

KEYNOTE MAX SCHREMS

New Trans-Atlantic Data Privacy Framework largely a copy of "Privacy Shield": *noyb* will challenge the decision

This third attempt of the European Commission to get a stable agreement on EU-US data transfers is likely to be back at the Court of Justice (CJEU) in a matter of months. The allegedly "new" Trans-Atlantic Data Privacy Framework adopted on July 10, 2023 is largely a copy of the failed "Privacy Shield". Despite the European Commission's public relations efforts, there is little change in US law or the approach taken by the EU. The fundamental problem with FISA 702 was not addressed by the US, as the US still takes the view that only US persons are worthy of constitutional rights.

So we have a new name, but the bottom line is that the content of the agreement is pretty much the same. If we go into the details of the criticism that this new deal faces:

- First one is the **commercial side of the deal**: privacy principle as mentioned in the new data deal is pretty much the same as the old safe harbor principle (which itself, was the privacy principle from the EU from the 1990's), and thus is very far away from the current EU privacy principle. As an example, companies can use your data without consent, as long as they give you the right to object. Another example is that the processing doesn't need to be necessary, it just needs to be relevant.
- The second part that is criticized is the **Government surveillance** part: the US and the EU negotiated on this subject for one and a half years, and the conclusion was that there wasn't any solution. The US was not moving and was unable to provide any reassurance on this subject. The negotiations were very tight, but then, ultimately, they found a solution. The official headline was that the US would introduce the principle of proportionality, which is huge deal. However, the mention of the word "proportionate" would appear in an executive order. An executive order is an internal guideline / rulemaking written and published by the President of the US. It only has power of law internally (which means EU citizens wouldn't be able to rely on it). The "new" US Executive Order 14086¹ (which is largely equivalent to PPD-28² from 2014) would now include the word "proportionate". The "trick" here: the US will attribute another meaning to the word "proportionate" than the CJEU. The executive order declares that the surveillance is "proportionate" under an undisclosed "US understanding" of the word and contrary to the two findings by the CJEU. This way the EU and the US were able to claim that they agreed on the same word ("proportionate") - even when there is no agreement on the meaning of the word.
The new executive order comes up as an update of the PPD-28 of 2014, but if you compare the 2, you realize that there aren't many changes, and some are not the better. As an example, there used to be 6 reasons for Government or NSA surveillance, opposed to 8 reasons currently.

¹ [2022-22531.pdf \(govinfo.gov\)](#)

² [Presidential Policy Directive -- Signals Intelligence Activities](#)

They also added some clarifications, one of them being that the President can change PPD-28 or the new executive order without publishing it. So we have an executive order which we rely on, but it could be changed at any point, without any publication.

- Secondly, the CJEU found that redress via the Privacy Shield "Ombudsperson" was not even remotely complying with Article 47 CFR³ - even when the Ombudsperson was hailed by the Commission public relations in 2016 as an "independent" form of "redress in the area of national security". The "trick" on redress: the Ombudsperson mechanism was renamed and split to a Civil Liberties Protection Officer (CLPO) and a so-called "Court" (which is not a court, but a partly independent executive body). While there are some minor improvements over the Ombudsperson, the individual will not have any direct interaction with the new bodies (they will have to send a complaint to an EU data protection authority and not be heard by the US) and they will give the exact same response as the previous "Ombudsperson". Under EO 14086 the CLPO and the Court must in any case respond by saying: "Without confirming or denying that the complainant was subject to United States signals intelligence activities, the review either did not identify any covered violations or the Data Protection Review Court issued a determination requiring appropriate remediation". The "judgment" of this "Court" is therefore known even before a case is brought.
- Finally, the US has refused to reform FISA 702 to give non-US persons reasonable privacy protections. There is agreement on both sides of the Atlantic that FISA 702 and EO 12.333 violate fundamental rights under the 4th Amendment in the US and Articles 7, 8 and 47 CFR in the EU - but the US continues to insist that non-US persons do not have constitutional rights in the US - hence a violation of their right to privacy is not covered by the 4th Amendment.
- FISA 702 has been prolonged until the end of April 2024, given that there is a "sunset clause" in US law. This would have been the perfect opportunity to improve US law, but given the new deal with the EU, there is little reason for the US to reform FISA 702.

Overall the new "Trans-Atlantic Data Privacy Framework" is a copy of Privacy Shield (from 2016), which in turn was a copy of "Safe Harbor" (from 2000). Given that this approach has failed twice before, there was no legal basis for the change of course - the only logic of having a deal was political.

³ [EU Charter of Fundamental Rights, art. 47](#)