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POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

HEARING
DATA PROTECTION IN A TRANSATLANTIC
PERSPECTIVE

Future EU-US data protection agreement in the
framework of police and judicial cooperation in criminal
matters

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SUMMARY

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SESSION I: Strengthening the transatlantic dialogue on data protection in order to overcome the current shortcomings and enhance legal certainty

(A more political session)

MS FRANCOIS LE BAIL, Director General DG Justice, European Commission

- A security partnership between the EU and the US is indispensable in the fight against terrorism, drug trafficking and international crime;
- The transatlantic partnership must be a long-term cooperation based on shared rights and values such as democracy, equity and human rights;
- However, the transatlantic cooperation is far from being satisfied. It is a patch-work that requires political willingness and determination;
- Dealing with personal data in a transatlantic perspective is complex because often privacy and other fundamental rights are violated;
- Security and privacy do not necessarily contradict each other. Fundamental rights must be respected while guaranteeing security at the same time;
- Systems of protections between the US and the EU are not identical (supervision, etc) and these different approaches make it more complex to find a common model;
- In May 2010, the European Commission has transmitted a recommendation to the Council to draft negotiating guidelines for opening negotiations with the US. Three objectives:
 - ensure a high level of protection in personal data's transfer,
 - establish unique coherent legally binding and enforceable personal data protection standards,
 - establish a mechanism that ensures the effective application of the agreement and creates a solid basis for EU-US cooperation which facilitating the transit of data that respects citizens' rights;
- For a long time, the European Commission has already been negotiating such topics with the US, but so far the fundamental rights were not taken into consideration. An effective agreement based on such values and rights would ensure more security;
- The European Commission wants to ensure closer cooperation with the European Parliament.

MR STEFAAN DE CLERCK, LE BAIL, Minister of Justice (Belgium)

- The Belgium Presidency is trying to get the negotiating mandate as soon as possible with the aim to discuss it in the Council meeting of December 2010;
- The general transatlantic agreement will never be able to cover all cases;
- The agreement should be an umbrella agreement which includes policies regarding specific fields or should be accompanied by specific agreements;

- Non-EU countries should be able to provide a high level of data protection by cooperating with the EU and the US;
- Personal data must be protected with a specific legal framework. Furthermore, data must not be kept more than a certain period of time;
- Citizens have the right to know when their personal data is used, by whom and for how long;
- Since the protection of rights might differ between countries, a proper level of protection must be carefully defined. Therefore, it is fundamental to overcome the significant differences between the EU and the US;
- When the transatlantic agreement will be adopted it will function as a stable base for future negotiations in specific areas related to data protection;
- Inter-institutional dialogue should be enhanced to develop coherent and efficient agreements as soon as possible. The Council and the Parliament must be informed by the Commission on the progress of the agreement.

MR WILLIAM KENNARD, Ambassador United States Mission to the European Union

- The US government recognizes and respects the important role of the European Parliament;
- The US and the EU for centuries share common values. American and European people are united by a shared history, culture and values;
- It is a stereotype that the US cares more about security and less about privacy than Europeans;
- The US believes that there can be no exercise of personal freedom if there is no security. Governments on both sides of the Atlantic must safeguard their citizens' security to the same degree to which they protect their liberties.
- This is a challenge the EU and the US must confront together and there is no need to sacrifice privacy for security. Today's challenges demand international solutions and multinational cooperation.
- The EU and the US have to be dynamic and they should build in necessary safeguards when planning and designing new record-keeping systems, including those that we rely on for law enforcement objectives;
- Over the years, the US and Europe have successfully managed law enforcement cooperation and judicial information. The US-EU Extradition and Mutual Legal Assistance Agreements and 54 accompanying bilateral instruments that came into force demonstrated such commitment to work together;
- Using these treaties and working with Eurojust and Europol, the American and European police and prosecutors successfully investigated an international ring of child sexual predators and pornographers. They arrested more than 20 defendants in five countries and rescued more than 50 children;
- One of the greatest success stories has been the work over three years of the U.S.-EU High Level Contact Group, the "HLCG," on data protection/privacy;

- Therefore, different approaches that are founded on different legal systems and traditions can share common attributes and are committed to the same core values;
- A binding agreement between the US and the EU will facilitate future agreements and mutually recognize the effectiveness of the different approaches to data protection and privacy. The EU and the US would have an overarching umbrella agreement enabling to move forward together;
- From what we understand of the proposed mandate, the US government is concerned that the proposed mandate diverges from its respective leaders' instruction to adopt the HLCG's well-informed common principles;
- It is also concerned and it needs to ensure that the agreement does not jeopardize the several hundred treaties, agreements, conventions, and arrangements underpinning every facet of Europe's and the United States' robust cooperation in justice and law enforcement;
- The US believes that making the effect of this agreement, retroactive carries serious harmful implications. Retrospective application would create confusion among law enforcement and judicial authorities;
- The US will also seek a clear statement of mutual recognition of the effectiveness of each other's data protection systems. Without such legal effect, there cannot be an added value of such an umbrella agreement;
- It is therefore important to the US that the negotiation will be flexible in order to accommodate the different legal systems and promote enhanced cooperation. Both sides should be guided by the HLCG's carefully crafted principles;
- The EU and the US should always remain open to strengthen dialogue and to increase legal certainty. The negotiation of an umbrella U.S.-EU data privacy agreement would provide such opportunity;
- The US believes that the US and the EU should take on the commitment to learn the "on the ground" reality of EU-US law enforcement and judicial information sharing in order to be informed of each other's responsibilities.

QUESTIONS

- The European Parliament wants to build up future principles and debate a comprehensive framework for transatlantic cooperation. It believes that it is fundamental to first understand the EU and the US systems, before coming to a common and legal protection system;
- The EU-US agreement could overlap and violate the already existing agreements between the US and different European countries. This explains the reason of why it is important to amend each of the existing agreements so that they can be included in the umbrella agreement (each agreement contain different protection rules). Can the US government be more flexible on this question?
- Until last year, the US government did not even know about the existence of the European Parliament. The US should be as flexible as it can be, not only theoretically, but also in practice. Furthermore, the EU should conduct negotiations with third countries;

- Freedom should come before questions of security and therefore "security-privacy services" are needed. How efficient are the data protection policies of the agreement? Need of data protection's laws?
- There are different legal frameworks which overlap the transatlantic agreement. There is a need for more US congress commitment and interparliamentary meetings to avoid incoherencies and amend any existing contradictions;
- Citizens must have access to their personal data and be informed when their data is examined. The question of citizens' rights is a fundamental issue that needs to be solved in order to safeguard privacy as well as security.

ANSWERS

- US Ambassador- The US government is working to be more flexible. Only when all the proposals will be discussed together (at a common table), will it be possible to solve the possible overlaps with the existing agreements and to decide on the amendments;
- The US and EU privacy regimes are not only different but also unstable, due mainly to the continuous development of technology. Flexibility should come from both sides and it implies the understanding of the different regimes as well as the understanding of the new technology;
- It is really difficult to ask the US Congress to amend the Privacy Act, if not impossible;
- European Parliament- The implementation of the agreement can be achieved only through working together and the EU institutions have to work side by side. This is why, the European Parliament must be informed on the working progresses by the Commission;
- Citizens have fundamental rights and thus they have the right to know about the existence of the transatlantic agreement and of the existing agreements, even if they may be secret agreements;
- EU Commission- The main job of the Commission is to find a balance between the general elements of the new transatlantic agreements and the existing agreements between the US and different European countries;
- Furthermore, the European Commission aims to create a common framework where the EU citizens have the same high level of protection across the EU;
- The legal framework of the agreement will encourage European countries and the US regions to respect the terms of the agreement;
- Inter-institution dialogue exists and the European Commission is not hiding anything from the European Parliament.

SESSION II: Shared Values, constitutional constraints and possible common solutions ensuring proportionality, judicial review and independent and effective oversight

(A more legal session)

MR MARC ROTENBERG, Executive Director of the Electronic Privacy Information Center (EPIC) Washington, D.C.

- EPIC is an independent research organisation which focuses on the question of privacy and civil liberties;
- EPIC believes that the question of data protection in the US is paradoxical. Often personal data is used for inappropriate purposes, there is no transparency and rights are violated;
- In order to solve these problems, the US protection law must be amended in certain areas. Three points:
 1. The Privacy Act of 1974 (collection of personal data by the US federal agencies) does not include non-US citizens or non lawful permanent residents. There is no logical reason for this
 2. The Patriot Act has reduced the privacy standards for US and non-US citizens and has at the same time limited the power of the courts' authority diminished
 3. Some of the new technologies are really useful but some have worsened the protection of personal data since many of the new techniques are not subject to the rule of law
- There should not be retroactive application of the transatlantic agreement but it should apply to the existing agreements;
- Initiatives to protect citizens' rights at this level will force other countries to adopt stronger privacy acts which protects the transfer of personal data. This would bring global benefits.

MS ANNE-CHRISTINE LACOSTE, Legal Adviser in the Policy and Consultation section of the European Data Protection Supervisor secretariat (EDPS)

- The Article 29 Working Party on the protection of individuals with regards to the processing of personal data:
 - is in favour of the transatlantic agreement on data protection, for instance legal security for the transfer of data and high level of protection
 - recalls the importance of police and judicial cooperation in criminal matters and the importance of information-sharing and thus cooperation between law enforcement
 - need for transparency, purposes, proportionality, fundamental rights and principles;
- Six important points:

- 1. Individual Rights- need for administrative and judicial appeals for citizens and need for direct or indirect access to transferred personal data to avoid any violation of rights
- 2. Supervisor- an independent authority complementary to the option of a legal appeal
- 3. Subsequent transfers- in a third country or from that country to another country. The principle of finality and a high level of protection in two important requirements. Derogations are not accepted
- 4. Application- information-sharing between the various EU agencies (Frontex, Eurojust, Europol). The application of the agreement should have an impact at the national level and thus it must be applied also to the existing agreements between the US and the different European countries;
- 5. Umbrella Agreement- the proposed mandate should be a general agreement which includes other agreements in specific areas. However, the specific agreements do not have to entail derogations to the general agreement;
- 6. Scope- The scope of the agreement is obvious: to guarantee legal security and the respect of privacy in the transfer of personal data;

MS CLAIRE GAYREL, Researcher University of Namur (FUNDP)

- The perspective of a general data protection transatlantic agreement aiming at strengthening the EU-US cooperation in criminal matters raises many issues that cannot be all dealt with today;
- The EU-US HLCG Final Report appears to be a basis for future negotiations. However it does not address a range of crucial issues (many identified by the European Data Protection Supervisor in November 2008);
- These issues have not been made public, but in order to have a debate documents must be made publicly available;
- There are important incompatibilities between the EU and the US data protection regimes, mainly regarding the application of:
 - The purpose limitation principle- the application of the US routine-use allowing inter-agencies transfers of data often contradicts the European conception of compatible purposes. However, even in Europe there is a trend to extend the meaning of compatible purposes, for instance the use of personal data collected for commercial purposes and further used for law enforcement
 - The retention periods- in the US, these are not regulated at all or are extensively long. Specific agreements on the exchange of personal data should address these matters.
- As the EDPS strongly recommends, the EU should be consistent with the adequacy as a method and it should be considered a main objective of the agreement;
- The Working Document 12 of the Working Party 29 identified three objectives:

1. To provide a high level of compliance with the rules- issues raise for the differences of EU and US approaches of independent data protection authorities. Indeed, US privacy agencies are advisory bodies and not structurally independent compared to EU data protection authorities. Independence requires an assessment and must be sought in a wide range of guarantees
2. To provide support and help to data subjects in the exercise of their rights- strengthening cooperation between data protection supervisory bodies of both sides of the Atlantic is the necessary corollary to the strengthening of police and judicial cooperation of national authorities for law enforcement purposes
3. To provide appropriate redress to the injured party when rules are not complied with- in the US, it is limited at two levels. First, only US citizens are entitled to launch a redress action (US Privacy Act5). Second, the admissibility of a civil action is subject to other conditions that make it more difficult for the persons to launch a redress action. Beyond such limitation, there is the lack of protection of personal data regarding non-US persons and the lack of judicial review of violations of this Act;

These challenges underline the need of assistance mechanisms at the level of the data protection acts.

DR PATRICK BREYER, Arbeitskreis Vorratsdatenspeicherung (Working Group on data Protection), Germany

- The transfer of personal information to the US entails the real risk of a violation of human rights guaranteed in the ECHR. An international agreement cannot remove this risk (US human rights record regard death penalty, torture, impunity, deprivation of fair trial);
- An international agreement with the US would improve the current situation if it applies exclusively to the information sharing that is taking place under existing agreements, thus reducing the amount of information shared and providing for more safeguards;
- Information relating to a person may be handed over to states that do not protect fundamental rights in an equivalent manner only if the transfer does not violate the ECHR;
- To respect the right to privacy, certain guarantees must be laid down in self-executing provisions of the law of both the sender and recipient states:
 - a) Strict conditions- only information that is adequate, necessary and proportionate for prosecuting a criminal act may be transferred
 - b) Sensitive information- special protection must be afforded to sensitive information
 - c) Compliance- the decision on any transfer of information as well as on its use should be taken by an independent and impartial tribunal
 - d) Restrictive and specific purpose limitation- personal information must not be used, passed on or retained for any purpose other than that which it was obtained for
 - e) Deletion- personal information must be cancelled when no longer necessary
 - f) Independent oversight- a public and independent authority must ensure the legality of any processing of personal information
 - g) Notification- An individual whose data is processed without his/her knowledge must be notified

h) Data subject rights- Everyone must have the right to find out which information is being held relating to them
i) Effective remedy- Everyone whose rights - as set forth above - are violated must have the right to an effective remedy

- The EU must therefore strongly reject any sharing of personal information with the US at present and in the foreseeable future;
- Instead, the EU should recommend to the US to ratify the International Covenant on Civil and Political Rights including its First Optional Protocol as well as the American Convention on Human Rights.

QUESTIONS

- The European Parliament criticizes the European Commission and the US for excluding the Parliament in the working processes of the agreement. It finds it absurd that the access to the proposed mandate is only confidential and the EP further believes that the citizens have the right to know about such agreement. Are the Commission and the US maybe hiding elements of the proposed mandate that may violate fundamental rights?
- Is it possible to amend the US Privacy Act and extend it to non-US citizens? Will the new agreement guarantee the same rights on the protection of personal data to all European and US citizens?
- What are the rules to access to the documents of international agreements?

ANSWERS

- The European Commission is not hiding to the Council and Parliament any element of the agreement and the agreement will not violate any fundamental right or European principles;
- It is difficult to envisage that the US Privacy Act will be extended to foreigners and long-term residents and it is even more difficult that this agreement will guarantee, at least in practice, the same rights to both European and US citizens;
- Gayrel- The rules to access to the documents of the transatlantic agreement are unknown. It is such a pity because researchers and the European Parliament could be really useful in giving opinions and suggestions for the working progresses;
- The agreement will work as a global framework: it can be considered the basis to negotiate other agreements on data transfers between US and the EU.

SESSION III: The impact of a new framework agreement on the current EU-US and bilateral provisions

MR TROELS OERTING, Assistant Director of Europol

- Europol, US cooperation and joint operations are crucial to combat international crime and terrorism. Europol hosts American liaisons officers and some Europol liaisons officers are deployed in the US;
- The exchange of data between the US and Europol takes place through the ESIENA-network, which also focuses on data protection, confidentiality and security;
- As a result of Europol-US joint operations several numbers of the paedophile network have been identified;
- Europol believes that the EU and the US share common values. However, there are differences regarding the privacy and data protection's systems, the European data protection legal framework is stricter than the American;
- Europol collaborates with the US but at the same time it does not know about all the bilateral agreements between the US and different European countries.
- Europol fears that the new EU-US umbrella agreement will put Europol aside. In the future Europol will need to apply to stronger data protection standards, while the member states will keep their bilateral agreements regardless their conformity to the new framework;
- Europol is always ready to collaborate with the EU and member states for any proposal and new agreement.

MS MALCI GABRIJELCIC, National member for Slovenia and Chair of the College External relations team Eurojust

- Since 2006 Eurojust has an agreement with the US with 23 dispositions on data protection (from art. 8 to art.19 on the severity of protection of data), such as transparency, privacy safeguards, etc;
- Eurojust is open to considerate an adjustment of the 2006 agreement for the future agreement;
- It strongly hopes that the new agreement will include a clause that maintains the data protection's provisions of the 2006 agreement;
- Eurojust believes that the new agreement should apply to the future cases and not retroactively. If so, it should be applied to all the bilateral agreements to avoid discrepancies.

MR MICHAEL HEYN, Head of Unit V (Data protection in the area of police, criminal matters and intelligence), the federal Commissioner for Data Protection and Freedom of Information (Germany)

- Germany fully agrees with the new transatlantic agreement. Germany admits to have an agreement with the US, but it was not ratified;

- The new framework agreement should guarantee a high level of data protection which would harmonize data protection throughout Europe;
- Therefore the new mandate should be applied to all the existing bilateral agreements as well as it should fill the existing gaps;
- The new framework agreement should:
 - have a reference text for the US courts
 - define clear and rigorous principles
 - define a time limit for the storage of personal data
 - be applied to existing agreements without exceptions

PROFESSOR DOUWE KORFF, London Metropolitan University

- The US and the EU do not share common values and have different approaches on data protection;
- Data protection standards have been lowered since September 11, 2001;
- Human rights are violated by the US, mainly towards non-US citizens. US programs to combat terrorism do not have any limitation on the use of personal data;
- There is a need of an agency of surveillance independent from the US department of homeland security;
- The agreement should be set in general terms so that it can be applied also at national level. At the same time another agreement should be set looking at specific areas;
- The existing agreements should be put in line with the framework agreement. This does not mean that the new agreement has a retrospective application;
- Some of the bilateral agreements, such as the US-Germany one, have many ways to avoid restrictions. Therefore the new agreement should guarantee more transparency and avoid possible cops out;
- The European Commission must be transparent and inform the Parliament. If the new agreement will violate any fundamental right or European principle it will jeopardize the entire EU system;
- A transatlantic agreement is possible only through a transparent dialogue between the European institutions and only when the US will stop to violate human rights.

QUESTIONS

- Which member states have agreements with the US? Why they are not public and the European Union does not know about all the existing bilateral agreements?

- K. Morvay- Why in this conference are human rights' violations of the US mentioned without actually discussing the European violations of fundamental rights, especially in the ex-communist countries?
- The new agreement is meant to be legally binding. Will it be so in the US? How does the agreement address the question of terrorism?

ANSWERS

- The European Parliament asked the Commission about the existing bilateral agreements. The European Commission replied to know little about it because most of the European countries hide such information (Belgium denied to have an agreement with the US, but facts show a different reality);
- In Europe human rights are obviously also violated. Ninety percent of the prisoners at Guantanamo Bay have been captured and sent there by European countries. However, human rights in Europe are not violated as much as in the US, in Europe death penalty and torture are forbidden and all HR conventions have been ratified;
- The new agreement is meant to be legally binding, but in the US this wouldn't be the case. The question of terrorism is complex and impossible to address due to the fact that there is not yet a universal, common and recognised definition of terrorism. The new agreement would cover existing provisions that allow to accuse people of terrorist actions even though they are not involved (people being accused just for demonstrating), especially since the '70s.
- The framework agreement must protect citizens' rights and they have the right to know about the new agreement.