



The GDPR and Privacy Shield

The GDPR

The European Union's (EU) General Data Protection Regulation (GDPR) went into effect on May 25, 2018. The GDPR significantly enhanced the right of an EU and European Economic Area (EEA) individual to control their own personal data by imposing strict data protection obligations on businesses which must obtain consent for the processing of personal data for consumers and abide by its requirements regarding how their data is collected, used and transferred outside of the EU and EEA areas. The GDPR aims primarily to give control to citizens and residents over their personal data and to simplify the regulatory environment for international business by unifying the regulation within the EU. Businesses that collect or use EU or EEA data from individuals must consider whether they are in compliance with its data protection requirements as if an organization is found to be in breach of the GDPR, it could be fined up to 20 million euros or 4 percent of its annual global revenue, whichever is higher.

The EU-U.S. and Swiss-U.S. Privacy Shield Framework

The Privacy Shield program allows the participating U.S. organizations to be largely compliant with the GDPR. In 2016, the U.S. Commerce Department's International Trade Administration launched the EU-U.S. Privacy Shield Framework; the Swiss-U.S. Privacy Shield program went into effect in 2017. The EU-U.S. and Swiss-U.S. Privacy Shield Framework was designed to provide a compliance mechanism for data protection requirements involving personal data transferred from the European Union and Switzerland to the United States.

Personal data may only be transferred outside of the EU and Switzerland to countries that have been formally recognized by the EU and the Swiss as ensuring "adequate" data protection. The Privacy Shield program satisfies that criteria for the U.S. companies that register for this program and abide by its principles. In order to ensure compliance with the Privacy Shield programs, U.S. organizations must in addition to the self-certification where they agree to the Privacy Shield Principles, select and provide access to a readily available independent recourse mechanism (IRM), so that each individual's complaints and disputes (e.g., complaints and disputes of residents of the EU and Switzerland) can be investigated and expeditiously resolved at no cost to the individual. The International Centre for Dispute Resolution (ICDR) the international division of the American Arbitration Association (AAA), has been designated as the IRM for over 400 U.S. organizations.

If the individual's complaints or disputes are not resolved at the IRM stage, EU or Swiss nationals may invoke Annex I binding arbitration to determine whether a Privacy Shield organization has violated its obligations under the Privacy Shield Principles as to that individual and whether any such violation remains fully or partially unremedied ("residual claims"). Organizations voluntarily self-certify to the Privacy Shield Principles and, upon certification, the commitments become legally enforceable under U.S. law. Organizations that self-certify to the Privacy Shield Framework are required to arbitrate claims pursuant to the Recourse, Enforcement and Liability Principle.

In 2017, the ICDR was designated by the U.S. Department of Commerce to exclusively administer the "Annex I Binding Arbitration Program." U.S. Privacy Shield organizations are required to participate in

these Annex I arbitrations and approximately 3,000 companies are participating in the privacy shield program. The ICDR, in consultation with the U.S. Department of Commerce and its EU and Swiss counterparts, developed an expedited set of international arbitration rules and arbitrator code of conduct for the program. The arbitral tribunal pursuant to these rules has the authority to impose in its Award individual-specific, non-monetary equitable relief (such as access, correction, deletion, or return of the individual's data in question) necessary to remedy the violation of the Principles only with respect to the individual. The arbitrators were selected by the EU and Swiss jointly with the Department of Commerce. For further information on the ICDR's Privacy Shield services, visit <https://www.icdr.org/privacysshield>, or contact Luis Martinez at Martinezl@adr.org.

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