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## Annual Review Confirms Validity of EU-US Privacy Shield

On 23 October 2019, the European Commission (**Commission**) published its report on the Third Annual Joint Review of the EU-US Privacy Shield. The Privacy Shield is a self-certification scheme whereby certified US organisations can more easily receive personal data transferred to them from the EU. Certification is granted when an organisation implements measures in order to protect personal data. At the time of the review, there were more than 5,000 participating companies.

In its report, the Commission confirms that the EU-US Privacy Shield continues to provide an adequate level of protection for transfers of personal data. It indicates that important improvements have been made to the framework, but also identifies some areas of concern. The European Data Protection Board (**EDPB**), which is invited to participate in the annual review process, published its own report on the Third Annual Joint Review on 12 November 2019, essentially confirming the findings of the Commission and making further recommendations on access by public authorities of data transferred to the US under the Privacy Shield. The annual review procedure is an important element in the construction of the Privacy Shield since its predecessor, the EU-US Safe Harbour scheme, was annulled by the Court of Justice of the European Union (**CJEU**) on 6 October 2015 (Case C-362/14). Whether the improvements suffice for the Privacy Shield to meet the EU requirements will be determined by the European Courts in the coming months.

In their respective reports, the EDPB and the Commission welcome the fact that the US Department of Commerce (**DoC**) and the US Federal Trade Commission (**FTC**) undertook new *ex officio* oversight and enforcement actions regarding compliance with the Privacy Shield by certified organisations. “Random spot checks” by the DoC have increased to 30 organisations per month.

However, the reports signal a lack of oversight on substantive compliance. The actions by the DoC and FTC focus on formal and procedural aspects rather than substantive aspects. In particular, the EDPB and the Commission regret the absence of checks on onward transfers of personal data to jurisdictions outside the US or EU. The European institutions consider that the DoC should use its power to demand insight into the contracts that organisations make with partners in third countries.

Other areas of attention are the application of the Privacy Shield requirements regarding HR data, on which EU and US interpretations differ, and the re-certification process, which needs

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further refinement. The EDPB furthermore indicates that concerns it raised in earlier reports have not been addressed, for instance, with regard to the limitations to the rights of data subjects, the lack of specific rules on automated decision-making, and the overly broad exemption for publicly available information.

The EDPB report also voices concerns about the collection of and access to data by US public authorities for purposes of national security and law enforcement. US surveillance programs need increased safeguards, for example, when determining whether an individual or group can be a target of surveillance. The EDPB also laments the fact that the Privacy and Civil Liberties Oversight Board (**PCLOB**) is not providing it with updated reports on certain US surveillance mechanisms and privacy safeguards, making meaningful reviews difficult.

On the other hand, the EDPB and the Commission welcome the fact that, for the first time since their creation in 2016, all members of the PCLOB have been appointed. They also welcome the appointment of a permanent Ombudsperson (Mr. Keith Krach) on 18 January 2019, following the European demand made in the Second Annual Review of December 2018. According to the EDPB, however, the exact powers of the Ombudsperson still need to be clarified through the disclosure of internal procedures concerning interactions between the Ombudsperson and the intelligence community. So far, the EDPB is not convinced that the Ombudsperson's powers to access information and remedy non-compliance are sufficient in the light of Article 47 of the EU Charter of Fundamental Rights, which requires an effective remedy before a tribunal.

Questions on the criteria for international transfers of personal data are currently pending before the General Court of the European Union (**GC**) and the CJEU. In Case T-738/16, French digital rights groups are claiming that the EU-US Privacy Shield fails to uphold certain fundamental EU rights. A related question is before the CJEU in Case C-311/18 (more commonly known as the *Schrems II* case), in which the CJEU has been requested to provide a preliminary ruling on the validity of standard contractual clauses, and ultimately may set out general criteria for the level of protection that is required for international transfers. These criteria, in turn, could be relied on for the assessment of the EU-US Privacy Shield. In this regard, the current reports indicate improvements as well as areas of concern. As a result, the outcome of the cases before the EU Courts remains uncertain.

If the EU-US Privacy Shield were to be annulled, the transfers of personal data to the more than 5,000 US recipients that currently rely on the scheme will become illegal and transferring parties in the EU would need to find a solution to ensure compliance with the General Data Protection Regulation (GDPR). The decisions of the CJEU and GC are expected in early 2020.

A copy of the European Commission's report can be found [here](#). The EDPB's report can be found [here](#).

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## Get in touch

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