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From: Presidency
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- Way forward

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In February 2022, the U.S. informed several Member States of their plans to start working on an Enhanced Border Security Partnership (EBSP) as a new and important element that would be taken into account for participating in its Visa Waiver Program (VWP). Through the new Partnership, the VWP members would allow the U.S. Department for Homeland Security (DHS) to access the relevant biometric records in national databases through real-time information sharing for the purpose of immigration screening and vetting activities, in order to authenticate travellers' identities, including in the context of applications for asylum in the U.S. From their end, the U.S. (DHS) would make available records from their own biometric databases.

Following several meetings amongst JHA Counselors, with a majority of Member States being in favour of an EU coordinated approach, Coreper concluded in June 2022 that discussions should be pursued at technical level. More details were needed in order to gain a better understanding on the U.S. objectives, competences of the EU, compliance with the EU acquis as well as reciprocity.

Throughout the IXIM meetings in 2022 and 2023, delegations regularly exchanged information on their contacts with the U.S. on EBSP. The Commission, in parallel, conducted technical meetings with DHS in 2022 and 2023.

With the deadline indicated by the U.S. for the implementation of the EBSP approaching (2027), the Belgian Presidency, building on the work carried out by previous Presidencies, intensified the discussions on the topic with a view to identifying a clear way forward¹. This led to the following conclusions:

- During a meeting of the IXIM working party in February 2024, representatives of DHS confirmed that the conclusion of an EBSP agreement is one of the criteria for U.S. authorities to decide upon the (continuation of) participation of the Member States in the Visa Waiver Program.
- Based on the available information, it was concluded at technical level that the information exchange between Member States and U.S., envisaged under the EBSP concept, may affect EU competences and may not be fully covered by the current EU-U.S. Umbrella Agreement², applicable for the transfer of personal data between authorities for law enforcement purposes.
- **DELETED**

The document in annex describes the outcome of the various technical discussions, as asked for by Coreper in June 2022. It gives a state of play of the current understanding of the various issues, connected to EBSP. Against this background, delegations are invited to reply to the following question:

- *Would you agree that negotiating a common EU-U.S. framework for the exchange of data would be the appropriate way forward?*

¹ See 5096/24, WK 3742/2024, WK 7719/2024.

² Agreement between the United States of America and the European Union on the protection of personal information relating to the prevention, investigation, detection, and prosecution of criminal offences. Official Journal L 336/3, 10.12.2016.

1. Introduction

Taking into account the impeding deadline set by the US to conclude Enhanced Border Security Partnership (EBSP) agreements, the Belgian Presidency has taken the initiative to facilitate discussions among the Member States.

At the end of our Presidency, we would like to take stock of where we are with the EBSP file, building on document WK 3742/2024 presented to the IXIM-delegates at the March IXIM-meeting.

This document was presented to the delegations at the IXIM-meeting on 3 June 2024 (WK 7719/2024).

2. Overview of Discussions on EBSP

In 2022, a coordinated approach was agreed upon, leading to the inclusion of the EBSP topic on the agenda of the IXIM Working Party multiple times throughout the year. Reflecting on these earlier discussions, it appears that the questions and concerns raised – centred around the potential link between EBSP and the Visa Waiver Program (VWP), competence, compliance with the EU legal framework, reciprocity, and the risk of divergence among Member States – remained unchanged.

Throughout the IXIM-meetings in 2022 and 2023, delegations regularly exchanged information on their bilateral contacts with the US on EBSP.

The European Commission (Commission), in parallel, conducted technical meetings with the US Department of Homeland Security (DHS) in 2022 and 2023, in order to gain a better understanding of the US objectives and to assess the US' request. By early 2023, the Commission informed delegations about its intention to work out a Proof of Concept with the US to support the Member States. This Proof of Concept listed potential frameworks for data exchange, intended to serve as a basis for discussions among the European Union (EU), its Member States and the US authorities to determine the opportunities and limitations in relation to the intended information sharing. The initial version of the Proof of Concept was presented to the Member States during a workshop in October 2023, and a revised version was shared with DHS in December 2023 and later discussed during the technical meeting between the Commission and DHS in January 2024.

Despite attempts over the last two years to gain insight into the situation, including interventions by the Council Legal Service and the Commission during IXIM-meetings on different aspects, no further concrete steps were identified.

At IXIM, delegations expressed different views on how to proceed with this file, with some delegations considering the agreements with the US a national competence, whereas other delegations consider the EBSP to fall under EU competence. In the IXIM-meeting of 17 January 2024, the first one under the Belgian Presidency, the Presidency set out its intentions, which were to first get more clarity, then to develop a common vision and finally to determine an appropriate course of action. All of which was explained in document 5096/24.

The Presidency wanted to clarify the context and legal framework within which EBSP negotiations could take place, given that the Member States are being approached separately by the US, often with proposals adapted to their national situation and that the deadline set by the US to conclude an EBSP agreement is approaching. As a matter of priority, the Presidency decided to focus the discussion on practical guidance related to data protection aspects of the potential data exchange under the EBSP.

During the IXIM-meeting on 16 February 2024, DHS addressed the questions from IXIM-delegations. While a number of points were clarified, including the link between the EBSP and the VWP, many questions remained. In response to the Presidency's request, the Council Legal Service gave a preliminary explanation during the IXIM-meeting on 23 February 2024 on the legal aspects concerning the EU competences that could be affected when assessing the consequences of the EBSP. Drawing insights on these two IXIM-meetings, and recognising the need for a common vision, the Belgian Presidency undertook the task of summarising the situation, including on the basis of the elements provided by the Council Legal Service, and proposing a way forward which resulted in document WK 3742/2024, which was discussed during the IXIM-meeting on 13 March 2024. The Presidency concluded that the reflection on the way forward should be based on the principle that any agreement on EBSP must comply with the existing European legislation, in particular regarding data protection.

The Commission confirmed the analysis of the Council Legal Service that – on the basis of the information that was received from DHS on 16 February 2024 on the content and purpose of EBSP – the Umbrella agreement is not sufficient to cover all aspects of the anticipated data transfers between the EU Member States and the US under EBSP. The *tour de table* showed that the IXIM-delegations had different views regarding the ‘way forward’ but there was a clear demand from Member States for support and guidance by the Commission, especially on the issue of data protection. The Commission reiterated its willingness to support the Member States.

The Commission explained during the IXIM-meeting on 24 April 2024 that without detailed information about the US proposals for the data exchange under the EBSP (e.g. which authorities, which data, for which purposes) it would be very difficult to provide concrete guidelines and urged the Member States to provide more information on the US’ requirements. Nevertheless, its intervention did provide useful guidance, which is included in the analysis further on in this document. Afterwards, Member States in bilateral contact with the US, were able to share informally more details about their discussions. This gave a better picture of the US’ data exchange requirements, which were not identical for all Member States.

3. Division of Competences between the European Union and the Member States

The EU’s approach to visa policy negotiations with third countries has evolved significantly over the years. Initially, it was guided by the 2008 mandate³, which introduced a ‘Twin-track’ approach. This approach was designed to leverage the strengths of both bilateral and EU negotiations, ensuring that Member States could address specific national concerns while maintaining a cohesive EU stance on visa policy.

³ 8089/08 JAI 154 USA 20 RELEX 199 RESTREINT UE - Draft Council Decision of 11 April 2008 authorizing the Commission to open negotiations for the conclusion of an agreement between the European Community and the United States of America regarding certain conditions for access to the United States’ Visa Waiver Program in accordance with Section 711 of the “Implementing Recommendations of the 9/11 Commission Act in 2007”

- An EU-track covered certain conditions for access to the VWP falling under EU competence (repatriation of own nationals, enhanced travel document security and airport security, and exchange of information in the area of migration, border security, visa and travel purposes). With regard to data exchange, the objective was to establish the necessary safeguards for the sharing of personal data with the US, based on an EU-US agreement. The negotiations on this track were unsuccessful and have not been pursued actively with the US since 2009. However, the negotiating mandate was never formally withdrawn by the Council.
- A bilateral track covered the bilateral negotiations between the US and Member States to satisfy the US requirements for cooperation with the US.

In 2012, the Commission undertook a comprehensive analysis of the implications of the Lisbon Treaty on the ‘Twin-track’ approach, resulting in a detailed report⁴. The Commission reported on certain third countries’ maintenance of visa requirements in breach of the principle of reciprocity. It also underscored the EU’s exhaustive exercise of its competence in the field of the EU Common visa policy. More specifically, it stated the following: “**...given the exhaustive exercise by the Union of its competence in the field of visa policy, and the fact that the bilateral agreements constitute de facto a pre-condition for getting access to the VWP, in principle, an overarching EU-US agreement covering all conditions related to the access to the VWP should be negotiated and concluded. However, in view of the present situation, in which a significant number of Member States have already concluded with the U.S. agreements on terrorist screening and agreements on enhancing cooperation in preventing and combating serious crime, Member States may continue to negotiate and apply such bilateral agreements, on condition that these agreements do not affect or alter the scope of the Union's common rules in the area of police cooperation and judicial cooperation in criminal matters, in particular with regard to the exchange of law enforcement information, and in the area of data protection in this context.**” (see COM(2012)0681, page 13).

⁴ COM (2012) 681 final, Report from the Commission to the European Parliament and the Council, Seventh report on certain third countries’ maintenance of visa requirements in breach of the principle of reciprocity. See in particular footnote 13, regarding the way the 2008 mandate for the Commission to negotiate with the USA was being carried out. The Commission informed that “...the negotiations on the exchange of letters between the EU and the US regarding certain conditions for access to the VWP which fell under EC competence for entry or continued participation in the VWP have not been pursued actively with the US since 2009: the US does not require that Member States enter into bilateral agreements with the US regarding these requirements”.

During the IXIM-meeting of 23 February 2024, the Council Legal Service emphasised that an exhaustive and meaningful assessment of the respective competences of the Commission and Member States could only take place at the moment that the Commission would request a mandate for negotiations.

4. Legal Aspects on Data Protection

Prior to delving into the EU's data protection rules in the context of data transfers, it must be stressed that compliance with EU and national law regarding the access to data and the disclosure of personal data needs to be taken into account. Regardless of the approach taken (EU or bilateral), data transfer agreements with third countries must be compliant with the EU's data protection rules. Indeed, since 2018, with the entry into application of the General Data Protection Regulation (GDPR) and the Law Enforcement Directive (LED), there is a common set of data protection rules for all companies and data controllers operating in the EU, wherever they are based.

Based on the interventions of the Council Legal Service and the Commission during the past IXIM-meetings, organised under the Belgian Presidency, the following points should be highlighted:

4.1. Adequacy Decisions

In addressing the transfer of EU Member States' data to third countries, it is crucial to consider the regulatory framework outlined in Chapters 5 of the GDPR and the LED. Articles 45 of the GDPR and 36 of the LED empower the Commission to take adequacy decisions.

Such is the case for the Data Privacy Framework. This adequacy decision is designed for commercial purposes, emphasising data protection and privacy in commercial transactions. It is not relevant in this context, because the data transfer involves governmental or law enforcement entities rather than commercial enterprises.

Today, such adequacy decisions are not in place for data transfers to the US for criminal law purposes.

4.2. The Umbrella Agreement

While frameworks like the Umbrella Agreement (for criminal law enforcement purposes) exist, their applicability depends on the sender and receiving authorities and the purpose of the data transfer. It is crucial to understand the specific purpose and nature of the data transfer to determine which framework, if any, applies.

The Umbrella Agreement ensures data protection safeguards for data exchange between law enforcement agencies of the EU and the US for criminal law enforcement purposes. It sets out procedures and safeguards for sharing personal data, particularly in the context of criminal investigations and prosecutions.

The extent to which the Umbrella agreement could be applied to data exchanges under the EBSP depends on the purpose of the data transfer and the authorities involved in this transfer. If the transfer involves criminal law enforcement agencies of the EU and the US for criminal law enforcement purposes, the Umbrella agreement would apply. However, it is unlikely that the Umbrella Agreement would apply given the broader scope of ‘routine traveller screening’ intended by the EBSP requirements, and the likeliness that other than criminal law enforcement authorities will be involved in the transfer. During the IXIM on 24 April 2024, the Commission emphasised that the Umbrella Agreement does not cover other purposes of data transfer, such as those related to visa processing or immigration. In other words, the Umbrella Agreement would not apply to EBSP for data transfers that fall outside the scope of criminal law enforcement, i.e. the prevention, investigation, detection, and prosecution of criminal offences, and referred to the Court of Justice of the European Union (CJEU) case law that interprets the prevention of criminal offences strictly. In any case, generalised and systematic data exchange of all travellers would not fall under this concept.

4.3. Appropriate Safeguards

In the absence of an adequacy decision, Articles 46 GDPR and 37 LED provide that the transfer of personal data to third countries may take place subject to appropriate safeguards, such as an international agreement or a legally binding enforcement instrument between authorities, contingent upon the availability of enforceable data subject rights and effective legal remedies.

In that case, parties must have a clear and common understanding of what constitutes "appropriate safeguards", for example regarding the relation between the notion "criminal law enforcement" and other purposes, such as "migration".

Therefore, it is essential to identify caveats and issues for consideration in the context of bilateral negotiations. Guidance from the European Data Protection Board (EDPB)⁵ provides a useful checklist of necessary provisions for any future framework.

In order to provide appropriate safeguards, any agreement should provide *inter alia* that :

- Personal data are processed lawfully, fairly and in a transparent manner
- Personal data are processed for specified and limited purposes and not further processed in a manner incompatible with those purposes (purpose limitation principle)
- Sensitive data are subject to additional safeguards against the specific risks involved in the processing of such data
- Processing is limited to what is directly relevant and necessary to accomplish a specified purpose (data minimisation principle)
- Personal data is kept accurate, up to date and measures are taken to ensure that data that are inaccurate are rectified or erased (data accuracy principle)
- Personal data are kept for no longer than is necessary for the purpose for which they were processed (storage limitation principle)

⁵ EDPB – Guidelines 01/2023 on Article 37 Law Enforcement Directive; EDPB – Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data.

- Appropriate security measures are taken, including to ensure that the data are protected from accidental or unauthorised destruction, accidental loss, or unauthorised access, modification or dissemination
- Individuals are provided with rights of access, rectification and deletion.
- An independent body oversees compliance of processing carried under the agreement with its data protection requirements.
- Individuals have access to redress mechanisms allowing them to enforce their rights in Courts.

4.4. Inspiration from Existing Agreements

Even if the Umbrella Agreement is not applicable, it can serve as inspiration for future EU agreements, like those concluded by the European Union with third countries like New Zealand regarding Europol or Eurojust. The latest agreements often include updated lists of measures and incorporate the lessons from the jurisprudence of the CJEU.

In conclusion, negotiating data transfer agreements with the US at EU level requires an approach that considers the specific context, nature and purposes of the data exchanges in question, existing frameworks, safeguards, and inspirations from other agreements. By identifying caveats and developing comprehensive checklists, both parties can navigate negotiations effectively and protect individual rights and data privacy.

5. State of Play and Way Forward

The discussions held at the IXIM-meetings under the Belgian Presidency provided more clarity, as outlined above, but did not answer all of the Member States' questions. It became clear that Member States have a clear demand for guidance, coordination and support. The fact that some Member States may already be engaged in bilateral discussions with the US does not preclude them from seeking the Commission's advice. Therefore, the Commission is invited to indicate how they could provide additional support to the Member States.

The discussions can be summarised as follows:

- There is a necessity to further discuss, in order to strengthen the coordination between the Member States, about the legal framework within which negotiations can take place. Questions remain on data protection, on the reciprocity of information exchange with the US, on the factual relation between EBSP and US Visa policy etc ... To the extent that EBSP data exchange is to be negotiated by the Member States, the Commission could for example develop an annotated checklist of concerns that could be used by Member States for negotiations at the bilateral level. This type of written guidance for the Member States should be made available in the short term.
 - The fundamental question remains whether the exchange of data as intended by the US (a systematic data exchange for multiple purposes at the same time) is even possible under the EU-legislation. We must carefully assess the appropriateness of the proposed data transfers, particularly in comparison to the possibilities of information exchange between EU Member States.
 - By aligning their messages, the Member States can strengthen their position vis-à-vis the US. The IXIM Working Party can play a role in developing a common strategy and discourse, as there is a common ambition to have a coordinated approach.
- As existing data transfer arrangements with the US may not be applicable, the Member States and the Commission will continue to exchange on the necessary appropriate data protection safeguards for possible data transfers under the EBSP. There is a strong demand among the Member States that this should be achieved on the basis of a common reference framework.

- Since the US has clearly confirmed on several occasions and at different levels that the conclusion of an EBSP agreement will serve as a condition for determining whether a Member State can maintain its participation in the VWP beyond 2027, there is a demand from a number of Member States for the Commission to take the initiative to conclude an agreement between the EU and the US within this field. It will be up to the new Commission to decide on this matter considering the views of the Member States in the Council.

Although not everything has been clarified, the Presidency hopes that this document, which summarises the discussions held during the meetings, will be useful for future discussions at EU level and with the US.

Due to time constraints, several ambiguities as outlined in this document remain unresolved and will require further elaboration. We hope the efforts of the Belgian Presidency will serve as a basis for further progress on this file under the incoming presidencies.

Annex – List of References

- EDPB – Guidelines 01/2023 on Article 37 Law Enforcement Directive.
- EDPB – Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data.
- Overview of agreements concluded between Europol and third countries.
- Overview of agreements concluded between Eurojust and third countries.
- **DELETED**
- COM (2012) 681 final, Report from the Commission to the European Parliament and the Council, Seventh report on certain third countries' maintenance of visa requirements in breach of the principle of reciprocity.
- 2023, Commission, Proof of Concept on border management-related information sharing between the U.S. Department of Homeland Security (DHS) and the EU.