



Data Protection Newsletter Switzerland

EU-U.S. Privacy Shield

1. Political context

On February 29, 2016, the European Commission issued a communication on the actions taken to restore trust in transatlantic data flows. These actions became necessary due to the revelations on large-scale surveillance by US authorities and the decision of the Court of Justice in the Schrems matter.

In particular, the European Commission informed on the political agreement on a new framework for transatlantic data flows it has reached with the U.S., namely the EU-U.S. Privacy Shield, which will replace the Safe Harbour framework.

Key elements leading to this political agreement were several changes in the U.S. legal order. The intelligence activities were reformed by the Presidential Policy Directive 28 (PPD-28), providing for the extension of certain privacy protections rights to foreigners as well as to move away from bulk mass data collection towards targeted and focused collection and access to data. Further, the USA Freedom Act modified certain U.S. surveillance programs, strengthened judicial oversight and increased public transparency. Finally, the U.S. Congress passed the Judicial Redress Act which was signed into law by President Obama on 24 February 2016 and should enter into force within 90 days.

The cornerstones of the EU-U.S. Privacy Shield are the following:

- Obligations on companies and enforcement;
- Limits to the access of the U.S. government;
- Protection of individual's privacy rights;
- Review mechanism.

2. Obligations on Companies and Enforcement

Under the Privacy Shield, U.S. companies will need to accept strict obligations on data processing and guarantee personality rights if they wish to import personal data from Europe. These obligations include stricter liability provisions, including in case of data sub-processing. The U.S. Department of Commerce has committed to a regular and rigorous monitoring of the companies' compliance with their commitments under the Privacy Shield. Companies' commitments are legally binding and enforceable under U.S. law by the Federal Trade Commission and companies that do not comply will face sanctions.

3. Limits to the U.S. Government's Access

U.S. government has provided the EU with written representations and assurances that access by public authorities for law enforcement, national security and other public interest purposes will be subject to clear limitations, safeguards and oversight mechanisms. The U.S. will also establish a new redress mechanism for EU data subjects in the area of national security through an Ombudsperson who will be independent from the national security authorities. It is worth noting that this will apply not only to Privacy Shield transfers but to all personal data transferred to the U.S. for commercial purposes.

4. Protection of Individual's Privacy Rights

Any data subject will benefit from several accessible and affordable avenues to obtain redress, including cost-free alternative dispute resolution bodies. In addition, any company handling human resources data from Europe must commit to comply with the decisions of the competent EU Data Protection Authority against it while other companies may



voluntarily make such a commitment. Individuals can also introduce a claim to the Data Protection Authority at their domicile. In the latter case, a formalized procedure will facilitate the investigation in the U.S. and resolution of the claim within a reasonable timeframe. Finally, individuals will be able to complain to the Privacy Shield Panel, a dispute resolution mechanism that can take binding and enforceable decisions against U.S. Privacy Shield companies.

5. Review Mechanism

The Commission and the U.S. Department of Commerce will carry out annual reviews and involve EU data protection authorities and U.S. national security authorities and the Ombudsperson. This will allow to regularly monitoring compliance and suspend the Privacy Shield framework if necessary.

6. The Umbrella Agreement

On September 8, 2015, the EU and the U.S. initialed the Umbrella Agreement in Luxembourg. The Umbrella Agreement establishes a set of data protection safeguards that will apply to all transatlantic data transfer between the authorities in the area of criminal law enforcement. The signature of the Umbrella Agreement is contingent upon the entry into force of the Judicial Redress Act, which should be the case end of May, beginning of June 2016.

7. Conclusion

Once the EU-U.S. Privacy Shield and the Umbrella Agreement in place, the data protection level for transatlantic data transfer will strongly increase. It is expected that the Swiss authorities will also negotiate a similar agreement covering the transatlantic data transfer between Switzerland and the U.S.

Considering that data transfer between Switzerland and the U.S. are key for many Swiss companies and considering the importance to protect personality rights, the outcome of the negotiations of the EU-U.S. Privacy Shield is to be welcomed and may pave the way for a similar agreement with Switzerland.

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