



Opinion of the European Data Protection Supervisor

on the Proposal for a Council decision on the conclusion of the Agreement between the European Union and Canada with respect to matters related to supply chain security

THE EUROPEAN DATA PROTECTION SUPERVISOR,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 16 thereof,

Having regard to the Charter of Fundamental Rights of the European Union, and in particular Articles 7 and 8 thereof,

Having regard to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data,¹

Having regard to Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, and in particular Article 41 thereof,²

HAS ADOPTED THE FOLLOWING OPINION:

I. Introduction

1.1. Consultation of the EDPS

1. On 28 March 2012, the Commission adopted a Proposal for a Council decision on the conclusion of the Agreement between the European Union and Canada with respect to matters related to supply chain security³ (hereinafter: "the draft agreement"). The Proposal was sent to the EDPS on the same day.

1.2. Context and objective of the Proposal

2. The relations between the EU and Canada in the area of customs are based on the Agreement on Customs Cooperation and Mutual Assistance in Customs Matters

¹ OJ L 281, 23.11.1995, p. 31.

² OJ L 8, 12.01.2001, p. 1.

³ COM(2011) 937 final.

(CMAA) of 1998.⁴ Article 23 of the CMAA allows the contracting parties to expand this agreement to increase customs cooperation.

3. The Proposal aims at expanding the CMAA through a new, complementary agreement (hereinafter "the draft agreement") and at establishing a legal basis for EU-Canada customs cooperation on matters of supply chain security and related risk management, similarly to the current co-operation with the United States, on which the EDPS adopted an opinion on 9 February 2012.⁵

1.3 Aim of the EDPS Opinion

4. According to the Proposal, the draft agreement also aims at providing a legal basis for the exchange of information.⁶ While the exchange of personal data is not the main aim of the Proposal, significant exchanges of personal data will take place, especially related to operators. The present Opinion will analyse how the exchange of such personal data is regulated in the draft agreement. The Opinion will also analyse the relevant provisions of the CMAA agreement insofar as they have an effect on the processing of personal data under the draft agreement. Taking into account that the draft agreement provides the legal basis for further cooperation, the Opinion also provides recommendations for future decisions or agreements requiring the exchange of personal data that may be adopted on the basis of the draft agreement.

II. General remarks

II.1. Scope of the Proposal and the Opinion

5. The Proposal which is the object of this Opinion is based on the CMAA. Several of the issues identified stem from provisions in the CMAA and can thus not directly be remedied in the Proposal. This refers especially to the issue of purpose limitation (see section III.2 below). However, raising these points is useful because doing so can provide guidance for a possible future renegotiation of the CMAA. In the meantime, the CMAA should be interpreted restrictively in order to avoid a breach of EU data protection legislation.

⁴ Agreement between the European Community and Canada on customs cooperation and mutual assistance in customs matters (OJ L 7/37, 13.01.1998).

⁵ Agreement between the European Community and the United States of America on intensifying and broadening the Agreement between the European Community and the United States of America on customs cooperation and mutual assistance in customs matters to include cooperation on Container Security and Related Matters (OJ L 304, 30.06.2004, p.32-37). See also the recent Proposal for a Council decision on a Union position within the EU-US Joint Customs Cooperation Committee regarding mutual recognition of the Authorised Economic Operator Programme of the European Union and the Customs-Trade Partnership Against Terrorism Program of the United States (COM(2011) 937 final) and the EDPS Opinion of 9 February 2012, available on http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2012/12-02-09_EU_US_Joint_Customs_EN.pdf.

⁶ See p. 2.

II.2. Processing of personal data

6. As the EDPS has also stated in the context of his Opinion on EU-US customs cooperation, this type of cooperation implies that some of the information exchanged will include personal data. This is also recognised in the Explanatory Memorandum, which states that the exchange of information will be subject to the "confidentiality of information and personal data protection requirements".⁷
7. Although most of the information exchanged will relate to legal persons, personal data⁸ will be processed especially if the trade operator itself is a natural person or if the official name of the legal person acting as operator identifies a natural person.⁹ The Schecke judgment of the Court of Justice of the EU underlined the importance of data protection in such cases. Where the official name of the legal person identifies one or more natural persons the legal person can claim protection of the right to the protection of personal data.¹⁰

III. Specific remarks

III.1. Level of protection and applicability of the EU data protection framework

8. The EDPS welcomes the reference to Article 16 of the CMAA¹¹, according to which personal data may be exchanged only if the party receiving the data undertakes to protect such data in a way which is at least equivalent to the protection applicable to that of the sender of the data under those circumstances.¹²
9. The EDPS also welcomes the fact that the Proposal states that the exchange of information will be subject to confidentiality and privacy requirements set out in the legislation of the contracting parties.¹³
10. In the case of personal data processed (including the sending and receiving of data) in the EU, these requirements are laid down in Directive 95/46/EC and national implementing law, which will apply to the processing of personal data (under the former first pillar) by national customs authorities, and in Regulation (EC) No 45/2001 which will apply to the European Commission's competent services.¹⁴ However, the repeated use of the term "security" could raise doubts on the scope of the agreement. In order to ensure legal certainty, the EDPS recommends clarifying what exactly is intended by this term, in relation or

⁷ See p.2.

⁸ Personal data are defined in Article 2(a) of Directive 95/46/EC and Article 2(a) of Regulation (EC) No 45/2001 as "*any information relating to an identified or identifiable natural person*".

⁹ As stated by the Court of Justice of the EU in the Schecke case, ECJ, 9 November 2010, Volker und Markus Schecke, C-92/09 and C-93/09, OJ C 13/6, 15.1.2011. See also EDPS Opinion on the proposal for a Council Decision on a Union position within the EU-Japan Joint Customs Cooperation Committee concerning the mutual recognition of Authorised Economic Operator programmes in the European Union and in Japan, OJ C 190/2, 14.7.2010.

¹⁰ Paragraph 53 of the judgement cited in footnote 11.

¹¹ See Article 4(d) of the draft agreement and in Explanatory Memorandum of the Proposal.

¹² See Article 16(4) of the CMAA.

¹³ See Article 4(d) of the draft agreement and in Explanatory Memorandum of the Proposal.

¹⁴ See definition of "Customs Authority" in Article 1 of the draft agreement.

beyond the security of the system of information. In the absence of any precise justification, any extension to matters not falling within the common commercial policy should be excluded from the scope of the agreement.

11. Article 25 of Directive 95/46/EC and Article 9 of Regulation (EC) No 45/2001 allow as a principle the transfer of personal data to third countries provided that they ensure an adequate level of protection. Canada has only been declared adequate by the European Commission as regards the processing activities falling under the scope of the Personal Information Protection and Electronic Documents Act (PIPEDA).¹⁵ However, processing of personal data by Canadian customs authorities is not regulated by PIPEDA, but by the Canadian Privacy Act, which is not covered by the adequacy decision.
12. Therefore, adequate safeguards should be specified in any agreement providing for the transfer of personal data, under the supervision of EU data protection authorities. These should include, among others, respect for the principles of purpose limitation, data quality, necessity and proportionality. Also the following requirements should be considered: transparency, data security, and data subjects' rights of access, rectification and redress.¹⁶

III.2. Purpose limitation

13. The following comments address respectively the CMAA and the draft agreement. Article 16(2) of the CMAA limits the purpose of the exchange of data to mutual assistance. This term is too broad and is not defined in the text. In addition some exceptions apply. Firstly, the receiving party can process this information for other purposes if the sending party provides written consent, which may be subject to restrictions. Secondly, this purpose limitation does not prevent the receiving party to use the information in judicial or administrative proceedings related to infringements of customs legislation.¹⁷
14. While the second exception is legitimate according to EU data protection legislation¹⁸ if it is applied restrictively and on a case-by-case basis, the first one contradicts the principle of purpose limitation. The EDPS recommends narrowing and better defining the purpose of the exchange of data foreseen in the related agreements or revisions that may follow.

¹⁵ Commission Decision 2002/2/EC of 20.12.2001 on the adequate protection of personal data provided by the Canadian Personal Information Protection and Electronic Documents Act (OJ L 2, 4.1.2002, p.13-16).

¹⁶ See Annex of the Working Party 29 Working Document of 24 July 1998 on transfers of personal data to third countries (WP12), available on http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/1998/wp12_en.pdf.

These principles have also been agreed on by the EU-US High Level Contact Group as principles for information exchanges in the law enforcement area; see Final Report by the EU-US High Level Contact Group on Information Sharing and Privacy and Personal Data Protection, Council Document Nr. 9831/08, available at: http://ec.europa.eu/justice_home/fsj/privacy/news/index_en.htm, and the EDPS opinion of 11 November 2008, OJ C 128/1, 6.6.2009.

¹⁷ See Article 16(3).

¹⁸ See Article 26(1)(d) of Directive 95/46/EC and Article 9(6)(d) of Regulation (EC) No 45/2001.

15. As regards the draft agreement, Article 4(d) states that the contracting parties "shall cooperate by exchanging information for supply-chain security and risk management". However, the exchange of information for other purposes is not excluded.
16. The EDPS recommends amending this provision as follows: "shall cooperate by exchanging information *only* for supply-chain security and risk management". In addition, the terms "supply chain security" and "risk management" should be defined. The EDPS reminds that, in principle, all possible purposes of transfers of personal data should be specified and compatible with the original purpose for which they were collected. It should also be specified that data subjects should be informed accordingly.

III.3. Scope of the transfers and categories of data to be exchanged

17. As regards the scale of the exchange of data, the EDPS welcomes the fact that the dissemination of information among customs authorities can only take place on a need-to-know basis.¹⁹ This should exclude the possibility of massive transfers of personal data on the basis of the CMAA.
18. However, the categories of data that might be exchanged should be defined in the draft agreement and in any decision adopted on the basis of this agreement and implying the exchange of personal data.
19. The draft agreement can entail the processing of personal data relating to infringements of customs legislation. The EDPS reminds that EU data protection law restricts²⁰ the processing of personal data relating to offences. These categories of data are subject to stricter safeguards under EU law and may be subject to prior checking by the EDPS and by EU national data protection authorities. This should be specified in any further decision or agreement requiring the processing of sensitive data.

III.4. Redress

20. EU data protection law provides data subjects with the rights to administrative and judicial redress. This would also apply to data processed under the CMAA and the draft agreement (see Section III.1).
21. However, the EDPS is concerned about the effective redress possibilities for EU citizens as regards personal data processed by Canadian customs authorities, taking into account that the Canadian Privacy Act does not grant the right of redress to non-Canadian citizens or to citizens who are not permanent residents in Canada.²¹

¹⁹ See Article 16(5).

²⁰ See Article 10(5) of Regulation 45/2001 and Article 8(5) of Directive 95/46/EC and the national provisions implementing it.

²¹ The restriction of redress rights to nationals and permanent residents was also addressed in the EDPS Opinion of 9 December 2011 on the Proposal for a Council Decision on the conclusion of the Agreement between the United States of America and the European Union on the use and transfer of

22. The EDPS recommends that any further legal instrument providing for the exchange of data on the basis of the CMAA or the draft agreement specifies administrative and judicial redress possibilities and include the obligation to adequately inform data subjects on their options for seeking redress.
23. Similarly, the Canadian Privacy Act only entitles Canadian citizens and Canadian permanent residents to access or rectify the information relating to them held by government agencies. EU citizens should be granted the same rights, in accordance with Article 4(d) of the draft agreement and they should be informed accordingly. This should be specified in any further related agreement or decision providing for the exchange of personal data.

III.5. Security measures

24. The draft agreement also aims at providing a legal basis for "establishing contact points for exchanging information for supply chain security and risk management"²² and "introducing, where appropriate, an interface for data exchange, including for prearrival or pre-departure data"²³. Any future decision establishing contact points or an interface for data exchange should contain adequate security measures, including a data protection impact assessment, a security plan and regular audits. In addition, privacy and data protection should be integrated from the design stage. Privacy by Design is one of the essential elements of the new data protection framework proposed in January 2012 by the European Commission²⁴.

III.6. Oversight

25. Article 5 of the draft agreement states that the EU-Canada Joint Customs Cooperation Committee (JCCC), which is established by Article 20 of the CMAA, shall "see the proper functioning of the Agreement" and "examine all issues arising from its application". The EDPS recommends adding that compliance with the "confidentiality and privacy requirements set out in the legislation of the contracting parties"²⁵ shall be supervised by EU national data

Passenger Name Records to the United States Department of Homeland Security, OJ 2012, C 35/03, 09.02.2012, p.16.

²² See Explanatory Memorandum of the Proposal and Article 4(e) of the draft agreement.

²³ See Explanatory Memorandum of the Proposal and Article 4(f) of the draft agreement.

²⁴ In its Communication on a Comprehensive approach on personal data protection in the European Union, the Commission identified Privacy by Design as important in enhancing data controller accountability and data security, COM(2010) 609 final, pp. 12-13. This principle is confirmed in the Proposals of the Commission adopted on 25 January 2012 for a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (COM(2012)11 final), and for a Directive on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data (COM(2012)10 final). In his opinions on this Communication and on the Proposals, the EDPS addressed the importance of this approach in ensuring compliance with data protection principles; see the EDPS Opinions of 14 January 2011 (OJ C 181/01, 22.06.2011) and 7 March 2012 available on http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2012/12-03-07_EDPS_Reform_package_EN.pdf.

²⁵ As required by Article 4(d) of the draft agreement.

protection authorities (as regards processing by Member States), the EDPS (as regards processing by the Commission competent services) and Canada's privacy commissioners (in the case of processing by Canadian competent authorities).

III.7. Consultation of the EDPS on further JCCC decisions

26. Article 5 of the draft agreement states that the JCCC is empowered to adopt decisions to implement the draft agreement, in accordance with the respective domestic legislation of the parties, on aspects including "data transmission". The EDPS reminds that he should be previously consulted on any position to be adopted by the EU within the JCCC on decisions regarding the processing of personal data.

IV. Conclusion

27. The EDPS welcomes the reference to the applicability of the confidentiality and privacy requirements of the contracting parties and the reference to Article 16 of the CMAA. However, he recommends adding the following in the text of the draft agreement where possible or in future decisions or agreements adopted on the basis of the draft agreement:

- clarifying that matters not falling within the common commercial policy should be excluded from the scope of the agreement;
- narrowing and better defining the scope of the exchanges of personal data;
- specifying the categories of data to be exchanged;
- as regards the processing sensitive data, providing for adequate safeguards and subjecting where relevant the processing to prior check by EU national data protection authorities and the EDPS;
- guaranteeing to all data subjects the rights of access, rectification and effective judicial and administrative redress;
- informing data subjects on the characteristics of the processing as developed above;
- requiring adequate security measures;
- mentioning that compliance with the contracting parties personal data protection law shall be supervised by EU national data protection authorities, the EDPS and Canada's privacy commissioners;
- consulting the EDPS on further JCCC decisions regarding the processing of personal data.

Done in Brussels, 13 April 2012

(signed)

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor