

July 5, 2017

Directorate-General for Justice and Consumers
European Commission
Rue Montoyer 59
1000 Bruxelles
Belgium

RE: *Experiences with, and Views of, ACT | The App Association regarding the EU-US Privacy Shield after One Year*

ACT | The App Association appreciates the opportunity to provide input to the European Commission (EC) regarding the experiences of our members who have certified to the EU-U.S. Privacy Shield during its first year. We support the EC using this input to inform the annual review of the function, implementation, supervision and enforcement of the Privacy Shield. We submit the below in response to its questionnaire sent to the App Association.

The App Association represents more than 5,000 app makers and connected device companies across the EU that use mobile technologies to produce innovative solutions that drive the dynamic \$143 billion app ecosystem. Without the thriving app economy, the \$8 trillion internet of things (IoT) revolution would not be possible.¹ Alongside the global adoption of mobile technologies, our members have been creating innovative products and services that bolster the global digital economy, improve workplace productivity, accelerate academic achievement, and help people lead healthier, more efficient lives. The global nature of the digital economy has enabled our members to serve customers and enterprises located around the world, particularly between the U.S. and European Union (EU). For many of our members, participating in the EU-U.S. Privacy Shield allows our members – both in the EU and the U.S. – to have access to a streamlined and less expensive means to comply with EU data protection laws; to avoid complex contract negotiations with potential EU business partners that it would otherwise face; and to clarify their commitment to data security and privacy.

¹ http://actonline.org/wp-content/uploads/App_Economy_Report_2017_Digital.pdf.

For many years, the limits of European data protection requirements on the ability to transfer data to countries outside of the EU has been a challenge. The original Safe Harbor provided much-needed legal certainty to our members facing new digital economy commercial challenges of emerging political developments. The Safe Harbor was broadly supported by our members across industry sectors. When the Privacy Shield was invalidated in the EU courts, this certainty was removed; the adoption of the EU-U.S. Privacy Shield has offered to return this much-needed certainty. Evaluating the adequacy of the Privacy Shield is therefore a business and political necessity. Based on the experience of our members, the App Association holds no doubt that the EU-U.S. Privacy Shield framework “essentially equivalent” level of protection for personal data transferred from the EU to the US – is based on our understanding of EU and U.S. law and our reading of the essential legal values that are relevant to protecting citizens’ privacy.

In its first year of operation, the experience of our members with the EU-U.S. Privacy Shield has been exemplary. It has provided our members with an essential means of legal certainty after ensuring their alignment with data protection principles that are well-supported by the app developer community. In order to meet its requirements, some App Association members have indeed implemented new policies, procedures and other measures to meet their EU-U.S. Privacy Shield obligations and each of the Privacy Shield Principles; and have also modified their business and contractual arrangements with third parties to ensure that the third parties appropriately protect the personal information they receive from EU-U.S. Privacy Shield-certified organizations. However, in practice our members’ policies already exceed these requirements. The EU-U.S. Privacy Shield has also provided our members with the ability to publicly differentiate themselves from other businesses, and serves as a means of demonstrating alignment with the values that our members’ customers in the EU prioritize.

Further, in light of precedent created by the Court of Justice of the European Union (CJEU) in determining adequacy,² the App Association believes that the EU-U.S. Privacy Shield should satisfy the following:

- The EC should ensure that the adequacy of the EU-U.S. Privacy Shield at some recurrence.
- EU Data Protection Authorities (DPAs) require the ability to exercise independent and wide oversight in evaluating claims regarding the protection of the citizens they protect per Articles 7 and 8 Charter of Fundamental Rights of the EU (Charter).
- If data transfers from the EU cause infringement of Articles 7 or 8 of the Charter, the EU-U.S. Privacy Shield should satisfy the aims of Article 52 of the Charter, specifically:

² *Maximilian Schrems v Data Protection Commissioner*, 6 October 2015, CJEU, Case C-362/14.

- Upholding the rights provided citizens in the Charter and recognized generally by the EU through maintaining minimum safeguards for the protection of these rights;
- That sufficient accountability to the framework by the U.S. be assured;
- In its enforceability, operate in a way that aligns the scope and severity of EU data protection policies with the legitimate (and compliance measures should not be more robust than necessary), based on objective data protection rules that are easily understood and straightforward;
- That citizens have the ability to seek fair legal redress before an objective court, per Article 47 of the Charter.

In the App Association's view, (1) steps taken by the U.S. government to provide the accountability needed for the EU-U.S. Privacy Shield, (2) foundational rights in the U.S. and U.S. privacy law (based on both well-established consumer protection principles and augmented by sector-specific rules), and (3) measures adopted by the U.S. government to provide certainty as to the conditions in which U.S. intelligence agencies may lawfully collect data, each of the CJEU's criteria has been satisfied. As a result, fundamental rights of EU citizens cannot be infringed upon by U.S. government entities. Further, we believe it is clear that citizens have access to sufficient legal remedies under the EU-U.S. Privacy Shield.

We believe the protections offered in the EU-U.S. Privacy Shield, in conjunction with the strong human right protections offered by U.S. law (particularly since the Snowden revelations in June of 2013), surpass the measures taken in the invalidated Privacy Framework which only governed access to data. Recent changes of relevance include Presidential Policy Directive 28,³ U.S. Congressional amendments to the US Foreign Intelligence Surveillance Act,⁴ the improved operations of the US Foreign Intelligence Surveillance Court, and other changes have more than established the U.S. government's commitment to strong and robust privacy protections for all individuals. And in practice, the true benefit of the EU-U.S. Privacy Shield will be provided by the companies that participate in it voluntarily. App Association members, who have a strong commitment to end user privacy primarily due to market effects, will be crucial to the success of the EU-U.S. Privacy Shield.

³ Press Release, White House, Presidential Policy Directive—Signals Intelligence Activities § 4 (Jan. 17, 2014), <http://www.whitehouse.gov/the-press-office/2014/01/17/presidential-policy-directive-signals-intelligence-activities>.

⁴ Pub.L. 114–23.

While appreciating the variety of questions posed in the questionnaire regarding the EU-U.S. Privacy Shield, the ultimate determination that must be made is whether the EU-U.S. Privacy Shield satisfies Article 25(6) of the Data Protection Directive as interpreted by the CJEU. Based on the App Association's insights, analysis, and experience, we submit that the answer to this question must be yes; therefore, the EU-U.S. Privacy Shield easily provides an "essentially equivalent" safeguard for data transferred from the EU to the US.

Sincerely,

A handwritten signature in black ink, appearing to read "Brian Scarpelli". The signature is fluid and cursive, with a large initial "B" and a long, sweeping tail.

Brian Scarpelli
Senior Policy Counsel

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