

March 24, 2021

Secretary Gina M. Raimondo
1401 Constitution Avenue NW
Washington, DC 20230

Dear Secretary Raimondo:

Congratulations on your confirmation. We look forward to working with you and the Department of Commerce over the coming years to support and grow opportunities for tech entrepreneurship and are committed to assisting the government in building startup-forward policy. In that vein, we urge you to prioritize negotiations with the European Commission over a successor framework to the U.S.-EU Privacy Shield agreement. Especially for the nation's startups, it is essential that companies have clear guidance and practical options for lawfully transferring personal data across the Atlantic.

Engine is a non-profit that works with government and a community of thousands of high-tech, growth-oriented startups across the nation to support technology entrepreneurship through research, policy analysis, and advocacy. And Allied for Startups is a worldwide network of organizations focused on improving the policy environment for startups—including in the U.S. and EU—and ensuring that the voices of startups are heard in government. The companies we work with are pioneers of innovation and generate outsized economic and job growth, but for many their success depends on a path to compliance with international data protection requirements.

The trade relationship between the U.S. and EU constitutes the largest such bilateral relationship in the world—worth over one trillion dollars a year—and the data flows that underlie those business and investment partnerships are essential.¹ Disrupting that transatlantic commerce or interrupting associated data flows could undermine broad sectors of the U.S. economy, including, but not limited to, financial services, healthcare, and information technology. Businesses—including startups—in these and other sectors need to transfer data across the Atlantic. Indeed, for U.S. startups seeking to engage customers, expand, or partner with businesses in the EU, they can only do that if they are able to data transfer.

But startups in particular face significant uncertainty in transatlantic commerce, collaboration, and R&D right now. Up until recently, startups could rely on the U.S.-EU Privacy Shield framework to comply with data protection laws when transferring personal information across the Atlantic.² That framework set up a self-certification scheme, where companies committed to privacy safeguards that align privacy protection with Europe. This framework was invalidated by the European Court of Justice in July 2020.³

¹ Alanna Petroff, *Europe and the US Have the World's Most Important Business Ties*, CNN (July 11, 2018) <https://money.cnn.com/2018/07/11/news/economy/us-eu-tariffs-trade/index.html>.

² Privacy Shield Framework, <https://www.privacyshield.gov/welcome> (last visited Mar. 15, 2021).

³ In the decision known as *Schrems II*, the European Court of Justice invalidated the U.S.-EU Privacy Shield. Consequently, all the companies who filed through the Department of Commerce to seek Privacy Shield certification found themselves in breach of law on the day of the judgement. That Court decision turned on concerns over how personal data of EU users could be collected by U.S. intelligence agencies. The Court did not reach a definitive conclusion, though, instead deferring to data protection authorities to evaluate the scope and nature of legal safeguards. In our view, this also creates uncertainty and opens the door to individual interpretation by the data protection authorities, which could cause further disruptions to transatlantic commerce that is so vital to U.S. startups.

Unlike large companies that can maneuver data transfers on their own and without a formal framework in place, startups were particularly reliant on the now defunct Privacy Shield. For startups operating on thin margins and often without in-house privacy counsel, it is extremely challenging to assess EU and U.S. privacy laws, determine whether such U.S. laws meet the essential guarantees offered by European laws, and ensure the startups and their business partners are in compliance with EU law. Startups are also ill-equipped to negotiate individual data handling agreements, but without them companies are now in a very precarious position. In fact, 70 percent of the companies operating under the Privacy Shield were small or medium-sized.⁴ Now, with Privacy Shield abolished, many U.S. startups are facing substantial difficulty sharing data across the Atlantic, impeding their ability to operate in that market.

In the light of the above, we encourage you to make negotiations towards a new, sustainable Privacy Shield an immediate priority. The much-anticipated framework for transatlantic data transfer should be tailored with the day-to-day business and regulatory needs of the U.S. startup community in mind, as they urgently need legal clarity, as well as cost-efficient and practicable solutions. We were pleased to see the early appointment of Deputy Assistant Secretary for Services, Mr. Christopher Hoff, as lead negotiator on the project, suggesting the administration is already off to a promising start.

In the meantime, we encourage you to leverage the Department's position and relationships to stress that European regulators should hold back from taking any enforcement actions until the European Data Protection Board provides guidance on the use of Standard Contractual Clauses ("SCCs"). While there is still no governing framework in place, and there exists a lack of clarity over compliance, startups that act in good faith to protect the privacy of EU users should be protected against enforcement actions brought by data protection authorities.

Startups need the government's leadership and guidance, especially as startups stand to be a key driver of economic and job growth when the current global pandemic has subsided.⁵ The umbrella of the U.S.-EU Privacy Shield offered a clear roadmap to startups seeking to protect user privacy but unable to negotiate their own agreements or withstand a significant amount of litigation. The current lack of clarity in transatlantic data transfer is hugely disruptive for the commercial interests and competitiveness of U.S. startups. Especially as these companies need to be able to exploit the full potential of the U.S.-E.U. commercial relations, particularly during the current pandemic recovery, the Department of Commerce should do all it can to ensure there are legal frameworks that allow startups to do that while protecting privacy and complying with EU laws.

Thank you for your attention to this matter.

Sincerely,

Engine
Allied for Startups

⁴ Kate Cox, *US-EU Privacy Shield Data Sharing Agreement Struck Down By Court*, Ars Technica (July 16, 2020), <https://arstechnica.com/tech-policy/2020/07/court-tosses-us-eu-data-sharing-agreement-amid-us-surveillance-concerns/>.

⁵ Jennifer Weinhart, *Startups Need Policymakers to Chart a Roadmap for Recovery*, Morning Consult, (December 15, 2020), <https://morningconsult.com/opinions/startups-need-policymakers-to-chart-a-roadmap-for-recovery/>.