

Meijers Committee

standing committee of experts on international immigration, refugee and criminal law

CM1613

Note on the EU-US Umbrella Agreement

The Meijers Committee would like to welcome the Agreement between the United States of America and the European Union on the protection of personal information relating to the prevention, investigation, detection and prosecution of criminal offences (further: the Umbrella Agreement)¹ that has been submitted to the European Parliament for approval. However, with this note the Meijers Committee wants to express its concerns with regard to a number of issues. In addition to the comments expressed by the European Data Protection Supervisor,² this note contains remarks on the effects of the Umbrella Agreement on existing agreements, judicial remedies and the legal basis. The Meijers Committee encourages the European Parliament to obtain clarifications on the following points.

I. Effects of the Umbrella Agreement on existing agreements

In accordance with its Article 5.1 the Umbrella Agreement *supplements but does not replace* provisions regarding the protection of personal information in international agreements between the parties or the US and Member States that address matters within the scope of the Agreement.

The existing agreements include:

- Europol – US Supplemental Agreement on the exchange of personal data 2002;
- Eurojust – US Agreement 2006;
- EU – US Mutual Legal Assistance Agreement 2003;
- A long list of bilateral mutual legal assistance treaties between individual Member States and the US (made compatible to the aforementioned 2003 EU-US MLA Agreement by means of additional legal instruments);
- EU – US Agreement on the processing and transfer of financial messaging data from the EU to the US for the purpose of the Terrorist Finance Tracking Programme (TFTP) 2010;
- EU – US Agreement on the use and transfer of passenger name records to the United States Department of Homeland Security 2012.

The existing agreements, rather than the Umbrella Agreement, offer the legal basis for the exchange of personal data between the EU, its Member States and the US. Personal data were already exchanged in accordance with these agreements. The Umbrella Agreement offers a *superstructure* including general rules on data protection and information security (Articles 9 and 10).

The Meijers Committee is concerned that the relation between this superstructure and the existing agreements is not fully clear from the text of the Umbrella Agreement, especially with regard to the Agreement's terminology, and with regard to the sustainability of the adequacy requirement, a requirement that has a long standing tradition in the EU.

¹ Council, 8557/16, 18 May 2016.

² Preliminary Opinion on the agreement between the United States of America and the European Union on the protection of personal information relating to the prevention, investigation, detection and prosecution of criminal offences, Opinion 1/2016, 12 February 2016.

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1. Terminology

To enable a good understanding of the transatlantic exchanges of personal data in general and the Umbrella Agreement in particular, the Umbrella Agreement should use clear and consistent terminology. The terms personal data and personal information are used interchangeably in the Umbrella Agreement, but that is unlikely to cause confusion. However, the Umbrella Agreement defines the term “competent authority” for the US by referring to a US national law enforcement authority responsible for the prevention, detection, or prosecution of criminal offences, including terrorism. This seems to exclude law enforcement authorities on state level.

In an informal explanatory note on the 2002 Europol-US Agreement, Europol stated that it was at that time impossible for the US side “to indicate with any degree of accuracy which authorities could be involved in using such information, given the fact that there are many different authorities which would qualify as being involved in preventing, investigating and prosecuting criminal offences. This was especially true given the many different State and local authorities responsible.”³

For these reasons, the Meijers Committee recommends clarifying whether or not the term “competent authority” for the US includes law enforcement authorities on state level in a declaration.

The Meijers Committee also wishes to stress the legal uncertainty caused by the Umbrella Agreement’s use of the phrase “appropriate level of protection of personal information” (in Article 7.2). The Umbrella Agreement does not provide a decision on the adequate level of data protection of the US. Obtaining an adequacy decision is left to the provisions of the aforementioned existing agreements and the applicable EU legal instruments (such as the 2008 Framework Decision to be repealed by the newly adopted Directive 2016/680). However, in the absence of an adequacy decision, Article 37 of Directive 2016/680 allows transfers to third states to be organized provided that appropriate safeguards are ensured. The Umbrella Agreement ensures such appropriate safeguards, but uses confusing terminology. The above-listed existing agreements on personal data exchange in criminal matters and the legal instruments governing the transatlantic exchange of personal data in commercial matters use the term “adequate” to describe the level of data protection that a third state or international body should ensure. The Umbrella Agreement, however, refers to “an appropriate level of protection of personal information” in its Article 7.2 when describing the conditions under which consent should be given in the case of onward transfer of data. Similarly, in Article 7.3 the Umbrella Agreement requires that appropriate information mechanisms between competent authorities are provided for in any agreement that the US one the one hand and the EU or a Member State on the other hand would conclude on personal data transfer other than in relation to specific cases, investigation or prosecutions.

The Court of Justice of the EU has defined an adequate level of data protection as a level of protection that is “essentially equivalent protection to that guaranteed within the European Union.”⁴ Therefore, the Meijers Committee suggests that it be clarified that the Umbrella Agreement ensures appropriate safeguards and that the “essentially equivalent” requirement fully applies to all transfer mechanisms.

³ Council, Informal explanatory note : Europol-US Supplementary Agreement, 13696/0, 4/11/2002, p. 12.

⁴ Court of Justice, C-362/14, Schrems v. Data Protection Commissioner, 6 October 2015, para 74.

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“Essentially equivalent” would mean that the essential elements of data protection included in Article 8 of the EU Charter are complied with. Hence, the “essentially equivalent” requirement does not mean that all safeguards (e.g. independent control) are available in the country of destination, but that the EU citizen is protected in an essentially equivalent way (e.g. by EU Data Protection Authority).

2. Appropriate safeguards and adequacy requirement

Recognizing that the Umbrella Agreement does not contain an adequacy decision but rather ensures appropriate safeguards (see above), the Meijers Committee wants to express its concerns since the Umbrella Agreement follows in the footsteps of several of the above-listed transatlantic agreements on personal data exchange. These agreements include provisions prohibiting generic restrictions concerning the level of data protection as a ground for refusal of personal data transfers.⁵

First, Article 6.3 on purpose and use limitation states that this article shall “not prejudice the ability of the transferring competent authority to impose additional conditions in a specific case to the extent the applicable legal framework for transfer permits it to do so. Such conditions shall *not* include generic data protection conditions, that is, conditions imposed that are unrelated to the specific facts of the case.”

Second, Article 7.4 on the onward transfer of personal data on the condition of prior consent states that the level of data protection in the receiving state or body shall *not* be the basis for denying consent for, or imposing conditions on, such transfers.

The aforementioned provisions in the Umbrella Agreement prohibiting general restrictions regarding the level of data protection in the receiving state or body have as an effect that an adequacy decision is not allowed since the adequacy requirement imposes general data protection conditions on the transfer of personal data. Consequently, the competent EU authority transferring personal data to the US for the purpose of prevention, investigation, detection and prosecution of criminal offences, has no choice but to rely on appropriate safeguards instead. Therefore, the Meijers Committee wonders whether this means that adequacy requirements are excluded when it comes to transfers of personal data to the US for law enforcement purposes.

3. Possibility for adding further requirements

The Meijers Committee is convinced that specific agreements on the transfer of personal data can still contain additional requirements regarding e.g. the processing of personal data. Article 6.3 of the Umbrella Agreement confirms this possibility. However, due to the Umbrella Agreement functioning as a superstructure, it may be difficult in practice to negotiate such additional requirements, since the Agreement could be referred to as the applicable standard. For that reason, the Meijers Committee recommends adding a clarification that additional requirements can be made for specific transfers provided that the data protection safeguards in accordance with the Umbrella Agreement and the agreement that provides in the legal basis for the transfer are not reduced.

⁵Article 9 of the Eurojust – US Agreement and Article 9 of the EU-US MLA Agreement both explicitly state that generic restrictions with respect to the legal standards of the requesting State or party in the processing of personal data may not be imposed by the requested State or party as a condition for providing evidence or information.

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II. Judicial Remedies

The Meijers Committee welcomes the signing of the US Judicial Redress Act in February 2016. However, this Act does not amount to simply activating a set of judicial redress rights from the 1974 US Privacy Act to EU citizens before US courts. Rather, the Judicial Redress Act contains its own version of the requirement of a level of adequate data protection from the US perspective and requires the presence of “appropriate privacy protections” in the EU.

Besides the fact that the Attorney General should first designate a foreign country or regional economic integration organisation (such as the EU) as a covered country, that covered country should have entered into an agreement with the US (see the list above) that provides for appropriate privacy protections or the covered country should have effectively shared information with the US and have appropriate privacy protections for such shared information. If the US does not view EU privacy protections as appropriate, the application of the US Privacy Act to EU citizens could potentially be brought to a halt.

For these reasons, the Meijers Committee wonders what the effects of the Judicial Redress Act will be in practice, considering that the EU privacy protections will also be assessed on their appropriateness.

III. Legal basis of the Umbrella Agreement

Finally, the Meijers Committee wishes to point at the legal basis of the conclusion of the agreement under EU law. In Advocate General Mengozzi’s Opinion in the Request for an Opinion 1/15 (“PNR Canada”),⁶ it was suggested that the agreement at stake be based on both Articles 82 and 87 TFEU (judicial cooperation in criminal matters and police cooperation) or Article 16 TFEU (protection of personal data), since the agreement envisaged pursues two inseparable objectives of equal importance (namely combating terrorism and serious transnational crime – which follows from Article 87 TFEU – and the protection of personal data which follows from Article 16 TFEU).

The same argument applies to the Umbrella Agreement. By explicitly referring to Article 16 TFEU, it will be even better ensured that the essential elements of the right to data protection will be respected, in the application of the Umbrella Agreement.

⁶ Court of Justice, Opinion of Advocate General Mengozzi, Opinion 1/15, 8 September 2016.

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About

The Meijers Committee is an independent group of legal scholars, judges and lawyers that advises on European and International Migration, Refugee, Criminal, Privacy, Anti-discrimination and Institutional Law. The Committee aims to promote the protection of fundamental rights, access to judicial remedies and democratic decision-making in EU legislation.

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