Summary of the Opinion of the European Data Protection Supervisor on the negotiating mandate of an EU-US agreement on cross-border access to electronic evidence

[The full text of this Opinion can be found in EN, FR and DE on the EDPS website www.edps.europa.eu]

(2019/C 186/06)

On 5 February 2019, the European Commission issued a Recommendation for a Council Decision authorising the opening of negotiations to conclude an international agreement with the United States of America (US) on cross-border access to electronic evidence. The Annex to the Recommendation sets out the Council's directives to negotiate the agreement. The objective of the proposed agreement would be to address, through common rules, the legal issue of access to content and non-content data held by service providers in the EU and the US.

The EDPS welcomes and supports the objective of the Commission to conclude an agreement on cross-border access to electronic evidence with the US, thus ensuring a high level of protection for personal data in transfers between the EU and the US for law enforcement purposes, and appreciates the commitment to introduce sufficient safeguards. As the EDPS has long argued, the EU needs sustainable arrangements for sharing personal data with third countries for law enforcement purposes, which are fully compatible with the Charter of Fundamental Rights. Even when investigating domestic cases, law enforcement authorities increasingly find themselves in 'cross-border situations' simply because a foreign service provider was used and the information is stored electronically in a third country. In practice, this often concerns service providers headquartered in the US due to their dominance on global markets. The growing volume of requests for electronic evidence and the volatility of digital information put a strain on existing models of cooperation, such as MLATs. The EDPS understands that authorities face a race against time to obtain data for their investigations and supports efforts to devise new models of cooperation, including in the context of cooperation with third countries.

This Opinion aims to provide constructive and objective advice as the Council has to deliver its directives before the start of this delicate task. It builds on the case-law of the Court of Justice of the European Union in recent years, which has affirmed data protection principles including fairness, accuracy and relevance of information, independent oversight and individual rights of individuals. These principles are as relevant for public bodies as they are for private companies and become all the more important considering the sensitivity of the data required for criminal investigations.

Against this background, the EDPS wishes to make the following observations:

— he welcomes that the Recommendation already includes important data protection safeguards, including the need to make the Umbrella Agreement applicable by reference, and supports the need for certain additional safeguards as proposed by the Commission;

— given specific risks that arise in the context of direct cooperation between service providers and judicial authorities, he proposes to involve a judicial authority in the other party to the agreement;

— he recommends adding Article 16 TFEU as a substantive legal basis.

Additionally, the Opinion offers further recommendations for possible improvements and clarifications of the negotiating directives. The EDPS remains at the disposal of the institutions for further advice during the negotiations and before the finalisation of the future EU-US agreement.

1. INTRODUCTION AND BACKGROUND

1. On 17 April 2018, the Commission issued a package of two legislative proposals: a Proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters ([1]) (hereinafter 'the e-evidence Proposal'), and a Proposal for a Directive laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings ([2]). While work is ongoing at the European Parliament, the Council of the European Union (the Council) has reached a general approach on those two proposals ([3]).

2. On 5 February 2019, the Commission adopted two recommendations for Council Decisions: a Recommendation to authorise the opening of negotiations in view of an international agreement between the European Union (EU) and the United States of America (US) on cross-border access to electronic evidence for judicial cooperation in criminal matters ([4]) (hereinafter 'the Recommendation'), and a Recommendation to authorise the participation of the Commission on behalf of the EU in negotiations on a second Additional Protocol to the Council of Europe Convention on Cybercrime (CETS No 185) ([5]). The Annex to the Recommendation (hereinafter 'the Annex') is of utmost importance since it lays down the recommended Council's directives to the Commission to negotiate the agreement on behalf of the EU. The latter recommendation is the subject of a separate EDPS Opinion ([6]). However, the EDPS considers that both negotiations with the US and at the Council of Europe are closely linked.

3. The Recommendation was adopted on the basis of the procedure laid down in Article 218 of the Treaty on the Functioning of the European Union (TFEU) for agreements concluded between the EU and third countries. With this Recommendation, the Commission seeks to obtain authorisation from the Council to be appointed as the negotiator on behalf of the EU and to start the negotiations with the US, along the negotiating directives annexed to the Recommendation. Once the negotiations are completed, in order for the agreement to be concluded, the European Parliament will have to give its consent to the text of the agreement negotiated, after which, the Council will have to adopt a decision concluding the agreement. The EDPS expects to be consulted on the text of the draft agreement in due course in accordance with Article 42(1) of Regulation (EU) 2018/1725.

4. The EDPS welcomes that he has been consulted following the adoption of the Recommendation by the European Commission, as well as by the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament. The EDPS also welcomes the reference to his Opinion in Recital 4 of the Recommendation. He wishes to underline that the present Opinion is without prejudice to any additional comments that the EDPS could make on the basis of further available information at a later stage.

5. CONCLUSIONS

66. The EDPS understands the need for law enforcement authorities to secure and obtain electronic evidence quickly and effectively. He supports the efforts to identify innovative approaches to obtain cross-border access to electronic evidence. Therefore, this Opinion aims to provide constructive and objective advice to the EU institutions as the Commission seeks to obtain authorisation from the Council to negotiate with the US.

([1]) Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters, COM(2018) 225 final.

([2]) Proposal for a Directive of the European Parliament and of the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings, COM(2018) 226 final.

([3]) The Council adopted its general approach on the proposed Regulation on 7 December 2018, available at https://www.consilium.europa.eu/en/press/press-releases/2018/12/07/regulation-on-cross-border-access-to-e-evidence-council-agrees-its-position/#. The Council adopted its general approach on the proposed Directive on 8 March 2018, available at https://www.consilium.europa.eu/en/press/press-releases/2019/03/08/e-evidence-package-council-agrees-its-position-on-rules-to-appoint-legal-representatives-for-the-gathering-of-evidence/

([4]) Recommendation for a Council Decision authorising the opening of negotiations in view of an agreement between the European Union and the United States of America on cross-border access to electronic evidence for judicial cooperation in criminal matters, COM(2019) 70 final.

([5]) Recommendation for a Council Decision authorising the participation in negotiations on a second Additional Protocol to the Council of Europe Convention on Cybercrime (CETS No 185), COM(2019) 71 final; Convention on enhanced international cooperation on cybercrime and electronic evidence, Budapest, 23 November 2001, CETS No 185.

([6]) EDPS Opinion 3/2019 regarding the participation in the negotiations in view of a Second Additional Protocol to the Budapest Cybercrime Convention.

67. The EDPS agrees with the Commission's statement that the envisaged agreement should be conditional on strong protection mechanisms for fundamental rights. Several data protection principles and safeguards are already envisaged in the negotiating directives. He first recommends to include Article 16 TFEU as one of the substantive legal basis in the preamble of the Council Decision. He welcomes that the Umbrella Agreement, which he actively supported, should apply by reference to the future agreement. In his Opinion 1/2016 on the Umbrella Agreement, the EDPS recommended essential improvements and the reinforcement of several safeguards; he recommends to include those safeguards in the negotiating directives.

68. Given the impact of the envisaged agreement on fundamental rights, the EDPS also considers that further safeguards than those already envisaged should be included to ensure that the final agreement meets the proportionality condition. He notably recommends the involvement of judicial authorities designated by the other Party to the agreement as early as possible in the process of gathering electronic evidence so that these authorities would have the possibility to review compliance of the orders with fundamental rights and raise grounds for refusal.

69. In addition to these general recommendations, the recommendations and comments of the EDPS in the present Opinion relate to the following specific aspects of the envisaged agreements to be negotiated with the US in the negotiating directives:

— the mandatory nature of the agreement;

— the onward transfers by US competent authorities;

— the rights of data subjects in the US, in particular the right to information and the right of access;

— the control by and independent authority in the US;

— the judicial redress and administrative redress in the US;

— the categories of data subjects concerned;

— the definition and types of data covered by the envisaged agreement;

— the criminal offences covered by the envisaged agreement;

— the specific safeguards to ensure an appropriate level of security of the data transferred;

— the type of authorities that can issue orders for electronic evidence;

— the possibility for service providers served with an order for electronic evidence to object based on specific grounds.

70. Finally, the EDPS remains at the disposal of the Commission, the Council and the European Parliament to provide advice at further stages of this process. The comments in this Opinion are without prejudice to any additional comments that the EDPS could make as further issues may arise and would then be addressed once further information is available. He expects to be consulted on the text of the draft agreement before its finalisation.

Brussels, 2 April 2019.

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