

Transatlantic data flows

Privacy Shield is a new framework for transatlantic exchanges of personal data, agreed between the European Commission and the US government. Although it has significant improvements compared to its predecessor, *Safe Harbour*, concerns remain to be addressed before its finalisation.

Background

According to the European Data Protection [Directive 95/46](#) (and to the [General Regulation](#) that will replace it from 2018), data transfers outside the EU/EEA are allowed only if third countries ensure an **adequate** level of protection. The Commission's 2000 [Decision](#) on the EU-US Safe Harbour (SH) regime, allowing data transfers for commercial purposes, was invalidated by the 2015 [Schrems ruling](#), in which the Court of Justice stated that the *adequate protection level* was to be understood as *essentially equivalent* to that guaranteed in the EU, in accordance with the Charter of Fundamental Rights. The Court also held that the Commission has not duly assessed the adequacy of the US legal order, and that it was not possible to verify whether interference with fundamental rights would be limited to that strictly necessary, in line with its [case law](#). The Commission's assessment should also verify whether there are effective safeguards complementing possible derogations for law enforcement purposes. The invalidation of Safe Harbour has created legal uncertainty, and the need for a new arrangement. In the meantime, more than 4 000 companies making data transfers [can refer](#) to other existing tools, such as the [Binding Corporate Rules](#) or [Standard Contractual Clauses](#).

Safe Harbour had previously been criticised as unsatisfactory for protection of citizens' rights, particularly after the Snowden [revelations](#) on mass surveillance programmes. The **European Parliament**, as well as its [specific inquiry](#), has repeatedly called for the suspension of SH, in particular in its [2014 resolution](#) on electronic mass surveillance and in its 2015 [follow-up](#) (after *Schrems*), in which it urged the Commission to take immediate action to ensure effective data protection in transfers to the US, a key issue in [EU-US cooperation](#) in the JHA field.

The Commission's texts

Negotiations between the Commission and US authorities, started in 2013, to [review SH](#), intensified after *Schrems*. A new political agreement was [announced](#) in February 2016, followed by the publication of a series of documents forming the new *Privacy Shield* (PS): a Commission [Communication](#) on restoring trust and a draft [Adequacy Decision](#), as well as seven [Annexes](#) containing different US authorities' *commitments*. The Commission assures that PS will guarantee effective data protection for Europeans, mainly by: strong obligations on companies; safeguards and transparency obligations on US government access to EU citizens' data; redress mechanisms (including an Ombudsman) and a monitoring system. While PS covers commercial data exchanges, it allows derogations for security purposes, thus other recent reforms in US surveillance legislation are also significant. Notably, the adoption of the [US Judicial Redress Act](#) in February (extending access to US courts to EU citizens) was a prerequisite for the [Umbrella](#) Agreement (on [data](#) transfers to the USA for law enforcement purposes) for which the EP needs to consent to its [conclusion](#).

Reactions to Privacy Shield

As shown in the [hearing](#) of the LIBE Committee and in the [media](#), reactions to PS have so far been lukewarm (if not critical), pointing to the fact that it would allow US intelligence to collect massive and indiscriminate data, at least in six specific cases as the [Obama Policy Directive 28/2014](#) indicates, and that new challenges could be brought to the Court. In its April 2016 [Opinion](#), the [Article 29 Working Party](#), while welcoming the efforts made, expressed concerns and practical recommendations to improve the Commission's adequacy decision, referring to 'its' [essential guarantees](#) for justifiable interferences with fundamental rights.

Next steps: the Commission's adequacy decision can only be adopted following approval of representatives of Member States ([Article 31 Committee](#)). The EP is expected to adopt a (non-binding) [resolution](#) in the May plenary.

