



LAYTONS

Privacy Shield

One year after Safe Harbor

LAYTONS

Our Sectors

- Technology, Communications & Digital Media
- Construction, Land & Planning
- Personal Affairs, Private Wealth & Philanthropy
- Retail & Hospitality

Our Expertise

- Banking & Finance
- Charities
- Commercial & Corporate
- Data Protection & Information
- Disputes
- Employment & Immigration
- Family & Matrimonial
- Insolvency & Restructuring
- IP & Technology
- Real Estate
- Tax
- Trusts Estates & Private Client

This information is offered on the basis that it is a general guide only and not a substitute for legal advice. We cannot accept any responsibility for any liabilities of any kind incurred in reliance on this information.

Privacy Shield

One year after Safe Harbor

On 12 July 2016, the European Commission deemed the Privacy Shield Framework adequate to enable data transfers between the European Union and the United States in support of transatlantic commerce.

From 1 August 2016, US-based organisations have been able to join the Privacy Shield Framework, by self-certifying with the Department of Commerce and publicly committing to comply with the Framework's requirements.



Michael Edgar
Solicitor | Commercial
michael.edgar@laytons.com
+44 (0)20 7842 8000



Simon Baker
Partner | Commercial
simon.baker@laytons.com
+44 (0)20 7842 8000



Rationale for the Privacy Shield Framework

Under the EU Data Protection Directive, it is unlawful for any EU-based organisation to transfer personal data to a country outside the European Economic Area unless that country ensures an adequate level of protection for the rights and freedoms of the individuals who are the subject of that data.

This principle will become even more important when the new EU General Data Protection Regulation takes effect in May 2018, since the Regulation applies not only to EU organisations but also to US businesses that sell to, make services available to, or target EU customers.

One way that EU-based organisations can ensure an adequate level of protection when transferring data to the US is to incorporate the [Model Clauses for the transfer of personal data to third countries](#) into all their transatlantic contracts. However, this can be burdensome.

The Old Regime: Safe Harbor

Until October last year, the EU-US Safe Harbor Framework provided a mechanism whereby EU-based organisations could lawfully transfer personal data to any US-based organisation that was registered under the Safe Harbor Framework, without the need to incorporate additional safeguards such as the Model Clauses.

However, following the leaks by Edward Snowden in 2013 relating to the US government's surveillance activities, an Austrian Facebook user, Maximilian Schrems, brought a legal challenge concerning the transfer of his personal data from Facebook's Irish subsidiary to servers based in the US. The Irish data protection authority rejected the challenge, but the claim was subsequently referred to the European Court of Justice by the High Court of Ireland.

[This ultimately led to the European Court of Justice declaring the Safe Harbor Framework invalid on 6 October 2015.](#)

Following the Schrems decision, and subsequent talks between the European Commission and the US Government, political agreement was reached in February 2016 for the Privacy Shield Framework to replace Safe Harbor as the mechanism for lawful transatlantic transfers of personal data.

Privacy Shield requirements

Privacy Shield is more than simply an updated version of Safe Harbor. The Privacy Shield requires the US to monitor and enforce more robustly, and cooperate more with European data protection authorities. It includes, for the first time, written commitments and assurance regarding access to data by public authorities.

[The US Department of Commerce summarises the key new requirements under the Privacy Shield Framework here.](#)

[The complete set of Principles of the Framework is set out here.](#)

Benefits of Privacy Shield

The Privacy Shield Framework, which is administered by the International Trade Administration within the US Department of Commerce, enables US-based organisations to benefit from the European Commission's adequacy determination in July 2016. This provides a smoother mechanism for US organisations to lawfully receive European personal data and to give EU organisations confidence that data will be processed in compliance with EU data protection standards.

Joining the Privacy Shield Framework

To join the Privacy Shield Framework, a US-based organisation is required to self-certify to the US Department of Commerce ([via their Privacy Shield website](#)) and publicly commit to comply with the Framework's requirements. While joining the Privacy Shield Framework is voluntary, once an eligible organisation makes the public commitment to comply with the Framework's requirements, the commitment will become enforceable under US law.

EU organisations that conduct business with US organisations can review which organisations [have self-certified on the Privacy Shield List here](#).

Potential challenges

The Schrems case served as a reminder that adequacy decisions made by the European Commission (such as its decision approving the previous Safe Harbor framework) are open to challenge by the European Court of Justice if and when circumstances change. Therefore, the long-term validity of the Privacy Shield Framework is not guaranteed and some organisations may find this uncertainty a reason to adopt a wait-and-see approach.

On the other hand, the Privacy Shield Framework has been swiftly gaining momentum, with over 700 businesses signed up by the start of this month (including tech blue-chips such as Google and Microsoft). Further, both the European Commission and US government appreciate the importance of providing a stable data protection framework to benefit transatlantic commerce, and will hopefully work effectively together to continue to support Privacy Shield.

Given that Safe Harbor had a decent run of 13 years from its introduction in 2002, many US businesses may decide that the benefits of joining the Framework outweigh the potential uncertainty of its validity in the long term.

London

2 More London Riverside
London SE1 2AP
+44 (0)20 7842 8000
london@laytons.com

Manchester

22 St. John Street
Manchester M3 4EB
+44 (0)161 214 1600
manchester@laytons.com

Guildford

Ranger House, Walnut Tree Close
Guildford GU1 4UL
+44 (0)1483 407 000
guildford@laytons.com



LinkedIn

www.laytons.com