

LIBE Committee inquiry- note for the file

Meeting of 24th July 2013 concerning feedback from the first meeting of the EU-US expert group on data protection

A) List of participants

European Parliament

Claude Moraes MEP
Ciara Burbridge, assistant to Claude Moraes MEP
Antoine Cahen, LIBE secretariat, HoU
Kristiina Milt, LIBE secretariat
Danai Papadopoulou, LIBE secretariat

European Commission

DG JUST

Paul Nemitz, DG JUST C- Fundamental rights and Union citizenship, Director
Bruno Gencarelli, DG JUST Unit C3 - Data protection, Deputy HoU
Aikaterini Dimitrakopoulou, DG JUST Unit C3 - Data protection
Titus Poenaru, DG JUST Unit 02 - Interinstitutional relations

DG HOME

Renhard Priebe, DG HOME A - Internal security, Director
Julian Siegl, DG HOME Unit A3 - Police cooperation
Elisabete Soares, DG HOME Unit D1- Interinstitutional relations

B) Summary of the discussion

Mr Nemitz started the presentation by ensuring the EP that COM treats it on an equal basis with Council. He said that the first meeting was basically spent on building trust with our counterparts, and thus the substantive outcome was very limited. It seems US experts were hesitant to cooperate at the beginning, and instead of answering questions they tried to show that US law and practice compares favourably with those of EU Member States. The COM reported that by the end of the meeting they showed, however, more willingness for cooperation.

High level participants were present in the meeting, such as Robert Litt (General Counsel for the director of national intelligence), who is responsible for the dialogue with the Congress from the part of the Obama administration, but he basically repeated a speech that he had given a few days ago at the [Brookings Institute](#).

Mr Nemitz gave a brief overview of the discussion on the US legal framework - there are 3 legal bases which cover the programmes. He first mentioned Section 215 of the Patriot Act, which is used to collect in bulk metadata (non-content) about telephone conversations in case of US citizens. In US data is transferred directly to the state (and allegedly stored by NSA for a period of 5 years) - in EU the storage period is 2 years. Then Section 702 of FISA was raised, which is used both for content and non- content

in case of non US citizens. It seems that the US experts were saying that there is no bulk collection of data in this case, and that this is a targeted programme (communications linked to a specific individual, plan etc.). To the question of the COM whether there are other bulk collection programs apart from those under s. 702, the US experts refused to comment. They mentioned that, generally speaking, another legal basis apart from s. 702 could be the [Executive order No 12333](#). The US experts also mentioned that there is a court review of the authorisation of applications. No appeal process is available to EU citizens, nor are they informed that they had been targeted after the surveillance ends. Companies from whom data is requested can only appeal on the basis that it is too burdensome, but they cannot challenge the grounds for the decision, as they are never informed about it. It was also pointed out that the FISA court judges are ordinary judges who are appointed there for a limited mandate and alternate regularly.

It seems that the US experts are only ready to accept minimal measures such as setting best practices about government databases. They agree that we need to build trust for Internet and Trans-Atlantic relations. The question of applicable law is also an interesting one. In a pending case, Google claims that EU law doesn't apply to it because its servers are located in California (Case C-131/12, Google Spain SL, Google Inc. v Agencia Española de Protección).

Mr Priebe then took the floor and pointed out that the inquiry should not be mixing all subjects, in order not to create problems in other areas of security cooperation such as cybersecurity, etc. where the cooperation with the US is very important. There will be also coming in the autumn reports from the COM on the implementation of the EU-US PNR and the TFTP agreements. The COM reminded those agreements to the US counterparts. The latter questioned the competence of the former to discuss national security issues. The COM explained that their competence is based on the data protection agreements and reminded the CJEU caselaw which has restrictively interpreted the notion of national security, as an argument for MS to depart from EU law provisions. It should be emphasised that Treaty exceptions for reasons of national security are subject to a necessity and proportionality test. However, most MS-s in Coreper reiterated that national security is not an EU competence, but a national one. This is also why a second expert group was set up to deal separately with issues of intelligence. The COM reminded also that existing agreements provisions (e.g. safe harbour) can be used for the purposes of an EU response - national DPAs can suspend the application of this agreement, should citizens claim that a recording is not necessary for national security. The CJEU could deal with such issues through preliminary questions.

The COM will report to Council in October along with the Presidency.

Mr Moraes emphasised that EU is seen by the public as one entity, not COM, Council and EP separately. He would like to concentrate on the report - it has to be a credible report, a real EU response. This could lead to a win-win situation for both EP and COM. He insisted that we should ask for more transparency on instruments. We should use the EU law, particularly the data protection regulation to increase the real protection without cutting security or hampering economics.

COM explained that at the moment the problem is the different level of protection in different MS-s. For example in some MS-s national DPA can give information on whether national security keeps a file on a citizen, while other don't..

The COM also mentioned that a good candidate to invite could be Mr David Medine, Chairman of the [Privacy and Civil Liberties Oversight Board \(PCLOB\)](#), "an independent, bipartisan agency within the executive branch" which aims to verify: 1) whether what NSA does is legal under US law, 2) whether the relevant laws are constitutional and 3) whether all that's being done is good policy. He will apparently be in Warsaw in September.

C) Conclusions and follow-up

EU-US expert group's next meeting is planned to be in September (date was not mentioned), and it will bear on statistical questions.

Parliament will receive in due time for its meeting on 5th September all information requested, namely the mandate of the expert group, the list of its members, the date of its next meeting in September, its future calendar and supporting documents.

The Rapporteur asked Mr Nemitz to report, preferably not in camera, to the Shadows and LIBE Committee during the 5th September Hearing, so that Members can get direct feedback from the first meeting of the expert group. Mr Nemitz agreed to this request.