

**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL ON THE SECOND ANNUAL REVIEW OF THE FUNCTIONING OF THE EU-US Privacy Shield**

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**Second Annual Review of the EU-US Privacy Shield**

Submitted by Department for Digital, Culture, Media and Sports on 18 January 2019

**SUBJECT MATTER**

1. The EU-US Privacy Shield became operational on 1 August 2016, after the European Commission issued its formal decision that the US Privacy Shield framework provides adequate protection to allow personal data to be transferred to the United States. The Privacy Shield imposes stronger obligations on US companies to protect Europeans' personal data by requiring the US to monitor and enforce more robustly, and cooperate more with European Data Protection Authorities. It also includes written commitments and assurance regarding access to data by public authorities. The framework reflects the principles and requirements laid down by the CJEU in its judgment in the *Schrems* case, which invalidated the previous EU-US partial adequacy decision which was based on the Safe Harbour framework.
2. On 19 December 2018, the European Commission published its report and staff working document on the second annual review of the EU-US Privacy Shield. The Report, generally positive, concludes that the US continues to ensure an adequate level of protection for personal data transferred under the Privacy Shield from the EU to the participating companies in the US. It notes that the steps taken by the US authorities to implement the recommendations made by the Commission in its 2017 report have improved the functioning of the framework.
3. The Commission report highlights the improvements made over the past year including the strengthening by the US Department of Commerce of the certification process and of its proactive oversight of the framework. The Department has set up new mechanisms to detect compliance issues, such as random spot checks, and carried out an analysis of Privacy Shield participants' websites to ensure that links to privacy policies are correct. The US Federal Trade Commission has also taken a more proactive approach to enforcement, including by issuing subpoenas to request information from Privacy Shield participants. The report welcomes the appointment of new members of the Privacy and Civil Liberties Oversight Board, which restores the Board's full quorum. In addition, the Presidential Policy-Directive No. 28, which provides privacy protections for non-Americans, has been implemented across the US intelligence community. The Department of Commerce has also launched a consultation on a federal approach to data privacy and the Commission notes

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its interest in the ongoing debate about federal privacy legislation in the US. The Commission encourages the US to adopt a comprehensive system of privacy and data protection and to become a party to the Council of Europe's Convention 108.

4. The Commission notes concerns among NGOs about the adoption of the US CLOUD Act in March 2018, which requires US service providers to comply with US orders to disclose content and other data, regardless of where such data is stored. The Commission will closely monitor whether any executive agreements under the CLOUD Act are conducted, and carefully assess their impact on the Privacy Shield.
5. The Commission expects the US authorities to nominate a permanent Ombudsperson by 28 February 2019 to replace the one that is currently acting, and will consider taking appropriate measures in accordance with the General Data Protection Regulation if this does not take place. The Ombudsperson is the mechanism that ensures complaints concerning access to data by US authorities are addressed.
6. The Commission also highlights two important developments in regard to access to personal data for law enforcement purposes, which have strengthened the protections of individuals. Firstly, in the case of *Carpenter v United States* (2018), the US Supreme Court held that a search warrant is in principle required for law enforcement authorities to access cell site location records. Secondly, the Deputy Attorney General issued a memorandum on a more restrictive policy on applications for non-disclosure orders under the US Stored Communications Act. The memorandum requires prosecutors to make a detailed determination regarding the need for a non-disclosure order and puts a ceiling on how long a notification can be withheld. The Commission states that the new policy contributes to stronger protections where law enforcement authorities seek to obtain access to personal data transferred under the Shield.

## SCRUTINY HISTORY

7. The EU-US Privacy Shield is an arrangement put in place by the European Commission and the US authorities, and therefore is based on a Commission Implementing decision instead of a Council one. The framework has been the subject of Parliamentary scrutiny due to its relationship with the wider debate around data protection and data flows in the context of the UK's decision to leave the EU.

## MINISTERIAL RESPONSIBILITY

8. Margot James MP, Minister of State for Digital is responsible for data protection policy.

## INTEREST OF THE DEVOLVED ADMINISTRATIONS

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9. Data protection is a reserved matter.

### **LEGAL AND PROCEDURAL ISSUES**

#### i. Legal basis

10. The Privacy Shield is based on Article 25(6) of the Data Protection Directive 95/46/EC.

#### ii. European Parliament Procedure

9. Not applicable because this is an arrangement put in place by the European Commission and the US authorities.

#### iii. Voting procedure

10. Not applicable.

#### iv. Impact on United Kingdom law

11. There is no direct impact on UK law.

#### v. Application to Gibraltar

12. The Privacy Shield applies to Gibraltar as Gibraltar is subject to EU data protection law.

#### vi. Fundamental rights analysis

13. The Commission has indicated that the Privacy Shield guarantees a high level of protection of the fundamental rights of EU individuals, due to the Privacy Shield Principles by which companies have to abide, as well as the US Government's written commitments on the enforcement of the arrangement, including assurances on safeguards and limitations on access to data by public authorities. They have also stated that any interference of the fundamental rights of EU citizens by US public authorities for national security, law enforcement or other public interest purposes will be "limited to what is strictly necessary to achieve the legitimate objective in question".

### **APPLICATION TO THE EUROPEAN ECONOMIC AREA**

14. The Privacy Shield applies to the European Economic Area.

### **SUBSIDIARITY**

15. The Privacy Shield does not raise any issues of subsidiarity.

### **POLICY IMPLICATIONS**

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16. The UK Government welcomes the outcome of the second joint annual review and in doing so continues to support the EU-US Privacy Shield framework. The Privacy Shield continues to provide the most efficient method for transatlantic data transfers, and is essential to UK businesses.

17. In terms of the UK's exit from the EU, the US Government has recently published guidance as to how personal data can continue to flow from the UK to the US under the Privacy Shield in a no deal scenario. It also confirms how personal data can continue to flow during and after an implementation period. This arrangement supports trade between the US and UK, while also ensuring continued high standards of data protection for UK citizens' data and legal certainty for business.

### CONSULTATION

19. This is not a UK instrument.

### IMPACT ASSESSMENT

20. This is not a UK instrument or document requiring an impact assessment

### FINANCIAL IMPLICATIONS

21. None.

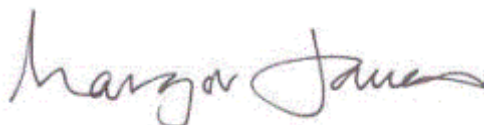
### TIMETABLE

22. The Commission's report will be sent to the European Parliament, the Council, the European Data Protection Board and to the US authorities. The European Commission expects the US Government to identify a nominee to fill the Ombudsperson position on a permanent basis by 28 February 2019 at the latest. If this does not happen by that date, the Commission will consider taking appropriate measures, in accordance with the General Data Protection Regulation.

### OTHER OBSERVATIONS

23. None

### MINISTERIAL NAME AND SIGNATURE



**MARGOT JAMES MP**  
**MINISTER FOR DIGITAL AND CREATIVE INDUSTRIES**