



Plenary sitting

A8-0354/2016

28.11.2016

RECOMMENDATION

on the draft Council decision on the conclusion, on behalf of the European Union, of the Agreement between the United States of America and the European Union on the protection of personal information relating to the prevention, investigation, detection, and prosecution of criminal offenses (08523/2016 – C8-0329/2016 – 2016/0126(NLE))

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Jan Philipp Albrecht

Symbols for procedures

- * Consultation procedure
- *** Consent procedure
- ***I Ordinary legislative procedure (first reading)
- ***II Ordinary legislative procedure (second reading)
- ***III Ordinary legislative procedure (third reading)

(The type of procedure depends on the legal basis proposed by the draft act.)

CONTENTS

	Page
DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION.....	5
SHORT JUSTIFICATION.....	6
OPINION OF THE COMMITTEE ON LEGAL AFFAIRS	10
ANNEX: LETTER FROM THE COMMITTEE ON FOREIGN AFFAIRS	14
PROCEDURE – COMMITTEE RESPONSIBLE.....	16
FINAL VOTE BY ROLL CALL IN COMMITTEE RESPONSIBLE.....	17

DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

**on the draft Council decision on the conclusion, on behalf of the European Union, of the Agreement between the United States of America and the European Union on the protection of personal information relating to the prevention, investigation, detection, and prosecution of criminal offenses
(08523/2016 – C8-0329/2016 – 2016/0126(NLE))**

(Consent)

The European Parliament,

- having regard to the draft Council decision (08523/2016),
 - having regard to the agreement between the United States of America and the European Union on the protection of personal information relating to the prevention, investigation, detection, and prosecution of criminal offenses (08557/2016),
 - having regard to the request for consent submitted by the Council in accordance with Article 16 and Article 218(6), second subparagraph, point (a), of the Treaty on the Functioning of the European Union (C8-0329/2016),
 - having regard to the letter from the Committee on Foreign Affairs,
 - having regard to Rule 99(1), first and third subparagraphs, Rule 99(2), and Rule 108(7) of its Rules of Procedure,
 - having regard to the recommendation of the Committee on Civil Liberties, Justice and Home Affairs and the opinion of the Committee on Legal Affairs (A8-0354/2016),
1. Gives its consent to conclusion of the agreement;
 2. Instructs its President to forward its position to the Council, the Commission and the governments and parliaments of the Member States and of the United States of America.

SHORT JUSTIFICATION

1. Following calls by the European Parliament, on 3 December 2010, the Council adopted a decision authorising the Commission to open negotiations on an Agreement between the European Union and the United States of America on the protection of personal data when transferred and processed for the purpose of preventing investigating, detecting or prosecuting criminal offences, including terrorism, in the framework of police cooperation and judicial cooperation in criminal matters (thereinafter "Umbrella Agreement"). On 28 March 2011, the Commission opened negotiations with the U.S. Department of Justice. Over the course of the negotiations, the Parliament was regularly informed pursuant to Article 218(10) TFEU, and your Rapporteur issued a series of working documents to facilitate discussions in the LIBE Committee.
2. The text of the agreement was initialled on 8 September 2015. Following the adoption by the U.S. Congress of the Judicial Redress Act on 24 February 2016, on 18 July 2016, the Council decided to request the European Parliament to give its consent to the conclusion of the Agreement, pursuant to Article 218(6)(a)(v) TFEU, and submitted the request to the Parliament on 12 September 2016.
3. The purpose of the Agreement is to ensure a high level of protection of the fundamental rights and freedoms of individuals, in particular the right to privacy with the respect to the processing of personal data when personal data are transferred to competent authorities of the European Union and its Member States and the US for these purposes.

Scope of the agreement

4. Your rapporteur finds it important to point out that the "Umbrella Agreement" does not provide for a legal basis for transfers of personal data. This legal basis for data transfers is to be found in existing EU-US agreements or bilateral agreements between the Member States and the US or national laws providing for personal data exchanges (e.g. international agreements on PNR, TFTP or MLA). The Umbrella Agreement supplements the protections and safeguards of these agreements, and enhances and harmonises the data subject rights. As the Parliament's Legal Service in its opinion of 14 January 2015 however raised some issues that could need further clarification, your Rapporteur refers to the declaration by the Commission¹ made in the context of the Parliament's consent procedure. One of the clarifications concerns the last part-sentence of Article 5(3) ("no further authorisation [for data transfers] shall be required"). This clause does not provide for a de-facto adequacy decision, but merely states that no further legal basis than the respective agreement referred to in Article 3(1) shall be necessary, which is already the case. The Commission also clarified that the presumption of compliance with applicable international transfer rules is not an automatic, but a qualified one, which is refutable and does not affect the powers of the data protection authorities.

5. Pursuant to Article 3, the Agreement will apply to transfers of personal data between law enforcement authorities of the EU or the Member States and the U.S. law enforcement authorities for the purposes of prevention, detection, investigation and prosecution of criminal offences, including terrorism. It covers all data transfers between these authorities, regardless

¹ [reference to be added once the Commission declaration is available]

of the nationality or place of residence of the data subject concerned. It also covers personal data that are transferred by private entities in the territory of one party to competent authorities of the other party for these purposes, based on an international agreement.

6. The Agreement does not cover data exchanges between national security authorities, as those are outside of Union competence. Neither does it cover transatlantic transfers between private entities (e.g. under contractual clauses or the EU-U.S. Privacy Shield) nor the subsequent access in the U.S. to these personal data by a U.S. law enforcement authority or national security authority.

7. The Agreement also provides that each Party will implement its provisions without any arbitrary or unjustifiable discrimination between its own nationals and those of the other contracting Party. According to the Commission, this provision strengthens other provisions of the Agreement, such as those providing for safeguards of data subjects (i.e. access, rectification and administrative redress) as it ensures that European citizens will benefit, in principle, from equal treatment with U.S. with regard to the practical implementation of the agreement. (Article 4).

Major elements of the Umbrella Agreement

8. The Agreement contains provisions setting out the basic data protection principles, namely:

9. Purpose and use limitations of personal data transferred (Article 6). Personal information shall be processed for specified purposes authorized by the legal basis for the transfer. Further processing by other or the same law enforcement, regulatory or administrative authorities is allowed provided it is not incompatible with the initial purpose of the transfer. The transferring authority may impose additional conditions to the transfer and the subsequent processing to the extent that the applicable legal framework allows for it.

10. Data quality and integrity (Article 8) and retention periods (Article 12). Personal information shall be maintained with such accuracy, relevance, timeliness and completeness as is necessary and appropriate for the lawful processing. Moreover, the processing shall be subject to specific retention periods to ensure that personal data is not processed longer than necessary. The retention period is to be found in the legal basis governing a processing. The Parties shall publish or make available such periods.

11. Rules on onward transfers, both to domestic authorities of the contracting party (e.g. the French police sharing with the German police information received from the U.S. FBI) and to third country authorities or international organisation not bound by the Agreement (Article 7); In the latter case, the prior consent of the law enforcement authority originally transferring the data is required.

12. As regards the processing of personal data other than in relation to specific cases, investigations or prosecutions (bulk), the Umbrella Agreement provides that any specific agreement allowing the “bulk transfer” of personal data will have to further specify the standards and conditions under which this processing in bulk may take place, in particular, as regards the processing of sensitive data, onward transfers and data retention periods. Such bulk data transfer, in particular those of sensitive data, might raise questions of compatibility with EU data protection framework as interpreted by the Court of Justice. However, as the Umbrella Agreement does not constitute a legal basis for such bulk transfers, this issue has to

be clarified in the context of the respective transfer agreements. Accordingly, the Parliament in 2014 decided to request an opinion from the CJEU on the compatibility of the EU-Canada PNR agreement with the Charter. The case is still pending.

13. The Agreement also sets out the rights of individuals (information, access, rectification, erasure) and rights for administrative and judicial redress. All these rights are exercised pursuant to the law of the country where they are invoked (including the derogations).

14. One of the main novelties of the Umbrella Agreement is that it will allow the citizens of each Party to be able to seek judicial redress for the i) denial of access, ii) denial of rectification or iii) unlawful disclosure by the authorities of the other Party. These rights are exercised pursuant to the law of the State where they are invoked. In order to overcome the lack of rights for non-US citizens, the US Congress adopted the Judicial Redress Act on 24 February 2016. This Act will extend to the citizens of “covered countries” (e.g. the Member States) some judicial redress grounds provided under the 1974 US Privacy Act. However, these rights are not conferred to non EU-citizens whose data have been transferred to the US. This differential treatment between EU nationals and non-EU nationals established by the US Judicial Redress Act has raised questions. Nonetheless, the Commission clarified that other judicial redress avenues in the US are available to all EU data subjects concerned by the transfer for law enforcement purposes, regardless of their nationality or place of residence.

15. Regarding the exemptions possible under Section 552a(j)(2) of the US Privacy Act, the data subject rights conferred by the Umbrella Agreement are formulated in an unconditional manner and accordingly, the US authorities may not invoke exemptions of the US Privacy Act for law enforcement databases to deny an effective judicial redress to EU citizens as it is currently the case for law enforcement databases such as for PNR data or the TFTP. This is also the legal understanding of the Commission in its declaration.

16. The Umbrella Agreement provides that the Parties shall have in place one or more public oversight authorities that exercise independent oversight functions and powers, including review, investigation and intervention, where appropriate on their own initiative; have the power to accept and act upon complaints made by individuals relating to the measures implementing the Umbrella Agreement; have the power to refer violations of law related to the Umbrella Agreement for prosecution or disciplinary action when appropriate. Union data protection framework foresees external independent authorities from the supervised entity in order to ensure that they remain independent from any direct or indirect external influence. The Umbrella Agreement requires that the oversight authorities must exercise independent oversight functions and powers.

17. Last, the Umbrella Agreement shall be subject to periodic joint reviews, the first one will take place no later than three years from the entry into force of the Umbrella Agreement and thereafter on a regular basis, and the composition of the respective delegations shall include representatives of both data protection authorities and law enforcement authorities. The findings of the joint reviews will be made public.

18. Your Rapporteur concludes that the agreement constitutes major progress for the protection of personal data when transferred between the EU and the US in the context of law enforcement activities. It may not be the best agreement that can be envisaged, but it is certainly the best one possible in the current situation. Moreover, the agreement does not limit or infringe any data subject rights, as it constitutes no legal basis for any data transfers. It

merely adds new rights and protections to the existing frameworks for data transfers in the context of EU US law enforcement cooperation.

19. Therefore, your Rapporteur recommends that the Members of Parliament's Committee on Civil Liberties, Justice and Home Affairs support this report and that the European Parliament gives its consent.

9.11.2016

OPINION OF THE COMMITTEE ON LEGAL AFFAIRS

for the Committee on Civil Liberties, Justice and Home Affairs

on the draft Council decision on the conclusion, on behalf of the European Union, of the Agreement between the United States of America and the European Union on the protection of personal information relating to the prevention, investigation, detection, and prosecution of criminal offenses
(08523/2016) – C8-0329/2016 – 2016/0126(NLE))

Rapporteur: Angel Dzhambazki

SHORT JUSTIFICATION

On 2 May 2016 the Commission submitted to the Council a proposal for a Council Decision on the conclusion, on behalf of the European Union, of an Agreement between the United States of America and the European Union on the protection of personal information relating to the prevention, investigation, detection, and prosecution of criminal offences [2016/0126 (NLE) - COM (2016)237 final], also known as “the Umbrella Agreement”.

The proposal was submitted to the Council after the US Congress had adopted the Judicial Redress Act of 2015. Pursuant to this Act the US Department of Justice is authorised to designate foreign countries or regional economic integration organisations whose natural citizen will be able thereafter to bring civil actions against certain US government agencies for purposes of accessing to or amending data in possession of these agencies or of redressing unlawful disclosures of records transferred from a foreign country to the United States to prevent, investigate, detect or prosecute criminal offences.

On 18 July 2016 the Council decided to request the European Parliament to give its consent to the draft Council Decision on the conclusion of the above-mentioned agreement.

Your rapporteur invites the Committee on Legal Affairs to call on the Committee on Civil Liberties, Justice and Home Affairs to recommend that Parliament give its consent to the agreement for the following reasons.

(a) The envisaged agreement is based on the correct legal basis

Article 16 in conjunction with Article 218(6)(a) of the Treaty on the Functioning of the European Union (TFEU) are the correct legal basis for the proposal.

Article 16(1) TFEU states that everyone has the right to the protection of personal data

concerning them and paragraph (2) of the same article gives the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, the power to lay down rules relating to the protection of individuals with regard to the processing of personal data. Article 218(6)(a) states that the Council shall obtain the consent of Parliament to conclude an international agreement, inter alia, when the agreement covers fields to which the ordinary legislative procedure applies.

The purpose of the agreement is to ensure a high level of protection of personal information and enhance cooperation between the United States and the European Union and its Member States, in relation to the prevention, investigation, detection or prosecution of criminal offenses, including terrorism (Article 1).

The envisaged agreement is mainly devoted to establishing a wide set of protections and safeguards, which will apply to the transfers of personal data for criminal law enforcement purposes between the United States, on the one hand, and the European Union or its Member States, on the other. In this regard, the agreement comprises provisions on non-discrimination (Article 4); limitations on data use (Article 6); prior consent to onward transfers (Article 7); procedures to ensure the quality and integrity of personal information (Article 8); information in case of data security breaches (Article 9); notification of an information security incident (Article 10); maintaining records (Article 11); retention periods (Article 12); special categories of personal information (Article 13); measures to promote accountability for processing personal information (Article 14); right to access and rectifications (Articles 16 and 17); administrative and judicial redress in case of denials to access to or rectification of personal data or unlawful disclosure of personal data (Articles 18 and 19); and mechanisms of effective oversight and cooperation between oversight authorities (Articles 21 and 22).

It is worthwhile to note in this connection that Article 1 of the proposed agreement specifies that the agreement shall not be the legal basis for any transfers of personal information and that a separate legal basis shall always be required.

(b) The envisaged agreement guarantees a high level of protection of the fundamental right to personal data and contributes to legal certainty

The many safeguards and guarantees to which reference has been made above, if appropriately implemented, are suitable to ensure a high level of protection of the right to the protection of personal data as enshrined in Article 16 TFEU and in Article 8 of the Charter of Fundamental Rights, and to comply with the case law of the Court of Justice in the field of data protection. In this connection, it is worthwhile to note that, in line with the case law of the Court of Justice in the *Shrems* case (C-362/14, EU:C:2015:650), the envisaged agreement requires the Parties to provide in their applicable legal framework for the possibility for their citizens to seek judicial review regarding denial of access or of amendment of records or intentional unlawful disclosure of information (Article 19). In any case, the institutions which will be involved in the implementation of this agreement, and in the negotiation of future agreements on the basis of which transfers of personal information will be made, should pay due consideration to and should look for guidance, where appropriate in the abovementioned judgment of the Court in *Schrems*, in the Court's judgment in *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238), and, obviously, to future case law of the Court, including its upcoming opinion on the agreement envisaged between Canada and the European Union on the transfer and processing of Passengers Name Record data.

The envisaged agreement creates a framework for the protection of personal data that contributes to legal certainty. The agreement will supplement, where necessary, data protection safeguards in existing and future data transfer agreements or national provisions authorising such transfers (Article 5). This represents a significant improvement compared to the present situation in which personal information is transferred to the United States on the basis of legal instruments that generally contain no or only weak data protection provisions. What is more, the agreement provides for a baseline for future agreements providing for transfers of personal data in relation to criminal law enforcement activities between the United States and the European Union and/or its Member States, below which the level of protection could not fall. Furthermore, this agreement sets an important precedent for possible similar agreements with other international partners.

It should also be noted that the agreement obliges the Parties to take all necessary measures to implement the agreement, including, in particular, their respective obligations regarding access, rectification and administrative and judicial redress for individuals, before it could be considered that their respective data protection legislations are equally protective (Article 5). The agreement obliges the Parties to conduct periodic joint reviews of the policies and procedures set up for its implementation and of their effectiveness, the first of which should be conducted no later than three years from the date of entry into force of the agreement. The agreement clearly provides that the findings of the joint review should be made public (Article 23). Your rapporteur considers that Parliament should be timely informed of any action taken under this provision and of the findings of the joint review to be able to take any action available that it considers appropriate in due course.

(c) The envisaged agreement will improve law enforcement cooperation with the United States

This agreement will have a significant impact on police and law enforcement cooperation of the European Union and its Members with the United States. By establishing a common and comprehensive framework of data protection rules and guarantees, this agreement will enable the EU and its Members, on the one hand, and US criminal law enforcement authorities, on the other hand, to cooperate more effectively with each other. The agreement will also facilitate the conclusion of future data transfer agreements with the US in the criminal law enforcement sector, as data protection safeguards will have been agreed and will thus not have to be negotiated each time afresh. Finally, setting common standards in this area of cooperation can significantly contribute to restoring trust in transatlantic data flows.

The Committee on Legal Affairs calls on the Committee on Civil Liberties, Justice and Home Affairs, as the committee responsible, to recommend that Parliament give its consent to the draft Council decision on the conclusion, on behalf of the European Union, of the Agreement between the United States of America and the European Union on the protection of personal information relating to the prevention, investigation, detection, and prosecution of criminal offenses.

PROCEDURE – COMMITTEE ASKED FOR OPINION

Title	Agreement between the United States of America and the EU on the protection of personal information relating to the prevention, investigation, detection, and prosecution of criminal offenses
References	08523/2016 – C8-0329/2016 – COM(2016)0237 – 2016/0126(NLE)
Committee responsible	LIBE
Opinion by Date announced in plenary	JURI 12.9.2016
Rapporteur Date appointed	Angel Dzhambazki 11.7.2016
Date adopted	8.11.2016
Result of final vote	+: 18 -: 1 0: 2
Members present for the final vote	Joëlle Bergeron, Marie-Christine Boutonnet, Jean-Marie Cavada, Kostas Chrysogonos, Therese Comodini Cachia, Mady Delvaux, Rosa Estaràs Ferragut, Enrico Gasbarra, Mary Honeyball, Gilles Lebreton, António Marinho e Pinto, Julia Reda, Evelyn Regner, Pavel Svoboda, Axel Voss, Tadeusz Zwiefka
Substitutes present for the final vote	Daniel Buda, Pascal Durand, Angel Dzhambazki, Stefano Maullu, Virginie Rozière

ANNEX: LETTER FROM THE COMMITTEE ON FOREIGN AFFAIRS

Ref: D(2016)51448

Claude Moraes
Chair
Committee on Civil Liberties, Justice and Home Affairs

Dear Chair,

A proposal for a Council decision on the conclusion on behalf of the EU of an Agreement between the United States of America and the EU on the protection of personal information in relation to the prevention, investigation, detection and prosecution of criminal offenses (2016/0126 NLE) was referred to the European Parliament for consent on 12 September 2016.

At their meeting on 27 October 2016, coordinators of the Committee on Foreign Affairs (AFET) decided that an AFET opinion on the above-mentioned Agreement was to be provided to your Committee and rapporteur in the form of a letter. In my capacity as Chair of the Committee on Foreign Affairs, I am pleased to forward you this opinion.

Firstly, it should be underlined that the initialling of this Agreement, five years after the Council adopted a decision authorising the Commission to open such negotiations on 3 December 2010, is a success, especially within the current context of international efforts to fight terrorism.

The very fact that the parties will enhance their cooperation, while ensuring a high level of data protection, is extremely positive for addressing common challenges on both sides of the Atlantic. The Committee on Foreign Affairs particularly supports the substantial improvement regarding the protection afforded to all personal data of EU data subjects when exchanged with the United States for criminal law enforcement purposes. This Committee also welcomes the fact that European citizens will benefit from equal treatment with U.S. citizens with regard to the practical implementation of the Agreement (cf. article 4).

However, I would like to emphasize that extreme caution has to be shown regarding the guarantee for a high level of security of personal data exchanged by the parties (cf. article 9). Moreover, appropriate actions which might be taken in order to mitigate the damage caused by incidents (cf. article 10) would need to be further defined bearing in mind the protection of EU data subjects and in respect of the EU Charter of Fundamental Rights.

The fact that this Agreement provides that the parties shall establish oversight authorities in order to scrutinise its implementation, monitor complaints of citizens and refer violations to prosecution is also very positive. I would like to underline that the actions of such authorities will be very useful for the periodic joint reviews.

Therefore, I would like to convey that the opinion of the Committee on Foreign Affairs is to support the consent to the conclusion of this Agreement.

Yours sincerely,

Elmar Brok

Copy: Jan Philipp Albrecht, Rapporteur

PROCEDURE – COMMITTEE RESPONSIBLE

Title	Agreement between the United States of America and the EU on the protection of personal information relating to the prevention, investigation, detection, and prosecution of criminal offenses	
References	08523/2016 – C8-0329/2016 – COM(2016)0237 – 2016/0126(NLE)	
Date of consultation / request for consent	19.7.2016	
Committee responsible Date announced in plenary	LIBE 12.9.2016	
Committees asked for opinions Date announced in plenary	AFET 12.9.2016	JURI 12.9.2016
Not delivering opinions Date of decision	AFET 27.10.2016	
Rapporteurs Date appointed	Jan Philipp Albrecht 12.9.2016	
Discussed in committee	8.11.2016	
Date adopted	24.11.2016	
Result of final vote	+: 41 -: 4 0: 6	
Members present for the final vote	Jan Philipp Albrecht, Heinz K. Becker, Caterina Chinnici, Agustín Díaz de Mera García Consuegra, Frank Engel, Cornelia Ernst, Tanja Fajon, Monika Flašíková Beňová, Lorenzo Fontana, Mariya Gabriel, Sylvie Guillaume, Jussi Halla-aho, Monika Hohlmeier, Brice Hortefeux, Sophia in 't Veld, Eva Joly, Barbara Kudrycka, Cécile Kashetu Kyenge, Marju Lauristin, Juan Fernando López Aguilar, Monica Macovei, Roberta Metsola, Claude Moraes, József Nagy, Péter Niedermüller, Soraya Post, Branislav Škripek, Helga Stevens, Traian Ungureanu, Bodil Valero, Harald Vilimsky, Josef Weidenholzer, Cecilia Wikström, Kristina Winberg, Tomáš Zdechovský	
Substitutes present for the final vote	Janice Atkinson, Kostas Chrysogonos, Anna Maria Corazza Bildt, Miriam Dalli, Daniel Dalton, Maria Grapini, Petra Kammerevert, Jeroen Lenaers, Nuno Melo, Angelika Mlinar, Morten Helveg Petersen, Salvatore Domenico Pogliese, Barbara Spinelli, Josep-Maria Terricabras, Axel Voss	
Substitutes under Rule 200(2) present for the final vote	Agnieszka Kozłowska-Rajewicz	
Date tabled	28.11.2016	

FINAL VOTE BY ROLL CALL IN COMMITTEE RESPONSIBLE

41	+
ECR	Daniel Dalton, Jussi Halla-aho, Monica Macovei, Helga Stevens, Branislav Škripek
EFDD	Kristina Winberg
ENF	Lorenzo Fontana
PPE	Heinz K. Becker, Anna Maria Corazza Bildt, Agustín Díaz de Mera García Consuegra, Frank Engel, Mariya Gabriel, Monika Hohlmeier, Brice Hortefeux, Agnieszka Kozłowska-Rajewicz, Barbara Kudrycka, Jeroen Lenaers, Nuno Melo, Roberta Metsola, József Nagy, Salvatore Domenico Pogliese, Traian Ungureanu, Axel Voss, Tomáš Zdechovský
S&D	Caterina Chinnici, Miriam Dalli, Tanja Fajon, Monika Flašíková Beňová, Maria Grapini, Sylvie Guillaume, Cécile Kshetu Kyenge, Marju Lauristin, Juan Fernando López Aguilar, Claude Moraes, Péter Niedermüller, Soraya Post, Josef Weidenholzer
Verts/ALE	Jan Philipp Albrecht, Eva Joly, Josep-Maria Terricabras, Bodil Valero

4	-
ALDE	Angelika Mlinar
GUE/NGL	Kostas Chrysogonos, Cornelia Ernst, Barbara Spinelli

6	0
ALDE	Morten Helveg Petersen, Sophia in 't Veld, Cecilia Wikström
ENF	Janice Atkinson, Harald Vilimsky
S&D	Petra Kammerevert

Key to symbols:

+ : in favour

- : against

0 : abstention