



Brussels, 19.12.2018
COM(2018) 860 final

**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND
THE COUNCIL**

on the second annual review of the functioning of the EU-U.S. Privacy Shield

{SWD(2018) 497 final}

1. THE SECOND ANNUAL REVIEW – PURPOSE, PREPARATION AND PROCESS

On 12 July 2016, the Commission adopted a Decision (the “adequacy decision”) in which it found that the EU-U.S. Privacy Shield (the “Privacy Shield”) ensures an adequate level of protection for personal data that has been transferred from the EU to organisations in the U.S.¹ The adequacy decision notably provides for an annual evaluation of all aspects of the functioning of the framework by the Commission. The first annual review took place on 18 and 19 September 2017 in Washington, D.C., and on 18 October 2017 the Commission adopted its report to the European Parliament and the Council,² accompanied by a Commission Staff Working Document (SWD(2017)344 final).³

On the basis of its findings from the first review, the Commission concluded that the U.S. continued to ensure an adequate level of protection for personal data transferred under the Privacy Shield from the Union to organisations in the U.S. At the same time, the Commission considered that the practical implementation of the Privacy Shield framework could be further improved in order to ensure that the guarantees and safeguards provided therein continued to function as intended. To this end, the Commission made ten recommendations.

The present report concludes the second annual review of the functioning of the Privacy Shield. This report, as well as the accompanying Staff Working Document (SWD(2018) 497), follow the same structure as the report on the first annual review. They cover all aspects of the functioning of the Privacy Shield, also in light of developments that took place during the last year. A central element of the Commission's assessment was the implementation of its recommendations from the first annual review.

In preparation for the second annual review, the Commission gathered information from relevant stakeholders (in particular Privacy Shield-certified companies, through their respective trade associations, and non-governmental organisations (NGOs) active in the field of fundamental rights, in particular digital rights and privacy), as well as from the relevant U.S. authorities involved in the implementation of the framework.

The second annual review meeting took place in Brussels on 18 and 19 October 2018. The review was opened by the Commissioner for Justice, Consumers and Gender Equality Věra Jourová, U.S. Secretary of Commerce Wilbur Ross, the Chairman of the Federal Trade Commission Joseph Simons and the Chair of the European Data Protection Board Andrea Jelinek. It was conducted for the EU by representatives of the European Commission's Directorate General for Justice and Consumers. The EU delegation also included seven

¹ Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield, OJ L 2017, 1.8.2016, p. 1

² Report from the Commission to the European Parliament and the Council on the first annual review of the functioning of the EU-U.S. Privacy Shield (COM(2017)611 final, see http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=605619)

³ Commission Staff Working Document Accompanying the Report from the Commission to the European Parliament and the Council on the first annual review of the functioning of the EU-U.S. Privacy Shield (SWD(2017)344 final), see http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=605619

representatives designated by the European Data Protection Board (the independent body bringing together representatives of the national data protection authorities of the EU Member States and the European Data Protection Supervisor).

On the U.S. side, representatives from the Department of Commerce, the Department of State, the Federal Trade Commission, the Department of Transportation, the Office of the Director of National Intelligence, the Department of Justice and members of the Privacy and Civil Liberties Oversight Board participated in the review, as well as the acting Ombudsperson and the Inspector General for the Intelligence Community. In addition, representatives from an organisation that offers independent dispute resolution services under the Privacy Shield and the American Arbitration Association provided information during the relevant review sessions. Finally, the review was informed by presentations from Privacy Shield-certified organisations on how companies comply with the requirements of the framework.

The Commission's findings have further been informed by a study commissioned by the Commission and publicly available material, such as court decisions, implementing rules and procedures of relevant U.S. authorities, reports and studies from non-governmental organisations, transparency reports issued by Privacy Shield-certified companies, annual reports from independent recourse mechanisms, as well as media reports.

This year's review took place in the context of the challenges to data privacy that are increasingly global in nature, as exemplified by the Facebook / Cambridge Analytica case. Both the EU and the U.S. are aware of the similar challenges they face when it comes to protection of personal data. During the review, both sides stressed the need to address such abuses of personal data, including through the vigorous enforcement actions by the EU's Data Protection Authority and the U.S. Federal Trade Commission.

The Commission's report also reflects the ongoing debate about federal privacy legislation in the U.S. The convergence between our two systems in the long term would strengthen the foundations on which the Privacy Shield framework has been developed.

2. FINDINGS AND CONCLUSION

The second annual review covered both the "commercial aspects" of the Privacy Shield framework and issues relating to government access to personal data.

As regards the "commercial aspects", i.e. questions concerning the administration, oversight and enforcement of the obligations applying to certified companies, the Commission noted that in line with the Commission's recommendations from the first annual review, the Department of Commerce has further strengthened the certification process and introduced new oversight procedures. In particular, the Department of Commerce adopted a new process that requires first-time applicants to delay public representations regarding their Privacy Shield participation until their certification review is finalised by the Department of Commerce. Moreover, the Department of Commerce has introduced new mechanisms to

detect potential compliance issues, such as random spot-checks (at the time of the annual review, such spot checks had been performed on about 100 organisations) and the monitoring of public reports about the privacy practices of Privacy Shield participants. In the search for false claims of participation in the framework, the Department of Commerce is now actively using a variety of tools, for instance a quarterly review of companies that have been identified as more likely to make false claims and a system for image and text searches on the internet. As a result of these newly introduced practices and procedures, the Department of Commerce since the first annual review has referred more than 50 cases to the Federal Trade Commission, which in turn took enforcement action in those cases where the referral as such was not sufficient in order to make the company concerned come into compliance.

With respect to enforcement, the Commission noted that the Federal Trade Commission, as part of its efforts to proactively monitor compliance with the Privacy Shield Principles, recently issued administrative subpoenas to request information from a number of Privacy Shield participants. The Federal Trade Commission has also confirmed that its investigation into the Facebook / Cambridge Analytica case is ongoing. Although the Commission considers that the Federal Trade Commission's new, more proactive approach to compliance monitoring is an important development, it regrets that at this stage it was not possible for to provide further information on its recent investigations and will closely monitor any further developments in this regard.

The second annual review also took into account relevant developments in the U.S. legal system in the area of privacy. These concern, in particular, the consultation initiated by the Department of Commerce on a federal approach to data privacy as well as the Federal Trade Commission's process of reflection on its current powers in the area of privacy and the efficacy of the use of its current remedial authority.

As the Facebook/Cambridge Analytica case and other revelations have shown, it would be important that the EU and the U.S. further converge in their responses. In this spirit, the Commission has observed the abovementioned initiatives with great interest and has contributed to the Department of Commerce's consultation process with a written submission⁴.

Regarding aspects relating to access and use of personal data by U.S. public authorities, the second annual review focused on relevant developments in the U.S. legal framework, including with regard to relevant agency policies and procedures, on recent trends in surveillance activities, and on developments in the setup and functioning of important oversight and redress mechanisms.

The most important legal development in the area of government access was the reauthorisation of Section 702 of the Foreign Intelligence Surveillance Act ("the Act") at the beginning of 2018. While the reauthorisation did not lead to the incorporation of the protections of Presidential Policy Directive 28 into the Act, as had been suggested by the

⁴ Available at https://ec.europa.eu/info/sites/info/files/european_commission_submission_on_a_proposed_approach_to_consumer_privacy.pdf

Commission, neither did it restrict any of the safeguards contained in the Act which were in place when the Privacy Shield decision was adopted. Moreover, the amendments did not expand the powers of the U.S. Intelligence Community to acquire foreign intelligence information by targeting non-U.S. persons under Section 702. Instead, the Amendments Reauthorization Act of 2017, which amends the Foreign Intelligence Surveillance Act of 1978, introduced some limited additional privacy safeguards, for instance in the area of transparency.

There have also been important developments concerning the Privacy and Civil Liberties Oversight Board which, at the time of the first annual review, had only one Board member left. The Commission had therefore recommended the swift appointment of the missing Board members. On 11 October 2018, the U.S. Senate confirmed the nominations of the Chairman of the Privacy and Civil Liberties Oversight Board as well as of two other members of the Board, thereby reinstalling the Board to its full quorum and allowing it to exercise all its functions. After the first annual review, the Commission had also recommended the public release of the Board's report on Presidential Policy Directive 28. The report was released on 16 October 2018⁵ and confirms that Presidential Policy Directive 28 is fully applied across the Intelligence Community. In particular, it confirms that further to the issuance of Presidential Policy Directive 28, the relevant elements of the Intelligence Community have adopted detailed rules on the implementation of that Directive and have changed their practices in order to bring them in line with the requirements of Presidential Policy Directive 28.

Finally, although the Commission had recommended the swift appointment of the Privacy Shield Ombudsperson, the position of Under-Secretary in the State Department to whom the office of the Ombudsperson has been assigned had not yet been filled by a permanent appointment at the time of the present report. In that regard, the Commission took note of the fact that at the second annual review, the U.S. government recognised the need for prompt progress on nominating a permanent Under Secretary and confirmed that this process is well underway.

At the time of the present report, the Ombudsperson mechanism had not yet received any requests. However, a complaint to the Ombudsperson had been submitted to the Croatian data protection authority and the relevant checks were ongoing.

The detailed findings concerning the functioning of all aspects of the Privacy Shield framework after its second year of operation are presented in the Commission Staff Working Document on the second annual review of the functioning of the EU-U.S. Privacy Shield (SWD(2018) 497) which accompanies the present report.

The information gathered in the context of the second annual review confirms the Commission's findings in the adequacy decision, both with regard to the "commercial aspects" of the framework and aspects relating to access to personal data transferred under the Privacy Shield by the U.S. authorities.

⁵ Report to the President on "the Implementation of Presidential Policy Directive 28: Signals Intelligence Activities", available at <https://www.pclob.gov/reports/report-PPD28/>

On the basis of these findings, the Commission concludes that the United States continues to ensure an adequate level of protection for personal data transferred under the Privacy Shield from the Union to organisations in the United States.

In particular, the steps taken to implement the Commission's recommendations following the first annual review have improved several aspects of the practical functioning of the framework in order to ensure that the level of protection of natural persons guaranteed by the adequacy decision is not undermined.

However, some of these steps have been taken only recently and the relevant processes are still ongoing. Any further developments concerning these processes therefore need to be closely monitored, in particular as they affect elements that are essential for the continuity of the adequacy finding. This concerns notably:

1. The effectiveness of the mechanisms introduced by the Department of Commerce in the second year of operation of the framework to proactively monitor compliance by certified companies with the Privacy Shield Principles, in particular compliance with substantive requirements and obligations.
2. The effectiveness of the tools introduced by the Department of Commerce since the first annual review to detect false claims of participation in the framework, with a particular focus on the search of false claims by companies that have never applied for certification.
3. The progress and outcome of ex-officio sweeps carried out by the Federal Trade Commission in the second year of operation of the Privacy Shield by means of administrative subpoenas to detect substantive violations of the Privacy Shield.
4. The development of additional guidance jointly by the Department of Commerce, Federal Trade Commission and EU data protection authorities on elements that require further clarification (e.g. HR data).
5. The appointment of a permanent Privacy Shield Ombudsperson.
6. The effectiveness of the handling and resolution of complaints by the Ombudsperson.

In particular, the Commission reiterates its call on the U.S. administration to confirm its political commitment to the Ombudsperson mechanism by appointing a permanent Privacy Shield Ombudsperson as a matter of priority. The Ombudsperson mechanism is an important element of the Privacy Shield framework and, while the acting Ombudsperson continues to carry out the relevant functions, the absence of a permanent appointee is highly unsatisfactory and should be remedied as soon as possible. The Commission expects the U.S. government to identify a nominee to fill the Ombudsperson position on a permanent basis by 28 February 2019 and inform the Commission about the nominated individual. If this does not take place

by that date, the Commission will then consider taking appropriate measures, in accordance with the General Data Protection Regulation⁶. The Commission also expects to receive precise and detailed information on all of the abovementioned aspects in order to be able to assess whether the steps taken are effective in practice.

Finally, the Commission will continue to closely follow the ongoing debate about the federal privacy legislation in the U.S. Given the significance of transatlantic data flows, the Commission encourages the U.S. to adopt a comprehensive system of privacy and data protection and to become a Party to the Council of Europe's Convention 108. It is through such comprehensive approach that convergence between our two systems can be achieved in the longer term, which would also strengthen the foundations on which the Privacy Shield framework has been developed.

⁶ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)