



Contribution of the EDPS to the consultation on the future EU-US international agreement on personal data protection and information sharing for law enforcement purposes

The EDPS welcomes the public consultation launched by the Commission on a future EU-US international agreement. He has been following closely the work of the High Level Contact Group since 2007 and has adopted in November 2008 an Opinion on the final report of the Group, in which he supports the objective of an agreement but nonetheless insists on the safeguards necessary to allow for an adequate protection of personal data. In this opinion, he asked for a thoroughly prepared agreement, based on transparency and involvement of all stakeholders.

The EDPS is pleased to see that many comments made in his opinion find an echo in the public consultation of the Commission. He wishes to emphasize that the present contribution comes as a complement to his previous opinion and as a support to the contribution of the Data Protection Authorities represented in the Article 29 Working Party and the Working Party on Police and Justice, in which he was involved.

The following points, raised in the consultation, deserve specific attention:

1. Purpose:

Rather than thinking of extending the agreement to purposes beyond law enforcement (such as transatlantic cooperation in a wider sense, as mentioned in the consultation), the agreement should have as its main and clearly defined purpose law enforcement. It is essential that this notion is interpreted in the same way by both parties, because it will have a major impact on the scope of the agreement, as developed below.

2. Scope of application:

- **General remark:**

The EDPS considers that there is an interest in having a wide scope of application as long as this guarantees the application of data protection principles to clearly identified processing of data, and in compliance with purpose limitation. The EDPS emphasizes the need to clearly distinguish, on the one hand, the scope of application of the agreement, and on the other hand, within this scope of application the need for a strict purpose limitation, so as to ensure that data collected for a specified purpose are not used for other purposes (unless specific derogations apply).

- **Material scope:**

The question is raised of the application of the agreement to all exchanges within the Area of Freedom, Security and Justice (borders - asylum - immigration, judicial cooperation in civil matters, judicial cooperation in criminal matters, police cooperation). Such a wide scope would guarantee the application of data protection principles in a wide area. On the other hand, it should be ensured that data are collected for the specific purpose of law enforcement and only used for this purpose.

In this context, the application of the agreement to visa or immigration data is a sensitive issue, considering that these personal data are in principle not processed in the context of law enforcement. Would it be needed on a case by case basis, the

purpose limitation principle would fully apply and should prevent any further use by the recipient in a broader context. The necessity and proportionality tests should also be met for each transfer request.

The weaker the link with traditional police cooperation, the more important the justification for transfer will have to be, and the purpose limitation test will be decisive: this would be the case for instance with regard to judicial cooperation in civil matters. The EDPS notes that personal data processed in this context do not have in principle a connection with law enforcement and for this reason would not need to be included in the scope of the agreement.

- **Personal scope:**

The EDPS notes that the background of the agreement is closely linked to data transfers by private entities for the purpose of law enforcement. The lack of a solid data protection framework was one of the causes of the deficiencies found in PNR and Swift. It would not be logic to exclude those transfers from the scope of the agreement. However, the involvement of private entities in data transfer schemes raises specific issues. Would it be decided to apply the agreement to such data, this should not be interpreted as a general acceptance, from a data protection perspective, of the legitimacy of the practice of systematic transfers of data of private companies on a broad scale. Besides, a transfer could only apply to data already collected in the country of origin according to applicable national law (i.e. under judicial oversight or strict conditions such as those foreseen in existing regulations like for Europol).

3. Nature of the agreement - safeguards:

As already emphasized, the adequacy of the general instrument could only be acknowledged if combined with adequate specific agreements on a case by case basis. It should be noted that the specific agreements which should complement the general agreement, need to have as an objective to *specify* data protection safeguards depending on the context: they cannot *derogate* from the general agreement, which should constitute a reference set of rules.

4. Data protection principles:

The EDPS wishes to focus in this contribution on the protection and enforcement of individuals' rights. Important aspects of such protection are:

- Strong oversight mechanisms, and redress mechanisms available to data subjects, including administrative and judicial remedies, irrespective of the data subject's nationality;
- Liability and compensation mechanisms;
- Involvement of independent data protection authorities, in relation especially to oversight and assistance to data subjects.

In addition, the EDPS strongly supports the need for accountability of data controllers, in the sense that they fully endorse and practice responsibility at an early stage for the processing of data they undertake, and can ensure and demonstrate compliance through internal and external audit mechanisms.

5. Final comments:

In order to ensure legal certainty, the principles enshrined in a binding agreement should apply not only to all future agreements, but also to existing agreements, including bilateral agreements between Member States and the United-States.

Brussels, 12 March 2010