

[EU Regulators Demand Action On 'Privacy Shield' Issues](#)

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Law360, New York (December 5, 2017, 10:25 PM EST) -- Europe's data protection authorities on Tuesday warned that they would move to strike down the trans-Atlantic Privacy Shield data transfer pact if officials don't act within the next year to address several "significant concerns," including a lack of clear guidance on consumers' redress rights and insufficient U.S. surveillance guarantees.

The group of [European Union](#) data protection authorities known as the Article 29 Working Party offered their latest take on the less than two-year-old Privacy Shield in a report released on the heels of the completion of the [first annual review](#) of the deal conducted in September by the [European Commission](#) and the [U.S. Department of Commerce](#) along with other officials from both regions. That report [offered mostly glowing reviews](#) of the pact, with the officials concluding that while Privacy Shield adequately protects data that flows between the continents, there remained nagging worries about the U.S. government's access to Europeans' personal data and the way that the pact is being overseen.

The working party had a harsher take, acknowledging that while Privacy Shield marked an improvement over the old safe harbor data transfer mechanism that the European Court of Justice invalidated in October 2015 in a move that led to the creation of the shield, they had identified a "number of important unresolved issues" that prevented them from throwing their support behind the newest data transfer mechanism.

"Therefore the WP29 calls upon the commission and the U.S. competent authorities to restart discussions," the authorities said. "An action plan has to be set up immediately in order to demonstrate that all these concerns will be addressed."

The working party specifically demanded that the appointment of the independent ombudsperson required to be set up at the U.S. Department of State to handle national security complaints and the selection of members to round out the depleted [Privacy and Civil Liberties Oversight Board](#) in the United States be "prioritized." The regulators want to see these positions filled by May 25, the date when the sweeping overhaul of the EU's data protection regime, known as the general data protection regulation, is set to take effect.

The remaining concerns — including issues over an alleged lack of guidance on principles such as onward transfers and on the rights and available recourse and remedies for data subjects, the need to increase oversight and supervision of companies' compliance with the Privacy Shield, and what exactly U.S. intelligence authorities are allowed to scoop up about EU citizens — should be addressed "at the latest" by the time officials convene for the second joint review, which is likely to occur sometime in the early fall.

If these conditions aren't met, the working party vowed to "take appropriate action, including bringing the Privacy Shield adequacy decision to national courts for them to make a reference to the [European Court of Justice] for a preliminary ruling."

The Privacy Shield has been under a [fog of uncertainty](#) since winning formal approval from EU member states in July 2016, with many worried that it could suffer the same fate as safe harbor. That pact was struck down more than 15 years after its implementation when the EU high court found that the mechanism failed to adequately protect the privacy rights of EU citizens because it offered them no judicial means of redress in the U.S. and allowed U.S. intelligence officials unfettered access to transferred data.

Despite the uncertainty, more than 2,500 companies, including [Google](#), [Facebook](#) and [Microsoft](#), have signed up to use Privacy Shield, and a move by the working party to have the mechanism declared inadequate would again throw into disarray these multinationals' data transfer activities.

The working party in the past has expressed skepticism about the Privacy Shield. Shortly after the mechanism was approved, the regulators [released an opinion](#) that gave only conditional backing to the fledgling deal.

Expressing many of the same concerns voiced in its report Tuesday, the working party in its earlier opinion had stressed that they had a number of lingering concerns about how the transferred data would be used for both commercial and national security purposes, but said that despite their reservations they were willing to see how the Privacy Shield worked in practice. They had promised to hold off on filing any formal challenges to the deal until after the first annual review was conducted.

With the completion of that review, in which eight representatives of the working party participated and which culminated in the release of a report by the European Commission in October, the working party moved to finish up its own report, which was dated Nov. 28 but released Wednesday.

On the commercial side, the working party called for more clarity around principles such as consumer redress for violations by companies that transfer their data overseas, ex-officio investigations and continuous monitoring of certified companies, more distinction between data processors and data controllers, and improvements to the interpretation and handling of human resource data and the rules governing automated decision making and profiling.

The regulators also pushed for the self-certification process for companies to "be enhanced to ensure uninterrupted protection for data subjects and rapid compliance with the Privacy Shield principles" and for cooperation between U.S. authorities to be "adjusted."

On the national security side, the working party said that while it welcomed recent efforts by U.S. officials "to become more transparent on the use of their surveillance powers," the collection and access of personal data by intelligence authorities under executive order 12333 and Section 702 of the Foreign Intelligence Surveillance Act, which is set to expire at the end of the month, still concerned them.

"With the imminent decision on whether and how to reauthorize section 702 FISA by the end of this year, the WP 29 takes the view that if Section 702 were to be reauthorized, several improvements should be introduced," the regulators said, demanding that U.S. lawmakers who

have so far offered a flurry of proposals on the issue provide for "precise targeting, along with the use of the criteria such as that of 'reasonable suspicion,' to determine whether an individual or a group should be a target of surveillance."