DOI 10.5817/MUJLT2024-2-3

SHROUDED IN SECRECY – DOES THE COMITOLOGY PROCEDURE FOR GDPR ADEQUACY DECISIONS FIT ITS PURPOSE?

by

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With the entry into force of Directive 95/46/EC, the EU based its approach toward data transfers on adequacy decisions, unilateral acts of the European Commission, issued as implementing acts. The EU co-legislators subsequently copied this model into the GDPR and the LED. Since the very beginning, the adequacy procedure involves a comitology phase in which a committee consisting of representatives of Member States expresses its opinion about the Commission's draft implementing act. I argue that adequacy, designed as a technical process, evolved into a tool in which politics, including economic relations and commercial interests, play an ever-greater role. This goes against the concept of comitology, the legitimacy of which is built on denying the political nature of what is delegated. Taking into account the above, as well as other shortcomings of the EU adequacy model, I argue that it is the right time to rethink it. There is also the need for a separate discussion regarding the role of the Article 93 Committee in the adequacy procedure, to be conducted together with the debate on the role and accountability of the European Commission.

KEY WORDS

General Data Protection Regulation (GDPR), Law Enforcement Directive (LED), Data Transfers, Adequacy Decisions, Comitology.

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1. INTRODUCTION

The European Union's approach towards regulating transfers of personal data in both the General Data Protection Regulation (hereinafter: GDPR),[1] and the Law Enforcement Directive (hereinafter: LED)[2] is determined by the dual objective of enabling, on the one hand, internal data flows between EU Member States, while, on the other hand, restricting international data transfers to third countries or international organisations. In accordance with Article 45 GDPR, the European Commission may issue an adequacy decision and decide that the third country, a territory or one or more specified sectors within that third country, or the international organisation ensures an adequate level of protection. This provision also establishes a list of elements, which the Commission needs to take into account when assessing the adequacy of the level of protection. A similar provision can be found in the LED (Article 36 thereof). Adequacy decision allows for an unrestricted flow of personal data between the EU and a third country a territory or one or more specified sectors or an international organisation, without any further safeguard being necessary. This makes it the most important instrument for legalising transfers of personal data from the EU,[3] a "holy grail" for third countries that want to achieve a free flow of data with the EU. Only in the absence of an adequacy decision, data transfers to third countries can be based on appropriate safeguards, and as a last resort on derogations, as provided by the GDPR and the LED.

While there is a lot of discussion about how to interpret different adequacy requirements, in particular, the concept of "essential equivalence",[4] **much less**

[1] 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), OJ L 119, 4.5.2016, p. 1–88. Available from: `https://eur-lex.europa.eu/eli/reg/2016/679/oj` [Accessed 1 July 2024].

[2] See Article 36 of 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, OJ L 119, 4.5.2016, p. 89–131. Available from: `https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX\%3A32016L0680` [Accessed 1 July 2024]. For a detailed analysis of the assessment under the LED, see: Drechsler, L. (2020) Comparing LED and GDPR Adequacy: One Standard Two Systems, *Global Privacy Law Review*, 1(2), pp. 93-104.

[3] For information about other instruments, such as Standard Contractual Clauses or Binding Corporate Rules, see the official Commission's webpage: `https://commission.europa.eu/law/law-topic/data-protection/international-dimension-data-protection\_en` [Accessed 1 July 2024].

[4] See for example, Drechsler, L. and Kamara, I. (2022) Essential equivalence as a benchmark for international data transfers after Schrems II, [in:] Kosta, E. and Leenes, R. (eds), *Research Handbook on EU data protection law*. Cheltenham/Northampton: Edward Elgar Publishing

attention is dedicated to the procedure of granting adequacy itself. The adequacy model based on implementing acts, which puts the Commission in charge of the assessment procedure, was proposed by the EU legislator in 1990, with the publication of the first legislative proposal of what was known as Directive 95/46/EC.[5] It relies on the comitology procedure, introduced in the EU legal system to relieve some of the burden from the European intergovernmental negotiating process, and allow negotiators not to discuss matters that would be too detailed and time-consuming.[6] Since its very beginning, **the comitology procedure has been considered as a technical and not political process**.

The comitology in data protection was introduced more than 30 years ago,[7] in a totally different geopolitical, technological and societal reality. Let me just mention that it took place one year after the fall of communism in several countries that are now EU Member States, something that back in 1990 was unimaginable. Since then, the data protection laws have changed significantly, European data protection has become a benchmark at the global level, and data transfers have become one of the key elements of our societies and economy. In the recent GDPR evaluation, the Commission correctly states that "[d]ata flows have become integral to the digital transformation of society and to the globalisation of the economy".[8]

I believe that there are four reasons why the model based on the committee procedure stayed in place for such a long time. **First**, due to the motives

2022; pp. 314-352, Wagner, J. (2018) The transfer of personal data to third countries under the GDPR: when does a recipient country provide an adequate level of protection? *International Data Privacy Law*, 8(4), pp. 318-337, Lindsay, D. (2017) The role of proportionality in assessing trans-atlantic flows of personal data, [in:] Svantesson, D.J.B. and Kloza, D. (eds.), *Trans-Atlantic data privacy relations as a challenge for democracy*, Cambridge: Intersentia, pp. 49-84, Gulczynska, Z. (2021) A certain standard of protection for international transfers of personal data under the GDPR. *International Data Privacy Law*, 11(4), pp. 360-374.

5 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, p. 31. Available from: `https://eur-lex.europa.eu/eli/dir/1995/46/oj` [Accessed 1 July 2024].

6 Robert, C. (2019) The political use of expertise in EU decision-making: The case of comitology. *Research report*, p. 15. Available from: `https://dumas.ccsd.cnrs.fr/SCIENCESPO\_LYON/halshs-03021131v1` [Accessed 1 July 2024].

7 See Commission Communication on the Protection of Individuals in Relation to the Processing of Personal Data in the Community and Information Security /* COM/90/314FINAL */, 13 September 1990. Available from: `https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM\%3A1990\%3A0314\%3AFIN` [Accessed 1 July 2024].

8 European Commission, Communication from the Commission to the European Parliament and the Council, Second Report on the application of the General Data Protection Regulation, COM(2024) 357 final, Brussels, 25 July 2024, p. 19. Available from: `https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM\%3A2024\%3A357\%3AFIN` [Accessed 1 July 2024].

described in this paper, the Commission is against any changes to it, with a strong preference towards maintaining the *status quo*; **second**: during the GDPR negotiations, i.e. the moment when the adequacy procedure was discussed, there were more important issues linked to data transfers, in particular the so-called "Snowden provision" prohibiting transfers not authorised by the EU law;[9] **third**: comitology constitutes a procedure that is widely used in the EU, relying on it allowed to avoid lengthy discussion regarding the possible way forward; **fourth**: use of comitology, which involves representatives of Member States, ensured that Member States would respect the Commission's adequacy decisions.

At the same time, there should be no doubt that the current model of issuing adequacy decisions is **lengthy and inefficient** - it takes years to negotiate a single decision. One of the reasons for this is the lack of any continuous monitoring of the Commission's actions and of any milestones or deadlines the Commission needs to meet. The following sentence by Kuner can serve as a summary of all the problems with adequacy procedure raised by its critics: "[t]he procedure for having third countries declared "adequate" by the European Commission is (...) a triumph of bureaucracy and formalism over substance, and has been criticized as inefficient, untransparent, and subject to political influence."[10] For the reasons explained below, I believe that the procedure, as it stands now, seems **not to fit its purpose in the digital age**. There are several reasons for that. The pace of work on adequacy decisions might be among the factors deterring third states from engaging in talks with the EU. In addition, for the first time, we can observe the emergence of mechanisms aimed at facilitating cross-border data transfers competing with the EU standard and being faster and less bureaucratic. In this context, let me just mention the Asia-Pacific Economic Cooperation and Privacy (APEC) Cross Border Privacy Rules (CBPR).[11] APEC includes countries with adequacy decisions such as the USA, Japan or Canada and the number of its members is growing faster than the number of third countries covered with adequacy decisions.[12] While APEC rules do not involve the

[9] See Article 48 GDPR.

[10] Kuner, C. (2017) Reality and Illusion in EU Data Transfer Regulation Post Schrems. *German Law Journal*, 18(4), p. 911.

[11] Asia-Pacific Economic Cooperation, APEC Privacy Framework. Available from: `https://www.apec.org/publications/2005/12/apec-privacy-framework` [Accessed 1 July 2024].

[12] At the same time, it should be noted that the APEC approach is not compliant with the essential equivalence requirement. See: European Commission, Commission Staff Working Document accompanying the document: Report from the Commission to the European Parliament and the Council on the first review of the functioning of the adequacy decision for Japan' SWD (2023) 75 final, 3 April 2023. Available from: `https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX\%3A52023SC0075` [Accessed 1 July 2024]. "The

process of making adequacy determination,[13] we can observe third countries such as Japan or the United Kingdom establish their own adequacy models for data transfers and grant the EU their adequacy findings. Finally, the adequacy decisions now constitute a piece of a broader EU strategy[14] and the Commission uses them as a part of trade negotiations. As the best example in this case serves Japan, which received an adequacy decision ahead of the agreement between the EU and Japan for an economic partnership.[15] It seems that the Commission is extending the reach of EU's data protection standards in parallel with international trade agreement negotiations.[16]

Another issue is the fact the Commission undertakes the adequacy assessment, with very far-reaching consequences for the EU, being at the same time the guardian of the treaties i.e. an institution, which is supposed to

APEC CBPR system is a self-certification system based on the principle of accountability. Its main weakness, at least from an EU perspective, is that it lacks tools to make it binding and thus operates essentially on a voluntary basis", Drechsler, L. and Matsumi, H. (2024) Caught in the middle: the Japanese approach to international personal data flows. *International Data Privacy Law*, 14(2), p. 143.

13 Wolf, C. (2014) Delusions of Adequacy? Examining the Case for Finding the United States Adequate for Cross-Border EU-U.S. Data Transfers. *Washington University Journal of Law and Policy*, 227(43), p. 232.

14 European Commission, Communication from the Commission to the European Parliament and the Council, Exchanging and Protection Personal Data in a Globalised World, COM(2017) 7 final. Available from: `https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM\%3A2017\%3A7\%3AFIN` [Accessed 1 July 2024].

15 EU Council, EU-Japan: the Council approves a protocol to facilitate free flow of data, Press release, 29 April 2024. Available from: `https://www.consilium.europa.eu/en/press/press-releases/2024/04/29/eu-japan-the-council-approves-a-protocol-to-facilitate-free-flow-of-data/` [Accessed 1 July 2024].

16 Voss, W. G. (2020) Cross-border data flows, the GDPR, and data governance. *Washington International Law Journal*, 29(3), p. 517. As revealed by the Commission, in deciding which nations to target, the Commission looks at:

- the extent of the EU's (actual or potential) commercial relations with a given third country, including the existence of a free trade agreement or ongoing negotiations;
- the extent of personal data flows from the EU, reflecting geographical and/or cultural ties;
- the pioneering role the third country plays in the field of privacy and data protection that could serve as a model for other countries in its region; and
- the overall political relationship with the third country in question, in particular with respect to the promotion of common values and shared objectives at the international level.

See: European Commission, Communication from the Commission to the European Parliament and the Council, Exchanging and Protecting Personal Data in a Globalised World Questions and Answers, COM(2017) 7 final (19 January 2017), p. 8. Available from: `http://ec.europa.eu/newsroom/document.cfm?doc\_id=41157` [Accessed 1 July 2024].

check whether the assessment aligns with EU primary law.[17] This leads to a situation where, **in the case of adequacy decisions**, **the Commission cannot be considered an honest broker and independent assessor**, as it is interested in a particular outcome of the procedure and, as I argue in this paper, might be politically motivated in its actions. The consecutive attempts to ensure the adequacy of EU-U.S. transfer mechanisms, which required a significant effort and political will, might be the best example of using adequacy as a political tool. Over the period of several years, the Commission dedicated significant resources to EU-U.S. negotiations while at the same time, it has not explored the possibility of adequacy decisions e.g. for EU neighbouring countries or international organisations. Finally, the recent controversies regarding the review of decisions issued under Directive 95/46/EC,[18] could also be seen as another proof of the role politics plays during the adequacy assessment. A decision-making process based on politics would go against the core of the comitology model. As pointed out by Robert, the idea underlying this procedure "is that some matters may be delegated because they are basically only reliant on technical competence as opposed to the exercise of political responsibility".[19] In the adequacy context, such a situation may have significant implications as it creates risks for data subjects' rights. **If the adequacy is based on a Commission's assessment, which is incorrect or politically motivated, it might be undermining the protection of the EU's fundamental rights**.

2. FUNCTIONING OF THE ARTICLE 93 COMMITTEE

2.1. GENERAL RULES ON ADEQUACY DECISIONS AND THE COMITOLOGY PROCEDURE

In the information society, while data subjects remain in one geographical location, their data can be processed in many different places and jurisdictions. The objective of the transfer rules established in the GDPR (and the LED) is to ensure that the level of protection for natural persons is not undermined no matter where their data are processed. At the foundation of the EU model lies the principle that protection accompanies personal

[17] European Commission, What the European Commission does in law. Available from: https://commission.europa.eu/about-european-commission/role-european-commission/law_en [Accessed 1 July 2024].

[18] EDRi European Digital Rights et al. (2024) Concerns Regarding European Commission's Reconfirmation of Israel's Adequacy Status in the Recent Review of Adequacy Decisions, a letter sent on 22 April 2024. Available from: https://edri.org/wp-content/uploads/2024/04/Concerns-Regarding-European-Commissions-Reconfirmation-of-Israels-Adequacy-Status-in-the-Recent-Review-of-Adequacy-Decisions-updated-open-letter-April-2024.pdf [Accessed 1 July 2024].

[19] Robert, C. (2019) op.cit., p. 19.

data during their whole "life-cycle".[20] While there are also other means of legalising data transfers, adequacy decisions are the most convenient ones. They do not require any actions on the controller's or processor's side - an adequacy decision confirms that a third country (or an international organisation) has a standard of essential equivalence regarding the protection of the fundamental rights and freedoms in connection with personal data and covers all entities within its territory.[21] In the absence of an adequacy decision, as indicated in Article 46 GDPR, organisations may also transfer personal data either where appropriate safeguards *vis-a-vis* the organisation receiving the personal data can be provided (in particular - standard data protection clauses (SCCs) and binding corporate rules (BCRs)). Besides the adequacy decision or appropriate safeguards, subject to specific conditions, one may still be able to transfer personal data based on a derogation listed in Article 49 GDPR (and respectively - Article 38 LED), such as the necessity to protect the vital interests of the data subject or of other persons.[22] However, if there is an adequacy decision in place that would cover the intended transfer, it has to be used for the transfer. Only in the absence of an adequacy decision, exporters can rely on appropriate safeguards and only as a last resort on derogations, as provided by the GDPR and the LED.

In line with Article 45(1) GDPR, it is up to the Commission to decide that the third country, a territory or one or more specified sectors within that third country, or the international organisation ensure an adequate level of protection. Moreover, **the Commission is in full control of the assessment process**. It conducts a detailed analysis of third-country legal regime; however, these documents are never made public.[23] Besides legal analysis, before issuing an adequacy decision, the Commission always holds detailed discussions with a third country. As a part of this process, Kuner identifies a stage called "agreement in principle",[24] which means a phase where a political deal has been reached, but is to be yet followed by the

[20] Padova, Y. (2016) The Safe Harbour is invalid: what tools remain for data transfers and what comes next? *International Data Privacy Law*, 6(2), p. 142.

[21] Article 45(1) and recital 104 GDPR.

[22] For a comprehensive overview of different transfer tools, see the European Data Protection Board, The EDPB data protection guide for small business. Available from: `https://www.edpb.europa.eu/sme-data-protection-guide/international-data-transfers\_en` [Accessed 1 July 2024].

[23] Kuner, C. (2024) International data transfers and the EDPS: current accomplishments and future challenge. In Van Alsenoy B. et al. (eds.), *Two decades of personal data protection. What next? EDPS 20th Anniversary*, Luxembourg: Publications Office of the European Union, p. 90.

[24] Ibid., p. 89.

agreement on the working level. This term was used when announcing the Data Privacy Framework.[25]

As adequacy decisions are adopted in the form of implementing acts, there are two ways of controlling the Commission's actions:

(i) *ex-post*, by the Court of Justice of the European Union (CJEU) - so far the Court has invalidated two of the Commission's adequacy decisions;[26]

(ii) *ex-ante* - by the "Article 93 Committee", competent to prevent the Commission from adopting an adequacy decision. [27]

The comitology procedure has formed a part of the adequacy decisions since its very beginning and the entry into force of Directive 95/46/EC. In line with Article 291(1) TFEU,[28] it is for the Member States to adopt all measures of national law necessary to implement legally binding Union law. However, when uniform conditions of implementation are needed, implementing powers are granted to the Commission (and, in specific cases, to the Council). Within the framework of the comitology procedure, a committee issues a formal opinion on a draft implementing act, in this case - a draft implementing decision of the European Commission recognising an adequate level of protection of personal data. The comitology procedure established in Article 93 GDPR is governed by Regulation 182/2011,[29] which contains the rules and general principles regarding the Commission's exercise of implementing powers. These rules are supplemented by the committee's rules of procedures, which specify the provisions of Regulation 182/2011.

The committee itself, despite its important role in the process of issuing adequacy decisions and other implementing acts to the GDPR, the LED and

[25] The White House, Remarks by President Biden and European Commission President Ursula von der Leyen in Joint Press Statement, 25 March 2022. Available from: https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/03/25/remarks-by-president-biden-and-european-commission-president-ursula-von-der-leyen-in-joint-press-statement/ [Accessed 1 July 2024].

[26] See Judgment of 6 October 2015 Maximillian Schrems v Data Protection Commissioner, C-362/14, ECLI:EU:C:2015:650 and Judgment of 16 July 2020 Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems, ECLI:EU:C:2020:559.

[27] In accordance with Recital 167 GDPR, "[i]n order to ensure uniform conditions for the implementation of this Regulation, implementing powers should be conferred on the Commission when provided for by this Regulation. Those powers should be exercised in accordance with Regulation (EU) No 182/2011. In that context, the Commission should consider specific measures for micro, small and medium-sized enterprises".

[28] Consolidated version of the Treaty on the Functioning of the European Union, O J 115, 09/05/2008 P. 0173 - 0173. Available from: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF [Accessed 1 July 2024].

[29] Regulation (EU) 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ L 55, 28.2.2011, p. 13–18. Available from: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX\%3A32011R0182 [Accessed 1 July 2024].

Regulation 1725/2018,[30] remains shrouded in secrecy. The information on its meetings, provided by the European Commission in the comitology register, is **very laconic and is only accessible through a general register of all committee procedures, often with significant delay**. While this approach may help in protecting the EU decision-making process, at the same time it hinders access to even the most basic information concerning the discussions on transnational flows of personal data.

2.2. FROM THE ARTICLE 31 COMMITTEE OF DIRECTIVE 95/46/EC TO THE ARTICLE 93 GDPR COMMITTEE

When adopting implementing acts, the Commission relies on competencies entrusted to it by the Member States. Therefore, the Member States should be able to execute control over how the Commission uses these powers. The Member States exercise control through a committee composed of their representatives. Adequacy decisions are subject to the examination procedure, i.e. a procedure, which allows Member States to review the proposal and, if needed, prevent the Commission from adopting an implementing act - in this case, an adequacy decision.

Despite having an official name,[31] the committee dealing with issues relating to the protection of personal data is traditionally identified by the number of the article that constitutes the legal basis for its functioning. If we look at the statistics of the work of the committee established in accordance with Article 31 of Directive 95/46/EC, [32] it has been quite active - it has held a

[30] Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ L 295, 21.11.2018, p. 39–98. Available from: https://eur-lex.europa.eu/eli/reg/2018/1725/oj [Accessed 1 July 2024].

[31] The official name of both the Article 31 Committee and the Article 93 is: Committee on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

[32] The Article stated: Article 31 The Committee 1. The Commission shall be assisted by a committee composed of the representatives of the Member States and chaired by the representative of the Commission. 2. The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft within a time limit, which the chairman may set according to the urgency of the matter. The opinion shall be delivered by the qualified majority, as laid down in Article 148 (2) of the Treaty. The votes of the representatives of the Member States within the committee shall be weighted in the manner set out in that Article. The chairman shall not vote. The Commission shall adopt measures which shall apply immediately. However, if these measures are not in accordance with the opinion of the committee, they shall be communicated by the Commission to the Council forthwith. In that event: - the Commission shall defer the application of the measures which it has decided for a period of three months from the date of communication, - the Council, acting by a qualified majority, may take a different decision within the time limit referred to in the first indent.

total of 73 meetings; the last meeting took place on 15 November 2016.[33] The Article 31 Committee ceased to operate on 25 May 2018, the date on which the GDPR became applicable, and was replaced by the Committee referred to in Article 93 GDPR. The three main EU legal acts on data protection: the GDPR, the LED and Regulation 2018/1725 all refer to this committee in their provisions. As of July 2024, the Article 93 Committee held 22 meetings.[34]

The comitology procedure shall be seen as an attempt to put in place a control mechanism over the Commission's actions when it implements EU law, in particular in light of its constantly increasing competence. The aim of the comitology is protecting the interests of the Member States. At the same time, **the Commission executes a relatively high level of influence over the committees' works**, in particular by chairing the meetings, setting the timeframe for the committees' activities and preparing agendas for the meetings. The role of the committees is to assess drafts prepared by the Commission; thus, by assisting in their works, **the Commission is assisting in the assessment of its own proposals**. During the GDPR negotiations not only the European Parliament but also Member States criticized the scope of powers granted to the Commission in the GDPR proposal.[35] Although the co-legislators limited some of the Commission's powers foreseen in the initial GDPR draft, this did not affect adequacy. The issue of the comitology in adequacy decisions was briefly discussed between the European Parliament and the EU Council, with the Parliament suggesting to have adequacy decisions adopted in the form of delegated acts.[36] However, in the final text the co-legislators kept the approach known from Directive 95/46/EC.

2.3. RULES GOVERNING THE ARTICLE 93 COMMITTEE

The Article 93 Committee applies the examination procedure referred to in Article 5 Regulation 182/2011 – in certain situations, it is also able to apply the

[33] See the European Commission's website on this comitology procedure. Available from: https://ec.europa.eu/transparency/comitology-register/screen/committees/C27000/consult?lang=en [Accessed 1 July 2024].

[34] Ibid.

[35] Note from General Secretariat to Working Group on Information Exchange & Data Protection, Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation) (18 July 2012). Available from: http://www.statewatch.org/news/2012/jul/eu-council-dp-reg-ms-positions-9897-rev2-12.pdf [Accessed 1 July 2024].

[36] Position of the European Parliament adopted at first reading on 12 March 2014 with a view to the adoption of Regulation (EU) No .../2014 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation). Available from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX\%3A52014AP0212 [Accessed 1 July 2024].

emergency procedure. In accordance with Article 5(1) Regulation 182/2011 and Article 4(1) of its Rules of Procedure, the opinions of the Committee shall be adopted by a qualified majority.[37] If the committee delivers a positive opinion, the Commission is obliged ("shall") to adopt the draft implementing act; in case of a negative opinion, the Commission cannot ("shall not") adopt the draft implementing acts, and in case of a "no opinion", i.e. a situation where none of the options got the required number of votes, the Commission has the choice to decide ("may") whether to adopt it or not. In practice, an abstention by a committee member has a similar effect to a vote against, as it counts towards the *quorum* but not towards the qualified majority, which is required for a draft implementing act to be adopted. Where the opinion of the committee is positive (i.e. a qualified majority of Member States voted in favour of the adoption of an implementing act), the Commission shall adopt the draft implementing act. In accordance with Article 4(3) of the Committee's rules of procedure, it is possible to issue a positive opinion by consensus, i.e. without a formal vote. For example, this was the case when the committee was deciding on the level of protection of personal data afforded by Japan.[38]

If the opinion of the committee is negative (i.e. a qualified majority of Member States opposed the adoption of the implementing act), the Commission shall not adopt the draft act. **The Article 93 Committee, therefore, has the power to prevent the Commission from issuing an implementing act**. In such a case, if the Commission deems an implementing act necessary, the chair of the committee, i.e. the Commission, may submit a revised version of the draft implementing act within two months of the negative opinion or submit a draft implementing act to the appeal committee for further discussion within one month of the delivery of such an opinion.[39]

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[37] Article 16(4) of the Treaty on European Union stipulates that, as of 1 November 2014, a qualified majority shall be defined as at least 55 % of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65 % of the population of the Union. A blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained.

[38] According to the report of the Committee meeting of 15 January 2019, the Committee delivered a positive opinion on the implementing measure by consensus. See: European Commission, Comitology Register, Minutes of the fifth meeting of the Committee on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Available from: `https://ec.europa.eu/transparency/comitology-register/screen/documents/060401/1/consult?lang=en` [Accessed 1 July 2024].

[39] With respect to adequacy decisions, the Commission has never triggered an appeal procedure. For more information about this procedure see Tosoni, L. (2019) Commentary on Article 93. In Kuner, C., Bygrave, L.A., Docksey, C., *The EU General Data Protection Regulation (GDPR). A Commentary*. New York: Oxford Academics, pp. 1285-1286.

Where the committee delivers no opinion, i.e. where no qualified majority has been obtained either in favour of or against the draft implementing act, the Commission may adopt the act or submit a revised new version thereof. However, in accordance with Article 5(4)(c) of Regulation 182/2011, the Commission may not adopt a draft implementing act where a simple majority of the committee members has objected to its adoption. Where an implementing act is deemed to be necessary, the chair may either submit an amended version of that act to the same committee within 2 months of the vote, or submit the draft implementing act within 1 month of the vote to the appeal committee for further deliberation.

The chair may use the written procedure to obtain the opinion of the committee, in particular where the draft implementing act has already been the subject of its deliberations. This procedure is convenient for the Commission, as - in line with Article 3(5) of Regulation 182/2011 - in such a case it is assumed that any member of the committee who does not oppose or expressly abstain from voting on the draft implementing act before the expiry of the prescribed period gives their tacit agreement with regard to the draft implementing act. In the course of the work of the Article 93 Committee, the written procedure was used e.g. to assess the adequacy of UK law – both under the GDPR and the LED,[40] when issuing an opinion on a new set of standard contractual clauses[41] or more recently - to vote on the EU-U.S. Data Privacy Framework.[42] The Article 93 Committee may also apply the emergency procedure referred to in Article 8 Regulation 182/2011, which concerns immediately applicable implementing acts. This procedure will only apply in the situation referred to in Article 45(5) GDPR, i.e. where available information reveals that a third country, a territory or one or more specified sectors within a third country, or an international organisation no longer ensures an adequate level of protection.

[40] See Comitology Register, Written vote on the draft Commission Implementing Decisions on the adequate protection of personal data by the United Kingdom pursuant to Regulation (EU) 2016/679 and pursuant to Directive (EU) 2016/680. Available from: https://ec.europa.eu/transparency/comitology-register/screen/meetings/CMTD\%282021\%291032/consult?lang=en [Accessed 1 July 2024].

[41] See Comitology Register, Written vote on Draft Implementing Decision on standard contractual clauses between controllers and processors under Article 28(7) of Regulation (EU) 2016/679 and Article 29(7) of Regulation (EU) 2018/1725 and on Draft Commission Implementing Decision on standard contractual clauses for the transfer of personal data to third countries pursuant to Regulation (EU) 2016/679. Available from: https://ec.europa.eu/transparency/comitology-register/screen/meetings/CMTD\%282021\%29817/consult?lang=en [Accessed 1 July 2024].

[42] See Comitology Register, Written vote on the draft adequacy decision on the EU-US Data Privacy Framework. Available from: https://ec.europa.eu/transparency/comitology-register/screen/meetings/CMTD\%282023\%291164/consult?lang=en [Accessed 1 July 2024].

Finally, it should be noted that the Commission's failure to adopt an implementing act or the failure to find a compromise with the Member States is not challengeable before the Court[43] and the Commission cannot be held accountable in this respect.

2.4. FUNCTIONING OF THE ARTICLE 93 COMMITTEE

The Article 93 Committee adopted the Rules of Procedure at its meeting on 21 September 2018.[44] As mentioned above, it is composed of one representative from each EU Member State,[45] who are accountable to their respective Member States and bound by the instructions agreed upon at the national level. Therefore, **members of the committee, even if they are experts in the field of data protection, cannot be considered independent in their actions**. The Secretariat of the Committee is provided by the European Commission – the Directorate-General for Justice and Consumers (DG JUST) and chaired by a Commission official. The Commission drafts minutes from the Committee's meetings (Rule 10 of the Committee's rules of procedure). Members of the committee shall have the right to request their position to be recorded in the minutes. The Chair shall also be responsible for drawing up summaries of each meeting for the Commission's register of the work of all committees **- these summaries constitute the only publicly available record of the committee's activities**. Importantly, they do not state the individual position

[43] Dordi, C., Forganni, A. (2003) The Comitology Reform in the EU: Potential Effects on Trade Defence Instruments, *Journal of World Trade*, 47 (2), p. 370.

[44] In comparison to the Rules of Procedure of the Article 31 Committee, the new rules introduce several important changes:

1. Article 2 (2)(b) RoP: Committee members removed the written form requirement for new items to be added by them to the meetings' agendas. In practice, this should allow for a possible change of a meeting agenda even just before the start of a committee meeting, which was not possible under the Rules of Procedure of the Article 31 Committee;
2. Article 3(1) RoP: Committee members clarified that substantial modifications of the draft implementing acts that require in-depth analysis, such as draft adequacy decisions, should be submitted no later than three calendar days before the date of the meeting during which they will be discussed. This provision is intended to prevent the Commission from sharing new versions of documents just before the meetings and to provide Member States with sufficient time to assess the documents submitted by the Commission;
3. Article 7 (1) RoP: Committee members added the provision on inviting representatives of Iceland, Norway, Liechtenstein and Switzerland to the meetings of the Article 93 Committee.

[45] In accordance with Article 5(1) of the Committee's rules of procedure, each Member State shall be treated as one member of the Committee. In addition to representatives of the EU Member States, representatives of Iceland, Liechtenstein and Norway are also invited to attend the meetings of the Committee.

of each Member State. **There is no written justification for the committee's decision and no explanation of the reasoning behind its actions**.

The committee meets in Brussels (during the COVID-19 pandemic and also more recently it held several meetings remotely). The Commission shares an invitation, agenda and draft implementing act with Member States no later than fourteen calendar days before the date of the meeting. It is important to emphasise the need for the Commission to comply with these requirements – in the case of comitology procedure, failure to comply with "essential procedural requirements" may lead to invalidity of the implementing act.[46] The Commission drafts meeting agendas; it convenes meetings of the committee either on its own initiative or at the request of a simple majority of the members of the committee.

In accordance with Article 3(3) Regulation 182/2011, the committee shall deliver its opinion on the draft implementing act within a time limit set by the chair, according to the urgency of the matter. The time limits should be proportionate and enable the members of the committee to examine the draft implementing act in an early and effective manner and to express their views. It should be stressed that **Member States are not involved in the preparation of draft implementing acts, including draft adequacy decisions**. In the case of adequacy, this means that the assessment of a third country's legal system and drafting of the implementing act are conducted solely by the Commission. Once the draft is shared with the Member States, within the comitology procedure, they are allowed to propose changes to it. However, **these changes need to be accepted by the Commission - as it is the Commission that decides on the shape of the document it puts to the vote**. This situation leads to the question of what constitutes the actual content of the committee's opinion. In Case T-254/99 the Commission argued that a committee's opinion does not consist in a text, but only in a vote on the measure, merely 'yes' or 'no'.[47] Assuming this interpretation is correct; it confirms the limited role played in practice by Member States in the whole procedure and the strong position of the European Commission.

3. WE KNOW THAT WE DO NOT KNOW ANYTHING (ABOUT PENDING ADEQUACY DECISIONS)

Draft adequacy decisions are prepared solely by the Commission. It is Commission's competence and not an obligation to issue them. Civil society,

[46] See Tosoni, L. (2019) op.cit., p. 1280. See also Judgment of the Court of Justice of 20 September 2017, C-183/16 P, *Tilly-Sabco SAS*, ECLI:EU:C:2017:704, paragraph 114.

[47] See Judgment of 12 March 2003, Case T-254/99 Maja Srl v Commission of the European Communities, ECLI:EU:T:2003:67, paragraph 67.

Member States, the EU Council and the European Parliament lack not only access to specific documents on the basis of which the adequacy was assessed but also some basic information about, for example, the methodology used and the way the Commission determines its priorities. Moreover, they learn about a possible new adequacy decision only when a relevant draft implementing act is made public in order to be sent by the Commission to Member States. The lack of transparency seems to be a conscious choice of the Commission, which on one hand, protects the EU decision-making process, but on the other - **limits the Commission's accountability** to the level that seems difficult to accept when taking into account the European Union's aspiration as a global standard setter in the area of data protection, as well as potential risks for data subjects' rights if the Commission's assessment is incorrect.

We lack information about which states were subject to the evaluation by the Commission, when the Commission ordered relevant studies on third countries, and what are the strategic priorities. For example, in its 2017 document, the Commission mentioned adequacy negotiations with India and Latin America, in particular Mercosur.[48] The most recent communication from the Commission mentions Kenya and Brazil.[49] For the first time, it mentions negotiations with an international organisation - the European Patent Organisation.[50] What is the status of negotiations with India and Mercosur countries other than Brazil? When did the Commission launch negotiations with Kenya? When the Commission engaged in negotiations with international organisations? Nobody knows the answers to these rather basic questions, as **there is no public information on these matters**. Moreover, there is no reporting obligation on the Commission in this regard. In addition, the Commission's strategy regarding adequacy decisions remains unclear, all we know, based on facts, is that the EU prioritised US adequacy,[51] at the same time marginalising some other topics, such as the adequacy of international organisations or the adequacy of EU neighbouring countries, including, for example, Ukraine. Why this is happening and what

[48] European Commission, Communication from the Commission to the European Parliament and the Council, Exchanging and Protecting Personal Data in a Globalised World, COM/2017/07 final, point 3.1. Available from: `https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM\%3A2017\%3A7\%3AFIN` [Accessed 1 July 2024].

[49] European Commission, Communication from the Commission to the European Parliament and the Council, Second Report on the application of the General Data Protection Regulation, COM(2024) 357 final, Brussels, 25 July 2024, p. 20. Available from: `https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM\%3A2024\%3A357\%3AFIN` [Accessed 1 July 2024].

[50] Ibid., p. 21.

[51] By issuing three consecutive adequacy decisions for EU-U.S. transfer schemes - i.e. Safe Harbour, Privacy Shield, Data Privacy Framework.

are the exact reasons behind it - we do not know, as all decisions remain at the discretion of the European Commission. In this context, broader transparency would allow Member States or the European Parliament to have more impact on the Commission's priorities. The dissatisfaction with the current model has been reflected in official documents. In its contribution to the GDPR evaluation, the Council "invites the European Commission to increase the transparency of its assessment process and present a comprehensive and coherent strategy for future adequacy decisions".[52] Similar comments were made for example by Kuner, who points out that "[t]he secretive nature of such [adequacy - MC] negotiations, together with the fact that adequacy decisions are based on legal studies that are never made public, illustrates the lack of transparency surrounding much data transfer regulation".[53] Analysis of the few available documents may lead to a conclusion that there seems to be no strategy regarding adequacy decisions, and the priorities seem to constantly change and evolve. The negotiations, of course, require involvement from the third state, something the EU has no control over. At the same time, making the Commission plans public would impose pressure on governments of such third countries, e.g. from a side of businesses interested in free flows of data with the EU. Finally, another argument in favour of higher transparency could be the fact that **the assessment conducted by the Commission is not always correct and could benefit from increased scrutiny**. The Commission not only does not publish any documents but also has never made public information about the methodology it relies on. Taking into account that out of thirteen adequacy decisions issued under Directive 95/46 /EC, the Court of Justice invalidated two, this puts the invalidation ratio at 15%. It is not only academics, who point out at mistakes made by the Commission in the Safe Harbour and Privacy Shield's adequacy assessment process,[54] for example, in his opinion in case Case C-311/18 Schrems II, Advocate General Saugmandsgaard Øe

[52] European Commission, Communication from the Commission to the European Parliament and the Council, Second Report on the application of the General Data Protection Regulation, COM(2024) 357 final, Brussels, 25.7.2024, p. 19. Available from: `https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM\%3A2024\%3A357\%3AFIN` [Accessed 1 July 2024].

[53] Kuner, C. (2024) International data transfers and the EDPS: current accomplishments and future challenge [in:] Van Alsenoy B. et al. (eds.), *Two decades of personal data protection. What next? EDPS 20th Anniversary*, Luxembourg: Publications Office of the European Union, p. 90.

[54] Cohen, N. (2015) The Privacy Follies: A Look Back at the CJEU's Invalidation of the EU/US Safe Harbor Framework. *European Data Protection Law Review*, 240 (3), p. 243.

presented a very detailed critique of the analysis of the Privacy Shield mechanism conducted by the Commission.[55]

4. ON THE NEED FOR A DEDICATED PROCEDURE FOR ASSESSING ADEQUACY

4.1. ARE IMPLEMENTING ACTS SUITABLE FOR ADEQUACY DECISIONS?

Formally, adequacy findings are decisions based solely on the objective assessment of a specific legal regime and take into account criteria established in Article 45(2) GDPR and Article 36(2) LED; in practice, however, they nowadays became also political decisions. Therefore, some reflection might be needed on the future of the adequacy procedure; in particular, what is the role of politics in it. If we conclude that the procedure is political, this would put the whole mechanism in question and place it beyond Article 16 TFEU - the GDPR's legal basis. On the other hand, the conclusion that the adequacy decisions are not purely technical but have a political component could **justify the higher level of scrutiny over the Commission's actions by both Member States and the European Parliament**. Currently, the European Parliament and the EU Council may challenge Commission only if they believe that a draft implementing act exceeds the implementing powers provided for in the GDPR.[56] Max Schrems, when commenting on the invalidation of the Safe Harbour and what happened next, stated that "[f]irst, I would like to voice my frustration with the weakness of the political level in the European Commission that lead to the absolutely laughable proposal for a new EU-US data sharing agreement called 'Privacy Shield'",[57] therefore making it clear that in his opinion the adequacy procedure was a political process in which the Commission made concessions towards the US. The view that adequacy decisions constitute a political instrument, among others influenced by economic relations and commercial interests, was expressed by

[55] Opinion of Advocate General Saugmandsgaard Øe delivered on 19 December 2019. Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems, Case C-311/18, paragraph 196-342.

[56] In line with Article 11 Regulation 182/2011 "[w]here a basic act is adopted under the ordinary legislative procedure, either the European Parliament or the Council may at any time indicate to the Commission that, in its view, a draft implementing act exceeds the implementing powers provided for in the basic act. In such a case, the Commission shall review the draft implementing act, taking account of the positions expressed, and shall inform the European Parliament and the Council whether it intends to maintain, amend or withdraw the draft implementing act".

[57] Schrems, M. (2016) The Privacy Shield is a Soft Update of the Safe Harbor. *European Data Protection Law Review*, 2(2), p. 148.

authors such as Greenleaf,[58] Wolf[59] and Panek.[60] The Commission's view on adequacy decisions that "[b]y enabling the free flow of personal data, these decisions have opened up commercial channels for EU operators, including by complementing and amplifying the benefits of trade agreements, and eased collaboration with foreign partners in a broad range of fields, from regulatory cooperation to research"[61] puts adequacy decisions in **the context that goes beyond data protection**. As I have already mentioned, the political dimension of the adequacy decisions can be also observed in cases where a decision is followed by a trade agreement, which includes provisions on data transfers.

Since the adoption of Directive 95/46/EC, the EU data protection framework has evolved and its importance increased. The EU Council has recently stated that "the GDPR has been instrumental in positioning the European Union as an international benchmark and reference standard for data protection and privacy beyond EU borders".[62] From the fundamental rights perspective, the verification of whether a third country's legal order meets this benchmark should be based solely on impartial criteria, and while politicians may take certain strategic decisions, we have to make sure that the process of assessing adequacy "on the ground" is objective, conducted by experts and protected from any external influence. This brings us to the issue of the lack of transparency embedded in the current model of assessing adequacy. **The sole actor in charge of the whole adequacy mechanism is the European Commission,** and as described above, this mechanism does not provide tools that would allow Member States to influence the Commission's actions in a meaningful way. If we conclude that adequacy decisions, while requiring certain objective criteria to be met, became also

[58] Greenleaf, G. (2000) Safe Harbor's low benchmark for 'adequacy': EU sells out privacy for US$. *Privacy Law and Policy Reporter*, 32.

[59] Wolf, C. (2014) op.cit., p. 241-242.

[60] Panek, W. (forthcoming) The European Commission's adequacy decisions' content as a guide for applying the adequacy assessment criteria, [in:] Hoepman, J.H., Jensen, M., Porcedda, M.G., Schiffner, S., Ziegler, S., (eds.). *Privacy Symposium 2024 - Data Protection Law International Convergence and Compliance with Innovative Technologies (DPLICIT)*. Cham: Springer Nature Switzerland. Available from: `https://kau.app.box.com/s/jn8zb7ntesoafs1rqm6igt9tljfu1k5x` [Accessed 1 July 2024].

[61] European Commission, Communication from the Commission to the European Parliament and the Council, Second Report on the application of the General Data Protection Regulation, COM(2024) 357 final, Brussels, 25 July 2024, p. 20. Available from: `https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM\%3A2024\%3A357\%3AFIN` [Accessed 1 July 2024].

[62] EU Council, Council position and findings on the application of the General Data Protection Regulation (GDPR), adopted on 17 November 2023, document 15507/2, point 16. Available from: `https://data.consilium.europa.eu/doc/document/ST-15507-2023-INIT/en/pdf` [Accessed 1 July 2024].

a political instrument, then the argument that they should be granted *via* a separate, dedicated procedure **becomes much stronger**.

4.2. TOWARDS RETHINKING OF THE CURRENT ADEQUACY PROCEDURE

The lack of transparency regarding the Commission's actions in the area of data transfers may give reasons to worry - we do not know with which third countries or international organisations the Commission is engaged in talks, we do not know the status of these talks, we do not know what are the Commission's plans and strategy as regards adequacy decisions. At the same time, we see growing concerns from academics[63] and NGOs[64] regarding the way the Commission is handling these matters. One of the ways of improving the current adequacy procedure could be **a separate regulation on data transfers, a *lex specialis* to the GDPR and the LED, similar to the Commission's proposal on harmonisation of the GDPR enforcement procedures**.[65] A dedicated procedure could allow, among others, to enhance transparency of the Commission's actions as well as to increase its accountability, e.g. by specifying the elements the Commission needs to take into account when conducting its assessments, introducing certain reporting obligations, increasing transparency of the procedure and imposing deadlines. It could also balance the Commission's role and allow for it to be held accountable by Member States or the European Parliament. Currently, the Member States scrutinize the Commission's work *via* a comitology procedure. However, as described above, **this mechanism does not provide tools that would allow Member States to influence the Commission's actions in a meaningful way**. The role of the European Parliament is limited to non-binding resolutions it can adopt. The discussion about the adequacy procedure is not new. The lack of a detailed procedure for adequacy decisions was criticised already during the GDPR negotiations.[66] Schweighofer argues that in order to address

[63] "The EU has focused disproportionately on data transfers to US companies and law enforcement authorities, and neglected other important strategic issues, such as how EU data transferred to authoritarian and non-democratic countries can be protected" Kuner C., International data transfers and the EDPS: current accomplishments and future challenge [in:] Van Alsenoy B. et al. (eds.), *Two decades of personal data protection. What next? EDPS 20th Anniversary*, Luxembourg: Publications Office of the European Union, p. 89.

[64] EDRi European Digital Rights, et. al. (2024) op. cit.

[65] See Proposal for a Regulation of the European Parliament and of the Council laying down additional procedural rules relating to the enforcement of Regulation (EU) 2016/679, COM/2023/348 final. Available from: `https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX\%3A52023PC0348` [Accessed 1 July 2024];

[66] "[t]he Draft GDPR does not discuss the logistics of how adequacy decisions are to be issued" Weber, R. H. (2013) Transborder data transfers: concepts, regulatory approaches and new legislative initiative, *International Data Privacy Law*, 3(2), p. 130.

the shortcomings, adequacy decisions should be replaced by international treaties signed by the EU.[67] However, this approach would result in replacing a non-transparent procedure with secret negotiations.

The importance of adequacy decisions has significantly increased since the early 1990s, i.e., the time when the procedure was drafted. At the same time, assessing adequacy still remains highly non-transparent. Given the importance of data transfers for society, the current model of assessing adequacy seems not to be sustainable and futureproof. The Commission makes decisions on the adequacy of third countries, which bear significant legal implications and affect the EU citizens' fundamental rights, behind closed doors. We all learn about new draft adequacy decisions only at the very moment the Commission makes them public ahead of sending the drafts to Member States. There are no updates regarding the status of ongoing works or even a list of states with which the Commission is currently negotiating the decisions. There are no deadlines for the Commission, no milestones, no body towards which it could be held accountable. In light of the above, the question that needs to be asked is whether matters of such importance as adequacy decisions, which have broad impacts on the EU citizens' fundamental rights, should be decided in the procedure that is currently in place. This question is even more relevant if we consider the length of the actual assessment procedure and the fact that the Commission granted adequacy to two transfer mechanisms, the Safe Harbour and the Privacy Shield, which did not meet the EU requirements and were subsequently invalidated by the CJEU.

We are dealing with a procedure where the **first phase** consists of non-transparent negotiations with third countries conducted by the Commission. As I have pointed out, it is already difficult to establish with which countries the Commission engages in talks - the lack of transparency reached the level where, without any explanation, the Commission stops mentioning in its documents certain states that it had mentioned previously as being assessed. The **second phase** consists of an actual assessment and preparations of a draft adequacy decision - both done in secrecy by the Commission. These are followed by the **third phase**, which is a non-transparent comitology procedure. The only publicly available assessment of draft adequacy decisions comes from the European Data Protection Board and its opinions. This situation should make us ask several questions. In the first place, we should ask ourselves why adequacy

[67] Schweighofer, E. (2017) Principles for US–EU Data Flow Arrangements [in:] Svantesson, D.J.B., Kloza, D. (eds.), *Trans-Atlantic Data Privacy Relations as a Challenge for Democracy*, Cambridge: Intersentia, pp. 44-46.

decisions are adopted *via* implementing acts. **The comitology procedure was chosen by the EU co-legislators more than 30 years ago** and was aimed at addressing different issues than the ones we are facing nowadays, such as how to ensure a harmonised approach inside the EU and how to guarantee that all Member States will recognise adequacy decisions adopted under Directive 95/46/EC. These were the challenges of the first years of the EU data protection laws, resolved a long time ago. In the meantime, the world has moved forward, data protection as an area of law has significantly developed and its importance has increased beyond the level the authors of Directive 95/46/EC could foresee.

Today we have mechanisms alternative to comitology aimed at achieving harmonisation on the EU level; in the case of the GDPR let me just mention the guidelines and recommendations of the EDPB, which are followed by all the EU data protection authorities. The EDPB recommendations on supplementary measures, developed in the aftermath of Schrems II judgment and applicable in all the EU Member States, could serve as an example of such soft-law harmonisation.[68] As regards Member States and the European Parliament, the information they receive is limited to two documents. When sending the draft implementing act to the Article 93 Committee, the Commission is obliged to share it with the European Parliament and the EU Council.[69] However, this obligation does not apply to any revisions of the initial text. Therefore, the Commission shares with the Parliament and the EU Council **only the first and the final version of the implementing act**. This means that both institutions lack information about drafting suggestions made during the comitology phase that were not included in the final document, which could for example help them in identifying the most problematic issues. While in practice Member States can receive relevant information from their representatives in the Article 93 Committee, the Parliament has no means of obtaining it.

When it comes to the Article 93 Committee, for almost thirty years, **the activities of it and its predecessor, the Article 31 Committee, have always been shrouded in secrecy**. Taking into account the significance of transfers of personal data to third countries, I argue that there is a need for a separate

[68] European Data Protection Board, Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data. Available from: `https://edpb.europa.eu/our-work-tools/our-documents/recommendations/recommendations-012020-measures-supplement-transfer_en` [Accessed 1 July 2024].

[69] See Article 10(5) Regulation 182/2011. The Commission also shares the draft adequacy decision with the European Data Protection Board and asks it to issue an opinion (see Article 70(1)(s) GDPR).

discussion regarding the committee's role, to be conducted together with the discussion about the role and accountability of the European Commission.

5. CONCLUSION

With the entry into force of Directive 95/46/EC, the EU based its approach toward data transfers outside the Union on adequacy decisions,[70] unilateral acts of the Commission, issued in the form of implementing acts. This model was subsequently copied into the GDPR and the LED. Since the very beginning, the adequacy procedure involves a comitology phase in which a committee consisting of representatives of Member States expresses its opinion about the Commission's draft implementing act. As mentioned above, what makes the difference between opinions issued by the Article 93 Committee and the EDPB opinions or resolutions of the European Parliament is that the opinions of the committee are binding for the Commission. At the same time, in principle, they are limited to a vote on a draft decision, either "yes" or "no", which significantly reduces their impact.

The Commission would be in favour of keeping the *status quo* as the current procedure puts its actions beyond the scope of any meaningful scrutiny. The Commission plays a crucial role in the works of the Article 93 Committee by (i) conveying and chairing the meetings, (ii) providing its secretariat, (iii) setting the timeframe for the committee's activities, (iv) preparing agendas for the meetings; (v) deciding on the final wording of documents put to the vote; and (vi) deciding on when these documents will be voted. **As regards the adequacy procedure, the Commission is dominating it at every and each of its stages**, as it: (i) engages in negotiations with a third country; (ii) conducts the initial assessment of a third country's legal regime and prepares a draft adequacy decision, (iii) participates in the works of the EDPB, when the Board is drafting an opinion on the draft decision,[71] (iv) is in charge of the comitology procedure that has to approve the draft decision. At the same time, the Commission is not impartial in this process and cannot be seen as an honest broker, as it is defending its own draft decision.

Since the early 90s of the past century, technological progress and globalisation changed the world, and the role of adequacy decisions has

[70] See European Commission, Adequacy decisions How the EU determines if a non-EU country has an adequate level of data protection. Available from: `https://commission.europa.eu/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions_en` [Accessed 1 July 2024].

[71] In line with Article 68(5) GDPR: "The Commission shall have the right to participate in the activities and meetings of the Board without voting rights. The Commission shall designate a representative. The Chair of the Board shall communicate to the Commission the activities of the Board".

significantly increased. More than 30 years later**, it is the right time to rethink the current model**. I argue that adequacy, designed as a technical process, evolved into **a tool in which politics, including economic relations and commercial interests, play an increasingly important role**. This goes against the concept of comitology, the legitimacy of which is built on denying the political nature of what is delegated.[72] In the adequacy context, such a situation may create risks for data subjects' rights. If the adequacy is based on a Commission's assessment, which is incorrect or politically motivated, it might be undermining the protection of the EU's fundamental rights.

In a digitalised and globalised environment, fostering cross-border data flows is of key importance for the European Union. The Commission itself recognises the growing significance of adequacy decisions. In the evaluation of eleven decisions issued under Directive 95/46/EC, the Commission states that "[o]ver the past decades, the importance of adequacy decisions has increased considerably as data flows have become an integral element of the digital transformation of the society and the globalisation of the economy. (...) In that context, adequacy decisions play an increasingly key role, in many ways".[73] Furthermore, the European Union is extending the reach of its data protection standards in parallel with international trade agreement negotiations. Adequacy decisions nowadays serve a purpose, which goes beyond the protection of personal data and Article 16 TFEU. The fact that the adequacy decisions are not purely technical but have a political aspect, could justify the higher level of scrutiny over Commission actions by both Member States and the European Parliament.

Improving the adequacy procedure requires higher transparency, accountability and establishing the EU strategy for data transfers. A departure from the comitology model would be beneficial for the EU and protection of data subjects' rights. It would allow us to have a clearer idea of how decisions are being taken and what are the EU's priorities. We would also be able to hold the Commission accountable for the progress made (or the lack of it) and understand why certain negotiations with third countries did not succeed or are not anymore mentioned in the official Commission's documents. It could also facilitate negotiations with third countries - for example, information about the methodology used by the Commission would make it easier for them to engage in negotiations with the EU, as

[72] Robert, C. (2019) op.cit., p. 16.

[73] European Commission, Report from the Commission to the European Parliament and the Council on the first review of the functioning of the adequacy decisions adopted pursuant to Article 25(6) of Directive 95/46/EC, COM(2024) 7 final. Available from: `https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX\%3A52024DC0007`[Accessed 1 July 2024], p. 2.

they would know what to expect. We also need to discuss whether at all, and if so, to what extent the process of assessing adequacy may take into account politics, including economic relations, and go beyond the objective analysis of a third country or international organisation's legal regime. This discussion is necessary not only in the context of trade agreements but also third countries establishing their own adequacy mechanisms under which they grant adequacy to the EU. The emergence of adequacy mechanisms competing with the EU model and being more efficient than it or initiatives such as APEC CBPR should also trigger discussion about the length of the current EU procedure.

The way forward could be **a separate legal act specifying the procedure for granting adequacy decisions**. The Commission itself already set a precedent for such a solution, as the EU co-legislators are currently negotiating legislation aimed at improving another procedure -the GDPR enforcement in cross-border cases.[74] As the first step, the discussion could focus on what can be achieved without re-opening the GDPR and the LED, for example, on specifying the elements the Commission needs to take into account when conducting its assessments, introducing certain reporting obligations, increasing transparency of the procedure and imposing deadlines. It could also balance the Commission's role and allow for it to be held accountable by Member States or the European Parliament. A temporary solution could be a number of voluntary commitments by the Commission. These could in particular cover transparency of the adequacy procedure, including publication of documents on which the assessments are based, an up-to-date list of third countries, with which the Commission is engaged in negotiations and presenting the Commission's adequacy strategy.

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