

15 June 2020

By email only

Ref: OUT 2020-0054

Dear Members of the European Parliament,

I would like to thank you for your letter dated 10<sup>th</sup> January 2020 regarding the agreement between the UK and the US on Access to Electronic Data for the Purpose of Countering Serious Crime<sup>1</sup>, signed on 3<sup>rd</sup> October 2019.

As a preamble to its answer, the EDPB would like to stress that it can at this stage only provide a preliminary analysis, on the basis of the elements at its disposal, and that the date of effective application of this agreement is likely to impact on any legal assessment and conclusion, given the applicable transitional period for the withdrawal of the UK from the European Union. Indeed, as per the Brexit withdrawal agreement, EU law continues to apply until the end of the transitional period, currently set for 31<sup>st</sup> December 2020, while this should no longer be the case as of 1<sup>st</sup> January 2021.

The EDPB first recalls that the European Commission and, ultimately, the Court of Justice of the European Union are the EU Institutions competent to assess whether, as per the Treaties and EU secondary law, the United Kingdom was in a capacity to enter into an agreement with the United States regulating access to personal data between both countries for the purpose of preventing and prosecuting serious crime. With regard to the compatibility of the agreement at stake with the EU *acquis* in the field of data protection, and in particular with the GDPR and the law enforcement directive, the EDPB stresses that the level of personal data protection, including substantive and procedural conditions for access to personal data, needs to be ensured consistently throughout the Union.

Considering the provisions of the agreement, read in conjunction with Sections 3 of the US CLOUD Act<sup>2</sup>, the EDPB has doubts as to whether the safeguards in the agreement for access to personal data in the UK would apply in case of disclosure obligations applicable to providers of electronic communication service or remote computing service under the jurisdiction of the United States, regardless of whether the data requested is located within or outside of the United States. Following this preliminary assessment, it is unclear whether the safeguards enshrined in the Agreement would apply to all, if any, requests for access made under the US CLOUD Act.

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<sup>1</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/836969/CS\\_USA\\_6.2019\\_Agreement\\_between\\_the\\_United\\_Kingdom\\_and\\_the\\_USA\\_on\\_Access\\_to\\_Electronic\\_Data\\_for\\_the\\_Purpose\\_of\\_Countering\\_Serious\\_Crime.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/836969/CS_USA_6.2019_Agreement_between_the_United_Kingdom_and_the_USA_on_Access_to_Electronic_Data_for_the_Purpose_of_Countering_Serious_Crime.pdf)

<sup>2</sup> <https://www.congress.gov/bill/115th-congress/senate-bill/2383/text>

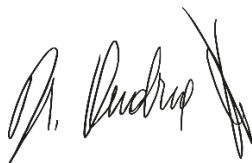
In this regard, as the Commission has entered into negotiations for the conclusion of an EU-US agreement to facilitate access to electronic evidence in criminal investigations, the EDPB stresses that any future agreement between the EU and the US must prevail over US domestic laws and include appropriate data protection safeguards in order to be fully compatible with EU primary and secondary law. This notably includes ensuring the continuity of data protection in case of onward sharing and onward transfers. In this context, the EDPB wishes to repeat its call for further improvements to the level of safeguards established by the EU-US Umbrella Agreement, for instance as regards the availability of judicial redress.

It is also essential that the safeguards include a mandatory prior judicial authorisation as an essential guarantee for access to metadata and content data. On the basis of its preliminary assessment, the EDPB, while noting that the agreement refers to the application of domestic law, could not identify such a clear provision in the agreement concluded between the UK and the US.

Finally, when it comes to a possible adequacy decision for the UK, the EDPB considers that the agreement concluded between the UK and the US will have to be taken into account by the European Commission in its overall assessment of the level of protection of personal data in the UK, in particular as regards the requirement to ensure continuity of protection in case of “onward transfers” from the UK to another third country.

Should the European Commission present a draft adequacy decision for the UK, the EDPB will provide its own assessment in a dedicated opinion.

Yours sincerely,



Andrea Jelinek