

RULES OF PROCEDURE FOR THE “Informal Panel of EU DPAs” ACCORDING TO THE EU-US PRIVACY SHIELD

The “Informal Panel of EU DPAs” (hereinafter: “panel”) is designed according to recital 49 ff. of the Commission Implementing Decision C(2016) 4176 of 12 July 2016 (hereinafter: Privacy Shield) and the supplemental principle III.5 (Operation of DPA Panels) of the Annex II.

The panel is competent for providing binding advice to the US organisations following unresolved complaints from individuals about the handling of personal information that has been transferred from the European Union (hereinafter: EU) under the Privacy Shield. The referral can be made either directly by the individual or by the US company. The panel will seek to deliver advice as quickly as the requirement for due process allows. As a general rule, the panel will aim to provide advice within 60 days after receiving a complaint from an individual or a referral from an organisation concerned and more quickly where possible. However, advice will be issued only after both sides in a dispute have had a reasonable opportunity to comment and to provide any evidence they wish.

The following rules of procedure will give guidance on how the panel will operate.

1.) Evaluation of the competence of the EU panel

The Data Protection Authority (hereinafter: DPA) that received a complaint or referral will assess if the panel is competent to handle the complaint or referral.

The panel is only competent for organisations which have committed to cooperate with the DPAs or which process human resources data collected in the context of an employment relationship. The competence of the panel can be verified on the Privacy Shield website of the US Department of Commerce.¹

If the panel is not competent, the DPA that received a complaint/referral will assess if its competence toward the EU data exporter would make it the most appropriate body to handle the complaint or referral and/or will explore possibilities to refer the case to US Department of Commerce (hereinafter: DoC) or the US Federal Trade Commission hereinafter: FTC)² or the US Department of Transportation (hereinafter: DoT).

Where the panel is competent, there is a need to designate the lead DPA and co-reviewer DPAs.

¹ One can do this by typing the organisation’s name into the search bar within the Privacy Shield List, clicking on the organisation’s name, and then clicking “Questions or Complaints?”; where the panel is competent, it is referred as “EU Data Protection Authorities (DPAs)”.

² Referral to the FTC seems to be only useful for cases that have a systematic character, i.e. cases of systemic failure. This DPA will however also refer cases which, taken together with others, may then point to a failure in an US company’s systems and procedures.

2.) Designation of Lead-DPA and co-reviewer DPAs

For the handling of each complaint or referral, the panel will be formed by one DPA acting as lead DPA and other designated co-reviewer DPAs.

The decision on which DPAs will act as lead and as co-reviewers should be taken in a timely manner and should, in principle, be confirmed within **two weeks' time** from the receipt of the initial complaint/referral.

Designation of the Lead-DPA

Principle

As a general rule, the lead DPA for handling a complaint or a referral within the panel should be the national DPA that receives the complaint by an individual or the referral by a certified US company.

If the same or very similar complaints/referrals are lodged with several DPAs it will be presumed that the DPA that first received a complaint/referral will act as lead DPA.

Derogations

In exceptional circumstances another DPA can be designated as lead. This may arise when the complaint concerns a data transfer that relates to a cross-border processing as set out in Art. 4 (23) of the General Data Protection Regulation (GDPR). In such situation, the lead DPA under Article 56 GDPR (i.e. the supervisory authority of the main establishment or of the single establishment of the data exporter) shall decide whether or not it will act as lead DPA also for handling the complaint in the panel.

Designation of the co-reviewer DPAs

As a general rule, there should be two co-reviewers. In appropriate circumstances the panel can be extended if more than two DPAs are interested in participating in the panel and can put forward a specific interest.

Where the lead DPA in the sense of Article 56 as outlined above decides to take the case, the concerned DPAs (Art. 4 (22) GDPR) should act as co-reviewers.

In cases where fewer than two DPA indicate an interest in acting as co-reviewer the lead DPA has the prerogative to designate up to two co-Reviewers. When selecting the co-reviewers the lead DPA should in particular take into consideration DPAs in whose jurisdiction the EU headquarter or significant subsidiaries of the US company's group are situated, if any. Other criteria include the place where the relevant data processing is facilitated in the EU, the place in the EU from which most data transfers take place, the place where a large number of EU individuals are likely to be affected by the alleged violation, particular expertise located with a certain DPA, and available resources. The lead DPA should also take into consideration the need to uniformly enhance the case-handling experience among the DPAs.

3.) Duties of DPA that receives a complaint/referral

- check if the panel is the competent body for the respective complaint/referral (HR-data collected in the context of an employment relationship, or commitment by the US company to submit to oversight by EU DPAs)
- if this is not the case, forward the complaint to the competent body (e.g. “EU centralized body” for the Ombudsperson-mechanism, DoC, FTC) and inform complainant/referring company
- if appropriate, encourage and if necessary help complainants in the first instance to use the complaint handling arrangements provided by the companies
- inform all WP29-members about complaint/referral upon reception
- if necessary seek a lead-DPA and appoint co-reviewers
- act as single point of contact for the complainant throughout the entire panel procedure and facilitate communication between and with the panel, regardless of whether the DPA is acting as lead or not
- provide any translation needed (mostly into and from English or other languages where appropriate) emerging from the communication with the complainant and DoC, FTC or other US statutory body through the panel, regardless if the DPA is acting as lead or not.

4.) Duties of Lead-DPA

The duties of the lead authority include:

- act as single point of contact towards the US-company concerned respectively the referring company throughout the entire panel procedure and facilitate communication between and with the panel
- designate or determine co-reviewers in consultation with DPAs
- inform all WP29-members about the participating DPAs in the panel
- inform the US-organisation in writing of the substance of the complaint and any other relevant information; personal data of the complainant should only be revealed if necessary to resolve the complaint; if the certification of an US-company to the Privacy Shield framework itself is in question, personal data will not be transferred, unless the data subject expressly consents to it (for instance, in the context of a request of assistance from the DPA to exercise the internal complaint system of the US Company).
- offer all sides (complainant, company) reasonable opportunity to comment and to provide any evidence they wish on the matter within a reasonable time-limit
- draft an advice including remedies (where appropriate) and circulate among co-reviewers

- take comments from co-reviewers into consideration and discuss if necessary and endeavour to reach a consensus
- issue the consolidated advice to the US-company
- inform WP29 chair and WP29-members of the advice issued without disclosing the personal data of the individuals and respecting any obligations of confidentiality
- make public the results of the consideration of complaints, if appropriate and by respecting confidentiality duties
- in case of non-compliance by a Privacy Shield certified US-company with the advice issued through the panel, prepare a draft on how to proceed given the options mentioned below and coordinate a decision in consultation with the other members of the panel
- if an US-Company fails to comply within 25 days of the delivery of the advice and has offered no satisfactory explanation for the delay, give notice of the panel's intention either to refer the matter to the FTC, DoT, or other US Federal or state body with statutory powers to take enforcement action in cases of deception or misrepresentation, or to conclude that the agreement to cooperate has been seriously breached and must therefore be considered null and void and in the latter case, inform the DoC so that the Privacy Shield List can be duly amended
- act as single point of contact to FTC, DoC and other relevant public authorities in the US throughout the entire panel procedure and facilitate communication between and with the panel.

5.) Duties of co-Reviewers

The duties of the co-Reviewers include:

- support the lead DPA when necessary or requested
- respond to enquiry to act as co-reviewers from the lead DPA within one week
- provide comments on the draft advice as quickly as possible but within two weeks to allow for further enquiry; if no comments are provided within this timeframe, it will be considered agreement with the draft advice prepared by the lead DPA; DPAs might request additional time if necessary and justified.

6.) Cooperation and communication in conjunction with the "Informal Panel of EU-DPAs"

Communication between DPAs in conjunction with the Panel will be facilitated via appropriate electronic means.

For determining the Lead DPA and co-Reviewers, the e-mail list of the International Transfers Subgroup can be used. Communication between the members of the Panel can be facilitated via an ad-hoc e-mail list of the DPAs involved.

Once the IT-system currently being created for the EDPB is operable it should be employed to facilitate the communication in conjunction with the Panel.

The Lead DPA and the co-Reviewer DPAs will work together to reach consensus as to the advice which will be provided to the US company. If there is difficulty finding consensus the lead DPA may ask the Chair of the WP29 to mediate a solution. As a last resort a vote may be casted on the existing draft advices. That vote will be decided by simple majority of the panel members (Lead DPA and co-Reviewer DPAs). In case of a split vote, the lead DPA's vote will prevail.

The same procedure applies for determining how to proceed in cases of non-compliance by the US-company with the advice issued.