

## Privacy Shield in jeopardy under Trump

The European Parliament says it is concerned that a data-sharing pact that allows personal data to be transferred across the Atlantic for business purposes is no longer fit for purpose because US intelligence agencies can access EU citizens' data without warrants.

In a resolution on 6 April, the European Parliament said that the European Commission must conduct a robust assessment of Privacy Shield, [which was signed by the US Department of Commerce and the European Commission in February 2016](#), because new rules enacted in January 2017 allow the US National Security Agency (NSA) to access EU citizens' data without first obtaining a warrant. The resolution, which is non-binding, [was passed by 306 votes to 240 votes, with 40 abstentions](#).

Privacy Shield allows US companies to move information from an EU subsidiary to the US parent company in line with EU data protection laws. Companies rely on the agreement to send data across the Atlantic for business purposes, including internal and government investigations.

The European Parliament said the commission should look into whether Privacy Shield provides enough personal data protection for EU citizens to comply with the EU Charter of Fundamental Rights and the General Data Protection Regulation (GDPR), which will become law in 2018.

In the resolution, the European Parliament said that an executive order, which was approved on 3 January under former US President Barack Obama's administration, may undermine Privacy Shield.

Before Privacy Shield was agreed, the US gave the commission written assurance that the ability of national security and law enforcement authorities to access personal data would be subject to clear limitations and oversight mechanisms. The US also agreed not to engage in indiscriminate mass surveillance. However, the 3 January executive order allows the NSA to access private data gathered without a warrant, court order or congressional authorisation. Under the order, the NSA can also share the information with 16 other agencies, including the US Department of Homeland Security and the FBI.

The parliament also said that a new right of redress for EU citizens, provided under Privacy Shield, may no longer be effective. The US Privacy and Civil Liberties Oversight Board (PCLOB) was intended to oversee Privacy Shield and to assist an ombudsman who is [tasked with ensuring EU citizens' rights under the pact are not violated](#). However, the European Parliament said that the body has been inactive since January as it only has one active member. The PCLOB needs five members to issue reports and recommendations. The European Parliament also said the Trump administration is yet to appoint a new ombudsman to oversee Privacy Shield.

Lawyers said the European Commission may abandon the pact if it concludes that the US no longer affords EU citizens adequate data protection rights. The European Commission is set to review Privacy Shield in September.

In a ruling on 6 October 2015, an earlier EU/US data sharing agreement, known as Safe Harbour, [was abandoned because it failed to adequately protect EU citizens' rights](#). EU judges said the 2000 agreement lacked a right of redress for EU citizens whose data is misused. They also found that under Safe Harbour, US authorities had accessed data indiscriminately.

In a statement, Claude Moraes, the chair of the European Union's civil liberties committee said: "This resolution aims to ensure that the Privacy Shield stands the test of time and that it does not suffer from critical weaknesses."

Moraes said that although there have been significant improvements in Privacy Shield, over Safe Harbour, "there are clearly deficiencies that remain to be urgently resolved to provide legal certainty for the citizens and businesses that depend on this agreement".

### **A Privacy Shield alternative?**

Olivier Proust at Fieldfisher in Brussels said that if the commission suspends or repeals Privacy Shield in September it would be a disaster for EU companies relying solely on the agreement as a legal basis for transferring data to the US.

"From a business perspective, the more uncertainty lingers on the fate of the Privacy Shield, the higher the risk of seeing the Privacy Shield collapse completely," he said.

Proust said that if Privacy Shield is repealed, US companies will have to put other legal mechanisms in place to transfer data across the Atlantic, such as EU model clauses, which allow companies to implement contractual provisions to ensure that transfers of data across the Atlantic are in line with EU law.

Proust said that companies are looking for legal certainty so that they can transfer personal data to the US without the risk of being caught up by the GDPR, under which companies can face fines of €20 million or 4% of global annual turnover, whichever is greater.

However, such contractual provisions may not be a safe option for companies either. In a case currently being heard in Ireland, Austrian citizen Maximilian Schrems, [is challenging the transfer of his data to the United States by Facebook](#). Schrems has questioned whether the EU model clauses used by Facebook to transfer data from Ireland to the US adequately protect EU citizens' rights.

Rohan Massey at Ropes & Gray in London said that if both Privacy Shield and model clauses are found to be invalid, two of the main mechanisms used to transfer data across the Atlantic will be unavailable to US companies. Massey said that this would put US corporates in a very difficult position in deciding what to do next.

"The choice for companies is either do nothing, which is not prudent, or press on with a compliance programme despite the regulatory uncertainty and the costs," Massey said.

Toby Duthie at Forensic Risk Alliance in London said that even before Trump, EU officials had concerns that the agreement may not be good enough, hence the scheduled review of the pact set for September.

Duthie said that the question is, especially in a contentious legal context, "is it prudent to rely on Privacy Shield given the uncertainty?" He said that the question becomes even more acute when considering the possible fines under the GDPR.

In recent weeks, the US and European leaders have sought to reassure companies that Privacy Shield will be maintained. In a statement sent to GIR on 7 April, the European Commission said that it had taken note of the resolution. What's more, a commission spokesperson said that Věra

Jourová, the European Union's commissioner for justice, consumers and gender equality, who visited the US in late March, had received reassurances from US Secretary of Commerce Wilbur Ross that he understands the importance of maintaining the commitments under Privacy Shield.