European Commission wants "umbrella agreement" for data protection with U.S.; will "reappraise" if US has "adequate protections" for the cross-border transfer of personal data

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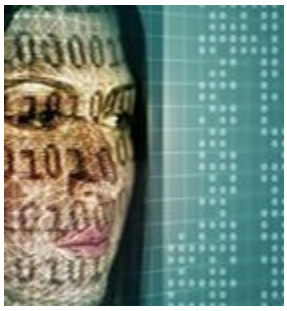

14 July 2010 — The European Commission has opened negotiations with the US on the creation of a data protection agreement that would govern all data transfers between the EU and the US. Last week Viviane Reding, Commissioner for Justice, Fundamental Rights and Citizenship, was in Washington and announced that the negotiation of separate deals on issues such as airline passenger name records (PNR) and financial data was not the best way to address privacy concerns:

"It is my determination to end this piecemeal approach. That is why, within my first few months in office in Brussels, I worked on a mandate to start negotiations with the US on an umbrella data protection agreement. The aim is clear: to provide legal certainty to data transfers by ensuring that all these transfers are subject to high standards of data protection on both sides of the Atlantic. EU Member States are currently discussing the fine print of the Commission's proposal before negotiations can officially start. This will be done swiftly and I am confident that the green light will be given in the coming months".

Last week the European Parliament gave its approval to the latest framework within which US authorities can gain access to Europeans' banking details to aid their counter-terrorism police and intelligence operations. The Parliament had rejected previous proposals and has been more protective of Europeans' privacy than other EU governing bodies.

We have discussed the EU data protection law in numerous posts. Basically, the law states that personal data must only leave Europe if it is protected as well as it would be within Europe. This can be done by other countries' data protection laws or by agreements about how specific information will be treated. Reding was quoted as saying that she recognised that many data protection regulators and legislators are concerned about the US's generally less privacy-protective laws:

"Past negotiations on the transfer of passenger data or the more recent talks on the transfer of financial transaction data for the purposes of the [US anti-terrorism programme] have shown how difficult it is to find mutually acceptable standards and practice for the protection of personal data. For years experts have been discussing the usefulness of having an international agreement between the European Union and the US based on high standards for the protection of personal data to prevent and prosecute crime. There were many talks but little political will. This has to change."

Reding said that the cultural differences between the approaches to personal data processing in the US and Europe had to be resolved. She said "removing protection gaps and discrepancies between the two legal systems and thereby improving legal certainty and reaching a high level of protection for any individual are the goals for this new agreement."

Reding said that the proposed agreement on how to treat data transferred for criminal purposes would also help authorities to come to agreement on data swapping for other, non-criminal purposes. She said it could become an "umbrella agreement" for all others:

"I want to negotiate a data protection agreement that contains all the necessary high level data protection standards, with obligations for data controllers and rights for data subjects, as well as mechanisms to ensure the application of those standards. This should become a complete self-contained set of rules. The US would feel the benefits immediately since high data protection standards would guarantee legal certainty and facilitate data transfers to and from the US much more easily than is currently possible."

For a further analysis of what this all means there is an excellent post on the Howrey Lovells blog *Chronicle of Data Protection* which you can access by *clicking here*.

No surprises here. Reding has been at the forefront of European data privacy issues. And these events come on the heels of European regulators investigations of Facebook and Google which go to heart of a debate that has gained momentum in Europe: to what extent are social networking platforms responsible for the content their members upload?

And not to be outdone, Joaquin Almunia, the EU's antitrust chief, has begun looking "very carefully" at allegations that Google presents a situation of anticompetitive behavior in search where "the importance of search to a competitive online marketplace" is understood. Word in the salons of Brussels is that a formal investigation will launch after the summer recess.

The investigations and current court cases are complex. The *Financial Times* has been running an excellent series, and several European legal blogs have provided us with quite a bit of information. Next week we'll have a full review and analysis with scores of links on the European investigations of Google and Facebook.

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