

29.11.2022

Data protection in the USA - current situation

With the Executive Order of 07.10.2022¹, the U.S. President has provided a response to the Schrems II decision of the European Court of Justice. The act recognisably addresses the court's main criticisms of the U.S. legislation. The goal is an adequacy decision by the European Commission. Transatlantic data transfers would then become much easier than before. A draft of the Commission's decision is expected in the upcoming months. Before it is finalised, the European Data Protection Board will issue an opinion that will be included in the evaluation.

1. Current Impact of the Executive Order

At present, there hasn't been any decisive change in the legal situation in the USA. The Executive Order provides for a transition period of up to one year. This is how long the eighteen U.S. intelligence services have time to integrate the guarantees provided for in the legal act into their practical work. According to information of the Hamburg DPA, many of these services will still need several months for implementation. This applies in particular to the new requirement to limit data access to a proportionate amount. As long as proportionality has not found its way into intelligence services' daily work, it is still to assume that the data processing violates the essence of the fundamental right to data protection. The same applies to institutional guarantees through the creation of a complaints body and a Data Protection Review Court. These bodies are still being established. They will not be operational for several months.

Transfer impact assessments currently drafted would therefore still have to come to the conclusion outlined by the European Court of Justice. The power of governmental access in the US continues to be beyond what is necessary in a democratic society.

2. Contents of the Executive Order

The Executive Order creates guarantees for European citizens against the intelligence services. The U.S. has thus moved a long way toward the European tradition of fundamental rights. The rather reflexive and sweeping criticism that can sometimes be read is therefore misplaced. Whether the legal act ultimately meets the requirements of the European Court of Justice will depend on numerous details as well as its implementation in practice. That is why it is now important to thoroughly examine

¹ <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/10/07/executive-order-on-enhancing-safeguards-for-united-states-signals-intelligence-activities/>

the legal guarantees in the procedure provided for this purpose. First, the European Commission's draft adequacy decision must be awaited. The European Data Protection Board will then take a position on this.

One positive aspect is that, for the first time, intelligence activities are subject to a proportionality clause. Here, the U.S. shows willingness to at least limit the scope of government data collection. The objection frequently to read that "proportionality" might not fully correspond with the German "Verhältnismäßigkeit" does not do justice to the importance of the issue. The definition of the term in the Executive Order is recognisably based on European constitutional law. The documentation requirement, which is case-specific and subject to review, also forces careful consideration in each case. An adequacy decision does not require completely congruent legal systems, but merely a level that is essentially the same. An assumption in advance that legal concepts could be inadequately interpreted in implementation practice is speculative.

It is problematic, however, that the Executive Order expressly maintains the instrument of mass surveillance via bulk collection. It is therefore not clear from the text of the Executive Order to what extent the new proportionality requirement specifically influences this bulk surveillance. It is therefore important to closely monitor future application with regard to possible undesirable developments.

It is also gratifying that another major point of criticism by the Court has been taken up, namely effective legal protection for European citizens against intelligence activities affecting them by a body with binding decision-making powers. The newly established Data Protection Review Court has the status of a court, is staffed with independent judges from outside the executive and can, among other things, order data erasure and processing restrictions. If unlawful processing is identified in the legal protection proceedings, the Executive Order obliges the court to eliminate it.

It should be noted, however, that for the plaintiffs, the legal protection procedure may be effective in substance, but it is hardly transparent and comprehensible. For example, it is not intended to provide information in the judgments about whether and what measures have been taken. The Commission and the Data Protection Board will have to thoroughly examine this handling of the tension between the state's interest in secrecy and the legal protection interests of the data subjects.

The legal form as an Executive Order is the tried and tested regulatory instrument in the USA for extraterritorial orders. It is not a second-class law. In this respect, it cannot be compared with the rather weak German "Verordnung". Robust interventions such as economic sanctions and counterterrorism have been effectively enforced by presidential orders for decades. It may be true that it can be swiftly withdrawn, for example after a change of government. However, this also applies to parliamentary laws. The EU will be able to react to this by immediate withdrawal of the adequacy status.

3. Recommendations for the adequacy decision

The Executive Order deserves a reasoned, open-ended review. The Commission's adequacy review will face the challenge of evaluating an abstract legal text that is not yet lived in practice. Crucial

issues such as the interpretation of proportionality by intelligence services or the functioning of the Data Protection Review Court will depend on actual application. This is why it is advisable to keep an eye on future developments on the ground. This requires transparency, which must be demanded from the European side. Corresponding conditions and reservations can be included in the resolution.

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