individuals and therefore ineffective. Further clarification of the various recourse procedures is therefore needed. . ..*" The group goes on to suggest that "*EU data protection authorities could be considered as a natural contact point for the EU individuals in the various procedures, having the option to act on their behalf.*"

Given the uncertainty over the implementation of the Privacy Shield, organisations have been relying heavily on the European Commission's standard contractual clauses—which are now under fire—to lawfully export data to the U.S.

Further, and more specifically, the EDPS recommends that the European Commission investigates whether it would be viable to involve "*EU representatives in (a) the assessment of the results of the oversight system. . . and (b) notification of certain categories of personal data to be processed by U.S. authorities. . ..*"

Additional Recommendations

The opinion concludes with a number of additional recommendations in order to improve the protection of personal data transferred under the proposed Privacy Shield. One such recommendation is an explicit prohibition on retaining personal data for commercial purposes for "*longer than necessary for the purposes for which the data were collected or further processed.*" The EDPS notes that this is "*an essential principle of data protection law.*" Furthermore, the EDPS recommends additional commitments that the amount of personal data which is processed is "*not excessive*" and "*limited to the information that is necessary.*"

The opinion suggests the addition of a further principle to protect individuals' personal data which is processed automatically, including safeguards such as the ability to contest decisions (e.g., creditworthiness) made on the basis of automatic processing. Additionally, the EDPS notes that the Privacy Shield currently does not, but ought to, reflect the new principles arising from the General Data Protection Regulation, the new European data protection legislation which will enter into force in May 2018. These new principles include "privacy by design," "privacy by default," and "data portability." Such amendments to the Privacy Shield would, if implemented, act to bolster the Privacy Shield and bring it closer to the level of protection provided by current and future EU data protection law.

Conclusion

A German Data Protection Commissioner has already fined Adobe Systems Inc., PepsiCo Inc.'s Punica, and Unilever N.V. for transferring personal data from the EU to the U.S. on the basis of Safe Harbor alone post-*Schrems*. There are likely to be further (and more severe) fines imposed in the future if an alternative solution is not adopted. The EDPS has acknowledged that the Privacy Shield is a notable improvement as compared to Safe Harbor; however, the opinion clearly states that improvement alone is not enough. The Privacy Shield, as currently drafted, still fails to provide protection which is "essentially equivalent" to EU law when personal data is transferred from the EU to the U.S. The EDPS explicitly recognises that "*the consequences of a new invalidation by the CJEU in terms of legal uncertainty for data subjects and the burden, in particular for SMEs, may be high.*" The Privacy Shield appears to be a step in the right direction; but there is clearly still a long way to go before the issue of Safe Harbor invalidation is adequately resolved, and an acceptable alternative is agreed.

Given the uncertainty over the implementation of the Privacy Shield, organisations that transfer personal data from the EU to the U.S. have been relying heavily on the European Commission's standard contractual clauses to lawfully export data to the U.S. However, this mechanism may also now be under fire. In late May, it was announced that the Irish Data Protection Commissioner is seeking declaratory relief in the Irish High Court and a referral to the CJEU to determine the legal status of personal data transfers under the standard contractual clauses. This is the first step in a process that may ultimately result in the standard contractual clauses in their current form being declared invalid by the CJEU, insofar as they concern transfers of data to the U.S. Should that happen, organisations that have been relying on the clauses will have to consider alternative means to legitimise the transfer of personal data to the U.S.

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