

Legal Update

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BREAKING NEWS: EU Data Commissioners Refuse to Accept Privacy Shield

By Peter T. Berk

Businesses looking for certainty for data transfers from the EU to the U.S. were disappointed last week when EU's data commissioners (the Article 29 Working Party) issued their opinion refusing to accept the European Commission's draft adequacy decision regarding the recently negotiated EU-US Privacy Shield. While the Article 29 Working Party's opinion is not binding and therefore does not sound the death knell for Privacy Shield, it does continue the current state of uncertainty for U.S. businesses.

As reported in our February 2016 Breaking News update, on February 2, 2016, EU and U.S. negotiators announced agreement on a new framework, dubbed "EU-US Privacy Shield," to replace the EU-US Safe Harbor framework that the Court of Justice of the European Union had invalidated in October 2015. The Privacy Shield contained new assurances and procedures aimed at addressing the concerns raised by the Court in invalidating the Safe Harbor. At that time, the Working Party requested information about the details of Privacy Shield and planned to discuss the new framework at its next meeting (which was held last week). Until that time, the EU data commissioners agreed that businesses could still rely on Binding Corporate resolutions or Model Contract Clauses for protected transfer of data from the EU to the U.S., but that reliance on Safe Harbor alone was not sufficient.

Throughout the opinion, the Working Party recognized that Privacy Shield was an improvement over the Safe Harbor and addressed a number of the concerns raised by the Court in invalidating Safe Harbor. The Working Party's opinion, however, also raised various issues with Privacy Shield. These issues included criticizing the lack of clarity in the framework and adequacy opinion, concerns about continued mass collection of data, questions regarding the adequacy, accessibility, and fairness of the proposed redress procedures, and apprehensions about whether the Privacy Shield complied with new EU regulations that are set to become effective in 2018.

What all of this means remains to be seen. While the Working Party's opinion is not binding on the European Commission (it can proceed with implementation), businesses should be careful how they proceed. This is because of the uncertainty concerning what the data commissioners themselves will do (they can bring enforcement actions for improper transfers and halt transfers of data), whether the Privacy Shield will be officially adopted by the Commission as planned (and if so, whether any changes will be made before then), and, if it is adopted, what the outcome of any court challenges to that framework will be. What is best for your business depends on its situation and should be discussed with your legal advisors.

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