

# THE FALL OF THE PRIVACY SHIELD

**A Wake-Up Call For  
US Privacy Laws**

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## I. INTRODUCTION

On July 16<sup>th</sup>, 2020, the Court of Justice of the European Union (CJEU) issued a landmark ruling against *Privacy Shield*, a European Commission / United States agreement on the transfer of commercial data. The CJEU found that *Privacy Shield* failed to guarantee Europeans' privacy, as US privacy protections fall short of those required under EU law.<sup>1</sup> The ruling potentially outlaws any transfer of personal data from the EU to the United States.<sup>2</sup> Absent new American privacy laws, we risk being shut out of global trade, making it illegal for American firms to provide software and services to EU residents.

## II. BACKGROUND

*Privacy Shield* was adopted by the European Commission in 2016<sup>3</sup> as a replacement for the previously invalidated *International Safe Harbor Privacy Principles*.<sup>4</sup>

*Privacy Shield* aimed to protect European data storage in the U.S., providing safeguards equivalent to those operative in the EU (*i.e.*, the GDPR).<sup>5</sup> First, it imposed stronger obligations on companies handling Europeans' personal data. Companies had to publish within their privacy policy the right of data subjects to access data. Data subjects were also granted first-hand knowledge as to whether an organization possessed data about them.<sup>6</sup> *Privacy Shield* also imposed more robust enforcement, requiring the Department of Commerce to monitor that companies publish their commitments in this regard. Indeed, the US Department of Commerce was required to hold periodic compliance reviews and act as a liaison with European Data Protection Authorities.<sup>7</sup> On top of this, organizations had to provide independent recourse mechanisms for free and accept binding arbitration.<sup>8</sup> Second, the US agreed to limit law enforcement and national security agencies' access

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<sup>1</sup> Court of Justice of the European Union, *The Court of Justice invalidates Decision 2016/1250 on the adequacy of the protection provided by the EU-US Data Protection Shield*, Press Release, Luxembourg, July 16, 2020, available at <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-07/cp200091en.pdf> (accessed August 19, 2020).

<sup>2</sup> European Commission, *Joint Press Statement from European Commissioner for Justice Didier Reynders and U.S. Secretary of Commerce Wilbur Ross*, Brussels, August 10, 2020, available at [https://ec.europa.eu/info/news/joint-press-statement-european-commissioner-justice-didier-reynders-and-us-secretary-commerce-wilbur-ross-7-august-2020-2020-aug-07\\_en](https://ec.europa.eu/info/news/joint-press-statement-european-commissioner-justice-didier-reynders-and-us-secretary-commerce-wilbur-ross-7-august-2020-2020-aug-07_en) (accessed August 20, 2020).

<sup>3</sup> The framework was introduced via European Commission's Decision (EU) 2016/1250 of 12 July 2016.

<sup>4</sup> See Court of Justice of European Union, *The Court of Justice declares that the Commission's US Safe Harbour Decision is invalid*, Press Release, Luxembourg, October 6, 2015, available at <https://curia.europa.eu/jcms/upload/docs/application/pdf/2015-10/cp150117en.pdf> (accessed August 20 2020).

<sup>5</sup> See European Commission, *EU Commission and United States agree on new framework for transatlantic data flows: EU-US Privacy Shield*, Press Release, Strasbourg, February 2, 2016, available at [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_16\\_216](https://ec.europa.eu/commission/presscorner/detail/en/IP_16_216) (accessed August 20, 2020).

<sup>6</sup> See Bryan Cave LLP, *A Side-by-Side Comparison of "Privacy Shield" and the "Safe Harbor": The Easiest Way to Understand What Privacy Shield is and What You Need to Use It*, July 16, 2019, available at [https://iapp.org/media/pdf/resource\\_center/Comparison-of-Privacy-Shield-and-the-Safe-Harbor.pdf](https://iapp.org/media/pdf/resource_center/Comparison-of-Privacy-Shield-and-the-Safe-Harbor.pdf) (accessed September 2, 2020).

<sup>7</sup> See Otava, *Safe Harbor Vs. The EU-US Privacy Shield*, November 4, 2019, available at <https://www.otava.com/reference/how-does-safe-harbor-compare-to-the-eu-us-privacy-shield/> (accessed September 2, 2020).

<sup>8</sup> See Bryan Cave LLP, *A Side-by-Side Comparison of "Privacy Shield" and the "Safe Harbor": The Easiest Way to Understand What Privacy Shield is and What You Need to Use It*, July 16, 2019,

to EU residents' data, promising "clear limitations, safeguards and oversight mechanisms".<sup>9</sup> Finally, *Privacy Shield* provided for individual redress through an Ombudsman mechanism.

### III. THE RULING

In 2015, in the wake of the annulment of the *International Safe Harbor Privacy Principles*, Max Schrems (an Austrian privacy advocate) brought a series of complaints, alleging that US national security laws failed to protect EU citizens from government surveillance.<sup>10</sup> In invalidating *Privacy Shield*, the CJEU cited the unenforceability of *Privacy Shield* under domestic American law as well as the lack of limitations on American surveillance activity.<sup>11</sup> Furthermore, the CJEU noted that American surveillance activity is overly broad, going beyond the level of data collection that is actually needed.<sup>12</sup>

In the immediate aftermath of the decision, companies that relied on *Privacy Shield* are left in a lurch.<sup>13</sup> At a minimum, firms must re-evaluate their data privacy standards, potentially introducing new privacy mechanisms or ceasing work in the EU altogether.<sup>14</sup>

### IV. CONCLUSION

At this point, it is clear that past transatlantic data protection agreements have been inadequate, failing to provide parity to data protections in the EU. While the immediate ramifications are unclear, this decision potentially puts the US at risk from being walled off from customers across Europe. In this way, widespread surveillance is not just a direct attack on American values and the Constitution, it's a direct threat to the future of our tech sector. US businesses risk being shut out of the EU market, with huge risks to future growth. As Max Schrems stated,

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available at [https://iapp.org/media/pdf/resource\\_center/Comparison-of-Privacy-Shield-and-the-Safe-Harbor.pdf](https://iapp.org/media/pdf/resource_center/Comparison-of-Privacy-Shield-and-the-Safe-Harbor.pdf) (accessed September 2, 2020).

<sup>9</sup> See European Commission, *EU Commission and United States agree on new framework for transatlantic data flows: EU-US Privacy Shield*, Press Release, Strasbourg, February 2, 2016, available at [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_16\\_216](https://ec.europa.eu/commission/presscorner/detail/en/IP_16_216) (accessed August 20, 2020).

<sup>10</sup> The Court of Justice of the European Union, *Judgement of the Court (Grand Chamber)*, July 16, 2020, available at

[http://curia.europa.eu/juris/document/document.jsf?text=&docid=228677&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=9745404#Footnote\\*](http://curia.europa.eu/juris/document/document.jsf?text=&docid=228677&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=9745404#Footnote*) (accessed August 21, 2020), para 55.

<sup>11</sup> See Christopher Kuner, *The Schrems II judgment of the Court of Justice and the future of data transfer regulation*, European Law Blog, July 17, 2020, available at <https://europeanlawblog.eu/2020/07/17/the-schrems-ii-judgment-of-the-court-of-justice-and-the-future-of-data-transfer-regulation/> (accessed August 21, 2020).

<sup>12</sup> The Court of Justice of the European Union, *Judgement of the Court (Grand Chamber)*, July 16, 2020, available at [http://curia.europa.eu/juris/document/document.jsf?text=&docid=228677&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=9745404#Footnote\\*](http://curia.europa.eu/juris/document/document.jsf?text=&docid=228677&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=9745404#Footnote*) (accessed August 21, 2020), para 184.

<sup>13</sup> Hunton Privacy Blog, *Regulators Issue Reactions to Invalidation of EU-U.S. Privacy Shield Framework*, July 22, 2020, available at <https://www.huntonprivacyblog.com/2020/07/22/regulators-issue-reactions-to-invalidation-of-eu-u-s-privacy-shield-framework/> (accessed August 21, 2020).

<sup>14</sup> See David Roe, *The Implications of the EU's Decision to Shoot Down US Privacy Shield*, CMS Wire, July 21, 2020, available at <https://www.cmswire.com/information-management/the-implications-of-the-eus-decision-to-shoot-down-us-privacy-shield/> (accessed August 21, 2020).

“It is clear that the US will have to seriously change their surveillance laws, if US companies want to continue to play a role in the EU market”.<sup>15</sup>

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<sup>15</sup> BBC News, *EU-US Privacy Shield for data struck down by court*, July 16, 2020, available at <https://www.bbc.com/news/technology-53418898> (accessed August 21, 2020).



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