Data Protection & Privacy 2021

Contributing editors
Aaron P Simpson and Lisa J Sotto

LEXOLOGY
Getting The Deal Through

HUNTON
ANDREWS KURTH

Leaders in Privacy and Cybersecurity

Keep the trust you've earned.

Complying with global privacy, data protection and cybersecurity rules is challenging, especially for businesses that operate across borders. Our top-ranked privacy team, in combination with the firm's Centre for Information Policy Leadership, advises on all aspects of US and European data protection law and cybersecurity events. We help businesses develop global compliance frameworks addressing regulatory obligations in the US, the EU and across the world. The firm is widely recognized globally as a leading privacy and data security firm.

For more information, visit www.huntonprivacyblog.com.

Publisher
Tom Barnes
tom.barnes@lbresearch.com

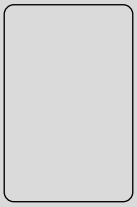
Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager
Adam Sargent
adam.sargent@gettingthedealthrough.com

Published by
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

First published 2012
Ninth edition
ISBN 978-1-83862-322-7

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



Data Protection & Privacy
2021

Contributing editors
Aaron P Simpson and Lisa J Sotto
Hunton Andrews Kurth LLP

Lexology Getting The Deal Through is delighted to publish the ninth edition of *Data Protection & 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 Canada and Romania.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

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.

London
August 2020

Reproduced with permission from Law Business Research Ltd
This article was first published in September 2020
For further information please contact editorial@gettingthedealthrough.com

Contents

The Privacy Shield

Aaron P Simpson and Maeve Olney
Hunton Andrews Kurth LLP

Twenty-first century commerce depends on the unencumbered flow of data around the globe. At the same time, however, individuals 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', Russia 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 European Union to the United States 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 was formally approved in Europe in July 2016. In 2017, the Swiss government announced its approval of a Swiss–US Privacy Shield framework. On 16 July 2020, four years after the EU–US Privacy Shield was formally approved, it was invalidated by the CJEU, again as a result of concerns arising from the US surveillance framework. The CJEU's decision to invalidate the EU-US Privacy Shield has left Privacy Shield-certified organisations scrambling to identify and implement alternative data transfer mechanisms to lawfully transfer EU personal data to the US.

Contrasting approaches to privacy regulation in the EU and US

Privacy regulation tends to differ from country to country, 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 again sought to bridge the gap between the different regulatory approaches in 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 has a 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 applies directly across the EU.

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 around the world 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 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 (HIPAA). 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 internet boom of the 1990s, 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 jointly 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.

From its inception, Safe Harbor was popular with a wide variety of US companies that had operations involving the importing of personal data from Europe. While many of the companies that certified to the framework in the US did so to facilitate intracompany transfers of employee and customer data from Europe to the US, there are a wide variety of others who certified for different reasons. Many of these include third-party IT vendors with business operations that called 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. However, recently that relative anonymity changed, 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 Kreise*s, 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 invalided 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 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 (collectively, the Privacy Shield) were 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. Prior to the invalidation of the EU-US Privacy Shield on 16 July 2020, after certification, entities certified as compliant with the Privacy Shield could import personal data from the EU without the need for another cross-border data transfer mechanism, such as standard contractual clauses. The Swiss-US Privacy Shield similarly permits certified organisations to import personal data from Switzerland without the need for another transfer mechanism. 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 (WP29), the European Parliament and the European Data Protection Supervisor) criticised certain aspects of the Privacy Shield as insufficient 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, WP29, 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 was subject to annual reviews by the European Commission to ensure it functioned 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 Privacy Shield-certified entities sought to comply with their Privacy Shield obligations. In November 2017, WP29 adopted an opinion on the review. The opinion noted that WP29 '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 did not, within specified time-frames, adequately address WP29's concerns about the Privacy Shield, WP29 might 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 EU–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 Committee of the European Parliament (LIBE) 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 at that time 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 program 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 appointment of three new members to the PCLOB by the US, 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 continued to ensure an adequate level of protection was given to personal data transferred from the EU to US companies under the EU–US Privacy Shield. The 2018 Commission Report also 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 examples of 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:

- 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 United States' 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.

Third annual review

On 23 October 2019, the European Commission published its report on the third annual review of the Privacy Shield. The report confirmed that the US continued to provide an adequate level of protection for personal data transferred pursuant to the Privacy Shield and noted several improvements made to the Privacy Shield framework following the second annual review. These improvements included efforts by US authorities to monitor participants' compliance with the Privacy Shield framework and the appointment of Keith Krach, Under Secretary of State for Economic Growth, Energy and the Environment, to the position of Privacy Shield Ombudsperson on a permanent basis (the vacancy of this position had been flagged in the two previous annual reviews). The European Commission's report on the third annual review noted that the number of Privacy Privacy Shield-certified organisations exceeded 5,000 at the time of the report, surpassing the number of companies that had previously registered for the now-defunct Safe Harbor framework in the nearly 15 years that Safe Harbor operated.

In its report on the third annual review, the European Commission also made the following findings and recommendations:

- The European Commission recommended shortening the 'recertification grace period' from the 3.5 months currently permitted by the Department of Commerce to a maximum of 30 days. The European Commission also recommended that the Department of Commerce send warning letters to companies that fail to recertify within 30 days of their recertification deadline.
- The European Commission recommended that the Department of Commerce strengthen its efforts to identify companies that have never certified to the Privacy Shield but nevertheless falsely claim

to be certified, noting that the Department of Commerce's verification efforts appear to have been focused on checking whether companies continue to claim Privacy Shield participation even after their certifications had lapsed.

- With respect to enforcement, the European Commission praised the FTC for bringing enforcement actions for violations of the Privacy Shield, but recommended that the FTC ensure it can share 'meaningful Information on ongoing investigations' with the European Commission and European data protection authorities.
- The European Commission recommended that data protection authorities continue to refine the definition of what falls within human resources data, given differing interpretations of the term by the various authorities and the lack of clear joint guidance.

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 EU–US Privacy Shield Frameworks to clarify the effect of the United Kingdom's planned withdrawal from the European Union (Brexit). The FAQs provided information on the steps Privacy Shield participants would need to take to receive personal data from the UK in reliance on the Privacy Shield after Brexit. This included requirements for Privacy Shield-certified organisations to implement certain changes to their public-facing Privacy Shield representations to expressly state their commitment to apply the Privacy Shield Principles to UK personal data received in the US in reliance on the Privacy Shield. Pursuant to the Withdrawal Agreement implementing the UK's departure from the EU, EU law (including EU data protection law) continues to apply in the UK during a Transition Period of 31 January 2020 to 31 December 2020. During the Transition Period, the European Commission's decision on the adequacy of the protection for personal data provided by the Privacy Shield was to apply to transfers of personal data from the UK to Privacy Shield participants in the US. As a result of the end of the Transition Period being set for 31 December 2020, in these FAQs, the Department of Commerce had set a deadline of 31 December 2020 to implement these required changes in order for the Privacy Shield to serve as a mechanism to transfer UK personal data to the US lawfully. In addition, the FAQs further stated that if a Privacy Shield participant opted to make such public commitments to continue receiving UK personal data in reliance on the Privacy Shield, the participant would be required to cooperate and comply with the UK Information Commissioner's Office with regard to any such personal data received.

As described in further detail below, the EU-US Privacy Shield was invalidated by the CJEU on 16 July 2020. As of the date of this writing, the Privacy Shield is no longer a lawful data transfer mechanism with respect to UK personal data, regardless of the Transition Period, and the Department of Commerce has not updated its UK-specific FAQs to discuss the impact of the invalidation specifically on the previously released requirements for Privacy Shield-certified organisations. Given the Department of Commerce's stated intention to continue administration and enforcement of the Privacy Shield, to understand their obligations going forward, organisations must keep a careful eye on developments related to the overlapping impacts of the UK's withdrawal from the EU and the CJEU's decision to invalidate the Privacy Shield.

US Privacy Shield enforcement actions

The FTC brought numerous 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 (IDmission); mResource LLC, doing business as Loop Works LLC (mResource); SmartStart Employment Screening Inc (SmartStart); and VenPath Inc (VenPath) – 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 program. As part of the FTC settlements, each company is prohibited from misrepresenting its participation in any privacy or data security program 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 continue to apply the Privacy Shield protections to personal information collected while participating in the Privacy Shield, protect it by another means authorised by the Privacy Shield framework, or 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 the 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.

Between November 2019 and January 2020, the FTC brought an additional 10 enforcement actions against companies alleged to have violated the Privacy Shield by falsely claiming to be certified to the framework. In November 2019, the FTC announced a settlement with Medable Inc stemming from allegations that, although Medable did initiate an application with the Department of Commerce in December 2017, the company never completed the steps necessary to participate in the framework. Then, in December 2019, the FTC announced settlements in four separate Privacy Shield cases. Specifically, the FTC alleged that Click Labs Inc, Incentive Services, Inc, Global Data Vault LLC and TDARX Inc each falsely claimed to participate in the EU–US Privacy Shield framework. The FTC also alleged that Click Labs and Incentive Services falsely claimed to participate in the EU–US Privacy Shield framework and that Global Data and TDARX continued to claim participation in the EU–US Privacy Shield after their Privacy Shield certifications lapsed. The complaints further alleged that Global Data and TDARX failed to comply with the Privacy Shield framework, including by failing to verify annually that statements about their Privacy Shield practices were accurate, and affirm that they would continue to apply Privacy Shield protections to personal information collected while participating in the program.

The following month, in January 2020, the FTC announced an additional five Privacy Shield settlements. The FTC had alleged, in separate actions, that DCR Workforce Inc, Thru Inc, LotaData Inc and 214 Technologies Inc had made false claims on their websites that they were certified under the EU–US Privacy Shield. In the case of LotaData, the FTC also alleged that the company had falsely claimed certified

participation in the EU–US Privacy Shield framework. Lastly, the FTC had alleged that EmpiriStat Inc falsely claimed current participation in the EU–US Privacy Shield after its certification had lapsed, failed to verify annually that its statements related to its Privacy Shield practices were accurate, and failed to affirm it would continue to apply Privacy Shield protections to personal information it collected while participating in the framework. In each of these cases, as part of the settlements, each of the companies was prohibited from misrepresenting its participation in the Privacy Shield framework, as well as any other privacy or data security program sponsored by any government, or any self-regulatory or standard-setting organisation.

Invalidation of the Privacy Shield framework

On 16 July 2020, the CJEU issued a landmark judgment in a case brought by Max Schrems – the privacy activist credited with initiating the downfall of Safe Harbor – deemed *Schrems II*. *Schrems II* was originally heard by Ireland's High Court after Schrems brought a claim against Facebook, questioning whether the methods under which technology firms transfer EU citizens' data to the US afford EU citizens adequate protection from US surveillance. Specifically, Schrems alleged that the EU Standard Contractual Clauses do not ensure an adequate level of protection for EU data subjects, on the basis that US law does not explicitly limit interference with an individual's right to protection of their personal data in the same way as EU data protection law does. Following the complaint, Ireland's Data Protection Commission brought proceedings against Facebook in the Irish High Court. In June 2019, Ireland's High Court referred the case to the CJEU to determine the legality of the methods used for data transfers through a set of 11 questions referred for a preliminary ruling. The preliminary questions primarily addressed the validity of the standard contractual clauses, but also concerned the EU-US Privacy Shield framework.

In *Schrems II*, the CJEU ruled that the EU–US Privacy Shield was not a valid mechanism to lawfully transfer EU personal data to the US. In the decision, the CJEU held that:

> *. . . the limitations on the protection of personal data arising from [US domestic law] on the access and use [of the transferred data] by US public authorities [. . .] are not circumscribed in a way that satisfies requirements that are essentially equivalent to those required under EU law, by the principle of proportionality, in so far as the surveillance programmes based on those provisions are not limited to what is strictly necessary.*

Further, the CJEU found that the EU–US Privacy Shield framework does not grant EU individuals actionable rights before a body offering guarantees that are substantially equivalent to those required under EU law. On those grounds, the CJEU declared the EU–US Privacy Shield invalid.

In the aftermath of the *Schrems II* decision, organisations that previously relied on the Privacy Shield to lawfully transfer EU personal data to the US were required to identify alternative data transfer mechanisms, or applicable derogations pursuant to article 49 of the GDPR, to continue transfers of personal data to the US. On 24 July 2020, the EDPB published a set of FAQs on the CJEU's decision. These FAQs confirmed that there was no grace period for companies that relied on the EU–US Privacy Shield framework during which they could continue transferring to the US without assessing the legal basis relied on for those transfers. Transfers based on the EU–US Privacy Shield framework were now, according to the EDPB, illegal. Certain EU data protection authorities also issued statements and guidance in the aftermath of the *Schrems II* decision, taking various stances on the implication of the ruling. For example, the UK Information Commissioner's Office issued a statement that it stood 'ready to support UK organisations [. . .] to ensure that global data flows may continue and that people's personal data is protected', and subsequently advised organisations to follow the EDPB's FAQs on the use of standard contractual clauses as 'this guidance still applies to UK controllers and processors'. Certain German data protection authorities took stronger approaches, such as the Berlin data protection commissioner, who called on Berlin-based companies to recall EU data currently stored in the US back to the EU.

The US Department of Commerce also issued two new sets of FAQs following the Schrems II ruling. The new FAQs state that although (as a result of the ruling) the Privacy Shield:

> *. . . is no longer a valid mechanism to comply with EU data protection requirements when transferring personal data from the European Union to the United States . . . this decision does not relieve participants in the EU–US Privacy Shield of their obligations under the EU–US Privacy Shield Framework.*

The FAQs further state that the Department of Commerce will continue to administer the Privacy Shield program, including processing applications for self-certification and recertification and maintaining the list of Privacy Shield-certified organisations. The FAQs also make clear that organisations that wish to remain on the Privacy Shield list must continue to annually recertify to the Privacy Shield framework, including paying the annual processing fee. As of the date of this writing, the Department of Commerce has taken the view that continued participation in the Privacy Shield 'demonstrates a serious commitment to protect personal information in accordance with a set of privacy principles that offer meaningful privacy protections and recourse for EU individuals'.

Regarding the Swiss-US Privacy Shield, the CJEU decision did not strictly affect the legality of that framework, so the Swiss-US Privacy Shield remains a valid transfer mechanism. However, on 16 July 2020, the Federal Data Protection and Information Commissioner of Switzerland (FDPIC) issued a statement that the it 'has taken note of the CJEU ruling. This ruling is not directly applicable to Switzerland. The FDPIC will examine the judgement in detail and comment on it in due course'.

HUNTON ANDREWS KURTH

Aaron P Simpson
asimpson@huntonak.com

Maeve Olney
molney@huntonak.com

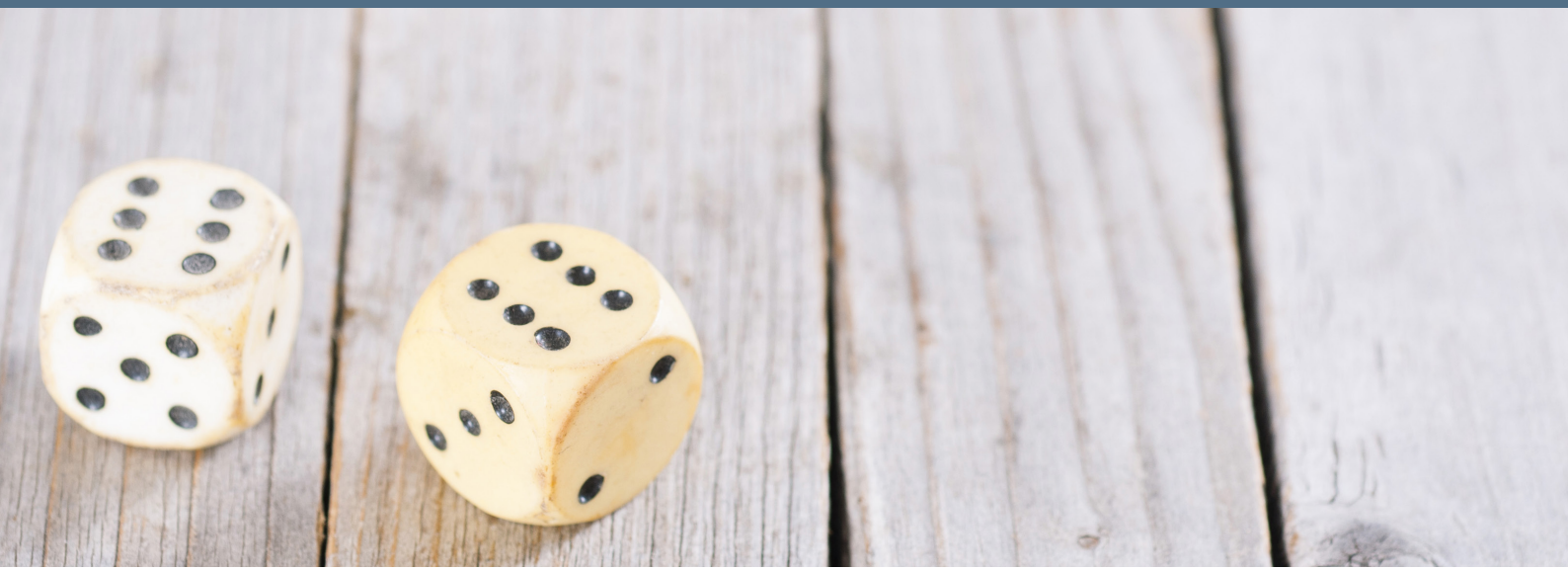
200 Park Avenue
New York, NY 10166
United States
Tel: +1 212 309 1000
Fax: +1 212 309 1100

30 St Mary Axe
London EC3A 8EP
United Kingdom
Tel: +44 20 7220 5700
Fax: +44 20 7220 5772

www.huntonak.com

HUNTON
ANDREWS KURTH

Leaders in Handling High-Stakes Cybersecurity Events



Luck is not a strategy.

Increase your company's resilience and responsiveness to cyber attacks.

Hunton Andrews Kurth LLP's privacy and cybersecurity practice assists global organizations in managing data through every step of the information life cycle. We help businesses prepare for and respond to cybersecurity incidents all over the world. The firm is ranked as a top law firm globally for privacy and data security.

For more information, visit www.huntonprivacyblog.com.

Other titles available in this series

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Business & Human Rights
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Defence & Security Procurement
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
Drone Regulation
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
Healthcare M&A
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Litigation Funding
Loans & Secured Financing
Luxury & Fashion
M&A Litigation
Mediation
Merger Control
Mining
Oil Regulation
Partnerships
Patents
Pensions & Retirement Plans
Pharma & Medical Device Regulation
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public Procurement
Public-Private Partnerships
Rail Transport
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
Sports Law
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Technology M&A
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

lexology.com/gtdt

an LBR business

ISBN 978-1-83862-322-7