



2016/3018(RSP)

7.12.2016

DRAFT MOTION FOR A RESOLUTION

to wind up the debate on the statement by the Commission

pursuant to Rule 123(2) of the Rules of Procedure

on the adequacy of the protection afforded by the EU-U.S. Privacy Shield
(2016/3018(RSP))

Claude Moraes

on behalf of the Committee on Civil Liberties, Justice and Home Affairs

**European Parliament resolution on the adequacy of the protection afforded by the EU-U.S. Privacy Shield
(2016/3018(RSP))**

The European Parliament,

- having regard to the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU) and Articles 6, 7, 8, 11, 16, 47 and 52 of the Charter of Fundamental Rights of the European Union,
- having regard to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data¹ (hereinafter ‘the Data Protection Directive’)¹,
- having regard to Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters²,
- having regard to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)³, and to Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA⁴,
- having regard to the judgment of the European Court of Justice of 6 October 2015 in Case C-362/14 *Maximillian Schrems v Data Protection Commissioner*⁵,
- having regard to the Commission communication to the European Parliament and the Council of 6 November 2015 on the transfer of personal data from the EU to the United States of America under Directive 95/46/EC following the judgment by the Court of Justice in Case C-362/14 (Schrems)⁶,
- having regard to the Commission Implementing Decision (EU)2016/1250 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of

¹ OJ L 281, 23.11.1995, p. 31.

² OJ L 350, 30.12.2008, p. 60.

³ OJ L 119, 4.5.2016, p. 1.

⁴ OJ L 119, 4.5.2016, p. 89.

⁵ EU:C:2015:650.

⁶ COM(2015)0566; 6.11.2015.

- the protection provided by the EU-U.S. Privacy Shield¹,
- having regard to the Opinion of the European Data Protection Supervisor (EDPS) 4/2016 on the EU-U.S. Privacy Shield draft adequacy decision²,
 - having regard to the Opinion of the Article 29 Working Party of 13 April 2016 on the EU-U.S. Privacy Shield³ and its Statement of 26 July 2016⁴,
 - having regard to its Resolution of 26 May 2016 on Transatlantic data flows⁵,
 - having regard to Rule 123(2) of its Rules of Procedure,
- A. whereas the European Court of Justice in its judgment of 6 October 2015 in Case C-362/14 Maximillian Schrems v. Data Protection Commissioner invalidated the Safe Harbour decision and clarified that an adequate level of protection in a third country must be understood to be ‘essentially equivalent’ to that guaranteed within the European Union by virtue of Directive 95/46 read in the light of the Charter, prompting the need to conclude negotiations on a new arrangement so as to ensure legal certainty on how personal data should be transferred from the EU to the U.S.;
- B. whereas, when examining the level of protection afforded by a third country, the Commission is obliged to assess the content of the rules applicable in that country deriving from its domestic law or its international commitments, as well as the practice designed to ensure compliance with those rules, since it must, under Article 25(2) of Directive 95/46/EC, take account of all the circumstances surrounding a transfer of personal data to a third country; whereas this assessment must not only refer to legislation and practices relating to the protection of personal data for commercial and private purposes, but must also cover all aspects of the framework applicable to that country or sector, in particular, but not only, law enforcement, national security and respect for fundamental rights;
- C. whereas transfers of personal data between commercial organisations of the EU and the U.S. are an important element for the transatlantic relationships, whereas these transfers should be carried out in full respect of the right to the protection of personal data and the right to privacy; whereas one of the fundamental objectives of the EU is the protection of fundamental rights, as enshrined in the Charter;
- D. whereas in its Opinion 4/2016 the EDPS raised several concerns on the draft Privacy Shield;
- E. whereas in its Opinion 01/2016 the Article 29 Working Party on the draft EU-U.S. Privacy Shield adequacy implementing Commission Decision welcomed the significant improvements brought about by the Privacy Shield compared with the Safe Harbour

¹ OJ L 207, 1.8.2016, p.1.

² OJ C 257, 15.7.2016, p.8.

³ http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2016/wp238_en.pdf

⁴ http://ec.europa.eu/justice/data-protection/article-29/press-material/press-release/art29_press_material/2016/20160726_wp29_wp_statement_eu_us_privacy_shield_en.pdf

⁵ Text adopted, P8_TA-PROV(2016)0233.

decision whilst also raising strong concerns about both the commercial aspects and access by public authorities to data transferred under the Privacy Shield;

- F. whereas on 12 July 2016, after further discussions with the U.S. administration, the Commission adopted its Implementing Decision (EU) 2016/1250, declaring the adequate level of protection for personal data transferred from the Union to organisations in the United States under the EU-U.S. Privacy Shield;
- G. whereas the EU-U.S. Privacy Shield is accompanied by several letters and unilateral statements from the U.S. administration explaining *i.a.* the data protection principles, the functioning of oversight, enforcement and redress and the protections and safeguards under which security agencies can access and process personal data;
- H. whereas in its statement of 26 July 2016, the Article 29 Working Party *welcomes the improvements brought by the EU-U.S. Privacy Shield mechanism compared to the Safe Harbour and commended the Commission and the U.S. authorities for having taken into consideration its concerns*; whereas nevertheless the Article 29 Working Party indicates that a number of *its concerns remain, regarding both the commercial aspects and the access by U.S. public authorities to data transferred from the E.U.*, such as for instance the lack of specific rules on automated decisions and of a general right to object, the need of stricter guarantees on the independence and powers of the Ombudsperson mechanism, or the lack of concrete assurances of not conducting mass and indiscriminate collection of personal data (bulk collection);
 - 1. Welcomes the efforts made by both the Commission and the U.S. administration, to address the concerns made by the European Court of Justice, the Member States, the European Parliament, data protection authorities and stakeholders, so as to enable the Commission to adopt the implementing decision declaring the adequacy of the EU-U.S. Privacy Shield;
 - 2. Acknowledges that the EU-U.S. Privacy Shield contains significant improvements compared to the former EU-U.S. Safe Harbour and that U.S. organisations self-certifying adherence to the EU-U.S. Privacy Shield will have to comply with higher data protection standards than under Safe Harbour;
 - 3. Takes note that on 6 December 2016, 1170 U.S. organisations have joined the EU-U.S. Privacy Shield;
 - 4. Acknowledges that the EU-U.S. Privacy Shield facilitates data transfers from SMEs and businesses in the Union to the U.S.;
 - 5. Notes that, in line with the ruling of the Court in the *Schrems* case, the powers of the European data protection authorities remain unaffected by the adequacy decision and hence they can exercise their powers, including the suspension or the ban of data transfers to an organisation registered in the EU-U.S. Privacy Shield;
 - 6. Acknowledges the clear commitment of the U.S. Department of Commerce to closely monitor the compliance by U.S. organisations of the EU-U.S. Privacy Shield principles and their intention to take enforcement actions against entities failing to comply;

7. Considers that, despite the clarifications made by the U.S. administration by means of the letters attached to the Privacy Shield arrangement, important concerns remain as regards commercial aspects, national security and law enforcement;
8. Notes, amongst, others the lack of specific rules on automated decision-making, on a general right to object, and the lack of clear principles on how the Privacy Shield Principles apply to processors (agents);
9. Stresses that, as regards national security and surveillance, notwithstanding the clarifications brought by the Director of National Intelligence Office in the letters attached to the Privacy Shield framework, “bulk surveillance”, despite the different terminology used by the U.S. authorities, remains possible;
10. Deplores that, neither the Privacy Shield Principles nor the letters of the U.S. administration providing clarifications and assurances demonstrate the existence of effective judicial redress rights for individuals in the EU whose personal data are transferred to an U.S. organisation under the Privacy Shield Principles and further accessed and processed by U.S. public authorities for law enforcement and public interest purposes, as required by article 47 of the Charter;
11. Recalls its Resolution of 26 May 2016 that the Ombudsperson mechanism set up by the U.S. Department of State is not sufficiently independent and is not vested with sufficient effective powers to carry on its duties and provide effective redress to EU individuals;
12. Regrets that the procedure of adoption of an adequacy decision does not provide for a formal consultation of relevant stakeholders such as companies, and in particular SMEs representation organisations;
13. Regrets that the Commission followed the procedure for adoption of the Commission implementing decision in a practical manner that de facto has not enabled the Parliament to exercise its right of scrutiny on the draft implementing act in an effective manner;
14. Calls on the Commission to take all the necessary measures to ensure that the Privacy Shield will fully comply with Regulation (EU) 2016/679, to be applied as from 16 May 2018;
15. Calls on the Commission to conduct, during the first joint annual review, a thorough and in-depth examination of all the shortcomings and weaknesses referred to in this resolution, in its Resolution of 26 May 2016 on Transatlantic data flows¹, and those identified by the Article 29 Working Party, the EDPS and the stakeholders, and to demonstrate how they have been addressed so as to ensure compliance with the Charter and Union law, and to evaluate meticulously if the mechanisms and safeguards indicated in the assurances and clarifications by the U.S. administration are effective and feasible;
16. Calls on the Commission to ensure that for the conducting of the joint annual review, all

¹ Text adopted, P8_TA-PROV(2016)0233.

the members of the team shall have full and unrestricted access to all documents and premises necessary for the performance of their task and that their independence in the performance of their tasks is ensured;

17. Calls on the Union Data Protection Authorities to monitor the functioning of the EU-U.S. Privacy Shield and to exercise their powers, including the suspension or definitive ban of personal data transfers to an organisation in the EU-U.S. Privacy Shield if they consider that the fundamental rights to privacy and the protection of personal data of the Union's data subjects are not ensured;
18. Stresses that the European Parliament should have full access to any relevant document related to the joint annual review;
19. Instructs its President to forward this resolution to the Commission, the Council, the governments and national parliaments of the Member States and the U.S. Government and Congress.