

July 2018

European Parliament Calls to Suspend EU-US Privacy Shield

On July 5, 2018, the European Parliament passed a nonbinding resolution calling on the European Commission to suspend the Privacy Shield, a data-sharing arrangement between the EU and the U.S., unless the U.S. is “fully compliant” with the arrangement’s terms by September 1, 2018. The vote approved the Motion for Resolution presented by the European Parliament Committee on Civil Liberties, Justice and Home Affairs (the Committee) on June 12, 2018, which addressed the protection of EU citizens’ personal data.¹

Background

In 2016, the United States and the European Commission adopted the EU-U.S. Privacy Shield, a self-certification program designed to enable companies in the U.S. to receive personal data from the EU and the three European Economic Area member states — Norway, Liechtenstein and Iceland. Under the Privacy Shield, companies self-certify their adherence to seven broad data privacy principles. Although enacted when the EU Data Protection Directive was in effect, the Privacy Shield still applies under the set General Data Protection Regulation (GDPR).

The Privacy Shield replaced the previous data sharing structure between the EU and U.S. known as the Safe Harbor, which the Court of Justice of the European Union invalidated in October 2015 in *Schrems v. Data Protection Commissioner*. In the *Schrems* decision, the court found that the Safe Harbor failed to adequately protect the privacy of EU citizens, mainly due to the U.S. government’s ability to access personal data for national security purposes. The Privacy Shield aimed to remedy the perceived inadequacies of the Safe Harbor by imposing certain restrictions on the collection of EU personal data by the U.S. government and appointing an ombudsman to oversee such collection practices. After the Privacy Shield’s adoption, many privacy advocates criticized the replacement framework for failing to address the governmental surveillance concerns raised in *Schrems*.²

The Resolution

In their resolution, members of the European Parliament (MEPs) echoed the Civil Liberties Committee’s recent criticism and pointed to the recent Cambridge Analytica scandal to demonstrate the ineffectiveness of the Privacy Shield. Particularly, the European Parliament noted that although this disclosure occurred before the Privacy Shield was in place, Cambridge Analytica’s affiliate company SCL Elections is listed on the Privacy Shield register. MEPs

¹ For more information regarding the Civil Liberties Committee’s criticism of the Privacy Shield, see our June 2018 [Privacy and Cybersecurity Update](#).

² For more information regarding criticism of the Privacy Shield, see our April 2017 [Privacy and Cybersecurity Update](#).

emphasized a greater need for monitoring under the agreement, particularly when “data is used to manipulate political opinion or voting behavior.”

MEPs also echoed the Committee’s concern about the recent adoption by the U.S. of the Clarifying Lawful Overseas Use of Data (CLOUD) Act in March 2018, which grants U.S. and foreign police services access to personal data across borders. The European Parliament indicated that this new U.S. law, which essentially provides a loophole to the Privacy Shield and the *Schrems* decision, runs into direct conflict with EU data protection laws, and may have serious implications for EU citizens.

The European Parliament also expressed apprehension about the executive order signed by President Trump in January 2017, commonly referred to as the “Enhancing Public Safety” order, which stripped privacy protections from non-U.S. citizens. MEPs argued that the substance of the order indicates “the intention of the U.S. executive to reverse the data protection guarantees previously granted to EU citizens and to override the commitments made towards the EU during the Obama Presidency.” The European Parliament is likely referring to Presidential Policy Directive 28, an Obama-era directive that backed extending privacy protections to non-U.S. nationals in regard to warrantless surveillance.

In addition, MEPs explicitly criticized the U.S. Department of Commerce (DOC) in its review of Privacy Shield certification applications, expressing concern that the DOC has not been requesting copies of agreements used by certified companies with third parties to ensure compliance, despite the availability of this option under the Privacy Shield. The European Parliament concluded that there is no effective control over whether certified companies actually comply with the Privacy Shield provisions.

Notably, in Europe only the European Commission can revoke the Privacy Shield, so the European Parliament’s resolution is nonbinding. However, an annual review of the Privacy Shield is due in September, which presents an opportunity for the Commission to reconsider the arrangement in light of Parliament’s resolution and the introduction of GDPR to implement more restrictive safeguards.

Effect of Suspension

Members of the Commission have publicly stated that, while the concerns surrounding the Privacy Shield are valid, a suspension may be premature and could result in panic and legal uncertainty. A complete suspension of the Privacy Shield would result in reverberating disruption across the world economy, in that many major companies rely on the agreement to run their businesses effectively.

Should the Privacy Shield be suspended, companies will need to find alternative lawful mechanisms to transfer data between the U.S. and the EU. One option is for companies to incorporate EU-approved contractual clauses between transferors and transferees to facilitate data transfers. An option for affiliated companies is to adopt binding corporate rules for data transfers. At any rate, companies that rely on the Privacy Shield would be wise to begin considering backup plans for cross-border data transfers should the Privacy Shield be suspended by the European Commission.

Key Takeaways

Although a sweeping suspension of the EU-U.S. Privacy Shield is unlikely to take effect within the next few months, the European Parliament’s passage of the suspension resolution indicates deep

concerns with the existing arrangement. U.S. companies currently relying on the Privacy Shield would be well-advised to seek alternative solutions to lawfully transferring data across borders.