

## OUTLINE

### I. CONTEXT OF THE DRAFT DECISION

#### 1. Background:

- DPD & SH decision
- EU-US HL expert group after Snowden revelations
- COM communication & 13 recommendations
- EUCJ decision
- COM negotiation of PS
  - Welcome COM efforts and US involvement of DoC, DoS, FTC, ODNI

#### 2. Context

- Legislative/political context
  - GDPR to be formally applicable
  - Pending ratification of Umbrella
  - TTIP negotiations
- Impact
  - economic impact & transatlantic relations
  - need to provide legal certainty and avoid further annulment
  - International impact: future adequacy decisions

### II. PURPOSE OF THE EDPS OPINION

- Mention COM (late) consultation
- EDPS as independent adviser plus contribution to WP29 opinion as member
- Building on EDPS opinion on Rebuilding Trust, EUCJ pleading and EP hearings
- Objective: advice COM & Art31 on draft adequacy decision (not directly on PS) before final decision
- Basis for the analysis: Not SH, but Directive in light of EUCFR & EUCJ case law - GDPR in view

### III. GENERAL COMMENTS

#### III.I. The scope should be widened

##### 1. Draft decision not comprehensive enough

- Directive: adequacy requires analysis of domestic law or international commitments
- EUCJ: all relevant domestic law/international commitment should be analysed
  - PS legal value and interaction with
    - other US laws, in particular those relating to:
      - privacy (federal/state level): not covered
      - LE & intelligence: partly covered
    - Relevant as regards exemptions from application of PS & where other US laws would interfere with PS
  - Agreements
    - already in force: PNR, TFTP2: not covered
    - pending ratification: Umbrella: not covered
  - Definitions (e.g., "foreign intelligence" & "collection") and interpretation: not covered
- Note that EUCJ requires *strict* review

##### 2. Limited scope of the PS, although wider than in SH

- General exceptions

- avoid circumventing DPD
- room for improvement (purpose limitation, exemptions for intra-group, check scope of liability)

## 12. Derogations

- US statutes seem to allow bulk collection.
  - PCLOB report: certain aspects of the FISA Section 702 program pushes it *close to the line of constitutional reasonableness* (and 4th Am does not protect non US persons)
  - Executive order 12333 still to be analysed by PCLOB.
- PPD 28: positive limitations but not enough.
  - Agency procedures applying it.
  - Legal value of PPD?
- LE access

## 13. Oversight

- CJEU requirements: need for effective detection and supervision mechanisms
- DoC and FTC role for commercial part
- Inspectors-General
- ODNI Civil Liberties and Privacy Office
- President's Intelligence Oversight Board
- Civil liberties/privacy officers
- FISC and FISCR
- House and Senate Intelligence and Judiciary Committees PCLOB

## 14. Review

- CJEU requirements: periodic checks
- covered: joint review. DPAs role?

## 15. Redress

- DPD: independent administrative and judicial remedy
- CJEU: need for effective *legal protection* and effective remedy before a *tribunal*
- Note that GDPR will require independent supervisory authority for adequacy decisions
  - Commercial part: complaint system: covered, although complex.
    - Check limits to FTC authority
  - Requirements to go Court (eg, statute) and limits to non US persons
  - Ombudsperson: not independent
  - Redress Act: very limited scope
  - FOIA
  - DPAs powers: EUCJ: adequacy decisions cannot eliminate or reduce the powers accorded to national DPAs by Charter and DPD

## V. CONCLUSION

- Appreciate COM negotiation efforts and commitment by several US Departments
- Good first result but need for (many) improvements (add summary)
- Need to ensure legal certainty for organisations and data subjects
- Key for transatlantic relations but also internationally, future adequacy decisions