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RESTREINT UE

Réunion spéciale des chefs de cabinet

TEXTE EN

PROPOSITION DE RECOMMANDATION DU CONSEIL AUTORISANT
L'OUVERTURE DE NEGOCIATIONS EN VUE D'UN ACCORD ENTRE L'UNION
EUROPEENNE ET LES ETATS-UNIS D'AMERIQUE SUR LA PROTECTION DES
DONNEES PERSONNELLES LORS DE LEUR TRANSFERT ET DE LEUR
TRAITEMENT A DES FINS DE PREVENTION, D'INVESTIGATION, DE DETECTION
OU DE POURSUITE D'ACTES CRIMINELS Y COMPRIS LE TERRORISME, DANS
LE CADRE DE LA COOPERATION POLICIAIRE ET JUDICIAIRE EN MATIERE
PENALE

Communication de Mme REDING, en accord avec Mme MALMSTRÖM

Cette question est susceptible d'être inscrite à l'ordre du jour de la 1919^{ème} réunion de la Commission le mercredi 26 mai 2010.

Copie: Membres de la Commission
Mmes et MM. les directeurs généraux et chefs de service de
JLS, COMP, ENTR, INFSO, MARKT, MOVE, RELEX, SANCO,
TAXUD, SG et SJ

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ANNEX

NEGOTIATING DIRECTIVES

The Commission shall, in the course of negotiations, aim to achieve the specific objectives set out in detail below [while reflecting, to the extent practicable, the recommendations made by the European Parliament in its Resolution ###]:

1. The purpose of the Agreement shall be to ensure a high level of protection of the fundamental rights and freedoms of individuals when personal data are transferred and processed to and by competent public authorities of the European Union and its Member States and the US for the purpose of preventing, investigating, detecting or prosecuting crime, including terrorism, in the framework of police cooperation and judicial cooperation in criminal matters within the scope of Chapter 4 or Chapter 5 of Title V of Part Three of the Treaty on the Functioning of the European Union. It shall lay down legally binding and enforceable data protection standards for such processing and establish mechanisms to ensure effective application of those standards in practice.
2. The Agreement shall provide for a high level of data protection standards in line with the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union, the European Convention for the Protection of Human Rights and Fundamental Freedoms and EU secondary legislation for the protection of privacy and personal data. The Agreement shall, in particular: ensure protection of everyone's personal data, regardless of nationality or place of residence; provide that such data must be processed fairly for specified purposes and on a legitimate basis laid down by law; stipulate that everyone has the right of access to data which have been collected concerning him or her, including the right to have them rectified; and guarantee that compliance with these rules shall be subject to control by an independent public authority, in line with Article 8 of the Charter of Fundamental Rights of the European Union.
3. The Agreement shall explicitly state that it creates enforceable rights for data subjects.
4. The Agreement shall apply to all future EU or Member States personal data transfer and processing agreements with the US for the purpose of preventing, investigating, detecting or prosecuting criminal offences, including terrorism, in the framework of police cooperation and judicial cooperation in criminal matters. The Agreement shall also apply to all existing EU or Member States personal data transfer and processing agreements with the US for the purpose of preventing, investigating, detecting or prosecuting criminal offences, including terrorism, in the framework of police cooperation and judicial cooperation in criminal matters after a transitional period of three years. In this respect the Agreement shall place an obligation on the EU and the US to bring those agreements in conformity with the Agreement no later than three years after its entry into force.

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5. The Agreement shall explicitly state that it cannot be the legal basis for any transfers of personal data, including from private entities, between the European Union and the US and that a specific legal basis for such data transfers shall always be required.
6. The Agreement shall apply to transfers and processing of personal data to and by European Union institutions, bodies, offices and agencies, European Union Member States and US public authorities responsible for prevention, investigation, detection or prosecution of criminal offences, including terrorism, in the framework of police cooperation and judicial cooperation in criminal matters. It shall apply to the aforementioned transfers and processing regardless of where the personal data originate from, as long as the personal data are processed by a competent public authority for the purpose of preventing, investigating, detecting or prosecuting criminal offences, including terrorism.
7. The Agreement shall build on the data protection principles identified by the High-Level Contact Group on Information-Sharing and Privacy and Personal Data Protection (HLCG), but neither be restrained by the wording agreed nor be limited to the principles identified by the HLCG. The Agreement shall notably further provide:
 - For definition of key terms;
 - For protection of the personal data of everyone, regardless of nationality or place of residence;
 - That, as regards data quality, personal data shall be processed fairly and lawfully, be accurate and, where necessary, be kept up to date;
 - That, as regards purpose limitation, personal data shall be transferred and processed for specified, explicit and legitimate purposes within the scope of this agreement, i.e. preventing, investigating, detecting or prosecuting criminal offences, including terrorism, in the framework of police cooperation and judicial cooperation in criminal matters, and shall not be further processed in a way incompatible with those purposes;
 - For the principle of data minimisation, i.e. that personal data shall be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed. In addition, the Agreement shall provide for an obligation to set appropriate time limits for erasure and for periodic review of the need for storage of the data;
 - For the obligation for notification of any breach of personal data to the competent authority and the data subject and for a mechanism for implementing this obligation;
 - That, as regards the security of processing, no person acting under the authority of the data controller, including a processor, shall process personal data unless instructed by the controller;
 - For the logging or documentation of all processing of personal data for the sole purpose of verification of compliance with the data protection standards laid down in this Agreement;

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- For procedures enabling EU and US independent public authorities responsible for data protection to assist data subjects with exercising their rights under this Agreement, notably the right to access, rectification, erasure and redress;
 - For the right to direct access for individuals. Should direct access need to be limited, the Agreement shall spell out the specific grounds for any necessary and proportionate restrictions. In the event of such restrictions to the right of direct access, the Agreement shall provide for indirect access by an independent public authority on behalf of the data subject;
 - For the right of data subjects to blocking, alongside rectification, objection and erasure;
 - For informing the data subject about the purpose of the processing, the identity of the controller, the categories of personal data that are processed and any other information insofar as this is necessary to ensure fairness;
 - For effective and enforceable rights of administrative and judicial redress for any person whose data are processed under the Agreement;
 - That any onward transfer to and subsequent processing by competent authorities of a receiving country shall be in accordance with the rules and conditions laid down in this Agreement and any additional conditions of applicable international agreements. Moreover, the purpose limitation of the original transfer must be respected. The Agreement shall also provide that exceptions to the purpose limitation in relation to onward transfers can, in very specific circumstances for which due justification is given, be agreed upon in further specific agreements;
 - For prior written consent by the original sending country in the event of onward transfer to third countries or international organisations and for an obligation to inform, whenever possible, the data subject of any such onward transfer. In addition, the Agreement shall specify, as a condition for onward transfer, that the third country must provide an adequate level of data protection;
 - For the liability of public authorities for breaches of the Agreement, including when the data are processed on behalf of public authorities, *inter alia* laying down effective and dissuasive sanctions;
 - For the right to compensation for any person who has suffered damages as a result of unlawful processing of his or her personal data or any act incompatible with the data protection standards laid down in the Agreement.
8. The Agreement shall require that compliance with the data protection standards laid down therein shall be subject to control by one or more independent public authorities within the territory to which it applies. Each independent public authority shall have effective powers of investigation and intervention and to engage in legal proceedings or to bring to the attention of the competent judicial authorities any violations of the data protection standards in this Agreement. Each independent public authority shall, in particular, hear claims lodged by any person concerning protection of his or her rights and freedoms with regard to the processing of personal

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data pursuant to this Agreement. The person concerned shall be informed of the outcome of the claim.

9. The Agreement shall establish a cooperation mechanism with procedural safeguards between the independent public authorities responsible for data protection of the European Union, its Member States and the US with a view to effective implementation of the Agreement. The parties shall mutually notify the designated authorities.
10. The Agreement shall stipulate that the parties shall undertake periodic joint reviews of application of the Agreement and examine how to make most effective use thereof. The joint review teams shall include representatives of public supervisory authorities of the European Union, its Member States and the US and experts from the police or the judiciary, as appropriate. The findings shall be made public.
11. The Agreement shall stipulate that its provisions shall apply to data transfers and processing concerning criminal intelligence but not to those concerning essential national security interests and specific intelligence activities in the field of national security. The Agreement shall include a narrow definition of national security interests in order not to unduly limit the scope of the agreement.
12. The Agreement shall include a clause addressing its territorial application.
13. The Agreement shall include a clause on its duration. Whether the duration is to be indefinite or definite shall be assessed in the light of the results of negotiations. In either case, a provision shall be included requiring a review of the Agreement in due course.
14. The Agreement shall stipulate that the parties shall consult each other to facilitate resolution of any dispute regarding interpretation or application of the Agreement.
15. The Agreement shall provide for the possibilities of suspension and termination of the Agreement by either Party in the event that the above-mentioned consultation procedure is unable to resolve the dispute.
16. The Agreement shall be equally authentic in the Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish language and shall include a language clause to this effect.
17. In the course of negotiations, the Commission shall promote accession by the US to the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981 (ETS No 108) and to its Additional Protocol with regard to Automatic Processing of Personal Data regarding supervisory authorities and transborder data flows of 8 November 2001 (ETS No 181).