

EU 'Privacy Shield' Pushback Paves Way For Court Challenge

By Allison Grande

Law360, New York (April 13, 2016, 9:54 PM ET) -- Europe's data protection regulators on Wednesday refused to endorse the new trans-Atlantic "Privacy Shield" data transfer mechanism, throwing a significant wrench in an already rocky road to approval and handing European Union citizens a blueprint for pressing an inevitable court challenge to the contentious deal.

In a highly anticipated opinion, the collective of EU data protection regulators known as the Article 29 Working Party refused to endorse the so-called Privacy Shield deal that officials from the European Commission and U.S. Department of Commerce floated in February to replace the popular and longstanding safe harbor mechanism that was struck down by the European Court of Justice last year.

While a court challenge similar to the one that led to the demise of the old safe harbor has long seemed inevitable, supporters of the Privacy Shield had hoped for a positive opinion from the regulators, which would have given a much-needed boost to the fight over the validity of the deal.

"It would be an easier path to approval if the Working Party had had a strongly favorable reaction to it," Akin Gump Strauss Hauer & Feld LLP cybersecurity, privacy and data protection practice co-leader David Turetsky said.

Instead, the regulators' detailed 58-page opinion only ramps up the legal uncertainty facing multinational companies while handing ammunition to privacy advocates and other opponents of the data transfer deal, attorneys say.

"If the Working Party had been more general about their concerns, then there would be no specific hooks for challengers to hang their hats on," said Stuart D. Levi, the head of Skadden Arps Slate Meagher & Flom LLP's privacy and cybersecurity group. "But by going into detail about what they thought was missing and what provisions were ambiguous, they've basically provided a blueprint for someone who is looking to challenge the Privacy Shield in the Court of Justice."

While the regulators acknowledged that the new deal was a significant improvement from the invalidated safe harbor, they revealed that they had a long list of concerns related to both the commercial and national security aspects of the framework. Some of the most pressing issues include the complexity of the new redress mechanism, the level of independence that an ombudsman created to address national security complaints will actually have and the potential for U.S. intelligence officials to continue to carry out the bulk collection of transferred data.

Although the opinion is not binding, it is expected to be highly influential as officials attempt to finalize the deal. But how exactly negotiators will respond to the regulators' criticisms remains to be seen, a factor that further complicates the already uncertain world that the more than 4,000 companies that relied on the safe harbor have been living in since the old pact was struck down.

"We've always said that for U.S. companies to invest in certifying to Privacy Shield, there has to be a level of certainty for them," said Boris Segalis, the U.S. co-chairman of Norton Rose Fulbright's data protection, privacy and cybersecurity practice group. "But right now, without the endorsement of the Working Party and questions remaining about the agreement, that level of certainty is not there."

As far as the impact that the regulators' opinion is expected to have on getting the Privacy Shield to the finish line, a step that is a necessary precursor to any court challenge, attorneys predict that the European Commission and U.S. Department of Commerce are going to have their hands full trying to figure out how to respond — or if they should respond at all — to the opinion.

"The opinion puts the European Commission in a hard place," Mayer Brown LLP cybersecurity and data privacy counsel Kendall Burman said. "They're going to have to decide if there's room to negotiate with the U.S. on some of the elements of the Privacy Shield to address the concerns outlined here or go forward and adopt the Privacy Shield in defiance of what the opinion says."

Julie Brill, the former Federal Trade Commissioner who played a prominent role in pushing the Privacy Shield and recently joined Hogan Lovells as co-director of the firm's privacy and cybersecurity practice, told Law360 on Wednesday that she felt that it was important for all involved to examine the Working Party's opinion and "determine whether there are points that can be clarified quickly."

"However, I encourage all stakeholders to not let the perfect stand in the way of something that is very, very good," Brill added.

According to attorneys who have been following the evolution of the Privacy Shield, the negotiators have the best chance of appealing the regulators when it comes to their concerns surrounding data transferred for commercial purposes.

In their opinion, the regulators took issue with the lack of clear data retention restrictions that would explicitly require companies to delete data that is no longer necessary, saying the principle as it stands "seems to open reuse of data for very large purposes and transfers."

They also criticized the protections surrounding onward transfers of EU data to a third country, as well as the new redress mechanism that negotiators crafted in response to criticisms that Europeans have no judicial means of redress in the U.S. for perceived misuses of their data.

Though the issues may seem significant, attorneys say that the fixes, which include establishing a glossary of terms that clarifies certain principles and simplifying the recourse mechanism, are relatively attainable.

"It's easier to play around with the commercial aspects of the Privacy Shield because they involve making changes to the rules that get imposed on private companies, which likely won't require going back to the legislature to do," said Norton Rose Fulbright partner Marcus Evans, who is based in London.

However, the same cannot be said for the national security concerns flagged by the regulators, which

the U.S. would not be able to address by merely clarifying the text of the agreement.

"These are things that require you to look at what your national security laws are, and that's obviously something that can't be changed overnight," Evans said.

With the uncertainty that lies ahead for businesses, the opinion may prompt more multinationals to start turning toward alternatives such as binding corporate rules and model contracts if they haven't already, especially given the Working Party's confirmation Wednesday that the alternative mechanisms remain valid and legal transfer options.

But attorneys caution that despite the setback dealt by the opinion, businesses shouldn't be too quick to give up on the Privacy Shield, which now moves to the collective of member states known as the Article 31 Working Party for feedback.

"The Article 29 Working Party's comments today signal that it may be some time before companies can rely on the Privacy Shield as a legal mechanism to transfer EU data across the Atlantic," said Mauricio Paez, who heads Jones Day's privacy and cybersecurity practice. "But the Privacy Shield is not dead — at least not yet."

--Editing by Katherine Rautenberg and Christine Chun.

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