Implications of the EU-US "Privacy Shield"

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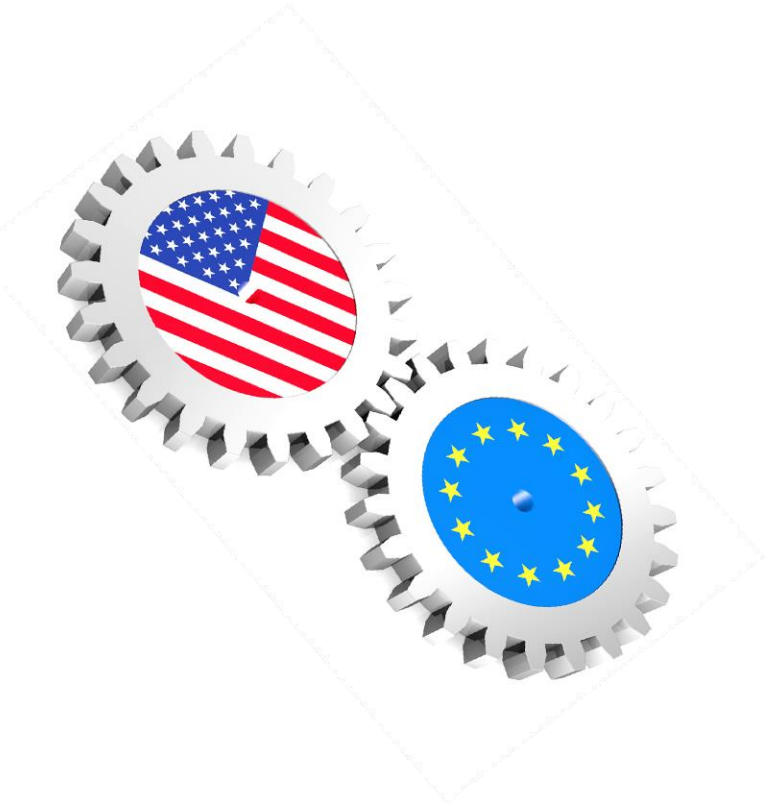
Introduction

1. Background
2. Main features of the Privacy Shield
3. Reactions to the Privacy Shield
4. Next steps :
   - for EU & US authorities
   - for businesses



Background—pre Schrems

Before the Schrems decision:

- Directive 95/46/EC of 24 October 1995 :

  Art. 25

  - (1) : « *The transfer to a third country of personal data may take place only if […] the third country in question ensures an adequate level of protection* ».
  - The Commission can assess whether the level of protection is adequate and if it is not, can enter into negotiations with a view to remedying the situation.
  - (6) : Upon conclusion of the negotiations, the Commission may « *find […] that the third country ensures an adequate level of protection* ».

Background—pre Schrems (cont)

Before the Schrems decision:

- Directive 95/46/EC of 24 October 1995 :

  Art. 26 :

  - « *A transfer of data to a third party which does not ensure an adequate level of protection […] may take place* » if certain conditions are fulfilled (consent, necessary for certain purposes etc …).
  - « *a Member State may authorize a transfer […] to a third country which does not ensure an adequate level of protection […] where the controller adduces adequate safeguards[…]; such safeguards may […] result from appropriate contractual clauses* ».

Background—pre Schrems (cont)

Before the Schrems decision:

- Commission decision 2000/520 of 26 July 2000 on the adequation of the protection provided by the safe harbour privacy principles.
- Commission decisions on Standard Contractual Clauses (SCC)
- Working papers of the WP on Binding Corporate Rules (BCR)
- Commission decisions relating to countries that ensure adequate protection (Canada, Switzerland, Israel etc…)

- As from June 2013: revelations by E. Snowden about the NSA surveillance programs.
- Commission's memo of 27 November 2013 with 13 recommendations to improve the functioning of the Safe Harbour scheme.

Background: Schrems

The Schrems decision:

- Decision of the CJEU of October 6, 2015:
  - the Safe Harbour Commission decision is invalid,
  - an adequacy decision issued by the Commission *« does not prevent a national DPA from finding that the law and practices in force in the third country do not ensure an adequate level of protection »*.

Background—post Schrems

After the Schrems decision:

- 16 October 2015: the WP issued a statement in which it said :
  - they would analyze the impact of the CJ decision on the other transfer tools,
  - they encouraged EU & US authorities to reach an agreement,
  - National DPAs would not take enforcement measures until the end of January 2016.
- 1st February 2016: Commissioner Jourova stated before the European Parliament that no deal had been found.
- 2nd February 2016: Commissioners Jourova & Ansip announced that a deal had been reached.

Background on EU-US Privacy Shield

- 3d February 2016: WP issued a statement:
  - The new Privacy Shield: they want to see the documents.
  - Alternative transfer tools (SCC, BCR) :

    The robustness of these tools must be analyzed in light of 4 essential guarantees for intelligence activities:

    i. Processing should be based on clear, precise and accessible rules.
    ii. Necessity and proportionnality, with regard to the legitimate objectives pursued, need to be demonstrated.
    iii. An independent oversight mechanism should exist, that is both effective and impartial.
    iv. Effective remedies need to be available to the individual.

    They will issue an opinion but in the meantime, it is possible to use these alternative transfer tools.

Main Features of the Privacy Shield

- Precise content not disclosed yet.
- Same mechanism as the Safe Harbor scheme.
- Key « new » points:
  - Stronger obligations on US companies.
  - Means of redress for European citizens.
    1. US companies themselves
    2. Alternative dispute mechanism
    3. European DPAs
    4. Arbitration mechanism
  - Limitation to the access to Europeans data by US public authorities for national security purposes.

Reactions to the Privacy Shield

- Pros: EU & US officials and professional organizations
  - Vera Jourova (EU Justice Commissioner)
  - Penny Pritzker (US Secretary of Commerce)
  - John Higgins (Director general of DigitalEurope)
- Cons: fundamental rights defenders
  - Max Schrems (the Austrian lawyer)
  - Jan Phillipp Albrecht (Member of the European Parliament who participated in the elaboration of the GDPR)
- The main criticisms are about:
  - the mass surveillance by US public authorities, which seems still possible, and
  - the redress for Europeans, and whether it will be effective.

The Judicial Redress Act (H.R.1428/S.1600)

- Designed to give EU citizens the right to sue the U.S. government for privacy violations.
- Passed by both the House and Senate on February 10, 2016; awaiting President Obama's signature.
- This bill authorizes U.S. DoJ to designate foreign countries or regional economic integration organizations whose natural citizens may bring civil actions under the U.S. Privacy Act of 1974.
- These suits may be brought against certain U.S. government agencies.
- The suits are limited to accessing, amending, or redressing unlawful disclosures of records transferred from a foreign country to the United States to prevent, investigate, detect, or prosecute criminal offenses.
- The bill does not provide a cause of action against private entities
  - But could be secondary liability for government contractors.

Next Steps for US and EU Authorities

- **Next steps for EU and US authorities**

1) Privacy Shield

- The Commissioners in charge must draft the Commission « adequacy decision » in cooperation with US authorities.
- The draft Commission decision:
  - may be submitted to the Working Party and
  - will be submitted to the « article 31 Committee » composed of representatives of the Member States.
- The WP and the committee will give their views.
- The Commission will issue its decision.

2) Other transfer mechanisms

- Once the WP has issued its assessment on the Privacy Shield, it will consider whether transfer mechanisms such as SCC and BCR can still be used.

Timing of Next Steps

- **Next steps for EU and US authorities Agenda**

1) Privacy Shield The Commissioners in charge must draft the Commission « adequacy decision » in cooperation with US authorities. WP said they want to get all documents before the end of February.

- The draft Commission decision:
  - may be submitted to the Working Party and
  - will be submitted to the article 31 committee.
- The WP and the committee will give their views. WP said there would be a meeting at the end of March and their opinion will be issued mid or end of April.
- The Commission will issue its decision. At the earliest in May.

2) Other transfer mechanisms

- Once the WP has issued its assessement on the Privacy Shield, it will consider whether transfer mechanisms such as SCC and BCR can still be used. At the earliest in April.

Next Steps for Businesses

- **What should businesses do now?**

  What are the risks?

- The old Safe Harbor has been invalidated, the new Privacy Shield is not yet enforceable.
- The grace period is over, DPAs can take enforcement actions and:
  - suspend or ban the transfer,
  - impose penalties, the maximum is set out in the law of each Member State (for France it is 1,5 M€, for the UK it is 0,5M £).

What are the Alternatives?

- Re-organize operations to avoid transfer of personal data to the US:
  - Locate servers within the EU or in a country which does ensure an adequate level of protection (with no access from outside)
  - Anonymize data
- Legal options:
  - Obtain individual consent
  - Adopt standard contractual clauses
  - Follow binding corporate rules
- Can you/should you wait for the Privacy Shield?

Action Items for Businesses

- Review your insurance – it might have coverage directed just at the US-EU Safe Harbor and needs to now include the US-EU Privacy Shield:
  - Cyber insurance (to include EU dispute resolution, arbitration)
  - D&O insurance
  - E&O insurance
- What for EU state enforcement activity:
  - Likely to be focused on certain industries.
- Identify those contracts that will need to be changed.
- Check your internal policies for Safe Harbor references and be prepared to make the necessary changes once the Privacy Shield requirements are fleshed out.

FOLEY HOAG LLP

Thank you!

Do you have any questions?