



**2018/2645(RSP)**

10.4.2018

# **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  
(2018/2645(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  
(2018/2645(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 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)<sup>1</sup>, 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/JHA<sup>2</sup>,
- 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*<sup>3</sup>,
- having regard to the judgment of the European Court of Justice of 21 December 2016 in Cases C-203/15 *Tele2 Sverige AB v Post- och telestyrelsen* and C-698/15 *Secretary of State for the Home Department v Tom Watson and Others*<sup>4</sup>;
- 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 the protection provided by the EU-U.S. Privacy Shield<sup>5</sup>,
- having regard to the Opinion of the European Data Protection Supervisor (EDPS) 4/2016 on the EU-U.S. Privacy Shield draft adequacy decision<sup>6</sup>,
- having regard to the Opinion of the Article 29 Working Party of 13 April 2016 on the EU-U.S. Privacy Shield<sup>7</sup> and its Statement of 26 July 2016<sup>8</sup>,
- having regard to the Report from the Commission to the European Parliament and the

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<sup>1</sup> OJ L 119, 4.5.2016, p. 1.

<sup>2</sup> OJ L 119, 4.5.2016, p. 89.

<sup>3</sup> EU:C:2015:650.

<sup>4</sup> EU:C:2016:970

<sup>5</sup> OJ L 207, 1.8.2016, p.1.

<sup>6</sup> OJ C 257, 15.7.2016, p.8.

<sup>7</sup> [http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2016/wp238\\_en.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2016/wp238_en.pdf)

<sup>8</sup> [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](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)

Council on the first annual review on the functioning of the EU-U.S. Privacy Shield<sup>1</sup> and the Commission Staff Working Paper accompanying the document<sup>2</sup>,

- having regard to the document of the Article 29 Working Party, EU-U.S. Privacy Shield - First Annual Review of 28 November 2017<sup>3</sup>,
  - having regard to its Resolution of 6 April 2017 on the adequacy of the protection afforded by the EU-US Privacy Shield<sup>4</sup>
  - 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 Maximilian 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; while the EDPS welcomes in the same opinion the efforts made by all parties to find a solution for transfers of personal data from the EU to the US for commercial purposes under a system of self-certification;
- 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 decision whilst also raising strong concerns about both the commercial aspects and access by public authorities to data transferred under the Privacy Shield;

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<sup>1</sup> COM(201)611 final, 18.10.2017

<sup>2</sup> SWD(2017)344 final, 18.10.2017

<sup>3</sup> WP 255 available at [http://ec.europa.eu/newsroom/article29/item-detail.cfm?item\\_id=612621](http://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=612621)

<sup>4</sup> Text adopted, P8\_TA(2017)0131

- 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);
- I. whereas in its Resolution of 6 April 2017, the European Parliament, while acknowledging that the EU-U.S. Privacy Shield contains significant improvements regarding the clarity of standards compared to the former EU-U.S. Safe Harbour, also considers that important issues remain as regards certain commercial aspects, national security and law enforcement, whereas it calls on the Commission to conduct, during the first joint annual review, a thorough and in-depth examination of all the shortcomings and weaknesses and to demonstrate how they have been addressed so as to ensure compliance with the EU Charter and Union law, and to evaluate meticulously whether the mechanisms and safeguards indicated in the assurances and clarifications by the US administration are effective and feasible
- J. whereas the Report from the Commission to the European Parliament and the Council on the first annual review on the functioning of the EU-U.S. Privacy Shield and the Commission Staff Working Paper accompanying the document, while acknowledging that the U.S. authorities have put in place the necessary structures and procedures to ensure the correct functioning of the Privacy Shield have made ten recommendations to the U.S. authorities in order to address issues of concern regarding not only the tasks and activities of the U.S. Department of Commerce (DoC) and Federal Trade Commission (FTC) as authorities involved in the process of monitoring the certification of Privacy Shield organisations and enforcement of the Principles, but also those issues related to national security, such as the re-authorisation of Section 702 of Foreign Intelligence Surveillance Act (FISA), or the appointment of a permanent Ombudsperson and lacking members of the Privacy Civil Liberties Oversight Board (PCLOB);
- K. whereas the opinion of the Article 29 Working Party, EU-U.S. Privacy Shield - First Annual Review of 28 November 2017, following the first annual joint review acknowledges the progress of the Privacy Shield in comparison with the invalidated Safe Harbour Decision; whereas the Article 29 Working Party recognizes the efforts made by the U.S. authorities and the Commission to implement the Privacy Shield;

- L. whereas the Article 29 Working Party has identified a number of important unresolved issues of significant concern, regarding both the commercial issues and those relating to the access by the U.S. public authorities to data transferred to the U.S. under the Privacy Shield (either for law enforcement or national security purposes) that need to be addressed by both the Commission and the U.S. authorities; whereas it has requested to set up immediately an action plan to demonstrate that all these concerns will be addressed, and at the latest at the second joint review;
- M. whereas in case no remedy is brought to the concerns of the Article 29 Working party in the given time frames, the members of Article 29 Working Party will take appropriate action, including bringing the Privacy Shield Adequacy decision to national courts for them to make a reference to the CJEU for a preliminary ruling;
- N. whereas, an action for annulment by *La Quadrature du Net and Others v Commission* (Case T-738/16) and a referral by the Irish High Court on the *Schrems II* case have been brought in front of the European Court of Justice; that the referral analyses whether there is effective remedy in US law for EU citizens whose personal data is transferred to the United States;
- O. whereas on 11 January 2018 the US Congress has reauthorised Section 702 of FISA for six years without addressing the concerns of the joint review report of the Commission and the opinion of the Article 29 Working Party;
1. Takes note of the improvements compared to the Safe Harbour agreement, including the insertion of key definitions, stricter obligations related to data retention and onward transfers to third countries, the creation of an Ombudsperson to ensure individual redress and independent oversight, checks and balances ensuring the rights of data subjects (PCLOB), external and internal compliance reviews, more regular and rigorous documentation and monitoring, the availability of several ways to pursue legal remedy, prominent role for national DPAs in the investigation of claims; acknowledges that the European Commission is of the view that the U.S. authorities have put in place the necessary structures and procedures to ensure the correct functioning of the Privacy Shield;
  2. Recalls that the Art 29 WP has given the deadline of 25th May 2018 to solve the outstanding issues, failing which the Art. 29 WP might decide to bring the Privacy Shield to national courts in order for them to refer the matter to the European Court of Justice for preliminary ruling<sup>1</sup>;

### **Institutional / nominations**

3. Acknowledges the recent designation of two additional Members coupled with the nomination of the Chairman of the PCLOB and calls on the Senate to ratify the names so as to start works without delay;

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<sup>1</sup> [https://ec.europa.eu/newsroom/just/document.cfm?doc\\_id=48782](https://ec.europa.eu/newsroom/just/document.cfm?doc_id=48782)

4. Recalls that the absence of a chair and a quorum has prevented until now the PCLOB from issuing its long-awaited report on the conduct of surveillance under Executive Order 12333 to provide information on the concrete operation of this Executive Order and on its necessity and proportionality with regard to interferences brought to data protection in this context;
5. Regrets that the report of the PCLOB on Presidential Policy Directive 28 (PPD28) is still subject to Presidential privilege and is thus not published yet;
6. Stresses that the delay in appointing a permanent Ombudsperson is not contributing to mutual trust and that his/her powers vis-à-vis the intelligence community will need to be better clarified as well as the level of effective remedy of his/her decisions;
7. Deplores that three of the five seats of the FTC remain vacant; calls on the U.S. government to appoint the remaining Commissioners as soon as possible as the FTC is the enforcing agency of the Privacy Shield principles by the US organisations;
8. Stresses that the lack of sufficient oversight and supervision after self-certification risks to lead to enforcement gaps; that better rules on oversight by independent public authorities should be established if this approach is maintained, (including 'sweep', on-site verifications, etc.);

#### **Commercial issues**

9. Considers that in order to ensure transparency and avoid false certification claims, the DoC should not tolerate US companies making public representations about their Privacy Shield certification before it has finalised the certification process and has included them on the Privacy Shield list; Calls on the DoC to undertake proactively and on regular basis ex officio compliance reviews to monitor the effective compliance of companies with the Privacy Shield rules and requirements;
10. In view of the recent revelations of misuse of personal data by companies certified under the Privacy Shield such as Facebook and Cambridge Analytica, calls on the US authorities competent to enforce the Privacy Shield to act upon such revelations without delay in full respect with the assurances and commitments given to uphold the current Privacy Shield arrangement and if needed, to remove such companies from the Privacy Shield list; calls also on the competent EU data protection authorities to investigate such revelations and, if appropriate, suspend or prohibit data transfers under the Privacy Shield;
11. Recalls its concerns about the lack of guarantees in the Privacy Shield for automated-decision making/profiling, which produce legal effect or significantly affect the individual; acknowledges the intention of the Commission to order a study to collect factual evidence and further assess the relevance of automated decision-making for data transfers under the Privacy Shield; takes note in this regard of the indication from the

joint review that the findings gathered seem to indicate that none of the data transferred under the Privacy Shield are processed through automated decision making systems;

12. Stresses that further improvements should be made with regards to the interpretation and handling of HR data due to the different reading of the notion “HR data” by the US government on one hand and the European Commission and the WP29 on the other hand; takes note of the WP29 call to the European Commission to engage in negotiations with the US authorities in order to amend the Privacy Shield mechanism on this issue;
13. Recommends, in the light of the joint review, that the DoC provides more precise guidance as regards essential principles of the Privacy Shield such as the Choice Principle, the Notice Principle, onward transfers, controller-processor’s relation and access;

### **Law Enforcement and National Security issues**

14. Takes note that the number of orders under Section 702 of FISA covering foreign intelligence targets worldwide has increased;
15. Regrets that the U.S. did not seize the opportunity of the recent reauthorization of FISA Section 702 to include the safeguards provided in PPD-28; calls for evidence ensuring that data collection under FISA Section 702 is not indiscriminate and access is not conducted on a generalised basis (bulk collection) in contrast with the EU Charter on Fundamental Rights;
16. Affirms that the reauthorisation of section 702 of the FISA act for 6 more years calls into question the legality of the Privacy Shield;
17. Highlight the persisting obstacles concerning the redress for non-US citizens subject to a surveillance measure based on section 702 FISA or EO 12333 due to the procedural requirements of “standing” as currently interpreted by the U.S. courts, in order to enable non-US citizens to bring legal actions before US courts against decisions affecting them.
18. Expresses its strong concerns regarding the recent adoption of the Clarifying Lawful Overseas Use of Data Act or CLOUD Act (H.R. 4943), which expands the abilities of American and foreign law enforcement to target and access people’s data across international borders without making use of the instrument of Mutual legal Assistance (MLAT) instruments, which provide for appropriate safeguards and respect the judicial competences of the countries where the information is located;
19. Considers that a more balanced solution would have been to strengthen the existing international system of Mutual Legal Assistance Treaties (MLATs) in view of encouraging international and judicial cooperation;

20. Considers that the US authorities have failed to proactively fulfil their commitment to provide the Commission with timely and comprehensive information about any developments that could be of relevance for the Privacy shield, including the failure to notify the Commission of changes in the U.S. legal framework;
21. Recalls that, as indicated in its Resolution of 6 April 2017, neither the Privacy Shield Principles nor the letters of the US administration provide clarifications and assurances demonstrating the existence of effective judicial redress rights for individuals in the EU in respect of use of their personal data by US authorities for law enforcement and public interest purposes, which were emphasised by the CJEU in its judgment of 6 October 2015 as the essence of the fundamental right in Article 47 of the EU Charter;

### **Conclusions**

22. 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 25 May 2018, and with the EU Charter so the adequacy should not lead to loopholes or competitive advantage for US companies
23. Calls upon the Commission and the U.S. competent authorities to restart discussions on the Privacy Shield arrangement and to set up an action plan in order to address as soon as possible the deficiencies identified by the Commission report on the joint review and in the WP29 report on the joint review;
24. Is concerned as to whether the current Privacy Shield arrangement provides the adequate level of protection required by Union data protection law and the EU Charter as interpreted by the European Court of Justice.
25. Instructs its Committee on Civil Liberties, Justice and Home Affairs to continue to monitor developments in this field and the follow up to the recommendations made in the resolution;
26. Instruct its President to forward this resolution to the Council, the Commission, the governments and parliaments of the Member States and the Council of Europe.