

# What To Watch As Privacy Shield Data Pact Scrutiny Heats Up

By Allison Grande

Law360 (August 22, 2018, 3:10 PM EDT) -- The Privacy Shield data transfer mechanism will soon face its latest and potentially most serious test as European Union and U.S. officials gear up to review the pact for a second time, and experts predict that its continued viability is likely to hinge on how much weight EU policymakers choose to give to competing input from their U.S. counterparts and EU lawmakers.

Google Inc., Facebook Inc., Microsoft Corp. and more than 3,500 other multinational organizations have signed up to adhere to Privacy Shield principles when transferring personal data between the U.S. and the EU since the pact was finalized in July 2016 to replace a safe harbor tool that was invalidated by Europe's highest court.

The deal has faced harsh scrutiny from its inception, with the privacy advocate who took down safe harbor challenging the new deal's adequacy in court almost immediately and European lawmakers and policymakers expressing repeated doubts over a host of commercial and national security concerns. Most recently, the European Parliament passed a nonbinding resolution on July 4 proposing that the **deal be scrapped** if the U.S. doesn't take steps by Sept. 1 to address shortcomings tied to the deal's purported inability to adequately protect EU citizens' data.

Although suspension of the pact on the date targeted by European lawmakers is highly unlikely, their call — along with viewpoints from policymakers and businesses in both the US and Europe — will almost certainly factor heavily into the second annual review of the pact's viability slated to be conducted this fall by the U.S. Department of Commerce and the European Commission, which gave the deal high marks in last year's review, experts say.

"It would be very surprising if [Privacy Shield] didn't pass the adequacy test again, so from that perspective we shouldn't expect any big surprises," said Eduardo Ustaran, co-director of the global privacy and cybersecurity practice at Hogan Lovells. "But I think it would be very difficult for the commission to just say that everything is perfect and that they don't have to bridge the gap between adequacy and the criticisms expressed by the European Parliament in this respect."

Here, experts flag three factors to watch as the fate of the vital data transfer mechanism again hangs in the balance.

## EU Lawmakers' Influence

The European Parliament's call last month for the suspension of Privacy Shield escalated what has been long-running criticism of the pact by both lawmakers and national data protection authorities, which have **also banded together** at various points in the past two years to express frustrations and doubts with the strength of the trans-Atlantic data transfer mechanism.

While neither the European Parliament nor the collective of regulators formerly known as the Article 29 Working Party and now called the European Data Protection Board has any power to actually suspend Privacy Shield — only the European Commission and the EU Court of Justice can take that step — policymakers' input is still likely to factor into the upcoming review, according to attorneys.

"The European Parliament's resolution does have some political weight," said Mintz Levin Cohn Ferris Glovsky and Popeo LLP member Susan Foster, who is based in London.

Foster explained that the commission is required to respond to Parliament within three months —

essentially by the beginning of October — with an explanation of what it is going to do, if anything, in response to Parliament's criticisms.

"That lines up broadly with the expected timing of the European Commission's annual review of Privacy Shield," Foster said.

The European Commission is no stranger to either criticisms over Privacy Shield's alleged inability to adequately protect EU citizens' personal data from commercial and national security abuses or navigating the review process in general.

The commission, along with its counterparts at the U.S. Department of Commerce, last fall conducted an inaugural review of the data transfer mechanism, which is required annually by the Privacy Shield deal. The review resulted in the European Commission **issuing a report** that upheld the adequacy and underlying principles of the deal, while making 10 recommendations in both the commercial and national security areas for improving how the Privacy Shield functioned.

Experts expect the second annual review to focus on how successful both companies and the U.S. government has been in implementing those suggestions, which included pushing the Trump administration to take steps to staff the Privacy and Civil Liberties Oversight Board and appoint an ombudsperson at the U.S. Department of State to handle national security complaints.

While these concerns had been flagged by EU lawmakers and regulators ahead of last year's review, their criticisms have only intensified during the past year, due in large part to recent developments such as the revelation that political research firm Cambridge Analytica harvested 87 million unwitting Facebook users' data and the passage of legislation in the U.S. that expanded law enforcement's access to data stored abroad by service providers.

Parliament **cited both factors** in issuing their recent nonbonding resolution, and experts say that it will be difficult for the European Commission to ignore these criticisms in their upcoming review.

"My view is the European Commission is expected to provide at least some constructive criticism of the Privacy Shield," said Ustaran, who is also based in London.

### **How Far U.S. Policymakers Are Willing to Go**

The main focus of both critics of the Privacy Shield as well as the recommendations issued by the commission following last year's review centered the pact's ability to adequately protect EU citizens from surveillance by U.S. intelligence agencies.

The U.S. government has caught the most heat for its alleged failure to adhere to the portions of the Privacy Shield that were meant to address surveillance concerns prompted by the release of documents by former National Security Agency contractor Edward Snowden that revealed the broad scope of the government's intelligence-gathering activities.

During the upcoming Privacy Shield review, "the commission is likely to press the U.S. to demonstrate that it is fully committed to Privacy Shield, including completing the pending appointments to the important Privacy and Civil Liberties Oversight Board, which has been operating with only one board member," Foster said.

As part of the Privacy Shield pact, U.S. officials had to provide written assurances that the law enforcement and intelligence authorities' access will be subject to clear limitations, safeguards and oversight mechanisms that will prevent indiscriminate mass surveillance of European citizens' data.

But those commitments have been called into question, particularly since the change in administrations at the beginning of 2017. Policymakers have been most concerned about the dormant nature of the PCLOB, which is charged with providing a check on government surveillance activities but hasn't been fully staffed in more than two years, and the absence of the promised appointment of an ombudsperson at the State Department to handle national security complaints.

Strides are being made on both fronts that are likely to factor into the annual review, experts noted.

Specifically, President Donald Trump has nominated a slate of candidates to fully restock the PCLOB, including Adam Klein, who was tapped last August to serve as chairman of the board, former Federal Trade Commission Chief Technologist Edward Felten and former Federal Communications Commission

Enforcement Bureau Chief Travis LeBlanc.

And BSA: The Software Alliance, the U.S. Chamber of Commerce, the Internet Association, the National Retail Federation and several other business groups on Monday sent a letter to the secretary of state urging the swift nomination of "a qualified candidate" to serve as the undersecretary for economic growth, energy, and the environment, who would also fill the ombudsperson role.

"We thought it was really important to have representation from a wide swath of industries in that letter to underscore the importance of the economic issues at stake for companies in all industries," Shaundra Watson, policy director at BSA, told Law360.

As the second annual review of Privacy Shield heats up, experts say they will be closely watching the tone that is struck between EU and U.S. policymakers, especially in light of recent political appointments and change in government policies when it comes to issues such as trade and national security.

"The Europeans are likely to be looking very closely to see how their recommendations from last year have been addressed, both on the commercial and national security sides," Watson said.

### **How Input From Business, Privacy Communities Will Be Weighed**

While most of the Privacy Shield backlash has been focused to date on the potential for intelligence authorities to broadly access EU citizens' data, policymakers have also expressed concerns with private companies' ability to adequately safeguard transferred data, especially in light of recent revelations such as Facebook's entanglement with Cambridge Analytica.

The European Commission, as it did last year, urged stakeholders to respond by Aug. 15 to a questionnaire about how companies have been adhering to the Privacy Shield principles and how the pact has been functioning in practice. The move prompted responses from several entities, including BSA and the Electronic Privacy Information Center.

"The role that we play is helping to facilitate a dialogue by providing information to the European Commission and others that want to understand how companies are implementing the Privacy Shield program," Watson said. "It's important for the government to understand the impact that Privacy Shield and cross-border data transfers have on these businesses and on the U.S. economy as well."

The feedback from BSA focused on the strides that companies have made in meeting the privacy protections required by the framework, including allowing individuals to exercise their rights to challenge data transfers and better control how their data is accessed and handled, according to Watson.

"Companies have developed more mature privacy compliance programs, and I think we have a good story to tell about how companies have enhanced transparency in their privacy practices and strengthened their internal compliance programs," Watson said.

EPIC, on the other hand, in its comments drew the commission's attention to a slew of recent privacy developments in the U.S. that the group felt should factor into the Privacy Shield review. Some of the highlights supported the enhancement of privacy protections — including the extension of Fourth Amendment protection to cellphone location data in the U.S. Supreme Court's decision in *Carpenter v. U.S.* and the confirmation of a full slate of FTC commissioners — while others, including vacancies at PCLOB, the absence of a Privacy Shield ombudsperson and the passage of the FTC's alleged failure to enforce a legal judgment against Facebook, built on long-running questions over the adequacy of the U.S. privacy regime.

"EPIC welcomes a close review of the EU-U.S. Privacy Shield by the European Commission," the group said at the end of its 21-page letter.

Watson noted that the Department of Commerce has taken "a number of steps" to enhance the certification process since the Privacy Shield's enactment and that it's expected that the process will continue to be tweaked as issues arise. But at the same time, Watson expressed hope that officials would take into account the business community's input when making any adjustments, especially given the huge blow to vital data transfer operations that a sweeping overhaul or suspension of Privacy Shield could have on the thousands of companies that have pledged to comply with the mechanism.

"A lot of work has been done both by companies to build compliance programs and by the government politically with respect to national security issues," Watson said. "The real challenge moving forward will be helping people get past some of the headlines and really appreciate what's going on here and how far

we've come, and communicating that progress to address the concerns raised by the European Parliament and other that have been critical of the Privacy Shield."

--Editing by Rebecca Flanagan and Katherine Rautenberg.