



EU-US "Umbrella Agreement"

Presentation of EDPS Preliminary Opinion 1/2016 before Civil Liberties, Justice and Home Affairs Committee (LIBE) of the European Parliament

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Ladies and gentlemen,

Distinguished Members of the European Parliament,

Thank you for the invitation to the discussion on the EU-US Umbrella Agreement.¹

Last week I issued my Preliminary Opinion on the text of the initialled Agreement as published by the European Commission on its website, when the intention was signalled by the parties in September last year to conclude the Agreement, once the Judicial Redress Act is passed by the US Congress.

First of all let me point out that neither the EDPS, nor the national Data Protection Authorities were part of the previous rounds of negotiations of this Agreement.

As with all EDPS Opinions, our intervention is an exercise of our role as an independent adviser to the EU institutions on all matters concerning the processing of personal data.

I am sure no one in this House underestimates what a delicate, complicated task falls to the Commission with these negotiations.

And let no one underestimate the historical significance of this Agreement.

It could be key for future international arrangements on law enforcement information exchange, involving not only the EU but also individual Member States.

And so we aim to provide constructive advice, in the interests of a satisfactory conclusion for the EU.

Our advice aims to allow the institutions to introduce the required horizontal and consistent framework.

Investigating and prosecuting crime is a legitimate policy objective.

¹ Full title: EU-US Agreement on the Protection of Personal Data when Transferred and Processed for Law Enforcement Purposes published at http://ec.europa.eu/justice/data-protection/files/dp-umbrella-agreement_en.pdf [accessed 15.2.2016]

International cooperation including sharing of personal information has become more important than ever.

The EDPS has longed argued, and I continue to underline, that the EU needs sustainable arrangements.

But, until now, the EU has lacked a robust common framework. Currently there are no consistent safeguards for individuals' fundamental rights and freedoms.

So I welcome and actively support the efforts of the European Commission to reach, for the first time, a general agreement with the US.

The crucial challenge is ensuring full compatibility with the EU Treaties and the Charter of Fundamental Rights, and in particular with Articles 7, 8 and 47 of the Charter and Article 16 TFEU.

Let me share with you my preliminary concerns with some of the terminology we find in the published text.

Now, we of course recognise that it is not possible to replicate entirely the definitions of EU law in an agreement with a third country.

But we stress that the safeguards for individuals must be clear and effective in order to comply fully with EU primary law.

I believe the safeguards already envisaged in the Agreement can and should be reinforced.

In the coming months the Commission will submit the Agreement to the consent of this Parliament.

But before they do so, I urge the Parties to consider carefully significant developments since last September.

The Schrems judgment of the Court of Justice of the EU in October which invalidated the Safe Harbor Decision, and the EU political agreement on data protection reform in December, do not directly affect this Agreement.

But they offer strict guidance on the standards which are required under EU law.

We have closely analysed the text of the Agreement.

And we have identified three essential improvements which we consider necessary for compliance with the Charter and with Article 16 of the Treaty.

We have also identified a further nine detailed recommendations in the interests of clarification.

The three essential improvements are the following:

- First, clarification that all the safeguards apply to all individuals in the EU, not only to EU nationals;
- Second, ensuring judicial redress provisions are effective within the meaning of the Charter; and

- Third, clarification that transfers of sensitive data in bulk are not authorised.

I will now briefly expand on these three recommendations.

The first EDPS recommendation is to clarify that all the safeguards apply to all individuals in the EU, not only to EU nationals.

The material scope of the Agreement is wide: it applies to all personal information transferred. This could imply personal information of anyone.

Yes, there are specific provisions in the Agreement that apply to all individuals - such as the rights to access, rectification and administrative redress.

But there are two essential provisions of the Agreement that appear to be limited to citizens of the two parties to the Agreement: namely, the general non-discrimination obligation in Article 4 and the right to judicial redress in Article 19.

This is a key point, and we cannot afford any ambiguity.

Indeed, where implemented by excluding anyone other than EU nationals from the personal scope of the Agreement, the Agreement would not be compliant with the protection afforded by Articles 7, 8 and 47 of the Charter. Under the Charter, the fundamental rights to privacy, personal data protection and an effective remedy apply to "everyone" in the EU, irrespective of nationality or status.

The second EDPS recommendation is to ensure that judicial redress provisions are effective - again within the meaning of the Charter.

Everyone in the EU should have the right to judicial redress, not only EU nationals.

Moreover, from the current wording of Article 19 of the Agreement, it is not apparent that individuals will have a right of judicial redress where their requests to have data erased are not complied with.

Once again, we can afford no ambiguity on this key point.

Exclusion of the right to erasure from the scope of judicial redress would also conflict with the interpretation given to Article 47 of the Charter by the Court of Justice in the Schrems judgment.

Yes, Article 19(3) of the Agreement also states its provisions are without prejudice to any other judicial review available with respect to the processing of an individual's personal data under the domestic laws of the Parties to the Agreement.

But, we are not in the position to fully assess at this stage the effectiveness of these alternative legal remedies to be provided for in sectorial legislation, particularly in the US.

Hence our emphasis on the need for general judicial redress provisions to be effective in practice.

Finally, the third EDPS recommendation is about transfers of sensitive data. We recommend that the Agreement be quite clear that bulk transfers of sensitive data are not authorised by this Agreement.

I am afraid that Article 13(2) of the Agreement seems to open the possibility of bulk transfers of sensitive data: it refers to the possibility of transfers of personal information "other than in relation to specific cases".

Such transfers would not necessarily mean transfers in bulk, but this possibility cannot be excluded.

I should add that this last essential recommendation is in line with previous EDPS Opinions, such as the Opinions on EU-US PNR Agreement and the EU-Canada PNR Agreement.

I will refrain from entering into details about the other nine more technical recommendations, due to time constraints.

But they are nonetheless important.

For instance, we noted that the Agreement creates a general presumption of compliance with transfer rules under EU data protection law, following Article 5(3).

This means that subject to the existence of a specific legal basis for transfers for the purposes of the Agreement, future transfers will not need any authorisation.

Therefore, it is crucial to ensure that this "presumption" is reinforced by all necessary safeguards within the text of the Agreement - including the exercise of other supervisory duties and powers by independent data protection authorities.

We hope that these recommendations will be considered before the Agreement is finalised.

Ladies and Gentlemen,

Honourable Members of the European Parliament

I mentioned the role of the Commission earlier. But you also have a big responsibility.

This is the outcome of our Preliminary Opinion.

Our evaluation may change should further information become available.

There is still time to adjust and improve this Agreement.

There is still time for a last round of discussions between the parties.

A few of our recommendations will require modest changes to the main body of the Agreement itself.

But most can be implemented by way of forms typical used in international agreements, such as an explanatory document accompanying the Agreement - while still ensuring that the provisions are binding.

We remain at the disposal of the institutions for further advice and dialogue on this issue.

Thank you for listening.