



Statewatch Analysis

Statewatch, the European Commission and the Dutch Senate

- Parliamentary sovereignty in the EU under threat?
- The EU-USA agreement on the exchange of personal data and later the US intervention on draft new EU Data Protection Regulation and the Snowden revelations

Tony Bunyan

(This Analysis was drafted in April 2011 and is now published for the first time: The Postscript was added in March 2014)

Introduction

There are seven EU-US agreements covering justice and home affairs issues: 1. Europol (exchange of data); 2. Extradition; 3. Mutual assistance; 4. PNR (passenger name record); 5. SWIFT (all financial transactions, commercial and personal); 6. Container Security Initiative (CSI); 7. Eurojust.

Reaching these agreements often proved controversial, the process attracted adverse media coverage, and was very time-consuming due to the involvement of both the European Parliament and the European Court of Justice. Accordingly the EU and the USA wanted to conclude a long-term *general* agreement covering *all* existing and future exchanges of personal data.

In August 2010 Statewatch put online the European Commission's Proposal for a general agreement with the USA on data protection and the exchange of personal data.^[1] and the "Mandate: Negotiating Directives".^[2] These were classified by the European Commission as "EU RESTREINT" (RESTRICTED). In December 2010 the Council of the European Union agreed the final text of both – but the texts were not made public.

However, the model for the agreement was said to be based on the Final Report by the EU-US High Level Contact Group on information sharing and privacy and

¹ <http://www.statewatch.org/news/2010/aug/eu-usa-dp-general-em-2.pdf>

² <http://www.statewatch.org/news/2010/aug/eu-us-general-dp-agreement-mandate-2.pdf>

personal data protection [³] whose scope covered all crimes, however minor. It raised wide concerns including from the European Data Protection Supervisor.[⁴]

On 29 March 2011 it was announced that negotiations with the USA has started.[⁵]

The Dutch Senate puts the documents on its website

The Dutch Senate found the two documents on the Statewatch site and put them on its own website on 2 September 2010. When this happened the European Commission contacted the Netherlands Minister of Security and Justice who in turn wrote to the Chair of the Dutch Senate Committee asking for them to be removed. The Senate Committee replied saying that they had been placed on their website in order to “foster public debate”.

See: Full-text of Letters between the Netherlands Minister of Security and Justice and the Dutch Senate Committee: Letters 1-4:

<http://www.statewatch.org/news/2014/jan/dutch-senate-letters-1-4.pdf>

- the Minister writes to the Parliament

On 22 February 2011 the Minister wrote again to the Senate Committee saying that the European Commission had contacted the Netherlands Permanent Representation in Brussels urgently requesting the removal of the documents by “Friday 25 February”. The letter said:

“The Commission argues that parliaments (or other Member State institutions) may only publish RESTREINT documents on their website after formal approval for publication by the relevant EU institutions. The fact that the document in this case was not obtained via official channels but was made public – illegally – earlier by Statewatch, does not waive this obligation.”

The letter ends with a threat by the Commission to take proceedings against the Netherlands government which could result in a fine.

- the Parliament writes to the Minister

On 25 February 2011 the Senate Committee replied:

“I would appreciate if you could clarify before this date the (legal) reasoning which underlines the European Commission’s arguments for the relevant parliamentary obligations, and on which legal basis the Commission is considering initiating infringement proceedings against the Netherlands.”

- the Minister writes to the Parliament

The Minister replied on 14 March 2011, following “informal contacts with the Commission”, and said their reasoning was that the documents concerned:

³ <http://www.statewatch.org/news/2008/jun/eu-usa-data-sharing-privacy-hlg-9831-08.pdf>

⁴ <http://www.statewatch.org/news/2011/feb/eu-edps-opinion-high-level-contact-group-2008.pdf>

⁵ <http://www.statewatch.org/news/2011/mar/eu-com-usa-talks-dp-agreement-prel.pdf>

“the mandate for a treaty between the European Union and the United States on the protection of personal data. Such mandates are obviously confidential. Document COM (2010) 252 / 2 is therefore marked by the author of the document, the Commission, as a ‘restreint’ (restricted) document.”

And that:

*“This classification is applied to information of which the disclosure - without authorisation from the Commission - could be **disadvantageous** for the interests of European Union or any of its Member States.”* (emphasis added)

“Restricted” is the lowest level of classified documents whose disclosure is “disadvantageous” (potentially controversial or embarrassing) and there is always the temptation for officials bump up “Limite” documents, which are not classified, to this level.

The Commission then said that “Restricted documents” are given to Member States on the understanding that *“national authorities of Member States respect the Commission’s security rules.”* But the rules cited are the “Internal Rules of Procedure” of the Commission (Decision 2001/844, OJ L 317). Moreover, these documents were not sent to the Dutch government and thus not passed by them to the Dutch Senate.

The Commission also argue that as they had not removed the “Restricted” classification the documents could not be made public:

“The fact that the document in question was made public in an illegal manner through statewatch.org does not alter this.”

And further that:

*“Without permission from the Commission, the publication by parliament of a document that was **sent** with the purpose of confidential information, means that the member state who is responsible for the acts of parliament, is in breach of the security rules of the Commission and **the principle of loyal cooperation** between institutions of the European Union and Member States pursuant to Article 4 paragraph 3 of the EU Treaty. Disclosure on the website of the Kamer gives the misleading impression that this confidential document was made public legally.”* (emphasis added)

First, the documents were not sent to the Dutch government.

Second, it claims, extraordinarily, that **the Dutch government can be held responsible for the actions of the Dutch parliament.**

Referring to the “obligations of parliament in this matter” the Commission says:

*“The system of the EU treaties and the related case law clearly indicates that the State as a unity is responsible for infringements committed by organs of the central government as well as by organs of decentralised governments. In proceedings initiated on grounds of failure to comply with obligations stipulated under EU law... **the Member State is responsible for the actions of, for example, its national parliament.**” (emphasis added)*

Such a claim that “the Member State is responsible for the actions of, for example, its national parliament” is a direct threat to parliamentary sovereignty and the overriding obligations of parliaments to the people who elected them.

- the parliament responds

The Dutch Senate responded on 22 March 2011 making two points.

First they defended absolutely their right to publish the documents as it saw:

“no reason for a change in their earlier position, namely, that the Upper House (Eerste Kamer) is free not only to use documents that are in the public domain but also to publish these on its website in the interest of public debate.”

And second that they would remove the document on 1 April 2011 as the Council of the European Union had now given its mandate to proceed with the negotiations with the USA and thus they were not longer relevant to its work.

Statewatch’s publication of the documents was in the public interest

The report of the EU-US High Level Contact Group, as noted by the European Data Protection Supervisor, only set out general principles and leaves substantive areas unresolved including those of redress, “preventing undue impact on relations with third countries”, the protection of private entities and measures guaranteeing the effective exercise of individuals' rights.

But one does not have to go further that to look at the scope of the Agreement as set out in the “Principles” to be highly concerned:

*“The European Union would apply these principles for 'law enforcement purposes' meaning use for the prevention, detection, investigation, or prosecution of **any** criminal offense.*

*‘The United States would apply these principles for 'law enforcement purpose,' meaning use for the prevention, detection, suppression, investigation, or prosecution of **any** criminal offense or violation of law related to border enforcement, public security, and national security, **as well as for noncriminal judicial or administrative proceedings** related directly to such offenses or violations.’ [emphasis added]*

The EU definition of the scope for the exchange of personal data would cover “any criminal offence”, however minor. The US definition is the same but

extends the scope to cover non-criminal judicial or administrative proceedings related to any crime however minor. What could possibly justify such an all-encompassing scope in terms of necessity and proportionality under EU data protection principles?

There is no guarantee EU citizens will be informed that data and information on them has been transferred to the USA or to which US agencies it has been passed.

The agreement would apply to individual requests and automated mass transfers and allow the USA to give the data to any third state "if permitted under its domestic law".

As Barry Steinhardt of the ACLU commented at the time the 1974 US Privacy Act only applies to US citizens and there is:

"no oversight or legal protections for non-U.S. persons... We believe that this situation clearly violates European legal requirements for the fair and lawful processing of personal information."

A recurring question during the secret EU-US meetings which discussed the Agreement has been the EU suggesting that the US should change its law so as to give the same protection to EU citizens as they have under EU law.

The last time this question arose was at the EU-US JHA Ministerial Meeting in Washington on 8-9 December 2010 (EU doc no: 17624/10). The US side referred to the "shared common values" noted by the HLCG and:

"The US was not ready to adapt its data protection system"^[6]

Postscript

The Negotiating Mandates were agreed in May 2010 and adopted in December 2010. Statewatch put the two documents online in August 2010. However, by February 2013 little progress had been made despite a number of meetings:

"On 28 March 2011 the Commission opened negotiations with the US side. Further negotiation sessions were held on 5-6 May, 26 May, 24 June, 28 July, 9 September, 9 November and 13 December 2011. In addition, at technical level meetings were held on 17 May and 18 July 2011. The next negotiation session is scheduled for 13 February 2012."^[7]

In truth by early 2012 EU-USA negotiations on a general agreement on the exchange of personal data were about to grind to a standstill. First, there was a growing point of view that the EU should agree and adopt its new Regulation on data protection (replacing that of 1995) before coming to any agreement with the USA – if at all given the USA was on record as saying it would not change its

⁶ <http://www.statewatch.org/news/2011/may/eu-usa-dec-10-no-17624-10.pdf>

⁷ <http://www.statewatch.org/news/2014/mar/eu-council-usa-dp-agreement-2011-5999-12.pdf>

Privacy Act of 1974 to give proper rights and protections for EU citizens. This was a view shared by Commissioner Reding who was responsible for drawing up.

This position hardened in December 2011 Statewatch leaked the Commission's draft new Regulation on Data Protection which had been sent out for Inter-Services consultation inside the Commission – Article 42 contained a strong clause concerning the terms on which personal data could be shared with any third-party (ie: the USA).^[8]

Then event took yet another turn, when the US Federal Trade Commission sent a strong 9-page critique of the Inter-Service draft Regulation to the European Commission including the provisions on Article 42 – Statewatch also leaked this Note. The USA exerted pressure not on DG Justice (Commissioner Reding) but other DGs in the Commission. They were lobbied by the USA's Delegation in Brussels so that the final version, which has to be agreed by the College of Commissioners, omitted a number of provisions including Article 42. From this point discussions on a General EU-USA Agreement on the exchange of personal were dead in the water.

Events from 6 June 2013 with the first Snowden revelation concerning “NSA collecting phone records of millions of Verizon customers daily” (Guardian) opened the floodgates for exposure after exposure on the activities not just of the NSA in the USA but particularly the UK's GCHQ and other EU Member State intelligence and internal security agencies.^[9] From the EU-USA perspective the rights of EU citizens on whom data had, and is, being collected poses unsurmountable problems.

As to the publication, as in the case of the Dutch Senate, of RESTRICTED and other classified documents the Council of the European Union adopted an Agreement between Member States of the European Union, meeting within the Council, regarding the protection of classified information in the interests of the European Union in July 2011. ^[10] It includes an overriding provision on the rights of the “originator” (the author) namely

Article 4

1. Each Party shall ensure that classified information provided or exchanged under this Agreement is not:

- (a) downgraded or declassified without the prior written consent of the originator;*
- (b) used for purposes other than those established by the originator;*

⁸ Proposal for Proposal for a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation):

<http://www.statewatch.org/news/2011/dec/eu-com-draft-dp-reg-inter-service-consultation.pdf>

⁹ <http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order/print>

¹⁰ 2011 Classified agreement between MSs and Council:

<http://www.statewatch.org/news/2014/jan/eu-council-ms-agreement-classified-info.pdf>

This allows an EU institution, an EU Member State, an EU agency or body and third-parties (like the USA) to exercise a veto on the release or downgrading (ie: from a RESTRICTED to a LIMITE document (which is not a Classified document).

Tony Bunyan, Statewatch Director, comments:

“Subsequent events have shown that it was clearly in the public interest to make public the inadequate EU negotiating position back in 2010. The USA’s hostile reaction to the draft new EU Regulation on data protection in 2011 and the Snowden revelations from June 2013 demonstrate the need for binding privacy rights in the EU that cannot be negotiated away in secret meetings.

This case highlights the limits that have been put in place to try and restrict the sovereignty of national parliaments’ to decide for themselves what documents can be placed in the public domain in order that the people can understand what is being decided in their name.”

[For the record this Analysis includes two RESTRICTED documents and 2 LIMITE documents - none of which are publicly accessible]