Data Protection & Privacy 2020

Contributing editors
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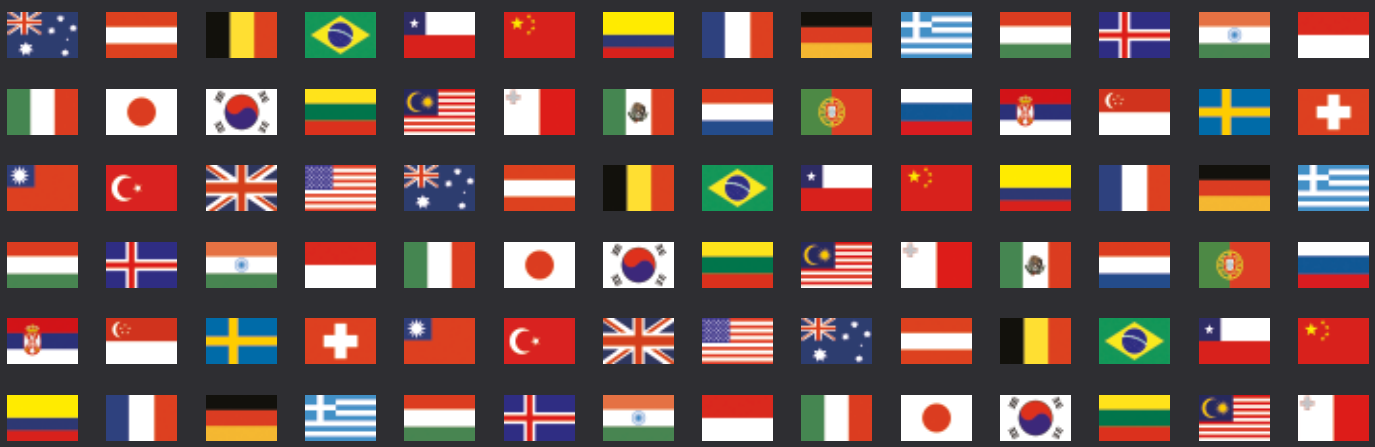
Hunton Andrews Kurth LLP



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Lexology Getting The Deal Through is delighted to publish the eighth edition of *Data Protection and Privacy*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Hungary, Iceland, Indonesia and Malaysia.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Aaron P Simpson and Lisa J Sotto of Hunton Andrews Kurth LLP, for their continued assistance with this volume.

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The Privacy Shield

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Twenty-first century commerce depends on the unencumbered flow of data around the globe. At the same time, however, individuals everywhere are clamouring for governments to do more to safeguard their personal data. A prominent outgrowth of this global cacophony has been reinvigorated regulatory focus on cross-border data transfers. Russia made headlines because it enacted a law in 2015 that requires companies to store the personal data of Russians on servers in Russia. While this is an extreme example of 'data localisation', the Russian law is not alone in its effort to create impediments to the free flow of data across borders. The Safe Harbor framework, which was a popular tool used to facilitate data flows from the EU to the US for nearly 15 years, was invalidated by the Court of Justice of the European Union (CJEU) in 2015, in part as a result of the PRISM scandal that arose in the wake of Edward Snowden's 2013 revelations. The invalidation of Safe Harbor raised challenging questions regarding the future of transatlantic data flows. A successor framework, the EU–US Privacy Shield, was unveiled by the European Commission in February 2016 and, in July 2016, was formally approved in Europe. In 2017, the Swiss government announced its approval of a Swiss–US Privacy Shield framework.

Contrasting approaches to privacy regulation in the EU and US

Privacy regulation tends to differ from country to country around the world, as it represents a culturally bound window into a nation's attitudes about the appropriate use of information, whether by government or private industry. This is certainly true of the approaches to privacy regulation taken in the EU and the US, which historically have been both literally and figuratively an ocean apart. Policymakers in the EU and the US were able to set aside these differences in 2000 when they created the Safe Harbor framework, which was developed explicitly to bridge the gap between the differing regulatory approaches taken in the EU and the US. With the onset of the Privacy Shield, policymakers have again sought to bridge this gap between the EU and US.

The European approach to data protection regulation

Largely as a result of the role of data accumulation and misuse in the human rights atrocities perpetrated in mid-20th-century Europe, the region takes an understandably hard-line approach to data protection. The processing of personal data about individuals in the EU is strictly regulated on a pan-EU basis by the General Data Protection Regulation (GDPR). Unlike its predecessor, the Data Protection Directive 95/46/EC, the GDPR is not implemented differently at the member state level but instead applies directly across the EU as a regulation.

Extraterritorial considerations are an important component of the data protection regulatory scheme in Europe, as policymakers have no interest in allowing companies to circumvent European data protection regulations simply by transferring personal data outside of Europe. These extraterritorial restrictions are triggered when personal data is exported from Europe to the vast majority of jurisdictions that have not been deemed adequate by the European Commission; chief among them from a global commerce perspective is the United States.

The US approach to privacy regulation

Unlike in Europe, and for its own cultural and historical reasons, the US does not maintain a singular, comprehensive data protection law regulating the processing of personal data. Although it is beginning to change with the onset of more comprehensive laws at the state level such as the California Consumer Privacy Act, the US generally favours a sectoral approach to privacy regulation. As a result, in the US, there are numerous privacy laws that operate at the federal and state levels, and they further differ depending on the industry within the scope of the law. The financial services industry, for example, is regulated by the Gramm-Leach-Bliley Act, while the healthcare industry is regulated by the Health Insurance Portability and Accountability Act of 1996. Issues that fall outside the purview of specific statutes and regulations are subject to general consumer protection regulation at the federal and state level. Making matters more complicated, common law in the US allows courts to play an important quasi-regulatory role in holding businesses and governments accountable for privacy and data security missteps.

The development of the Privacy Shield framework

As globalisation ensued at an exponential pace during the 1990's internet boom, the differences in the regulatory approaches favoured in Europe versus the US became a significant issue for global commerce. Massive data flows between Europe and the US were (and continue to be) relied upon by multinationals, and European data transfer restrictions threatened to halt those transfers. Instead of allowing this to happen, in 2000, the European Commission and the US Department of Commerce joined forces and developed the Safe Harbor framework.

The Safe Harbor framework was an agreement between the European Commission and the US Department of Commerce whereby data transfers from Europe to the US made pursuant to the accord were considered adequate under European law. Previously, in order to achieve the adequacy protection provided by the framework, data importers in the US were required to make specific and actionable public representations regarding the processing of personal data they imported from Europe. In particular, US importers had to comply with the seven Safe Harbor principles of notice, choice, onward transfer, security, access, integrity and enforcement. Not only did US importers have to comply with these principles, they also had to publicly certify their compliance with the US Department of Commerce and thus subject themselves to enforcement by the US Federal Trade Commission (FTC) to the extent their certification materially misrepresented any aspect of their processing of personal data imported from Europe.

Since its inception, Safe Harbor was popular with a wide variety of US companies whose operations involved the importing of personal data from Europe. While many of the companies that certified to the framework in the US did so to facilitate intra-company transfers of employee and customer data from Europe to the US, there are a wide variety of others that certified for different reasons. Many of these include third-party IT vendors whose business operations call for the storage of client data in the US, including personal data regarding a

client's customers and employees. In the years immediately following the inception of the Safe Harbor framework, a company's participation in the Safe Harbor framework in general went largely unnoticed outside the privacy community. That relative anonymity changed, however, as the Safe Harbor framework faced an increasing amount of pressure from critics in Europe and, ultimately, was invalidated in 2015.

Invalidation of the Safe Harbor framework

Criticism of the Safe Harbor framework from Europe began in earnest in 2010. In large part, the criticism stemmed from the perception that the Safe Harbor was too permissive of third-party access to personal data in the US, including access by the US government. The Düsseldorfer Kreises, the group of German state data protection authorities, first voiced these concerns and issued a resolution in 2010 requiring German exporters of data to the US through the framework to employ extra precautions when engaging in such data transfers.

After the Düsseldorfer Kreises expressed its concerns, the pressure intensified and spread beyond Germany to the highest levels of government across Europe. This pressure intensified in the wake of the PRISM scandal in the summer of 2013, when Edward Snowden alleged that the US government was secretly obtaining individuals' (including EU residents') electronic communications from numerous online service providers. Following these explosive allegations, regulatory focus in Europe shifted in part to the Safe Harbor framework, which was blamed in some circles for facilitating the US government's access to personal data exported from the EU.

As a practical matter, in the summer of 2013, the European Parliament asked the European Commission to examine the Safe Harbor framework closely. In autumn 2013, the European Commission published the results of this investigation, concluding that the framework lacked transparency and calling for its revision. In particular, the European Commission recommended more robust enforcement of the framework in the US and more clarity regarding US government access to personal data exported from the EU under the Safe Harbor framework.

In October 2015, Safe Harbor was invalidated by the CJEU in a highly publicised case brought by an Austrian privacy advocate who challenged the Irish Data Protection Commissioner's assertion that the Safe Harbor agreement precludes the Irish agency from stopping the data transfers of a US company certified to the Safe Harbor from Ireland to the US. In its decision regarding the authority of the Irish Data Protection Commissioner, the CJEU assessed the validity of the Safe Harbor adequacy decision and held it invalid. The CJEU's decision was based, in large part, on the collection of personal data by US government authorities. For example, the CJEU stated that the Safe Harbor framework did not restrict the US government's ability to collect and use personal data or grant individuals sufficient legal remedies when their personal data was collected by the US government.

The future of the Privacy Shield

Following the invalidation of Safe Harbor, the European Commission and US Department of Commerce negotiated and released a successor framework, the EU–US Privacy Shield, in February 2016. Both the EU–US and Swiss–US Privacy Shield frameworks have since been approved by the European Commission and the Swiss government respectively. The Privacy Shield is similar to Safe Harbor and contains seven privacy principles to which US companies may publicly certify their compliance. After certification, entities certified to the Privacy Shield may import personal data from the European Union without the need for another cross-border data transfer mechanism, such as standard contractual clauses. The privacy principles in the Privacy Shield are substantively comparable to those in Safe Harbor but are more robust and more explicit with respect to the actions an organisation must take in order to comply with the principles. In developing the Privacy Shield principles and accompanying framework, policymakers attempted to respond to the shortcomings of the Safe Harbor privacy principles and framework identified by the CJEU.

After releasing the Privacy Shield, some regulators and authorities in Europe (including the former Article 29 Working Party (the Working Party), the European Parliament and the European Data Protection Supervisor) criticised certain aspects of the Privacy Shield as not sufficient to protect personal data. For example, the lack of clear rules regarding data retention was heavily criticised. In response to these criticisms, policymakers negotiated revisions to the Privacy Shield framework to address the shortcomings and increase its odds of approval in Europe. Based on this feedback, the revised Privacy Shield framework was released in July 2016 and formally approved in the European Union. In addition, the Working Party, which previously was the group of European Union member state data protection authorities, subsequently offered its support, albeit tepid, for the new framework.

First annual review

Under the renegotiated framework, Privacy Shield is subject to annual reviews by the European Commission to ensure it functions as intended. In September 2017, the US Department of Commerce and the European Commission conducted the first annual joint review of the Privacy Shield, focusing on any perceived weaknesses of the Privacy Shield, including with respect to government access requests for national security reasons, and how Privacy Shield-certified entities have sought to comply with their Privacy Shield obligations. In November 2017, the Working Party adopted an opinion on the review. The opinion noted that the Working Party 'welcomes the various efforts made by US authorities to set up a comprehensive procedural framework to support the operation of the Privacy Shield'. The opinion also identified some remaining concerns and recommendations with respect to both the commercial and national security aspects of the Privacy Shield framework. The opinion indicated that, if the EU and US do not, within specified timeframes, adequately address the Working Party's concerns about the Privacy Shield, the Working Party may bring legal action to challenge the Privacy Shield's validity.

In March 2018, the US Department of Commerce provided an update summarising actions the agency had taken between January 2017 and March 2018 to support the EU–US and Swiss-US Privacy Shield frameworks. These measures addressed both commercial and national security issues associated with the Privacy Shield. With respect to the Privacy Shield's commercial aspects, the US Department of Commerce highlighted:

- an enhanced certification process, including more rigorous company reviews and reduced opportunities for false claims regarding Privacy Shield certification;
- additional monitoring of companies through expanded compliance reviews and proactive checks for false claims;
- active complaint resolution through the confirmation of a full list of arbitrators to support EU individuals' recourse to arbitration;
- strengthened enforcement through continued oversight by the FTC, which announced three Privacy Shield-related false claims actions in September 2017; and
- expanded outreach and education, including reaffirmation of the framework by federal officials and educational outreach to individuals, businesses and authorities.

With respect to national security, the US Department of Commerce noted measures taken to ensure:

- robust limitations and safeguards, including a reaffirmation by the intelligence community of its commitment to civil liberties, privacy and transparency through the updating and re-issuing of Intelligence Community Directive 107;

- independent oversight through the nomination of three individuals to the US Privacy and Civil Liberties Oversight Board (PCLOB) with the aim of restoring the independent agency to quorum status;
- individual redress through the creation of the Privacy Shield Ombudsperson mechanism, which provides EU and Swiss individuals with an independent review channel in relation to the transfer of their data to the US; and
- US legal developments take into account the Privacy Shield, such as Congress's reauthorisation of the Foreign Intelligence Surveillance Act's Section 702 (reauthorising elements on which the European Commission's Privacy Shield adequacy determination was based) and enhanced advisory and oversight functions of the PCLOB.

In June 2018, the debate regarding the Privacy Shield resurfaced when the Civil Liberties (LIBE) Committee of the European Parliament voted on a resolution to recommend that the European Commission suspend the Privacy Shield unless the US complied fully with the framework by 1 September 2018. This resolution, which passed by a vote of the full European Parliament on 5 July 2018, was a non-binding recommendation. Notwithstanding the result of the full vote, the Privacy Shield was not suspended and continued with the Privacy Shield principles unchanged.

Second annual review

In October 2018, the US Department of Commerce and the European Commission conducted the second annual review of the Privacy Shield, focusing on all aspects of Privacy Shield functionality. The review found significant growth in the programme since the first annual review and noted several key points, including:

- more than 4,000 companies certified to the Privacy Shield since the framework's inception, and the US Department of Commerce's promise to revoke the certification of companies that do not comply with the Privacy Shield's principles;
- the US's appointment of three new members to the PCLOB, and the PCLOB's declassification of its report on a presidential directive that extended certain signals intelligence privacy protections to foreign citizens;
- the ongoing review of the Privacy Shield Ombudsperson Mechanism, and the need for the US to promptly appoint a permanent Under Secretary; and
- recent privacy incidents affecting both US and EU residents reaffirming the "need for strong privacy enforcement to protect our citizens and ensure trust in the digital economy."

The European Commission's December 2018 publication of its report on the second annual review (the 2018 Commission Report) furthered several of these points. The 2018 Commission Report concluded that the US still ensures an adequate level of protection to the personal data transferred from the European Union to US companies under the EU-US Privacy Shield. The Report found that US authorities took measures to implement the Commission's recommendations from the previous year and several aspects of the functioning of the framework had improved. It also noted, however, several areas of concern, including companies' false claims of participation in and other non-compliance with the Privacy Shield, lack of clarity in Privacy Shield guidance developed by the US Department of Commerce and European Data Protection Authorities, and delayed appointment and uncertain effectiveness of a permanent Privacy Shield Ombudsman.

Subsequently, in January 2019, the European Data Protection Board (EDPB) also issued a report on the second annual review (the 2019 EDPB Report). Although not binding on EU or US authorities, the 2019 EDPB Report provided guidance to regulators in both jurisdictions regarding implementation of the Privacy Shield and highlighted the EDPB's ongoing concerns with regard to the Privacy Shield. The 2019 EDPB Report praised certain actions and efforts undertaken by US authorities and the European Commission to implement the Privacy Shield, including, for example:

- efforts by the US Department of Commerce to adapt the certification process to minimise inaccurate or false claims of participation in the Privacy Shield;
- enforcement actions and other oversight measures taken by the US Department of Commerce and FTC regarding Privacy Shield compliance; and
- issuance of guidance for EU individuals on exercising their rights under the Privacy Shield, and for US businesses to clarify the requirements of the Privacy Shield.

The 2019 EDPB Report also raised similar concerns regarding the US's ability to oversee and enforce compliance with all Privacy Shield principles (particularly the onward transfer principle); delay in the appointment of a permanent Privacy Shield Ombudsman; lack of clarity in guidance and conflicting interpretations of various topics, such as the definition of HR data; and shortcomings of the re-certification process, which, according to the 2019 EDPB Report, leads to an outdated listing of Privacy Shield-certified companies and confusion for data subjects.

Applicability of the Privacy Shield after Brexit

On 20 December 2018, the US Department of Commerce updated its frequently asked questions (FAQs) on the EU–US and Swiss–US Privacy Shield Frameworks to clarify the effect of the UK's planned withdrawal from the European Union (Brexit). The FAQs provide information on the steps Privacy Shield participants must take to receive personal data from the UK in reliance on the Privacy Shield after Brexit. As of the time of writing, the deadline for implementing the steps identified in the FAQs depends on whether the UK and European Union are able to finalise an agreement for the UK's withdrawal from the Union. To the extent the UK and European Union reach an agreement regarding withdrawal, thereby implementing a Transition Period in which EU data protection law will continue to apply to the UK, Privacy Shield participants will have to the end of the Transition Period to implement the relevant changes to their public-facing Privacy Shield commitments described in the FAQs and below. To the extent no such agreement is reached, participants must implement the changes by the date the UK withdraws from the European Union.

According to the FAQs, a Privacy Shield participant who would like to continue to receive personal data from the UK following the relevant deadline must update any language regarding its public commitment to comply with the Privacy Shield to include an affirmative statement that its commitment under the Privacy Shield will extend to personal data received from the UK in reliance on the Privacy Shield. In addition, Privacy Shield participants who plan to receive human resources data from the UK in reliance on the Privacy Shield must also update their HR privacy policies. The FAQs further state that if a Privacy Shield participant opts to make such public commitments to continue receiving UK personal data in reliance on the Privacy Shield, the participant will be required to cooperate and comply with the UK Information Commissioner's Office with regard to any such personal data received.

US Privacy Shield enforcement actions

The FTC has brought enforcement actions against companies for false claims of participation in and non-compliance with the Privacy Shield. In September 2018, the FTC announced settlement agreements with four companies – IDmission, LLC; mResource LLC (doing business as Loop Works, LLC) (mResource); SmartStart Employment Screening, Inc; and VenPath, Inc – over allegations that each company had falsely claimed

to have valid certifications under the EU-US Privacy Shield framework. The FTC alleged that SmartStart, VenPath and mResource continued to post statements on their websites about their participation in the Privacy Shield after allowing their certifications to lapse. IDmission had applied for a Privacy Shield certification but never completed the necessary steps to be certified. In addition, the FTC alleged that both VenPath and SmartStart failed to comply with a provision under the Privacy Shield requiring companies that cease participation in the Privacy Shield framework to affirm to the US Department of Commerce that they will continue to apply the Privacy Shield protections to personal information collected while participating in the programme. As part of the FTC settlements, each company is prohibited from misrepresenting its participation in any privacy or data security programme sponsored by the government or any self-regulatory or standard-setting organisation and must comply with FTC reporting requirements. Further, VenPath and SmartStart must either (i) continue to apply the Privacy Shield protections to personal information collected while participating in the Privacy Shield, (ii) protect it by another means authorised by the Privacy Shield framework, or (iii) return or delete the information within 10 days of the FTC's order.

Similarly, on 14 June 2019, the FTC announced a proposed settlement with a Florida-based background screening company, SecurTest, Inc, over allegations that SecurTest started, but did not complete, an application to certify to the Privacy Shield and nevertheless represented that it was Privacy Shield certified. The proposed settlement would prohibit SecurTest from misrepresenting the extent to which it is a member of any self-regulatory framework, including the Privacy Shield. That same month, the FTC announced it had sent warning letters to 13 US companies for falsely claiming participation in the now-defunct Safe Harbor Framework. In a press release, the FTC stated that it called on the 13 companies to remove from their websites, privacy policies, or any other public documents any statements claiming participation in Safe Harbor. The FTC noted that it would take legal action if the companies failed to remove such representations within 30 days. Taken together, the recent increase in FTC enforcement of the Privacy Shield demonstrates the agency's commitment to oversee and enforce compliance with the framework's principles.

Challenges to the Privacy Shield

In July 2019, the CJEU will hear a complaint brought by La Quadrature du Net, a French digital rights group, challenging the Privacy Shield's compliance with EU law. La Quadrature du Net claims that the Privacy Shield breaches fundamental EU rights and does not provide adequate protection for EU citizens' data, especially in light of US government surveillance practices. La Quadrature du Net originally filed its complaint in 2016, immediately after the approval of the Privacy Shield framework, but repeated back and forth between the digital rights group and the European Commission contributed to the delay of the proceedings.

The CJEU will also hear a separate challenge to the Privacy Shield brought by Max Schrems – the privacy activist who is credited with initiating the downfall of Safe Harbor – in a case deemed *Schrems II*. *Schrems II* was originally heard by Ireland's Supreme Court after Schrems brought a claim against Facebook questioning whether the methods under which technology firms transfer EU citizens' data to the United States afford EU citizens adequate protection from US surveillance. These methods include the Privacy Shield framework, as well as the standard contractual clauses. In June 2019, Ireland's Supreme Court referred the case to the CJEU to determine the legality of the methods used for data transfers.

Both CJEU decisions on the legality of the Privacy Shield are anticipated for autumn 2019.

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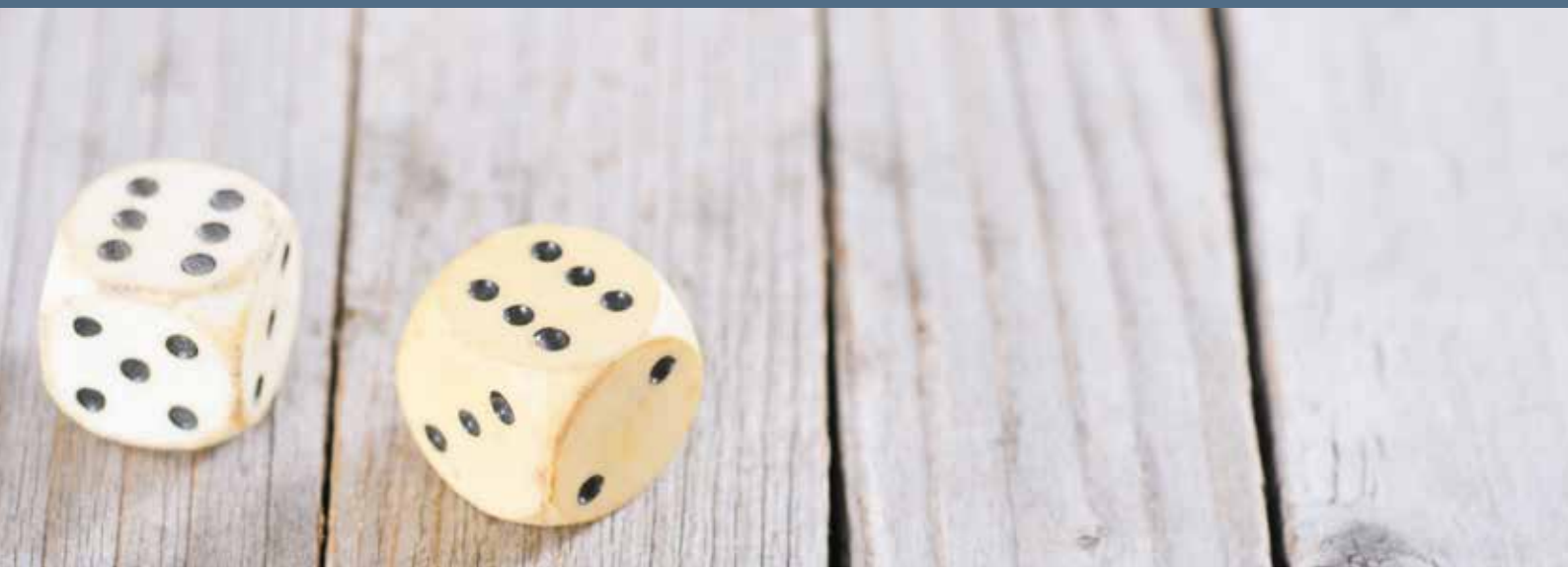

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