

“EU US Privacy Shield” (Safe Harbor 1.1)

“European Commission may be issuing a round-trip to Luxembourg”

First Statement: Please check for updates & typos. This is a very first assessment based on the press conference of the European Commission at 16:45 today (Feb 2nd 2016). There are no final texts yet and the situation is not fully clear yet.

“Letters” against Laws? Justice Commissioner Věra Jourová has proposed a system of “signed letters” by “high ranking” US government representatives such as the Director of National Intelligence as a legal basis to continue data exchanges with the United States despite no legal changes regulating US mass surveillance systems.

Schrems: *“With all due respect, but a couple of letters by the outgoing Obama administration is by no means a legal basis to guarantee the fundamental rights of 500 million European users in the long run, when there is explicit US law allowing mass surveillance. We don’t know the exact legal structure yet, but this could amount to obviously disregarding the Court’s judgement. The Court has clearly stated that the US has to ‘ensure’ proper protection by means of ‘domestic law or international commitments’. I doubt that a European can walk to a US court and claim his fundamental rights based on a letter by someone. The Commission could be en route to issuing a round-trip to the European Court in Luxembourg and back. This would also not provide any legal certainty for businesses – at the most it would provide a couple more months to adapt.”*

Tweet on the “letters”: <https://twitter.com/maxschrems/status/694315777764278272>

Lobbying vs. Court. Schrems: *As far as I hear, the pressure from the US, EU member states and the industry was simply so heavy that the Commission is intentionally acting against the advice of its own legal experts and the guidelines the Court judgement.”*

“Mass Surveillance” accepted by EU? In Commissioner Věra Jourová’s speech to the European Parliament on Monday the Commissioner repeated that the US conducts mass surveillance: *“In ... three circumstances: (1) If the tailored and targeted access is not technically or (2) operationally possible or (3) if they see some very dangerous trend, which need more than targeted access.”* At the same time the Commission has argued that there were changes in US law and that there will be guarantees by the US side that data transferred to the US will not be subject to “mass surveillance”. Schrems: *“The Court has explicitly held, that any generalized access to such data violates the fundamental rights of EU citizens. The Commissioner herself has said this form of surveillance continues to take place in the US yesterday. Today there should be some agreement, in whatever form, that ensures that EU data is not used anymore. This will be the sticking point for a new challenge before the Court in respect to national surveillance.”*

Commercial Protection. The Court of Justice has held that protection in the US has to not only be compliant with EU fundamental rights with respect to government surveillance, but also “essentially equivalent” to our laws in the commercial sector. The old “Safe Harbor” was by far not ‘equivalent’ to EU law in the commercial sector, as many studies have found. “Safe Harbor” became an easy way for US companies to avoid the higher EU law standards.

The proposed new model must have more stringent privacy protections to stand this these. This would mean that US companies will have to dramatically limit questionable data usage if they want to re-certify compliance with the new system. Schrems: *“The Commission has so far not*

addressed the commercial sector in detail. If they do not ensure that all US companies under the 'Privacy Shield' are now following the EU standards this deal will also not convince the Court."

"Hot Potato" could end up with DPAs. To even remotely comply with the Court judgement the new system has an exception allowing European Data Protection Authorities (DPAs) to suspend data transfers to the US in certain cases. Schrems: *"This means that 'PRISM companies' such as Google, Microsoft, Facebook or Apple may be subject to suspension of data flows from the EU, despite the new 'deal'. In essence the 'hot potato' would then be with the data protection authorities in the EU member states."*

'Equivalent' to the Worst? Many studies and lobby groups pointed at surveillance programs in member states such as the UK to claim that the US is equivalent to the EU. Schrems: *"The US side is mixing up EU law and member states law. International transfers are governed by EU law alone. The programs of member states are outside of EU jurisdiction."*

The total ignorance of the EU's jurisdiction is the basis for the common argument that the EU engages in the same surveillance as the US government. *"You cannot pick the worst member state, like the UK, and claim you are 'equivalent' to that. First, this is not a price you want to win, secondly you have to meet the standards of the European Court of Justice, EU law and the EU Charta of Fundamental Rights – not the standard of the worst member state."*

Overall Conclusion. Schrems: *"It is clearly too early for a final assessment. It seems the EU has tried to get as much as possible. This is also the first time we see at least some movement by the US side, after all letters and calls by European politicians were basically ignored. Going to courts over this matter and targeting the commercial sector seemed like a better strategy that most European politicians were so far using. Judging from the mere 'headlines' we know so far, I am however not sure if this system will stand the test before the Court of Justice. There will be clearly people that will challenge this – depending on the final text I may well be one of them."*

Deutsches Zitat:

„Es gibt anscheinend noch nicht mal einen Text. Vieles sind nur Überschriften, aber schon die Überschriften lassen befürchten, dass dieser "Deal" einfach nur ein Roundtrip zum EuGH nach Luxemburg ist. So viel ich gehört habe, haben sogar die Juristen in der Kommission vor diesem Pakt gewarnt, aber der Druck der Lobby, der USA und der Mitgliedsstaaten war anscheinend größer.“