

VĚRA JOUROVÁ
Member of the European Commission

Brussels,
Ares(2017)

Dear Ms in't Veld,

Thank you for your letter of 26 January, following up on the question you raised at the last structured dialogue within the LIBE Committee on 23 January.

Your letter raises two points, one concerning the use of exemptions under the U.S. Privacy Act and what this means for the protection of PNR (as well as TFTP) data under the EU-U.S. Umbrella Agreement, the other one concerning the relevance of a new Executive Order (signed on 25 January by President Trump) for both the EU-U.S. Privacy Shield and the Umbrella Agreement. I will deal with these two questions in turn.

First, as regards the status of PNR/TFTP data under the Umbrella Agreement, it is clear from the preamble of the agreement that they are covered with respect to the additional judicial redress right pursuant to Article 19(1) of the agreement (see Article 3(1) of the Agreement read in conjunction with the 4th paragraph of its Preamble). The reason for the limited scope of application of the Umbrella Agreement in this respect is that the specific international agreements on the exchange of PNR and TFTP data that the EU and the U.S. had previously concluded already contained an "adequacy finding" based on the principles, rights and obligations provided in those agreements and, with respect to judicial redress, existing U.S. law. Against this background, it has been an important achievement to obtain that the U.S. side would extend the additional redress right pursuant to Article 19(1) also to PNR/TFTP data.

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Given that PNR/TFTP data are covered by Article 19(1) of the Umbrella Agreement (which specifically obliges each Party to grant specific rights of judicial redress), and given that the Judicial Redress Act (that was adopted by the U.S. to allow for the “implementation” of this obligation) extends the benefit of the respective redress rights under the U.S. Privacy Act, it is clear that such data cannot be exempted from the benefit of the Judicial Redress Act. This is also the information that the Commission had received from the US authorities and which is reflected in the Statement the Commission communicated to the European Parliament in November 2016 and published in the Official Journal on 31 January 2017.

In addition, I would like to point out (as my services already did in their written reply of 18 March 2016 to questions from the LIBE Committee) that the judicial redress rights under the U.S. Privacy Act (as extended by the Judicial Redress Act for designated countries) are not the only judicial redress rights available in U.S. law. Rather, other redress rights exist, such as for example under the Administrative Procedure Act, the Freedom of Information Act or the Electronic Communications Privacy Act. These were the judicial redress avenues that were considered by the European Parliament when it gave its consent to the EU-U.S. PNR/TFTP Agreements and by the Council when it concluded such agreements.

Second, as regards the recently adopted Executive Order *"Enhancing Public Safety in the Interior of the United States"* of 25 January 2017,¹ my understanding is that it has been adopted in a specific context, namely measures taken by the new U.S. Administration to restrict immigration. This being said, Section 14 of the Executive Order concerning limitations to privacy rights for non-US persons indeed raises questions which need to be further analyzed. While I can therefore not provide you with a definitive assessment of the new order, I can share with you some of the provisional conclusions that I believe we can safely draw already now:

- At this moment, we see no relevance of the new order for the Privacy Shield, given that the framework, and the Commission’s assessment thereof (as reflected in the adequacy decision), does not build on the protections provided by the U.S. Privacy Act. The U.S. Privacy Act by its letter only protects U.S. persons. This is not changed by the recent designation of the EU and its Member States as “covered countries” under the Judicial Redress Act as this extension only concerns the transfer of personal data of EU citizens to US law enforcement authorities (as opposed to the transfers carried out between commercial operators falling within the scope of the Privacy Shield).
- As regards the Umbrella Agreement, it is also important to recall that the U.S. Privacy Act already prior to the Executive Order did not cover non-US persons. While the designations under the Judicial Redress Act changed this situation for EU citizens with respect to certain of the judicial redress rights, this extension is based on a statute and should thus be considered as “applicable law” within the meaning of Section 14 of the Executive Order. Thus, our understanding is that Section 14 of the new order does not apply to, and cannot reverse, the additional judicial redress rights granted to EU citizens.

¹ <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>

This being said, the situation needs to be fully analysed and my services have contacted the US authorities in this regard. More generally, be assured that the Commission will continue to monitor the implementation of the two data transfer instruments and is following very closely any development in the U.S. that might have an impact on the data protection rights of Europeans.

Sincerely yours,



Věra Jourová