

On February 28, the Director of the Personal Data Protection Agency, Zdravko Vukić, participated in the session of the European Data Protection Board, where an opinion was adopted on the draft Decision on Adequacy with regard to the data protection framework between the EU and the USA. The European Data Protection Board welcomes significant improvements, such as the introduction of requirements embodying the principles of necessity and proportionality for data collection in the US and a new legal protection mechanism for data subjects in the EU. At the same time, he expresses concern and asks for clarification on several points. Clarifications specifically refer to certain data subjects' rights, further transfers, scope of application of exemptions, temporary mass collection of data and practical functioning of the legal protection mechanism. The European Data Protection Board would welcome not only the entry into force but also the adoption of the Decision provided that all US intelligence agencies adopt updated policies and procedures to implement Executive Order 14086. The EDPB recommends that the Commission evaluate these updated policies and procedures and share its assessment with by the European Data Protection Board.

The President of the European Data Protection Board, Andrea Jelinek, said: "A high level of data protection is essential for protecting the rights and freedoms of individuals from the EU. While we acknowledge that the improvements in the US legal framework are substantial, we recommend that the concerns raised be addressed and the requested clarifications be provided to ensure that the adequacy decision is sustainable. For the same reason, we believe that after the first review of the Adequacy Decision, subsequent reviews should be conducted at least every three years, and the EDPB is committed to providing its contribution."

The draft Adequacy Decision, published by the European Commission on 13 December 2022, is based on the EU-US Data Privacy Protection Framework (DPF) which is supposed to replace the EU Court of Justice's "Privacy Shield" privacy protection system - and annulled in the judgment Schrems II. A key component of the DPF is the EU-US Data Privacy Framework, issued by the US Department of Commerce. The DPF only applies to self-certified US organizations. The European Data Protection Board has now issued an opinion on the Draft Decision, which considers commercial aspects and access to and use of data by US public authorities.

When it comes to commercial aspects, the European Data Protection Board welcomes a set of updated principles in the EU-US Data Privacy Protection Framework (DPF) in relation to the "Privacy Shield". It also notes that the set of principles remains essentially the same as under the Privacy Shield. In view of the above, there are still some concerns regarding, for

example, some exemptions from the right of access, the absence of key definitions, the lack of clarity regarding the application of the DPF principle to processors, the broad exemption from the right of access to publicly available information and the lack of special rules on automated decision-making and profile creation. The European Data Protection Board further reiterates that the level of protection must not be compromised by onward transfers. Therefore, the EDPB calls on the Commission to clarify that the safeguard measures imposed by the initial consignee on the importer in a third country must be effective in the light of the legislation of the third country, before onward transfer.

Furthermore, the European Data Protection Board asks the Commission to clarify the scope of the exemption regarding the obligation to comply with the DPF principle and underlines the importance of effective supervision and enforcement of the DPF. The European Data Protection Board will closely monitor these aspects, along with the effectiveness of the remedies provided to EU data subjects whose personal data is processed in a manner that violates the EU-US Data Privacy Framework (DPF). .

When it comes to government access to data transferred to the US, the European Data Protection Board notes the significant improvements introduced by Executive Order 14086. The Executive Order introduces the concepts of necessity and proportionality with respect to US intelligence gathering (signals intelligence ).

Furthermore, the new legal protection mechanism creates rights for EU individuals and is subject to review by the Privacy and Civil Liberties Oversight Board (PCLOB). The executive order also introduces more protective measures to ensure the independence of the Data Protection Review Court (DPRC), which was not the case with the previous Ombudsman mechanism, and introduces more effective legal remedies in cases of violations of the rights of respondents, including additional protective measures for respondents.

The European Data Protection Board points out that it is necessary to closely monitor the practical application of the newly introduced principles of necessity and proportionality. Additional clarity is also needed regarding temporary mass collection and further retention and dissemination of aggregated data.

The European Data Protection Board also expresses concern about the lack of a requirement for prior approval by an independent body for bulk data collection in accordance with Executive Order no. 12333, as well as due to the lack of systematic independent ex post review by a court or an equally independent body.

Regarding prior independent surveillance authorization under FISA Section 702, the European Data Protection Board regrets

that the FISA Court does not review compliance with Executive Order 14086 when approving programs that authorize the targeting of non-U.S. persons citizens, although the intelligence agencies implementing the program are bound by it. PCLOB reports on how the safeguards of Executive Order 14086 will be implemented and how those safeguards apply when information is collected under FISA section 702 and Executive Order 12333 would be particularly helpful.

When it comes to the legal protection mechanism, the European Data Protection Board recognizes additional safeguards, such as the role of special advocates and the review of the legal protection mechanism by the PCLOB. At the same time, the European Data Protection Board is concerned about the general application of the standard response of the Data Protection Review Tribunal (DPRC) informing the complainant that no violations have been found or that a decision has been taken ordering appropriate corrective measures, especially given that on that decision cannot be appealed. The European Data Protection Board therefore calls on the Commission to closely monitor the practical functioning of this mechanism.