



Dear Commissioner Vera Jourová,
Dear Claude Moraes,

Re: Impact of new U.S. policies and regulatory frameworks on the privacy rights of users in Europe

We write today to encourage your office to suspend the Commission implementing decision on the adequacy of the protection provided by the EU-U.S. Privacy Shield (“Privacy Shield”). Recent developments in the United States cast new doubt on the government’s commitment to safeguard the privacy and data protection rights of Europeans.

Access Now defends and extends the digital rights of users at risk around the world. By combining innovative policy, user engagement, and direct technical support, we fight for open and secure communications for all. We have engaged extensively on the question of data transfers of Europeans’ personal data to the United States, first under the Safe Harbor arrangement, then in reaction to the Schrems ruling, and now under the Privacy Shield.

The Privacy Shield adequacy decision is built on the assumption that the U.S. legal system provides for an “essentially equivalent” level of protection to EU data subjects similar to the one provided by the EU Charter of Fundamental Rights and Directive 95/46 on data protection. In March 2016, Access Now led a coalition of human rights and consumer protection organizations in explaining how the Privacy Shield failed to meet this standard of protection based on U.S. law and practice, including the broad reach of Section 702 of the FISA Amendments Act. We indicated that U.S. law, including representations made by officials in annexes to the Privacy Shield, is nonetheless insufficient to protect Europeans’ data under the legal criteria set out by these laws and the Court of Justice of the European Union. These statements carry basically zero legal weight and undermine the principle of the rule of law. This all shows how, in its current form, Privacy Shield already violates the laws of the European Union.

Complicating matters, since the adoption of the Privacy Shield, significant changes have been introduced to U.S. law and policy that even further degrade the protections for Europeans’ data. These developments show a near-reckless disregard for the human rights of Europeans and others outside the United States and foreshadow further weakening of the already watered-down protections for Europeans’ data. These actions include

- The Privacy and Civil Liberties Oversight Board (PCLOB) has lost its chairman and three other members, meaning it is operating currently with only a single member. This comes as the board has been expected to issue its report on Executive Order 12333, which was meant to cover on the impact of U.S. surveillance generally on the rights of non-U.S. persons. The fact that the board is now well below quorum (and will be for the foreseeable future) means this report cannot be issued.

- Section 14 of a new Executive Order on “Enhancing Public Safety in the Interior of the United States” strictly restricts protections under the U.S. Privacy Act of 1974 to U.S. persons except as provided for by law, indicating a disregard for any ability for non-U.S. persons to access or correct data held on them by government agencies. This statement calls into question the continuation of protections provided by order of the Attorney General under the Judicial Redress Act. Also at risk is the continued existence of Presidential Policy Directive (“PPD”) 28, which took the unprecedented but limited step of recognizing privacy “interests” of all people. Because PPD 28 has never been written into law it could be vacated unilaterally by the current administration.
- The new U.S. Director of the Central Intelligence Agency, Mike Pompeo, the nominee to be the new U.S. Attorney General, Jeff Sessions, and the nominee for Director of National Intelligence, Dan Coats, have each independently criticized even limited efforts to reform U.S. surveillance laws, like the USA FREEDOM Act of 2015, and called instead for even broader authorities. This is troubling because Section 702 of FISA Amendment Act, which is targeted toward non-U.S. persons and is the basis for the authorization of mass surveillance programs such as PRISM and UPSTREAM, is set to sunset at the end of 2017. Current efforts are underway to reform this law to bring it closer in line with human rights standards, but instead these high-ranking individuals have evidenced a desire to not only cleanly re-authorize the law but also to make it permanent (meaning there will be no future sunset to leverage for reform) or expand its reach.
- The expansion of Executive Order 12333 at the end of 2015 to allow the distribution of “raw” surveillance data collected by the National Security Agency with 16 other government agencies. This will increase the amount of information about EU data subjects accessible to officials in other agencies. Foreign intelligence collected under this executive order does not require any congressional or judicial authorization and there is little transparency about how it is carried out.

We strongly agree with your statement: “when Europeans’ personal data are transferred abroad, the protection travels with it,” and therefore we encourage the European Commission to suspend the arrangement absent significant reform. We welcome the Commission's own assessment that in case an adequate level of data protection by the Privacy Shield is no longer guaranteed, the European Commission will take the appropriate measures, including the suspension of its adequacy decision.

We urge the Commission to take into consideration the detailed developments in the U.S. legal framework that show the weakness of written assurances. The significance of these measures in the U.S. require urgent action from EU institutions that cannot wait until the upcoming annual review of the adequacy decision.

If you would like more information, we are available and would welcome the opportunity to discuss further these negative developments in U.S. law.

Sincerely,

Fanny Hidvégi, European Policy Manager
Amie Stepanovich, U.S. Policy Manager