

'Privacy Shield' Data Transfer Deal Needs More Work, EU Told

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By Allison Grande

Law360, New York (March 16, 2016, 8:18 PM ET) -- A coalition of more than two dozen advocacy groups on Wednesday urged European Union leaders to send back to the drawing board the new trans-Atlantic "Privacy Shield," arguing that "substantial reforms" to U.S. surveillance laws and stronger privacy pledges are needed to make the data transfer pact work.

In a [letter](#) sent to several EU officials including the head of the Article 29 Working Party and the chair of a leading parliamentary committee, the American Civil Liberties Union, Privacy International, Digital Rights Ireland and two dozen other groups bashed the data transfer pact that the European Commission and U.S. Department of Commerce unveiled in February to replace the safe harbor mechanism that was struck down by the European Court of Justice last year.

The new pact, dubbed the Privacy Shield, attempts to address the concerns that led to the invalidation of the safe harbor regime by imposing stronger obligations on U.S. companies such as Google Inc. and Facebook Inc. to protect the personal data of Europeans. It also requires stronger monitoring and enforcement to be carried out by the Commerce Department and the Federal Trade Commission, which has agreed to cooperate with European data protection authorities on complaints; allows Europeans to raise their complaints about data misuse through several different channels; and forces the U.S. to make commitments regarding the scope of its surveillance practices.

But despite these enhancements, the civil liberties groups argued in their letter Wednesday that the new deal fell far short of complying with the standards set out by the European high court or by the Article 29 Working Party, which is made up of Europe's data protection regulators.

“Without more substantial reforms to ensure protection for fundamental rights of individuals on both sides of the Atlantic, the Privacy Shield will put users at risk, undermine trust in the digital economy and perpetuate the human rights violations that are already occurring as a result of surveillance programs and other activities,” the letter said.

In urging the EU officials to “send the Privacy Shield back to the negotiators for further consideration,” the groups identified several areas of concern, including doubts surrounding the strength of the U.S. intelligence community’s written assurances on how it will use and safeguard transferred data.

The U.S. government, the groups said, has refused to accept the relevance and application of the internationally accepted standards of necessity and proportionality in its surveillance operations, so it is more than likely that EU citizens still cannot be sure under the new deal about what will happen to their data once it is transferred to the U.S.

The full text of the deal, which was formally unveiled on Feb. 29, also raises questions about the scope of certain provisions, including what limits are placed on the collection of EU data by the intelligence community and whether or not the EU and U.S. have reached a “common understanding” on key surveillance terms, such as “bulk surveillance,” the groups said.

The letter additionally flagged concerns with the Privacy Shield’s creation of an independent ombudsperson at the U.S. State Department to handle national security complaints, saying the role would be neither independent nor able to exercise sufficient authority to initiate investigations or respond to complaints adequately, and that citizens would likely be stymied in their ability use any redress mechanisms because they are not notified when their information is being collected or used.

“In order for the Privacy Shield to survive, the U.S. must formally commit to substantial reforms to respect human rights and international law in order to meet the standards set for by the [EU high court],” the groups said. “The Privacy Shield contains no such commitment.”

The groups pushed the policymakers to make approval of the Privacy Shield contingent on the timely reform of U.S. surveillance laws, which it said should at a minimum include a narrowed definition of “foreign intelligence information” to limit the scope of data collection and the discontinuation of “indiscriminate scanning” of the contents of communications.

On the commercial front, the groups stumped for increased protections for personal data collected and used by companies, more robust and comprehensive enforcement mechanisms, and stronger redress and transparency provisions.

“These reforms and safeguards would help protect individuals’ human rights and provide the legal certainty needed by companies operating transnationally,” said the groups, which also include Amnesty International, the Center for Digital Democracy, Consumer Watchdog, the Electronic Frontier Foundation, the Electronic Privacy Information Center, European Digital Rights, Privacy Rights Clearinghouse and France’s La Quadrature du Net.

While the negotiators have given their seal of approval to the Privacy Shield, the deal won’t be finalized until the EU member states and data protection regulators have reviewed it.

Europe’s data protection regulators revealed the day after the Privacy Shield was announced that it planned to carefully scrutinize the text and that they were aiming to release an Article 29 Working Party opinion on the deal by mid-April.

“The announcement of the EU-U.S. Privacy Shield is a new fact, it changes the situation,” Working Party Chair and French data protection regulator Isabelle Falque-Pierrotin, who was one of the recipients of Wednesday’s letter, said at the time. “We are ready to analyze the results of the negotiations ... and if this new shield is answering to our concerns.”

--Editing by Brian Baresch.