



M. Didier Reynders
Commissioner for Justice

cc: Ms. Andrea Jelink
Chairwoman of the European Data Protection Board

MEP Juan Fernando López Aguilar
Chair of the Committee on Civil Liberties, Justice, and Home Affairs

1 October 2020

Dear Commissioner Didier Reynders,

We, the American Civil Liberties Union (ACLU) and Access Now,¹ welcome the opportunity provided by the ruling of the Court of Justice of the European Union in the *Schrems II* case to advance crucial legislative changes on both sides of the Atlantic to reform surveillance programmes, tighten rules concerning government access to personal data, and strengthen human rights protections.

We support the approach you outlined in the Civil Liberties Committee when discussing the aftermath of this ruling - specifically, a long-term, sustainable solution for data flows between the EU and the US, since “no quick fix” will adequately address the criteria set forth in EU law and reaffirmed by the Court. As you stated, a long-term solution for data flows will require changes to US law. To assist the European Commission in this process, we identify below several critical reforms in two areas of US law: surveillance and legal remedies. These reforms will help ensure that US law satisfies the basic standards affirmed by the Court in the *Schrems II* case.

¹ The ACLU is a non-partisan, non-profit organisation with approximately two million members and supporters dedicated to protecting the fundamental rights guaranteed by the US Constitution, the laws of the United States, and the international laws and treaties by which the United States is bound. The ACLU has provided expert evidence on US surveillance programmes and government access to data in several international fora, including in the *Schrems II* case.

Access Now is an international NGO that works to defend and extend the digital rights of users at risk around the world.

Both the ACLU and Access Now provided feedback to the European Commission in every annual review of the EU-US Privacy Shield, and Access Now is a permanent member of the Commission expert group on the implementation of the General Data Protection Regulation.

The *Schrems I and II* decisions unequivocally require the US to reform its surveillance laws and to provide for stronger human rights safeguards, specifically for the rights to data protection and access to meaningful remedies. *Schrems II* focused on two US surveillance authorities in particular: Section 702 of the Foreign Intelligence Surveillance Act (FISA), which authorises the US to compel companies to assist with warrantless surveillance that targets non-US-persons; and Executive Order (EO) 12333, which authorises warrantless surveillance that largely takes place outside the United States. Under Section 702 and EO 12333, the US government claims legal authority to obtain extraordinary access to the private communications and data of persons around the world.

As *Schrems I and II* make clear, the EU must press the US to adopt the reforms listed below for any future data-flow arrangement to withstand judicial scrutiny, and for companies engaged in transatlantic data flows to be able rely on Standard Contractual Clauses.

Surveillance

1. End bulk, generalised collection conducted under EO 12333;
2. Narrow the categories of persons who may be targeted using surveillance under Section 702 and EO 12333, and require targeting standards that comply with human rights law;
3. Expand the role of the FISA court in supervising surveillance under Section 702 and EO 12333, and require additional judicial scrutiny of targets;
4. Limit retention and use of information under Section 702 and EO 12333.

Legal remedies

1. Move away from the flawed concept of the Ombudsperson and instead, through legislation, provide standing in US courts for individuals, including EU citizens, impacted by US surveillance programmes;
2. Ensure that individuals are notified and able to challenge improper surveillance under Section 702 and EO 12333;
3. Provide for a mechanism to ensure that non-US persons have enforceable rights beyond the ineffective Judicial Redress Act.

We look forward to discussing how to concretely articulate these reforms with you and your team during our call tomorrow and in the coming months.

Sincerely,

Estelle Massé, on behalf of Access Now and,
Ashley Gorski, on behalf of the American Civil Liberties Union.