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WORKING DOCUMENT

on future European Union (EU) - United States of America (US) international agreement on the protection of personal data when transferred and processed for the purpose of preventing, investigating, detecting or prosecuting criminal offences, including terrorism, in the framework of police and judicial cooperation in criminal matters

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Jan Philipp Albrecht

I. – Introduction

On 3 December 2010, the Council adopted a decision authorising the Commission to open negotiations on an Agreement between the European Union and the United States of America on protection of personal data when transferred and processed for the purpose of preventing investigating, detecting or prosecuting criminal offences, including terrorism, in the framework of police cooperation and judicial cooperation in criminal matters (hereinafter "umbrella agreement").

In accordance with the mandate given to the Commission the purpose of the Agreement is to ensure a high level of protection of the fundamental rights and freedoms of individuals, in particular the right to privacy with the respect to the processing of personal data when personal data are transferred and processed by competent authorities of the European Union and its Member States and the US for these purposes. The Agreement is to provide for a high level of data protection in line with the rights and principles set out in the Charter of Fundamental Rights of European Union, the European Convention for the Protection of Human Rights and Fundamental Freedoms and EU secondary law. Moreover, the Agreement is to lay down legally binding and enforceable data protection rights for data subjects and establish mechanisms to ensure effective application of those standards in practice.

In particular the agreement should contain specific provisions regarding:

- Purpose limitation of personal data transferred and processed. Personal data should be processed for specified, explicit and legitimate purposes within the scope of the agreement and should not be processed further in a way which is incompatible with those purposes;
- Data quality and integrity, i.e. personal data should be adequate, relevant and not excessive in relation to the purposes for which they are processed and retention period;
- Safeguards related to the processing of sensitive data;
- Rules on onward transfers, both to domestic authorities of the contracting party and to third country authorities;
- The rights of data subject to access their personal data, right of rectification, erasure and blocking of his/her personal data, any restriction to these rights shall be necessary and proportionate and for specific grounds;
- The right of information of the data subject;
- The right of the data subject for effective end enforceable administrative and judicial redress; and
- Effective oversight by public independent authorities who should enjoy effective powers of investigation and intervention. Compliance with the provisions of the Agreement is to be subject to the control by an independent public authority in line with Article 8 of the EU Charter.

It is important to stress that the Agreement itself does not provide the legal basis for the processing and transfer of personal data in a specific case. The legal basis is to be found in the Union or bilateral agreements entered into with the US (e.g. on the processing of airline

Passenger Name Records (EU-US PNR Agreement) or Financial Payment Messages for law enforcement purposes (EU-US TFTP Agreement) and providing for the transfers of personal data. The Agreement will merely set out the data protection legal framework that will apply to the transatlantic exchanges of personal data, thereby ensuring harmonised high level of protection legal framework.

On 28 March 2011 the Commission opened negotiations with the US side. Since then several negotiating rounds have taken place. The file has regularly been on the agenda of the EU-US Justice and Home Affairs Ministerial Meetings¹ On 25 June 2014 Attorney General of the US Mr Eric Holder announced that he would take legislative action in order to provide for judicial redress for Europeans who do not live in the US; this was welcomed by the European Commission as US legislation could "open the door to closing the deal on the data protection umbrella agreement"².

II. – State of play

In the previous Working Documents of 10 September 2010³ your Rapporteur presented a general description of the EU and US legal framework for data processing in the field of law enforcement, showing the differences in the approach to data protection between the EU and US law. Your Rapporteur highlighted a number of issues to which one should pay particular attention:

- the lack of a uniform data protection framework on both sides of the Atlantic,
- the current review of the EU data protection framework, including the integration of data protection law for the private and the public sector,
- the differences in approach as regards the concept of independent oversight,
- the principles of proportionality, data minimization, minimal retention periods, and purpose limitation, including on-going discussions concerning profiling and data-mining,
- the definition of the concept of national security,
- the application of data protection rules, including the right to judicial redress, to every individual, regardless of his or her nationality or place of residence.

There are also outstanding questions related, for instance, to the conditions for access by law enforcement authorities to personal data transferred by private companies from the territory of contracting party B to a company established in the territory of contracting party A.

The revelations on the Electronic mass surveillance of EU citizens by the US intelligence agencies, which have given rise to the Parliament Resolution of 12 March 2014⁴, have impacted on the negotiations on the data protection umbrella agreement. The inquiry

¹ See *i.a.* Joint Press Statement following the EU-US-Justice and Home Affairs Ministerial Meeting of 18 November 2013 in Washington:

² EU-US Justice Ministerial in Athens 25 June 2014: Vice-President Reding welcomes US announcement on data protection umbrella agreement, http://europa.eu/rapid/press-release_STATEMENT-14-208_en.htm.

³ PE448.804v01-00 and PE448.805v01.00

⁴ P7_TA-PROV(2014)0230

conducted by the Parliament found "compelling evidence of the existence of far-reaching, complex and highly technologically advanced systems designed by US and some Member States' intelligence services to collect, store and analyse communication data, including content data, location data and metadata of all citizens around the world, on an unprecedented scale and in an indiscriminate and non-suspicion-based manner"⁵.

In its resolution Parliament strongly emphasised "given the importance of the digital economy in the relationship and in the cause of rebuilding EU-US trust, that the consent of the European Parliament to the final TTIP agreement could be endangered as long as the blanket mass surveillance activities and the interception of communications in EU institutions and diplomatic representations are not completely abandoned and an adequate solution is found for the data privacy rights of EU citizens, including administrative and judicial redress"⁶. In particular Parliament asked for the umbrella agreement to provide for effective and enforceable administrative and judicial remedies for all EU citizens in the US without any discrimination⁷. The Parliament also asked the Commission not to initiate any new sectoral agreements or arrangements for the transfers of personal data for law enforcement purposes with the US as long as this umbrella agreement has not entered into force⁸.

Finally, in assessing the outcome of the umbrella agreement negotiations the case law of the Court of Justice, particularly the judgement of the Court in *Joined Cases C-293/12 and C-594/12 Digital Rights Ireland and Seitlinger and Others*, declaring the Data Retention Directive to be invalid and further interpreting article 7 and 8 of the Charter of Fundamental Rights of European Union, needs to be taken into account.

III. – Outstanding concerns

The electronic mass surveillance revelations have provided a new backdrop to the EU-US umbrella agreement negotiations. Beyond the demands for unambiguous wording and enforcement of data protection principles in line with the EU's fundamental rights obligations new concerns have arisen regarding the scope of the agreement to prevent the blurring of lines between law enforcement and intelligence as well as excessive definition and use of the concept of national security.

According to information available to your Rapporteur, in addition to the need for a practical and effective implementation of the US's welcome announcement that it will grant administrative and judicial remedies to EU citizens, the wording currently considered in the negotiations would not properly address essential data protection principles concerning *inter*

⁵ European Parliament resolution of 12 March 2014 on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' fundamental rights and on transatlantic cooperation in Justice and Home Affairs, P7_TA-PROV(2014)0230, paragraph 1.

⁶ European Parliament resolution of 12 March 2014 on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' fundamental rights and on transatlantic cooperation in Justice and Home Affairs, P7_TA-PROV(2014)0230, paragraph 74.

⁷ European Parliament resolution of 12 March 2014 on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' fundamental rights and on transatlantic cooperation in Justice and Home Affairs, P7_TA-PROV(2014)0230, paragraph 57.

⁸ European Parliament resolution of 12 March 2014 on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' fundamental rights and on transatlantic cooperation in Justice and Home Affairs, P7_TA-PROV(2014)0230, paragraph 58.

alia data retention, purpose limitation, onward transfers, and effective independent oversight.

The conditions relating to the retention of personal data are not drawn up with the required precision. Furthermore, contrary to the well established purpose limitation principle in EU law, a US law enforcement authority receiving personal data from an EU competent authority could reuse this personal data for further purposes and share it with other law enforcement authorities. The agreement would contain the principle of non-discrimination under which a party would apply the provisions of the agreement without discrimination between its own nationals and those of the other party. However this does not ensure that the treatment afforded to EU citizens would always comply with the minimum requirements of the Charter and EU data protection law. Indeed this principle could have the reverse effect of nullifying the protections of the agreement on the grounds that the law of a contracting party does not grant its own nationals any of the protections and safeguards set out in the agreement. This would imply that although EU citizens would be treated without discrimination, the effective protections and rights provided in the EU to their fundamental right to data protection would simply vanish when data are transferred because of the application of the principle of non-discrimination.

Oversight of processing operations is a key element of a data protection system. Article 8 of the Charter of Fundamental Rights of the European Union and Article 16 TFEU expressly lay down that compliance with data protection rules shall be subject to the control by independent authorities. The before mentioned case law of the Court of Justice has clarified this concept. However it is not clear how this fundamental rights principle is met since the oversight body currently is internal department of the US administration, which does not enjoy effective enforcement powers on the competent authority.

IV – Follow up

Your rapporteur trusts that the Commission will take the outstanding concerns into account in its role of guardian of the treaties. Once an agreement is reached he will subject it to intense scrutiny for compliance with EU data protection standards. In case of doubt your rapporteur will recommend that the Parliament seeks the advice of the Court of Justice.