



**2016/0126(NLE)**

18.10.2016

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## **DRAFT 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.)

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## 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 Articles 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 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 (A8-0000/2016),
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 Commission<sup>1</sup> 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

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<sup>1</sup> [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.