

Statement of the Working Party 29 on the EU – U.S. Umbrella Agreement

Brussels, October 2016

The conclusion of the Umbrella Agreement has come at a challenging time for the protection of personal data in the context of government access to personal data. After Edward Snowden’s revelations exposed the risks of mass surveillance, the European Court of Justice recalled in its Schrems decision that the EU fundamental rights to privacy and data protection, deriving from Article 7 and Article 8 of the European Charter of Fundamental Rights (EU Charter), apply to any interference. These rights ensure that the interference should be limited to what is strictly necessary and proportionate, and they need to be complied with when the Umbrella Agreement is concluded.

In this context, the Working Party 29 (hereafter WP29) welcomes the initiative to set up a general data protection framework for EU-U.S. law enforcement cooperation, an area where privacy concerns were insufficiently taken into consideration. The so-called “Umbrella Agreement”¹ will both complement existing EU-U.S. and Member State-U.S. law enforcement agreements and create a data protection standard for future agreements concluded in this field.

The Umbrella Agreement as a binding agreement determines the minimum data protection safeguards to be guaranteed by the EU and by the U.S. for future data flows between their law enforcement authorities, without authorizing any data transfer.

In general, the WP29 welcomes that the Umbrella Agreement considerably strengthens the safeguards in existing law enforcement bilateral treaties with the U.S., some of which were concluded before the development of the EU data protection framework. A suitably substantive Umbrella Agreement should be seen as a positive measure to improve law enforcement co-operation as the existence of a strong data protection framework will facilitate transfers and aid the negotiation of future data sharing agreements. The WP29 recognizes the legitimate case for efficient exchange of information in the context of co-operation between law enforcement authorities.

If the Agreement proceeds to adoption, the WP29 will closely monitor whether it fully satisfies key data protection requirements and whether it is in compliance with Article 7 and Article 8 of the EU Charter. It is therefore important that the effectiveness of the Agreement in practice is studied.

It is important that the Umbrella Agreement, in conjunction with the Judicial Redress Act and the Privacy Act, affords all data subjects in the EU an effective right of redress in U.S. courts in the law enforcement context. The US legislation includes various limitations and

¹ “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”, downloadable at the website of the European Commission at: http://ec.europa.eu/justice/newsroom/data-protection/news/160602_en.htm

preconditions as to the scope of application, the causes of action provided, the designation of agencies covered, as well as to the application of the Privacy Act in law enforcement matters. The WP29 therefore recommends requesting from the U.S. government additional assurances explaining and confirming the scope of redress rights granted to data subjects in the EU through the Judicial Redress Act in the law enforcement context. In particular, the WP29 seeks clarification as to how records from U.S. law enforcement authorities are exempted from the application of the Privacy Act and how this is compatible with the Umbrella Agreement.

Additionally, some clarifications may be needed in order to ensure that the level of protection of personal data afforded by the Umbrella Agreement is fully consistent with EU law. In particular, attention should be paid to the following points: the definitions of the concepts of “personal data” and “data processing” differ from the EU definitions; the data retention period should be defined more strictly in relation to the purpose pursued; the restrictions to individual’s access rights are very broad and access could be improved by the establishment of an indirect access right mechanism².

The WP29 appreciates this significant first step towards the achievement of a high level of protection of personal information in the context of law enforcement cooperation with the United States. At the same time, the WP29 would welcome further clarity on how the Agreement complies with EU fundamental rights and, thus, the legal certainty of the Umbrella Agreement.

Once the agreement is adopted, the WP29 will be paying specific attention to the implementation and to the oversight measures adopted to ensure that the rights afforded are effective. It will continue to follow closely future developments in the legislation and in the courts on both sides of the Atlantic.

Further background:

The Umbrella Agreement was signed on 2 June 2016. Currently, the Council is seeking to obtain the consent of the European Parliament in order to adopt the decision concluding the Umbrella Agreement.

² In this regard, see in particular Article 17 of Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA