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EU Officials OK 'Privacy Shield' Data Transfer Pact For Now

By **Allison Grande**

Law360, New York (July 26, 2016, 8:22 PM ET) -- Europe's privacy regulators on Tuesday gave conditional backing to the new trans-Atlantic Privacy Shield data transfer deal, saying that while they still had lingering concerns about the framework's ability to safeguard Europeans' privacy, they would refrain from mounting challenges to the pact for at least a year.

In its first remarks on the agreement since it was **formally adopted on July 12**, the collective of EU data protection authorities known as the Article 29 Working Party praised EU and U.S. officials for working to address the concerns that the group **raised in an April opinion** attacking the adequacy of the first draft of the deal, but stressed that they still had a number of lingering concerns about how the transferred data will be used for both commercial and national security purposes.

However, despite their reservations, the regulators expressed a willingness to see how the Privacy Shield will work out in practice, flagging the first joint annual review required by the deal as "a key moment for the robustness and efficiency of the Privacy Shield mechanism to be further assessed" and vowing to play an active role in evaluating the adequacy of the pact at that time.

In the meantime, the regulators said that they will hold off on filing any formal challenge to the deal, pledging instead to "proactively and independently" assist consumers with figuring out how to file complaints under the Privacy Shield and to "soon provide" information to companies about their obligations under the agreement.

"In effect, it's as if the U.S. is on probation from now until next summer; the EU regulators will be watching closely to see whether the conclusions the [European] Commission has drawn in the adequacy decision are borne out in practice once companies start transferring data under the Shield," BakerHostetler counsel Melinda McLellan told Law360, adding that the implication is that if the review doesn't turn out positively, then the validity of the data transfer mechanism "could be in jeopardy."

For the thousands of multinationals, including companies such as Google Inc. and Facebook Inc., that had long relied on the safe harbor data transfer pact that was **struck down by** the European Court of Justice in October and that the Privacy Shield agreement was designed to replace, the regulators' tentative endorsement of the new deal should come as welcome news, according to attorneys.

"It would have been pretty disastrous for companies if the data protection authorities had said they were challenging the Privacy Shield from the outset," said Mintz Levin Cohn Ferris Glovsky & Popeo PC member Susan Foster, who is based in London. "The fact that the regulators themselves are not actively on the attack and are willing to let the program play out in practice is helpful and far better for U.S. companies than the alternative."

While the Privacy Shield took effect earlier this month after the EU member states **signed off on the deal** and the European Commission adopted its decision finding the revamped agreement provides an adequate level of protection for personal data transferred to the U.S., the system won't be up and running until Aug. 1, which is the first day that companies will be able to certify

their compliance with the mechanism to the U.S. Department of Commerce. For companies that may have been on the fence about the shelf life of the deal, the regulators' statement is likely to inject a degree of comfort, according to attorneys.

"This statement appears to signal a desire to promote stability and to reassure concerned parties on both sides of the Atlantic," McLellan said.

According to the regulators, their remaining concerns with the pact on the commercial side center on the absence of specific rules on automated decisions such as profiling and on the right for consumers to object to data processing, as well as a lack of clarity regarding how the Privacy Shield principles will apply to processors.

The working party also raised concerns about the access that U.S. public authorities would have to transferred data, saying that it "would have expected stricter guarantees concerning the independence and the powers of the ombudsperson" appointed to handle national security complaints and that it was disappointed at the lack of concrete assurances that bulk data collection will not take place.

"On balance, it looks like the DPAs are prepared to give the Privacy Shield a fair chance to work out in practice," said Alan Charles Raul, who leads Sidley Austin LLP's privacy, data security and information law practice. "But they also signaled they plan to take a hard look at the effectiveness of the Privacy Shield when they conduct their first joint annual review."

According to the working party, the regulatory authorities during that review "will not only assess if the remaining issues have been solved, but also if the safeguards provided under the EU-U.S. Privacy Shield are workable and effective," adding that the results could also impact the validity of other transfer tools such as binding corporate rules and standard contractual clauses.

Attorneys advised that, in addition to taking a hard look at the enhanced obligations required of them under the strengthened Privacy Shield, companies that choose to comply with the pact should also be prepared for tweaks to be made to the Privacy Shield and to be ready to switch between transfer mechanisms, given that the validity of standard contractual clauses are **already being reviewed** by the EU high court and private citizens will still be able to challenge the Privacy Shield despite the regulators' endorsement.

"U.S. companies can and should expect that the Privacy Shield will have to change in the coming year or two," Lowenstein Sandler LLP privacy and information security practice chair Mary Hildebrand said. "But compared to going the way of Safe Harbor — we'll deal with it."

--Editing by Philip Shea.

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