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EU Privacy Pushback Prompts Lawyers to Look for Plan B

Ben Hancock, The Recorder

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SAN FRANCISCO — Companies that thought the new U.S.-EU "Privacy Shield" would restore legal certainty around transatlantic data transfers may want to think again.

On Wednesday in Brussels, a committee of Europe's data protection regulators known as the Article 29 Working Party lambasted the draft privacy framework as failing to uphold key elements of EU law and to sufficiently limit U.S. collection of EU citizens' data.

It's just the latest development that may encourage lawyers to advise clients to use alternate mechanisms to comply with EU data rules and avoid the Privacy Shield altogether.

Wednesday's opinion "puts a huge cloud on this arrangement and makes it very unattractive," said Lothar Determann, a partner in Baker & McKenzie's Palo Alto office and author of "Determann's Field Guide to Data Privacy Law."

The EU regulators on one hand lauded parts of the deal that aim to strengthen oversight of U.S. companies' compliance with key EU data privacy principles. "However, the Working Party has strong concerns on both the commercial aspects and the access by public authorities to data transferred under the Privacy Shield," it said in a statement.

The 58-page opinion of the working party is technically non-binding on the European Commission, which as the EU's executive arm negotiated the data transfer framework. The deal is an update to the Safe Harbor privacy arrangement from 2000 that was invalidated by the Court of Justice of the European Union in a ruling last October.

But the reaction is important politically ahead of a decision expected in May by EU member state governments on whether to approve the deal. The criticism from independent regulators could make it harder for some states to come out in support of the deal, potentially keeping the commission from finalizing it by its June target.

And if the European Commission is unwilling to reopen negotiations with the U.S.—or unable to secure new concessions—the opinion may add weight to any future legal challenge against the Privacy Shield. Under the October ruling, the data regulators themselves also have explicit authority to challenge arrangements like the Privacy Shield in court.

Some U.S. privacy lawyers and experts see litigation as all but certain in the coming months, as European privacy advocates try to test the bounds of the October ruling by the EU Court of Justice. "I think the minute it gets approved, somebody is going to challenge it," said Miriam Wugmeister, a partner at Morrison & Foerster privacy and data security practice in New York.

Paul Schwartz, a special advisor at Paul Hastings in San Francisco and a director of the UC-Berkeley Center for Law and Technology, said the working party's opinion "puts down a marker" for the EU high court to evaluate the new framework.

Either way, the opinion is a sign that companies that rely on being able to transfer data out of Europe may want to find other options besides the Privacy Shield.

Both Determann and Wugmeister noted that since the October decision, companies that participated in Safe Harbor have put in place other measures to make sure they can lawfully transfer EU citizens' data to the United States. These include so-called "standard contractual clauses" that are pre-approved by EU data regulators.

These have the added benefit, Wugmeister noted, of not requiring companies to take on the Privacy Shield's new obligations to participate in various types of dispute settlement proceedings if an EU citizen brings a complaint about how his or her data were used.

Determann added that while he thinks the Privacy Shield is a potentially useful tool, signing up for it amid continued scrutiny of the deal may provide limited benefits and could actually just be setting companies up for legal action by EU regulators further down the road.

CONTINUED SHORTCOMINGS

The European Commission initiated negotiations for what would become the Privacy Shield in 2014, about a year after the Snowden revelations brought to light the extent of U.S. surveillance activities through programs like PRISM. The negotiations accelerated after the October court decision invalidating Safe Harbor, which about 4,000 companies participated in.

The new framework, like its predecessor, incorporates a number of EU data privacy law "principles" that companies self-certify they will adhere to. But it also includes letters from U.S. government officials about how data are collected and used by law enforcement and intelligence authorities.

One of the key criticisms from the Article 29 Working Party is that the communications from the Office of the Director of National Intelligence "do not exclude massive and indiscriminate collection of personal data originating from the EU."

That's an issue that observers say would be difficult to resolve. The European Commission struggled for months to extract more specifics from the U.S. about the limits on the collection and use of personal data, yielding an 18-page letter from ODNI. Renegotiating for more would not be a quick or easy task.

Determann and other lawyers also see the working party as holding the U.S. to a standard that many EU member state surveillance bodies themselves could not meet.

Other criticisms in the opinion might be simpler to address. For example, the working party also said that the various mechanisms under the Privacy Shield through which EU citizens can bring

complaints "may prove too complex" to be effective.

Vera Jourova, the EU justice commissioner, said in a statement that the commission plans to come forward with a "user's guide" for citizens on how to seek redress for their complaints. But she fell short of saying the commission would enter into new negotiations with the U.S. on other issues flagged by the working party.

Referring to its criticisms as "useful recommendations," Jourova said the commission "will work swiftly to include them" in the final document approving the Privacy Shield framework.

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