

Il est inutile de rappeler que la protection de la vie privée et des données personnelles contre les abus de la part d'autres personnes et surtout de la part des autorités publiques est un droit fondamental qui en conditionne beaucoup d'autres comme la liberté d'expression la liberté de voyager, de s'associer et de participer sans contraintes à la vie politique de son propre pays. Il s'agit donc d'un droit essentiel dans les systèmes démocratiques et ne peut subir d'exceptions que si celles-ci sont justifiées, nécessaires et prévues par la loi (art. 8 CEDU).

It is unnecessary to remind you that the protection of private life and personal data against the abuses from other persons and especially from public authorities is a basic right that conditions a lot of others as expression liberty the liberty to travel, to associate itself and to participate without constraints to life politics of own country. It is a matter therefore of an essential right in the democratic systems and cannot undergo exceptions that if these are justified, necessary and foreseen by the law (art. 8 CEDU).

En principe ce droit fondamental est expressément protégé par plusieurs Constitutions nationales ⁽¹⁾ et par la jurisprudence des Cours suprêmes (voir le cas de l'Allemagne ou de la France) et par l'Union européenne (qui renvoie à la CEDU et au patrimoine commun constitutionnel des EMS).

As a rule this basic right is explicitly protected by numerous national Constitutions () and by the jurisprudence of the Supreme Courts (to see the case of Germany or France) and by the European Union (that relates back to the CEDU and to the constitutional common heritage of the MSs).

Dans la pratique cette protection de l'individu et de ses données sur la base du territoire est devenue de plus en plus difficile en raison des développements technologiques (voir le cas d'internet) ou des choix des entreprises multinationales de traiter les données dans des territoires différents de ceux où se trouvent les individus (data subject) ou, enfin en raison des nécessités liées à la coopération internationale contre le terrorisme et le crime organisé.

In practice this protection of the individual and of its data on the basis of the territory became more and more difficult due to the technological development (internet) or choices of the multinational businesses to treat the data in different territories of those

¹ Art. 10 de la Charte des droits et libertés fondamentaux de la République tchèque,
Art. 42 de la Constitution de la République d'Estonie,
art. 9a Constitution de la République hellénique,
Art.18 Constitution du Royaume d'Espagne,
Art. 22 Constitution de la République de Lituanie,
Art. 59 Constitution de la République de Hongrie,
art.10 Constitution du Royaume des Pays-Bas
Autriche - Lois constitutionnelles fédérales.Loi relative à la protection des données personnelles du 18 octobre 1978
Art.51 Constitution de la République de Pologne.
Art.35 Constitution de la République portugaise.
Art.38Constitution de la République de Slovénie.
Art.19Constitution de la République Slovaque
Art.10Constitution de la Finlande
Art.3 Constitution du Royaume de Suède
Artt.13 et 15 Constitution Italienne...

or' are located the individuals (data subject) or, at last because of the necessities linked to Organized crime.

Pour éviter que face à ce triple défi la protection des données ne soit vidée de son contenu et que les données puissent circuler au moins entre pays assurant une protection comparable les Etats ont défini au début des années '80 des principes à respecter à l'occasion des transferts des données par le biais

- de la Convention 108 de '81 du Conseil de l'Europe qui développe les prévisions de l'art. 8 de la CEDU

- et par des principes (guidelines ⁽²⁾) de l'OCDE à la quelle ont adhéré aussi les USA.

To avoid facing this triple challenge the protection of the data is not emptied of his container and that the data can circulate at least between countries assuring a comparable protection the States defined at the beginning of 80s of the principles to respect of the occasion of the transfers of the data by the bias - Convention 108 of 81 of the Council. 8 of the CEDU - and by principles (guidelines ()) ocde to the which one has adheré also the USA.

Ces principes visent essentiellement la qualité des données, la spécification de la finalité, les limites à l'utilisation, les garanties de sécurité, la transparence, le droit des intéressés.. et le fait que les Etats doivent adapter leur législation interne. Or les Etats membres de l'UE et les US ont appliqué d'une façon assez différenciée ces principes. De plus les US n'ont pas reconnu un droit spécifique à la protection des données aux citoyens non US (ou non légalement résidents sur le territoire des US).

These principles aim essentially to the quality of the data, the specification of the end, the limits to the usage, the security guarantees, the transparency, the right of the interested parties as well as to the fact that the States must adapt their internal legislation. Up until now the member States of the EU and the US applied differentiated principles. Moreover the US did not recognize a specific right to the protection of the data to the non-US citizens (or no legally residents on the territory of the US).

Dans ces conditions le transfert des données a pu être considéré possible surtout dans le cadre de transfert entre privés pourvu que ces derniers respectent des clauses contractuelles conformes aux principes retenus aussi en Europe ou adhèrent volontairement aux principes dites du Safe Harbour.

In these conditions the transfer of the data could be considered possible especially in the transfer framework between private companies provided that the latter respect contractual clauses in accordance with the withheld principles also in Europe or adhesive voluntarily to the principles said Safe Harbour.

Le problème de l'adéquation de la législation US en matière de protection des données reste toutefois entier lorsque ces données sont collectées à des fins de lutte contre le terrorisme et la criminalité internationale.

² http://www.oecd.org/document/18/0,2340,en_2649_34255_1815186_1_1_1_1,00.html

The problem of the appropriateness of the US legislation regarding protection of the data remains nevertheless entire when these data are collected to fight ends against the terrorism and the international crime.

A' cet égard les pistes suivies par l'administration US ont été :

1 - de conclure deux accords internationaux avec l'UE en matière de extradition et coopération judiciaire en matière pénale couvrant aussi sur la base de conditions paritaires la protection des données dan le cadre d'enquêtes judiciaires ⁽³⁾. Ces accords

³ DRAFT AGREEMENT ON MUTUAL LEGAL ASSISTANCE BETWEEN THE UNITED STATES OF AMERICA AND THE EUROPEAN UNION. Art3 P. 1 lettre f) Subject to Article 9, paragraphs 4 and 5, Article 9 shall be applied in place of, or in the absence of bilateral treaty provisions governing limitations on use of information or evidence provided to the requesting State, and governing the conditioning or refusal of assistance on data protection grounds.

Article 9: Limitations on use to protect personal and other data

1. The requesting State may use any evidence or information obtained from the requested State:

a) for the purpose of its criminal investigations and proceedings;

b) for preventing an immediate and serious threat to its public security;

c) in its non-criminal judicial or administrative proceedings directly related to investigations or proceedings:

i) set forth in subparagraph (a); or

ii) for which mutual legal assistance was rendered under Article 8;

d) for any other purpose, if the information or evidence has been made public within the framework of proceedings for which they were transmitted, or in any of the situations described in subparagraphs (a), (b) and (c); and

e) for any other purpose, only with the prior consent of the requested State.

2. a) This Article shall not prejudice the ability of the requested State to impose additional conditions in a particular case where the particular request for assistance could not be complied with in the absence of such conditions. Where additional conditions have been imposed in accordance with this paragraph, the requested State may require the requesting State to give information on the use made of the evidence or information.

b) Generic restrictions with respect to the legal standards of the requesting State for processing personal data may not be imposed by the requested State as a condition under subparagraph (a) to providing evidence or information.

3. Where, following disclosure to the requesting State, the requested State becomes aware of circumstances that may cause it to seek an additional condition in a particular case, the requested State may consult with the requesting State to determine the extent to which the evidence and information can be protected.

4. A requested State may apply the use limitation provision of the applicable bilateral mutual legal assistance treaty in lieu of the present article, where doing so will result in less restriction on the use of information and evidence than provided for in this article.

5. Where a bilateral mutual legal assistance treaty in force between the United States of America and a Member State on the date of signature of this Agreement, permits limitation of the obligation to provide assistance with respect to certain tax offences, the Member State concerned may indicate, in its exchange of written instruments with the United States described in Article 3, paragraph 2, that, with respect to such offences, it will continue to apply the use limitation provision of that treaty.1(1 This paragraph is intended to apply solely to Luxembourg.)

EXPLANATORY NOTE On Article 9. Article 9(2)(b) is meant to ensure that refusal of assistance on data protection grounds may be invoked only in exceptional cases. Such a situation could arise if, upon balancing the important interests involved in the particular case (on the one hand, public interests, including the sound administration of justice and, on the other hand, privacy interests), furnishing the specific data sought by the requesting State would raise difficulties so fundamental as to be considered by the requested State to fall within the essential interests grounds for refusal. A broad, categorical, or systematic application of data protection principles by the requested State to refuse co-operation is therefore precluded. Thus, the fact the requesting and requested States have different systems of protecting the privacy of data (such as that the requesting State does not have the equivalent of a specialised data protection authority) or have different means of protecting personal data (such as

pouvant affecter aussi les droits des citoyens US ils ont été récemment soumis pour ratification au Congrès US. En Europe ces accords n'ont pas été soumis pour ratification au PE mais sont en cours de ratification auprès de plusieurs EM.

In this respect the paths followed by the administration US were:

1. to conclude two international agreements with the EU regarding extradition and judicial cooperation in penal matter covering also on the basis of conditions paritaires the protection of the data in the framework judicial enquêtes (). These agreements being able to affect also the rights of the citizens US they recently were submitted for ratification to the Congrès US. In Europe these agreements were not submitted for ratification to the PE but are in ratification course auprès of several EM.

2. celle de la coopération administrative directe avec Europol (⁴) et Eurojust (⁵)

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3. celle d'obtenir dans le cadre d'un "light" international agreement directement par des privées (les compagnies aériennes européennes) des données personnelles des passagers voulant se rendre ou transiter par les USA.

Cet accord n'affectant pas les droits des citoyens US n'a pas été soumis pour ratification au Congrès mais nonobstant sa nature d'accord de coopération policière (autant que les accords en matière d'extradition et coopération judiciaire pénale) il n'a pas fait l'objet de réserves de la part des parlements nationaux de l'UE et a pu entrer en vigueur sans difficultés.

The one to obtain in the framework of a "light" international agreement directly by deprived (the European airline companies) personal data of the passengers wanting to go or pass through by the USA. This agreement not affecting the rights of the citizens US was not submitted for ratification to the Congrès but notwithstanding his nature

that the requesting State uses means other than the process of deletion to protect the privacy or the accuracy of the personal data received by law enforcement authorities), may as such not be imposed as additional conditions under Article 9(2a).

⁴ In the aftermath of 11 September 2001 an agreement between the USA and Europol for the exchange of information and intelligence was rushed through by 6 December 2001. This was supplemented by a further agreement on 20 December 2002 to allow the exchange of personal data. At the time of the adoption of these two agreements great concern was expressed: i) that the USA did not (and still does not) have a data protection law covering non-US citizens and ii) that the USA was unable to provide a list of all the agencies who could request or have access to data provided by Europol (said to be around 1,500 agencies at federal, state and local level). (source: <http://www.statewatch.org/news/2006/jul/01europol-usa.htm>)

⁵ On November 6th, 2006, The United States signed an Executive Agreement with Eurojust, the judicial cooperation unit of the European Union (E.U.), which will improve transatlantic law enforcement coordination and enhance the ability of the U.S. and the E.U. to fight international crime. The Agreement will foster the exchange of information between law enforcement communities in the U.S. and the E.U. and will strengthen cooperative efforts to prevent and prosecute organized crime, human trafficking, cybercrime and terrorism. Specifically, the agreement establishes the position of U.S. Liaison Prosecutor to Eurojust. The Liaison Prosecutor will be based at Eurojust headquarters in The Hague, Netherlands, and will facilitate law enforcement cooperation between the U.S. and the E.U. on a day-to-day basis. The Agreement particularly ensures the protection of personal information and individual privacy for both citizens of the U.S. and the E.U. "This agreement is just one more example of the strong relationship that exists between the United States and the European Union on law enforcement issues," said Attorney General Gonzales. "It represents an important part of our ongoing efforts to combat transnational crime and international terrorism while protecting the civil liberties of our citizens."

The Executive Agreement was signed following troika meetings hosted by Attorney General Gonzales at the Department of Justice with Secretary of Homeland Security Michael Chertoff, Minister of Justice of Finland Leena Luhtanen, Minister of Interior of Finland Kari Rajamaki and Vice President of the European Commission Franco Frattini.

agreed of police cooperation (as much as the agreements regarding extradition and cooperation judiciaire penal) it did not be the object of reserves from the national parliaments of the EU and was able to enter in force without difficulties.

4. celle de puiser directement les données personnelles liées à des transferts bancaires auprès de une succursale de la société SWIFT sur le territoire des US. Cet accès, déclaré illégale eu Europe ne vise pas seulement les données ayant un lien avec les US (comme dans le cas des vols aux US) mais toutes les données traitées apr le système qu'il concernent l'Europe ou d'autres continents, qu'il s'agisse de payments à des privés ou à dans le cdre des payments des institutions européennes ou nationales.

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Ces différents modalités de accéder à des données personnelles pour lutter contre le terrorisme ont soulevé des réserves de la part du Parlement européen celui-ci s'interrogeant notamment sur les questions suivantes:

These different methods to attain personal data to fight against the terrorism raised reserves from the European Parliament this one s'interrogeant itself notably on the following questions: