

Legal Service

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LEGAL OPINION

Re: EU-US Umbrella agreement concerning the protection of personal data and cooperation between law enforcement authorities in the EU and the US.

I. Introduction

1. On 26 November 2015, the Legal Service received a request from Mr Claude MORAES, Chair of the Committee on Civil Liberties, Justice and Home Affairs, for a legal opinion on the following three questions relating to 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*", also known as the "*EU-US Umbrella agreement*" (see the letter dated 25 November 2015 in Annex 1) :

"1. What would be the legal nature of the agreement in EU law? As an international agreement, would it take precedence over EU law on the protection of personal data? If any legal conflict arises between EU law and the agreement in terms of applicability, and in particular with regard to key data protection principles such as purpose limitation, which text would prevail?"

2. Would the agreement serve as an adequacy decision with regard to the transfers of personal data from the European Union to a third state? Will or can the agreement serve as a legal basis for any transfer of personal data?"

3. Article 8 of the Charter and Article 16 TFEU recognise the fundamental right to the protection of personal data to "everyone". Accordingly, would it be in conformity with EU law, especially the Charter, that an international agreement on the protection of personal data exchanged for law enforcement purposes limits some rights or benefits of data subjects to the nationals of a Member State, thereby

excluding, unlike under EU law, non-EU nationals in the EU or individuals whose personal data are processed in the EU and further transferred to the third country?"

II. Preliminary remarks

2. The Umbrella agreement in question was initialled by the EU and US on 8 September 2015, but it has not yet been formally signed by either party. The text of the draft agreement, as initialled, was transmitted to Mr MORAES, Chair of the LIBE Committee, by letter dated 14 September 2015 from Commissioner JOUROVÁ in which the Commission underlined that the text is, at this stage, "*still an internal document*" and so the Commission has asked if LIBE could "*in accordance with the principle of loyal co-operation between the Institutions, treat it like that.*" The Legal Service will therefore base the following legal opinion on that text of the Umbrella agreement as initialled in September 2015, but in line with the Commission's request will not annex a copy thereof to the present opinion.
3. As Commissioner JOUROVÁ also explained in her letter to the Chair of LIBE dated 14 September 2015, the "*prerequisite*" for the signature and conclusion of the EU-US Umbrella agreement is the adoption of the Judicial Redress Bill by the US Congress. As a result, the Commission will only start the signature and conclusion procedure foreseen in Article 218 TFEU after that Bill has first been adopted in the US.
4. The US House of Representatives has since passed the Judicial Redress Bill, without amendment, on 20 October 2015. The matter is thus now before the US Senate, which has yet to vote on the Bill. In these circumstances, the Commission has not yet proposed to the Council to adopt a decision authorising the signing of the EU-US Umbrella agreement, in accordance with Article 218(5) TFEU. Accordingly, the Parliament has also not yet been formally asked by the Council to give its consent to this agreement, in accordance with Article 218(6) TFEU.
5. However, Mr MORAES has indicated in his letter dated 25 November 2015 to the Legal Service that the US Congress is likely to adopt the Judicial Redress Act in the forthcoming weeks and so the EU may sign the agreement immediately afterwards.¹
6. In these circumstances, the Legal Service will therefore provide, below, succinct answers directly related to the three specific questions raised, without examining any other legal questions which may arise regarding this file.

¹ According to information received from the European Parliament's Office in Washington, it has been confirmed by the US Department of Justice that the EU-US Umbrella Agreement is, under US law, an "*executive agreement*" and so no further approval by the US Congress will be necessary before its signature by the US.

III. Legal analysis

QUESTION 1 : What would be the legal nature of the agreement in EU law? As an international agreement, would it take precedence over EU law on the protection of personal data? If any legal conflict arises between EU law and the agreement in terms of applicability, and in particular with regard to key data protection principles such as purpose limitation, which text would prevail?

7. Under EU law, the EU-US Umbrella agreement is clearly to be regarded as an "international agreement", within the meaning of Title V, "International agreements" of Part Five, "the Union's external action", of the Treaty on the Functioning of the European Union (hereafter "TFEU").
8. As provided for by Article 216 (2) TFEU, international agreements concluded by the Union "are binding upon the institutions of the Union and on the Member States."
9. In accordance with the settled case-law of the Court of Justice, an international agreement can have primacy over acts of secondary Union legislation.²
10. That primacy of an international agreement would not, however, extend to primary Union law, in particular to the general principles of which fundamental rights form part.³
11. Indeed, the legal obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the Union Treaties, which include the principle that all Union acts must respect fundamental rights. That respect for fundamental rights constitutes a condition of the lawfulness of all Union acts which it is for the Court of Justice to review in the framework of the complete system of legal remedies established by the Union Treaties.⁴
12. In the light of the foregoing, it must be concluded that, in principle, the EU-US Umbrella agreement, as an international agreement, may well have primacy over secondary Union legislation adopted by the EU legislature.
13. At present, the EU-US Umbrella agreement would thus have primacy over existing secondary Union legislation on data protection.⁵ In the future, the EU-US Umbrella agreement will also have primacy over the data protection package currently being examined by the EU legislature, namely the proposed General Data Protection Regulation⁶ and the proposed Directive⁷ on data protection in the law enforcement

² See the judgment of the Grand Chamber of the Court of Justice in Case C-308/06, *Intertanko and Others*, EU:C:2008:312, paragraph 42 and case-law cited therein.

³ See the judgment of the Grand Chamber of the Court of Justice in Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission*, EU:C:2008:461, paragraph 308.

⁴ *Ibid.*, paragraphs 281 to 285.

⁵ In particular, Directive 95/46 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 (OJ L 281, 23.11.1995, p.31) and Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters (OJ L 350, 30.12.2008, p. 60).

⁶ 2012/0011 (COD). It is unlikely though that a conflict would arise between the EU-US Umbrella agreement and the general Regulation on data protection, given that, on the one hand, the EU-US

sector, which are both expected to be adopted by the EU legislature very shortly and will subsequently repeal and replace the aforementioned existing secondary legislation in this field.

14. The primacy of the EU-US Umbrella agreement over secondary EU legislation cannot though extend to primary Union law, and in particular to fundamental rights guaranteed by primary Union law, including the right to privacy and the right to the protection of personal data, as referred to in Article 16 TFEU and Articles 7 and 8 of the Charter.

QUESTION 2 : Would the agreement serve as an adequacy decision with regard to the transfers of personal data from the European Union to a third state? Will or can the agreement serves as a legal basis for any transfer of personal data?

15. The concept of an "*adequacy decision*" is well known in Union law as it has long been included in existing secondary EU legislation⁸ and discussed by the Court of Justice in the context of judicial procedures concerning the interpretation and validity of such EU acts.⁹ In order to ensure effective protection of personal data, transfers of personal data from the EU to a third country must be prohibited, as a matter of general principle, unless, as a derogation from that principle, it can be established that an adequate level of protection of that data will in fact be ensured by the domestic law or international commitments of the third country and the practice designed to ensure compliance with those rules.¹⁰
16. Though there are various legal mechanisms by which an "*adequate*" level of protection can be ensured for transfers from the EU to a third country, the principal method employed is for the EU legislature to confer a power on the Commission to adopt an "*adequacy decision*" which finds that a third country ensures an adequate level of protection. The prime example of this is currently to be found in Article 25 of Directive 95/46.¹¹ The proposed data protection package will effectively continue with this same approach of conferring powers on the Commission to adopt an "*adequacy decision*" in

Umbrella agreement is intended to apply only to transfers of personal data between "*competent authorities*", in both the EU and the US, for the prevention, investigation, detection or prosecution of criminal offences, including terrorism, and given that, on the other hand, Article 2 of the proposed Regulation would expressly exclude competent authorities for such criminal matters from its scope.

2012/0010 (COD). Conversely, the proposed Directive on data protection in the law enforcement sector would deal directly with the same matters which fall within the scope of the EU-US Umbrella agreement (i.e. transfers of personal data between "*competent authorities*", in both the EU and the US, for the prevention, investigation, detection or prosecution of criminal offences, including terrorism) and so a potential conflict between this proposed Directive on data protection in the law enforcement sector (and in particular its Chapter V on international transfers) and the EU-US Umbrella agreement is possible.

⁸ See article 25 of Directive 95/46. See also article 13 of Council Framework Decision 2008/977/JHA.

⁹ See, most recently, the judgment of the Grand Chamber of the Court of Justice in Case C-362/14, *Schrems*, EU:C:2015:650, in particular paragraphs 68 to 78.

¹⁰ *Ibid.*, paragraph 75.

¹¹ "*By way of derogation from Article 25*", Article 26 of Directive 95/46 foresees certain alternative legal mechanisms for international transfers, including the unambiguous consent of the data subject, the necessity for the performance of a contract, legal requirements on important public interest grounds and the necessity to protect the vital interests of the data subject.

both the General Data Protection Regulation and the Directive on data protection in the law enforcement sector, each in their own respective fields of application.¹²

17. International agreements have also been concluded by the Union with third countries as an alternative means of ensuring an adequate level of protection for the transfer of personal data from the EU to a third country, particularly where the matter in question falls outside of the scope of existing secondary Union legislation on data protection.¹³ As a result, such international agreements can also be described, in general terms, as comparable to an "*adequacy decision*" adopted by the Commission under secondary Union legislation, even if there are obvious differences between the legal form and effects of each of these two types of Union act.
18. The EU-US Umbrella agreement can thus be described, in general terms, as comparable to an adequacy decision, given in particular the express wording of its Article 5(3), under the heading "*Effect of the Agreement*" :

"[By giving effect to the obligation of the Parties to take all necessary measures to implement this Agreement, contained in paragraph 2], *the processing of personal information by the United States, or the European Union and its Member States, with respect to matters falling within the scope of this Agreement, shall be deemed to comply with their respective data protection legislation restricting or conditioning international transfers of personal information, and no further authorization under such legislation shall be required.*"

19. In effect, Article 5(3) of the EU-US Umbrella Agreement contains an alternative form of "*adequacy decision*" which - according to the primacy of international agreements over secondary Union legislation, explained in the preceding section of this legal opinion - will have primacy over the comparable provisions on adequacy decisions in Union secondary legislation. Thus, this international agreement will provide an alternative form of adequacy decision which is intended to effectively override the requirement, "*restricting or conditioning international transfers*" within the sense of Article 5(3) of the EU-US Umbrella agreement, set out in secondary Union legislation (such as the proposed data protection package) which confers a power on the Commission to issue an adequacy decision before transfers from the EU to the US can be considered lawful.
20. In this context, it is important to underline the fact that the Court of Justice enjoys the full powers of judicial review, set out in the Treaties, with respect to a standard

¹² See Chapter V, "*Transfer of personal data to third countries or international organisations*", in both the proposed Regulation and Directive. It is to be noted that transfers by way of other "*appropriate safeguards*" are also foreseen, but these are also to be regarded as secondary in nature to a Commission adequacy decision.

¹³ One obvious example is the Agreement between the US and the EU on the use and transfer of passenger name records to the United States Department of Homeland Security (OJ L 215/5, 11.8.2012) which was concluded after the Court of Justice had declared that the previous adequacy decision adopted by the Commission on the basis of article 25 of Directive 95/46 was invalid, given that this matter fell outside of the scope of that Directive : see the Judgment of the Court (Grand Chamber) of 30 May 2006 in Joined Cases C-317/04 and C-318/04, *Parliament v Commission*, EU:C:2005:190.

"adequacy decision" adopted by the Commission on the basis of powers conferred on it by Union secondary legislation. This is clearly demonstrated by the recent judgment of the Grand Chamber of the Court of Justice in the *Schrems* case (cited above), in which the Court declared invalid, by its own motion, such an adequacy decision adopted by the Commission on the basis of Article 25 of Directive 95/46 (the "Safe Harbour" decision).

21. By stark contrast, the powers of the Court of Justice are very limited with respect to an international agreement. Under Article 218(11) TFEU, the Court of Justice may be requested to deliver an opinion as to whether an agreement envisaged is compatible with the Treaties. That provision has the aim of forestalling complications which would result from legal disputes concerning the compatibility with the Treaties of international agreements binding upon the EU. A possible decision of the Court of Justice, after the conclusion of an international agreement binding upon the EU, to the effect that such an agreement is, by reason either of its content or of the procedure adopted for its conclusion, incompatible with the provisions of the Treaties could not fail to provoke, not only in the internal EU context, but also in that of international relations, serious difficulties and might give rise to adverse consequences for all interested parties, including third countries.¹⁴
22. In addition, it should also be emphasised that the Court of Justice does not have the power to declare invalid an international agreement concluded by the Union with a third country. Indeed, the Court of Justice may only annul an act adopted by an EU institution (i.e. an EU act falling purely within the system of Union law), which could itself later lead to the conclusion, by both the Union and a third country, of an international agreement (which cannot be annulled by the Court of Justice), which then itself produces separate effects in international law outside of the system of Union law. To give a concrete example of this, the Court of Justice has previously annulled a decision of the Council concluding an international agreement, on behalf of the Union, with a third country.¹⁵
23. Consequently, the powers of the Court of Justice to review the legality of an international agreement with respect to primary Union law, including fundamental rights guaranteed by the Charter, is far more limited in the case of an international agreement which may be described as a form of "adequacy decision".
24. Thus, it may be concluded that Article 5(3) of the EU-US Umbrella agreement will indeed serve as a form of adequacy decision, given that it will override any requirement, set out in secondary Union legislation (such as the proposed data protection package) for the Commission to issue an adequacy decision before transfers from the EU to the US, in the field covered by the EU-US Umbrella agreement, can be considered lawful. However, the legal effects of such an adequacy decision contained

¹⁴ Opinion 2/13 of the Court of Justice (Full Court), EU:C:2014:2454, paragraphs 145 and 146.

¹⁵ Judgment of the Court (Grand Chamber) of 30 May 2006 in Case C-317/04, *Parliament v Commission*, EU:C:2005:190, in particular paragraphs 67-70. In that case, the Court of Justice finally ordered as follows [emphasis added]: "Annuls Council Decision 2004/496/EC of 17 May 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection."

in an international agreement will be significantly different to those of an adequacy decision to be adopted by the Commission under a power conferred on it by the EU legislature in secondary Union legislation. In particular, the powers of judicial review of the Court of Justice are very limited with respect to international agreements, when compared to the full powers of the Court of Justice to review adequacy decisions adopted by the Commission under secondary Union legislation.

25. Finally, with regard to the second part of this second question, it is apparent that the EU-US Umbrella agreement cannot itself serve as a legal basis for any transfer of personal data, given that Article 1(3) of the EU-US Umbrella expressly states that "*This Agreement in and of itself shall not be the legal basis for any transfers of personal information. A legal basis for such transfers shall always be required.*" As stated in Article 1(2), this agreement only therefore establishes a "*framework*" for the protection of personal data in the broad field of law-enforcement cooperation, but a separate act (including, for example, another international agreement on a specific matter within that field) would be required as a legal basis for any particular transfer of personal data from the EU to the US.

QUESTION 3: Article 8 of the Charter and Article 16 TFEU recognise the fundamental right to the protection of personal data to "everyone". Accordingly, would it be in conformity with EU law, especially the Charter and in particular with regard to key data protection principles such as purpose limitation, that an international agreement on the protection of personal data exchanged for law enforcement purposes limits some rights or benefits of data subjects to the nationals of a Member State, thereby excluding, unlike under EU law, non-EU nationals in the EU or individuals whose personal data are processed in the EU and further transferred to the third country?"

26. The Legal Service has previously advised on the issue of the exclusion of non-EU residents in the context of EU law on data protection in its legal opinion dated 17 May 2013 (SJ-0255/13) on the scope of the proposed Regulation on data protection. In that legal opinion, the Legal Service underlined the fact that under Article 16(1) TFEU and Article 8(1) of the Charter ; "Everyone has the right to the protection of personal data" concerning them.¹⁶ Thus, under EU primary law, the right to protection of personal data is granted to "*everyone*" and is not restricted on the basis of residence or citizenship or any other criteria.
27. As regards the EU-US Umbrella agreement, it is important to note that Article 19 "*Judicial Redress*" of this agreement expressly provides that certain limited rights¹⁷ of judicial redress shall be made available, subject to certain conditions, only to "*any citizen of a Party*".

¹⁶ Paragraphs 12 to 19 of legal opinion SJ-0255/13.

¹⁷ These rights are limited, subject to any requirements that administrative redress first be exhausted, to seeking judicial review with regard to (a) denial by a Competent Authority of access to records, (b) denial by a Competent Authority of "*amendment of records*" and (c) unlawful disclosure of information that has been "*wilfully or intentionally made*".

28. Accordingly, the EU-US Umbrella agreement does not provide that the US will afford rights of judicial redress to natural persons, falling within the scope of EU law, other than EU citizens.
29. This then opens a significant "gap" in the protection of the personal data of individuals covered by EU law which applies to "everyone", when compared with the limited obligations imposed on the US by the EU-US Umbrella agreement to provide for judicial redress rights only for EU citizens.
30. In effect, the EU-US Umbrella agreement fails to ensure that all natural persons covered by EU law will be afforded rights of judicial redress in the US where their personal data is transferred by competent authorities in the EU to competent authorities in the US. A significant category of individuals covered by EU law (i.e. non-EU citizens covered by EU law¹⁸) and whose data is processed in the EU (i.e. transferred from the EU to the US) by competent authorities in the EU will not benefit from any rights of judicial redress whatsoever in the US, under the terms of the EU-US Umbrella agreement, quite unlike in other EU-US agreements.¹⁹
31. As explained above in the previous section, Article 5(3), "Effect of the Agreement", provides that the transfer of personal data from the EU to the US "shall be deemed to comply with [EU data protection legislation] restricting or conditioning international transfers of personal information, and no further authorization under such legislation shall be required," on condition that the US gives effect to Article 5(2) which itself provides that the Parties "shall take all necessary measures to implement this Agreement, including, in particular, their respective obligations regarding access, rectification and administrative and judicial redress for individuals provided herein."
32. Thus, as a result of the combined provisions of Article 5(2) and (3) and Article 19 of the EU-US Umbrella agreement, the US shall be "*deemed to comply*" with EU data

¹⁸ Thus, all third-country nationals (other than perhaps US citizens who may benefit already from rights under US law) who are present in the European Union (and thus covered by the territorial scope of EU law) will be excluded from the scope of Article 19 of the EU-US Umbrella agreement on judicial redress. This will exclude, for example, the following individuals legally present in the EU for both long and short periods : e.g. third country students and researchers, third country seasonal workers, third country intra-corporate transferees, third country nationals and stateless persons seeking international protection, not to mention third-country nationals present in the EU (with a relevant short or long term visa, where appropriate) for business purposes or as tourists. The third-country family members of an EU citizen legally residing in the EU (spouses, children etc) will also be excluded.

¹⁹ By contrast, it should be noted that the Agreement between the US and the EU on the use and transfer of passenger name records to the United States Department of Homeland Security (OJ L 215/5, 11.8.2012) provides for "Redress for individuals" in Article 13, in the following broad terms "Any individual regardless of nationality, country of origin or place of residence whose personal data and personal information has been processed and used in a manner inconsistent with this Agreement may seek effective administrative and judicial redress in accordance with US law."

See also the Agreement between the EU and the US on the processing and transfer of Financial Messaging Data from the EU to the US for the purposes of the Terrorist Finance Tracking Program (OJ L 195, 27.07.2010, p. 5), which provides in Article 18, under "Redress", that "Any person" is entitled to seek effective administrative and judicial redress and that, for this purpose and as regards data transferred to the US pursuant to this Agreement, the US Treasury Department "shall treat all persons equally in the application of its administrative process, regardless of nationality or country of residence" and also that "All persons, regardless of nationality or country of residence, shall have available under US law a process for seeking judicial redress from an adverse administrative action."

protection legislation - and no further adequacy decision of the Commission under secondary EU legislation will be required - for all transfers, by competent authorities in the EU, of personal data from the EU to the US (relating to the personal data of both EU citizens and non-EU citizens covered by EU law), as long as the US just provides for rights of judicial redress for EU citizens only in the US.

33. Clearly, there is a "*mismatch*" between the limited scope of the obligation of the US to provide for rights of judicial redress to EU-citizens (only), under Article 19 of the agreement, and the broader scope of the "*adequacy decision*" - which overrides any other adequacy decision of the Commission under EU legislation, as explained in the previous section - which is given effect by Article 5(3) of the EU-US Umbrella agreement relating to all transfers of personal data from the EU to the US.
34. In this context, it should be recalled that the Court of Justice recently made the following ruling in the Schrems case,²⁰ [emphasis added] :

"legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him, or to obtain the rectification or erasure of such data, does not respect the essence of the fundamental right to effective judicial protection, as enshrined in Article 47 of the Charter. ... The very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law."

35. Obviously, it is simply not possible to reach a finding that a third country offers an "*adequate*" level of protection of personal data in respect of transfers, by competent authorities in the EU, of personal data of certain individuals covered by EU law, where that third country affords absolutely no means of judicial redress to those same individuals whose personal data is to be transferred. The total absence²¹ of any rights of judicial redress goes beyond being a disproportionate interference with the fundamental right to data protection and becomes, as the Court of Justice has recently confirmed, also a failure to respect the very "*essence*" of the fundamental right to effective judicial protection.
36. Given that the essence of fundamental rights guaranteed by primary EU law will be compromised in this way, it must be concluded that the EU-US Umbrella agreement is

²⁰ Judgment of the Grand Chamber of the Court of Justice in Case C-362/14, *Schrems*, EU:C:2015:650, paragraph 95.

²¹ Here we are dealing only with the most extreme case of a complete absence of any rights of judicial redress, which concerns only non-EU citizens. EU citizens are, under Article 19 of the EU-US Umbrella agreement, to be provided with some, albeit limited, rights of judicial redress in the US. However, the rights which EU citizens may thus obtain will still be less than those of US citizens (equal rights for EU and US citizens are not foreseen in this international agreement) but will also be subject to the same derogations that apply to US citizens under US law (which in certain respects limit the scope of these rights very significantly, particularly with regard to US national security issues). The Legal Service will not though express any view, in the present legal opinion, on whether the judicial redress rights to be provided for EU citizens, under Article 19 of the EU-US Umbrella agreement, will in fact be "*adequate*", within the meaning of EU law - or "*essentially equivalent*", as the Court of Justice recently interpreted this term to mean in paragraph 73 of the *Schrems* judgment. That is an entirely separate legal issue, not covered by the present request for a legal opinion, which would require a much more detailed assessment of applicable provisions of US law which cannot be made by the Legal Service in the limited time available to reply to this particular request.

not compatible with primary EU law and the respect for fundamental rights, in so far as it seeks to provide, in Article 5(3), for an alternative form of "*adequacy decision*" for transfers of personal data from the EU to the US, falling within the scope of this agreement, relating to all persons covered by EU law, despite the fact that this is based on only a limited obligation of the US to provide for the right of only EU citizens to seek judicial redress in the US, thereby excluding all non-EU citizens who are covered by EU law from the benefit of any right to seek judicial redress in the US.

IV. Conclusions

37. In the light of the foregoing, the Legal Service has reached the following conclusions:

- (a) The EU-US Umbrella agreement is an "*international agreement*", within the meaning of Title V, "*International agreements*" of Part Five, of the TFEU.
- (b) In principle, the EU-US Umbrella agreement, as an international agreement, may well have primacy over secondary Union legislation adopted by the EU legislature. This primacy of the EU-US Umbrella agreement would then apply in the future to the data protection package.
- (c) The primacy of the EU-US Umbrella agreement over secondary EU legislation cannot though extend to primary Union law, and in particular to fundamental rights guaranteed by primary Union law, including the right to privacy and the right to the protection of personal data, as referred to in Article 16 TFEU and Articles 7 and 8 of the Charter. To the extent that the EU-US Umbrella agreement is found to be contrary to primary Union law, and in particular to fundamental rights, then this agreement will therefore not be given primacy over secondary EU legislation.
- (d) Article 5(3) of the EU-US Umbrella agreement will serve as a form of "*adequacy decision*", given that it will override any requirement, set out in secondary Union legislation (such as the proposed data protection package) for the Commission to issue an adequacy decision before transfers from the EU to the US, in the field covered by the EU-US Umbrella agreement, can be considered lawful. However, the legal effects of such an adequacy decision contained in an international agreement will be significantly different to those of an adequacy decision to be adopted by the Commission under a power conferred on it by the EU legislature in secondary Union legislation. In particular, the powers of judicial review of the Court of Justice are very limited with respect to international agreements, when compared to the full powers of the Court of Justice to review adequacy decisions adopted by the Commission under secondary Union legislation.
- (e) The EU-US Umbrella agreement cannot itself serve as a legal basis for any transfer of personal data, given the terms of its Article 1(3).
- (f) The total absence of any rights of judicial redress for a data subject compromises the very "*essence*" of the fundamental right to effective judicial protection, as enshrined in Article 47 of the Charter. As a result, it is simply not possible to reach a finding that a third country offers an "*adequate*" level of protection of

personal data in respect of transfers to a third country, by competent authorities in the EU, of personal data of certain individuals covered by EU law, where that third country affords absolutely no means of judicial redress to those same individuals whose personal data is to be transferred.

- (g) The EU-US Umbrella agreement is not compatible with primary EU law and the respect for fundamental rights, in so far as it seeks to provide, in Article 5(3), for an alternative form of "*adequacy decision*" for transfers of personal data from the EU to the US, falling within the scope of this agreement, relating to all persons covered by EU law, despite the fact that this is based on only a limited obligation of the US to provide for the right of only EU citizens to seek judicial redress in the US, thereby excluding all non-EU citizens who are covered by EU law from the benefit of any right to seek judicial redress in the US.

(signed)

María José MARTINEZ IGLESIAS
Director

(signed)

Dominique MOORE

Visa:

(signed)

Freddy DREXLER
The Jurisconsult

Annex: Request for a legal opinion dated 25 November 2015.



Ευρωπαϊκό κοινοβούλιο - Parlamento Europeo - Evropský parlament - Europa-Parlamentar - Europäisches Parlament
Euroopa Parlament - Ευρωπαϊκό Κοινοβούλιο - Európean Parliament - Parlement européen - Parlamento na hÉiríopa
Euroski parlament - Parlamento europeo - Eirópaís Parlamenti - Euroopa Parlamend - Európai Parlament
Parlament Ewropejski - Europees Parlement - Parlament Europejski - Parlamento Europeu - Parlamento European
Európsky parlament - Evropski parlament - Euroopa rahvaametk - Euroopariikmetk

Committee on Civil Liberties, Justice and Home Affairs
The Chairman

IPOL-COM-LIBE D (2015) 56248

Mr Freddy DREXLER
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D 204130 25.11.2015

Subject: Request for a legal opinion on the EU-US agreement on data protection in the cases of exchanges of personal data for law enforcement purposes (Umbrella agreement)

Dear Mr Drexler,

I am addressing to you about the above mentioned agreement between the European Union and the United States, which was initialled on 8 September 2015.

During its meeting of 15 September 2015, LIBE Coordinators decided to request the opinion of the Legal Service on the EU-US umbrella agreement; following the invitation of the rapporteur of the file and the discussions held in LIBE Committee meetings of 16 July 2015 and 14 September 2015.

The Committee on Civil Liberties, Justice and Home Affairs therefore requests the opinion of the Legal Service on the following questions:

1. What would be the legal nature of the agreement in EU law?

As an international agreement, would it take precedence over EU law on the protection of personal data? If any legal conflict arises between EU law and the agreement in terms of applicability, and in particular with regard to key data protection principles such as purpose limitation, which text would prevail?

2. Would the agreement serve as an adequacy decision with regard to the transfers of personal data from the European Union to a third state? Will or can the agreement serve as a legal basis for any transfer of personal data?

3. Article 8 of the Charter and Article 16 TFEU recognise the fundamental right to the protection of personal data to "everyone".

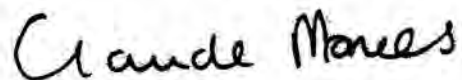
Accordingly, would it be in conformity with EU law, especially the Charter, that an international agreement on the protection of personal data exchanged for law enforcement purposes limits some rights or benefits of data subjects to the nationals of a Member State, thereby excluding, unlike under EU law, non-EU nationals in the EU or

individuals whose personal data are processed in the EU and further transferred to the third country?

Having in mind that the US would likely adopt the Judicial Redress Act in the forthcoming weeks so that the EU would sign the agreement immediately afterwards I would be grateful if the Legal Service could give the LIBE Committee its opinion in this regard by 15 December 2015.

I would like to express in advance my gratitude for your cooperation and advice.

Yours sincerely,

A handwritten signature in black ink that reads "Claude Moraes". The script is cursive and fluid.

Claude Moraes