

Client Alert

Data, Privacy & Security Practice Group

April 19, 2016

EU Privacy Advisory Body Criticizes EU-U.S. Privacy Shield

An independent advisory body on data privacy in the European Union (“EU”), known as the Article 29 Working Party (“Working Party”), released its statement and opinion on the EU-United States (“U.S.”) Privacy Shield, making no endorsement of the plan and offering criticisms of unresolved issues. As King & Spalding previously reported, the European Commission (“EC”) and U.S. Department of Commerce (“Commerce”) published the text of the EU-U.S. Privacy Shield on February 29, 2016, along with a draft adequacy decision, pending European authorities’ approval. The Privacy Shield would serve as a potential basis for transatlantic transfers of personal data, replacing the Safe Harbor Framework, which was invalidated by the European Court of Justice in October 2015.

The Working Party was established by Data Protection Directive 95/46/EC and is dedicated to protecting individuals with regards to the processing and free movement of personal data. The group is comprised of representatives from EU countries’ data protection supervisory authorities, a representative from the European Data Protection Supervisor, and a representative from the EC, and provides independent advice on data protection efforts.

The non-binding opinion authored by the Working Party repeatedly recognized the parties’ swift action responding to the invalidation of the Safe Harbor Framework and the improvements compared to the prior agreement, but noted three major areas of concern. The first addressed the language in the draft adequacy decision, which the Working Party argued did not oblige organizations to delete data if no longer needed. The Working Party stated an essential element of data protection law provides that data is kept no longer than necessary. The second concern was the failure of U.S. government to rule out the collection of “massive and indiscriminate data,” which the Working Party deemed an unjustified interference with individual’s fundamental rights. Finally, the Working Party expressed concern with the effectiveness and independence of the Privacy Shield Ombudsperson.

In addition to the main areas of concern, the Working Party raised a number of other criticisms. For example, the Working Party noted there was an overall lack of clarity in the Privacy Shield, including many undefined terms not generally used in data privacy law. In terms of the commercial aspect of the draft adequacy decision, the Working Party challenged the interim period of transfers for existing commercial relationships and identified loopholes in the provision of onward transfers of data to third countries, the complaint handling mechanism, and transfers of human resources and pharmaceutical data.

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Moreover, the Working Party questioned whether the Privacy Shield would be compliant with the General Data Protection Regulation (“GDPR”), adopted by the European Parliament last Thursday. When GDPR comes into force in 2018, it will replace the current Data Protection Directive 95/46/EC, and strengthen the privacy rules applied to entities transferring data to countries outside of the EU, increase the fines for violations of privacy rules, and codify the right to be forgotten. The Working Party called for a review of the Privacy Shield adequacy decision once the GDPR enters into application.

While the Working Party did not endorse the Privacy Shield and raised many areas of concern, the non-binding nature of the Working Party’s role provides that the EC can still proceed to adopt Privacy Shield. Next, the Article 31 Commission, composed of member state representatives on data privacy matters, must make a binding recommendation, followed by formal adoption by the EC College of Commissioners. However, the Working Party’s criticism will make it more difficult for the EC’s College of Commissioners to adopt a Final Adequacy Decision in favor of the agreement, especially in light of the GDPR’s passage. Moreover, were the EC to proceed and adopt the agreement after the Working Party’s criticisms, it would open up the Privacy Shield to challenge before the European Court of Justice.

The degree to which the Working Party’s criticisms of the Privacy Shield interject uncertainty into the agreement’s passage and subsequent enforcement may devalue its potential for companies searching for a secure source of authority for transatlantic transfers of data. Instead, the current processes, particularly standard contractual clauses and binding corporate rules, may offer safer alternatives, pending revisions of the agreement in line with the Working Party’s recommendations, reconsideration of the Privacy Shield in 2018, and the coming into statutory force of the GDPR.

King & Spalding’s Data, Privacy and Security Practice

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