

## FOLLOW-UP OF THE EDPS OPINION OF 30 MAY 2016 ON THE DRAFT ADEQUACY DECISION ON THE EU-U.S. PRIVACY SHIELD

### Basis for a LTT/ internal memo

*Last update: 20/07/2016*

In his Opinion of 30 May 2016 on the Draft Adequacy Decision on the EU-U.S. Privacy Shield, the EDPS welcomed the efforts showed by the parties to find a general solution for transfers of personal data from the EU to the U.S. for commercial purposes. However, he recommended robust improvements on the draft in order to achieve a solid framework, capable of being stable in the long term. These included, as a strict minimum, the following proposals:

1. Main EDPS recommendations	Final adequacy decision
1.1. Including all essential EU data protection principles	Partly addressed: a data retention principle has been added, but there are no safeguards regarding decisions taken on the basis of automated processing
1.2. Limiting the derogations in the commercial part for access by US authorities	Not clearly addressed (see below)
1.3. Improving redress and oversight mechanisms	Partly addressed (see below)
2. Commercial part	
2.1 adding a prohibition of keeping personal data in a form which permits identification of data subjects for longer than necessary for the purposes for which the data were collected or further processed.	Fully addressed: a new paragraph has been added to explicit the data retention principle.
2.2 adding safeguards regarding automated processing;	Not addressed: only a reference to the possibility to discuss this under the joint review
2.3 fully integrating the data minimisation principle in Annex II.II.5;	Not addressed
2.4 clarifying the purpose limitation principle and streamlining the concepts used around this notion;	Can be considered as addressed: recital 22 states that the choice principle does not supersede the express prohibition of incompatible processing. However, terms "incompatible" and "materially different" are still used
2.5 improving the provisions on onward transfers, the right to access and the right to object in accordance with the WP29 opinion;	Onward transfers: improvements. Almost fully addressed. Right to access: satisfactory addressed. Right to object: not addressed.
2.6 limiting the exceptions in the commercial part, including as regards journalistic materials, and clearly clarify the scope of draft decision;	Not addressed
2.7 specifying the purposes for which the derogations in Annex II.I.5 are allowed and the requirement of a legal basis.	Not addressed
3. Redress and oversight mechanisms in the	

	<p>data where their request complies with the FISA or where the request is made by the FBI based on a so-called National Security Letter. NB: no reference is made here to <i>access</i> by U.S. authorities but they speak of <i>seek</i> personal data. (minor wording changes made)</p> <p>"To be transferred" is found in Recital 80 and onward. "(..) these authorities equally restrict interference by public authorities to target collection and access." (minor wording changes made)</p> <p>Recital 83: "As regards <i>access</i> to collected data and <i>data security</i>, PPD-28 requires that access "shall be limited to authorized personnel with a need to know the information to perform their mission" and that personal information "shall be processed and stored under conditions that provide adequate protection and prevent access by unauthorized persons, consistent with the applicable safeguards for sensitive information". Intelligence personnel receive appropriate and adequate training in the principles set forth in PPD-28." (no changes made)</p> <p>Recital 90 is new and sums up why the Commission believes this aspect to be in conformity with <i>Schrems</i> and Articles 7 and 8 of the Charter. The Commission speaks of limits of the access of the public authorities to the data and says there will not be unlimited access.</p>
4.4. We recommend nuancing recital 55 of the draft decision, which states that limitations on the access and use of personal data transferred under the EU-U.S. Privacy Shield for national security purposes are "clear".	New Recital 67 - "The Commission's analysis shows that U.S. law contains <del>clear</del> a number of limitations on the access and use of personal data transferred under the EU-U.S. Privacy Shield for national security purposes as well as oversight and redress mechanisms that provide sufficient safeguards for those data to be effectively protected against unlawful interference and the risk of abuse. (..)"
<b>5. Redress and oversight mechanisms concerning access by US authorities</b>	
5.1. develop role of the Ombudsperson could be further developed, to ensure he/she is able to act independently of the executive	Not addressed. Only independence from intelligence agencies is confirmed, but not independence from the executive branch as a whole.
5.2. Obtain further commitments from US authorities ensuring cooperation between the different oversight layers.	Addressed.
5.3. allow EU participation in the oversight	Partly addressed. Complaints channelled through