BEUC The European Consumer Organisation

The Consumer Voice in Europe

Ms. Isabelle Falque-Pierrotin
Chairwoman - CNIL
Chairwoman - Art. 29
Working Party
Via email

Ref.: BEUC-X-2016-035/MGO/cs 11 April 2016

Subject: EU-US Privacy Shield proposal

Dear Ms. Falque-Pierrotin,

I am writing on behalf of BEUC, the European Consumer Organisation, which represents 41 independent national consumer associations from 31 European countries. We want to voice our concerns with regards to the proposed EU-US Privacy Shield, in view of the foreseen adoption of the Article 29 Working Party opinion on this issue at the next plenary meeting of the Working Party on 12-13 April 2016.

After analysing the proposed Privacy Shield scheme, we are convinced that it does not adequately protect consumers' fundamental rights to privacy and data protection, as established in the EU Charter of Fundamental Rights and the 1995 Data Protection Directive, and seen in the light of the European Court of Justice decision on the 'Schrems' case.

We are therefore not in favour of the adoption of this new scheme, which suffers from the same fundamental flaws as its predecessor, 'Safe Harbor'. We understand the importance of transatlantic data flows but EU consumers' privacy must not be compromised by commercial interests or political pressures.

As you are very well aware, the European Union and United States privacy regimes are oceans apart both in terms of approach and substance. Unlike in the EU, in the US there is no statutory recognition of privacy as a fundamental right and the commercial collection and use of personal data remains largely unregulated except in certain narrow sectors. Also, under the US system there is no independent data protection authority that equals our national DPAs in terms of obligations and competences. It is hard to grasp that a legal system that is far from matching the fundamental pillars and values of our system could be considered to provide an "essentially equivalent" level of protection to ours.

The Privacy Shield does not and cannot change the existing fundamental imbalance between the EU and US privacy regimes, which will be further enhanced by the upcoming EU General Data Protection Regulation. Even the European Commission indirectly recognises this in the Communication that accompanied the publication of the Privacy Shield, which states that:

"(…) *Now that Europe has equipped itself with a single, coherent and robust set of rules, we hope that the U.S. will also continue to pursue efforts towards a comprehensive system of privacy and data protection. It is through such a*

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comprehensive approach that convergence between the two systems could be achieved in the longer term".

Moreover, the Privacy Shield itself raises many questions and has loopholes which compromise the adequate protection of EU consumers. Just to mention a few:

- It continues to be a self-declared, self-regulatory system which will be adhered to by a limited number of companies. Self-regulatory schemes cannot substitute a proper regulatory system.

- Despite the commitments made by the US authorities, effective enforcement and oversight is still a source of concern. For example, there are no clear rules for the self-certification or external audits. The role of European Data Protection Authorities has not improved substantially in terms of oversight and in the US there is still no independent data protection authority.

- There are no data retention rules in the agreement.

- There are no strong data minimisation rules, personal information must only be limited to the data that is "relevant" for the purposes of processing and not "necessary" like in EU law. Also, the purpose limitation rules can be easily circumvented by defining a broad purpose for processing.

- There are broad exceptions that unduly restrict the right of access to personal data and also allow companies to apply opt-out rules and process data without user consent.

- The redress system is extremely complex and still not equivalent of having access to judicial redress:

    - Complaints to companies and alternative dispute resolution systems are generally not an efficient mean of redress when it comes to privacy.

    - The proposed arbitration system plays by US rules in a manner which is not EU consumer friendly and the arbitration panel does not even have the ability to order the payment of damages or court costs.

    - There is no straightforward and strong obligation for US authorities to take up and respond to all complaints. There is still no independent data protection authority in the US with similar obligations and competences to the ones in the EU.

    - It is not clear how the system would work in practice. The whole process is excessively long and complex. Would consumers, every time, have to first complain to the company, then go to the dispute resolution system, then to their DPAs who would turn to the FTC, then to the arbitration panel and maybe then to Court? Also under which conditions would DPAs be able to stop data flows?

    - If the aim is to protect EU consumers when their data is transferred to the US, why is the content of the Privacy Shield to be interpreted under US law, which is very different in approach and substance from EU law?

BEUC considers that the European Commission should hold off from adopting the Privacy Shield, or any similar decision, until the United States can really guarantee, via its legal framework, an essentially equivalent level of data protection to the one existing in the EU.

We very much hope that you will take into consideration these concerns, which are shared by consumer organisations and privacy advocates on both sides of the Atlantic[1], when adopting the Article 29 Working Party's opinion on the Privacy Shield proposal this week.

Last but not least, we would also like to call upon the Data Protection Authorities to take all the necessary steps to enforce the EU data protection rules towards those companies that have not transitioned from the invalidated 'Safe Harbor' scheme and might therefore be transferring data to the United States in an unlawful manner.

Yours sincerely

Monique Goyens
Director General

[1] Transatlantic Consumer Dialogue Resolution on the EU-US Privacy Shield Proposal - 7 April 2016

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