GMVV & CO. GMBH
STRATEGIC THINK TANK
COMPANY/NGO/GOVERNMENT

Frankfurt am Main, September 6, 2023

Open Letter to Madam President of the European Commission Ursula von der Leyen

Subject: Critical assessment of the adequacy decision C(2023) 4745 final of 10 July 2023.

Dear Madam President,

GMVV & Co. GmbH is a strategic Think Tank, registered with the Parliament of the European Union and the Commission in the EU Transparency Register under Section IV, specializing in research in the field of criminal law and justice in connection with the protection of human and civil rights.

The adequacy decision adopted on 10 July 2023 pursuant to Art. 45 GDPR, which states that the U.S. provides adequate data protection for the transfer of personal data to third-party countries, is incompatible with the Charter of Fundamental Rights of the European Union (CFR). Based on the principles of the EU-U.S. Data Privacy Framework (DPF) and Executive Order (EO) 14086, we conclude that the EU Commission's decision, as currently drafted, disproportionately restricts the fundamental rights to privacy, data protection, and effective remedy.

I. Justification

The EU Charter of Fundamental Rights obliges all EU institutions and bodies to respect and uphold fundamental rights and freedoms. If the European Court of Justice (ECJ) concludes that a decision of an EU institution is not compatible with the Charter, this decision is invalid. This was the case when the ECJ declared the two predecessors of the Data Privacy Framework, the Safe Harbor agreement and the Data Privacy Shield, invalid in the 2015 *Schrems I* and 2020 *Schrems II* rulings, respectively. The latter ruling resulted in legal uncertainty for companies involved in the transfer of personal data between the EU and the US. So far, this legal uncertainty has been addressed using standard contractual clauses,[11] which requires considerable additional effort for companies[12] and has a negative impact on the economy. Against this background, data traffic between the EU and the U.S. that is regulated in accordance with the fundamental EU freedoms and rights is not only a legitimate interest of EU citizens, but also of EU companies. In this context, an effective and understandable system of legal protection must be ensured by the EU and the U.S. that meets the requirements of the EU Charter of Fundamental Rights and the European Convention on Human Rights and which is in line with the leading decisions of the European Court of Justice and the European Court of Human Rights with regard to procedural fairness.

1. Fundamental right to privacy and data protection

The passage of the Executive Order 14086 on 7 October 2022 expanded U.S. privacy law and limited the authority of U.S. intelligence agencies by requiring U.S. surveillance activities, such as the National Security Agency's (NSA) PRISM program, to follow the principles set forth in Section 2(a) of EO 14086. These principles state that U.S. agencies may only conduct surveillance activities that are necessary and proportionate

[11] Ursula Sury, 'EU-U-S. Data Privacy Framework' [2023] Informatik Spektrum 46.
[12] IHK Region Stuttgart, 'Datenübermittlung in die USA und in Drittstaaten' (*ihk.de*, n.a.) <https://www.ihk.de/stuttgart/fuer-unternehmen/recht-und-steuern/datenschutzrecht/datenuebermittlung-usa-4852420?print=true&printsrc=button> accessed 31 August 2023.

to advance a "validated intelligence priority".[13] Thus, the threshold for when a surveillance program may be conducted is more aligned with the wording of Article 52 of the CFR compared to EO 14086's predecessor, Presidential Policy Directive 28 (PPD-28).[14] Despite this literal alignment, by using the terms "necessary" and "proportionate", we see a problem with the interpretation of the terms. There is no agreement between the EU and the U.S. on an explicit definition of these terms, and experience shows that there are divergent interpretations of them in U.S. and EU law. The lack of proportionality of the U.S. mass surveillance programs such as the PRISM program or the Upstream program was determined in the *Schrems I* and *Schrems II* rulings. Although according to EO 14086 individual surveillance must be preferred over mass surveillance as a means of obtaining information,[15] it is up to the discretion of the U.S. authorities to decide at what point mass surveillance is a necessary means.

As a result, mass surveillance programs will continue largely unchanged despite Executive Order 14086.[16] Thus, data of EU citizens have been legally monitored by U.S. authorities since the adoption of the adequacy decision. The legalization of mass surveillance of EU citizens by U.S. authorities allowed by the EU Commission is not an improvement but a significant deterioration of the legal protections and interests of EU citizens that is not in accordance with the rule of law principles of the EU.

2. <u>No rule of law without adequate legal remedies</u>

Even though the appeal mechanism of EO 14086 represents a significant improvement over the ombudsman procedure of the Data Privacy Shield, for example through the possibility of obtaining the deletion of unlawfully stored data,[17] it does not yet meet the level of protection of Art. 47 CFR. The two-stage appeal procedure allows for a review

[13] Executive Order 14086, s 2(a)(ii)(A)(B).
[14] Maximilian Schrems, 'New US Executive Order unlikely to satisfy EU law' (*noyb.eu*, 7 October 2022) <https://noyb.eu/en/new-us-executive-order-unlikely-satisfy-eu-law> accessed 31 August 2023.
[15] Executive Order 14086, s 2(c)(ii)(A).
[16] Executive Order 14086, s 2(c)(ii).
[17] Executive Order 14086, s (4)(a).

of the possible infringement of rights by the Civil Liberties and Privacy Office (CLPO) and then a second review by the Data Protection Review Court (DPRC). The complainant's interest is represented separately by the so-called Special Advocate. One of the problems with this procedure is the lack of transparency. EO 14086 stipulates that data subjects will not be informed of any monitoring by U.S. authorities, regardless of the results of the CLPO and DPRC reviews.[18] Thus, the decisions of the CLPO and DRPC are considered classified information and hence not directly accessible to the public or the complainant.[19]

Furthermore, the independence of the DPRC is compromised, since it, like its predecessor, is considered part of the executive branch and not an independent court.[20] The actual effectiveness of the appeal will have to be closely monitored in the coming months. The *dataprivacyframework.gov* website of the International Trade Administration and the U.S. Department of Commerce serves, among other things, to help EU citizens file complaints about data misuse. A comparable platform should be established at EU level in order to make the complaints procedure comprehensible and available for all EU citizens.

II. Lack of conformity with the leading decisions

Against this background, we conclude that the significant objections of the ECJ in the *Schrems I* and *Schrems II* rulings have not been adequately implemented. Additionally, under the DPF, legal rights for the respect of private and family life (Art. 7 CFR) and protection of personal data (Art. 8 CFR), are disproportionately restricted when data are transferred to the US. Furthermore, the redress mechanism for EU citizens presented in Executive Order 14086, in the form of the Data Protection Review Court and Special Advocates, fails to ensure the right to an effective remedy and an impartial tribunal

[18] Executive Order 14086, s 3(c)(iii)(E), s 3(d)(i)(H).
[19] European Parliament, Motion for a resolution on the adequacy of the protection afforded by the EU-US Data Privacy Framework [2023] 2023/2501(RSP), no. 8.
[20] European Parliament, Motion for a resolution on the adequacy of the protection afforded by the EU-US Data Privacy Framework [2023] 2023/2501(RSP), no. 9.

guaranteed under Art. 47 CFR. As a result, we see it as inevitable that the current version of the adequacy decision will be ruled invalid by the European Court of Justice.

III. Summary

In conclusion, we call on the EU Commission to review the significant legal deficiencies we have raised here and to adapt and improve the legal basis for transatlantic data transfers to ensure EU fundamental rights and the principles of a fair, transparent and constitutional process in accordance with the Charter of Fundamental Rights, the ECHR and the relevant leading decisions.

We call on the EU Commission and the European Parliament to make the EU-U.S. Data Privacy Framework and the accompanying data transfer conditional on the requirement that the data of EU citizens shall not be collected through secret, non- transparent or warrantless U.S. mass surveillance programs.

We call on the EU Commission to clearly define the nature and scope of the terms "necessity" and "proportionality" in the context of data transmission in a bilateral agreement.

We call on the EU Commission to immediately establish a monitoring body charged with the task of monitoring the practicality and effectiveness of the redress mechanisms established under the Data Privacy Framework. The results of the monitoring should be published in an annual report. These reports should serve as a basis for making necessary changes and improvements to the Data Privacy Framework.

We call on the EU Commission to initiate a translation of the complaint's website (*dataprivacyframework.gov*) under the Data Privacy Framework into all 24 official EU languages.

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