

VĚRA JOUROVÁ
Member of the European Commission

Brussels,
Ares(2016)

Dear Ms O'Reilly,

I refer to your letter of 22 February 2016 on the use of the term 'ombudsperson' for the new complaint-handling office created under the recently concluded EU-U.S. Privacy Shield.

Since we received your letter, the full documentation of this arrangement has been made available on our website.¹ I trust that you have already had the opportunity to examine the texts, in particular Annex III of the Commission's draft adequacy decision containing the details of the newly established "EU-U.S. Privacy Shield Ombudsperson Mechanism Regarding Signals Intelligence." You will see that this mechanism contains a number of important features that we believe should address the concerns you expressed in your letter.

In particular, I would like to highlight the following salient elements of this mechanism:

Firstly, the U.S. government will establish a new complaint-handling position within the Department of State, that will be occupied by a high-ranking official, Under Secretary of State Catherine Novelli. The new office, which the US government has termed "Ombudsperson", shall ensure that individual enquiries and complaints relating to the potential access by U.S. intelligence authorities to data transmitted from the EU to the United States will be properly investigated and receive a timely response. This constitutes major progress from the current situation where U.S. rules (Presidential Policy Directive 28) only foresees a contact person for foreign governments that wish to raise concerns regarding U.S. signals intelligence activities. At the same time, individuals will be able to address their complaint, in their own language, to the Member States bodies competent for the oversight of national security services and eventually to a centralised EU individual complaint handling body. These bodies will then interface, on behalf of the individual, with the Ombudsperson, thereby easing the burden on individuals in the exercise of their fundamental rights.

Ms Emily O'Reilly
European Ombudsman

¹ See: http://europa.eu/rapid/press-release_IP-16-433_en.htm and http://europa.eu/rapid/press-release_MEMO-16-434_en.htm

Secondly, there is a clear commitment from the U.S. government that the Ombudsperson will have to come back to the complainant with a timely response, confirming that the complaint has been thoroughly investigated and that either U.S. law has been complied with or, in cases of non-compliance, that this situation has been remedied. This is a very important element, given that such confirmation necessarily presupposes that the Ombudsperson will have to receive relevant and sufficient information allowing her to make an own assessment, both as regards the investigation carried out and the compliance of the respective national intelligence activities with U.S. law.

Third, the Ombudsperson will be independent from the U.S. intelligence community. While she will act under the authority of the Secretary of State, the latter is bound by the relevant commitments made to the Commission, including as to the timely response to be given to EU individuals. Moreover, the Ombudsperson should not be viewed in isolation: in performing her responsibilities to ensure an appropriate response to and resolution of complaints, the Ombudsperson will closely coordinate with a number of oversight bodies that are themselves independent from the intelligence agencies whose conduct will be investigated. This concerns, in particular, the statutorily independent Inspectors-General that have been created for the various elements of the Intelligence Community and that have broad powers to conduct investigations, audits and reviews of intelligence programmes; the various Civil Liberties and Privacy Officers in those authorities; and the Privacy and Civil Liberties Oversight Board (PCLOB), an independent agency within the executive branch charged with protecting privacy and civil liberties in the field of counterterrorism policies. In this regard, and with a view to democratic accountability, it is important to know that these bodies report on their findings directly to Congress, thereby allowing the latter to exercise its oversight function. Together with them, the Ombudsperson will be able to guarantee independent oversight of the U.S. intelligence community.

Fourth, the European Commission will continuously monitor the overall functioning of the Privacy Shield framework to ensure it is complied with and still meets the adequacy requirements set out by the Court of Justice. Together with the U.S. authorities, it will carry out an Annual Joint Review of the implementation of the Privacy Shield arrangement which will also involve the participation of the Ombudsperson as necessary. The Commission will use this opportunity to check whether the Ombudsperson mechanism operates properly and in particular delivers timely responses as required. Should this not be the case, this could trigger the suspension of the adequacy decision, as is made clear in our draft decision.

Finally, I would like to draw your attention to the fact that the new Ombudsperson function will be a comprehensive mechanism covering complaints from any EU individual for all personal data transferred to the U.S. irrespective of the means of transfer (whether transferred under the Privacy Shield, standard contractual clauses or binding corporate rules, or any of the derogations permitted under the present or future data protection acquis). In other words, no distinction is made either as regards the individual who can make a complaint or the method of transfer of his or her personal data.

The Commission appreciates that this particular mechanism may differ in a number of aspects from an Ombudsman as defined by the International Ombudsman Institute. This is explained by the specific purposes of the mechanism, and the particularly sensitive context of national security. This notwithstanding, the Commission believes that the mechanism will play an important role in safeguarding the rights of EU individuals where their personal data have been transferred to the United States.

I trust that these explanations are helpful to you.

Yours sincerely,

Věra Jourová