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NOTE

from : Austria
to : COREPER

Subject : EU-US Working Group on Data Protection

Austrian Declaration to the remit of the EU-US Working Group on Data Protection

1. As to the discussion on the mandate in general

Austria strongly supports all efforts aiming at the clarification of facts regarding US surveillance programmes such as PRISM. In particular, Austria appreciates the European Commission's commitment to the protection of the fundamental rights of the EU citizens. The same applies to the Commission's proposal for an EU-US high level working group.

As for the remit of the Working Group Austria has clearly expressed the view that the discussion in this group must not be limited to theoretical questions of data protection but shall be based on facts. It is self-evident that excepting the issue of intelligence collection as such from the tasks of the Working Group would it make completely impossible for its members to assess the impact of the surveillance programmes concerned.

Within this context Austria would like to stress that data monitoring at large scale by non-EU authorities targeting on EU territory has incisive effects not only on the right to data protection of every EU-resident but also on the confidentiality of business information. The latter implies that competitiveness of EU businesses and in this way also the internal market are directly affected by the relevant intelligence gathering.

It follows from the above considerations that the US surveillance activities of interest do by no means fall completely outside the scope of EU law. On the contrary, both safeguarding fundamental rights and ensuring fair competition in the internal market are key EU competences.

Against this backdrop and with a view to the mixed composition of the Working Group (Commission, Member State experts etc) and notably in the light of the envisaged “co-chaired approach” (Commission and Presidency) Austria is of the opinion that, in the present case, division of competences between the EU and the Member States has to be regarded as a side issue. And after all, in relation to external parties the EU as such is not obliged to prove its legal capacity, in particular when jointly acting together with Member States.

Austria, therefore, regrets even more the fact, that the Presidency has decided from the start to propose a very restrictive wording as to the definition of the tasks assigned to the Working Group. Moreover, it was striking that the main emphasis of the recent discussions on the HLG mandate was given to elaborating the fields not to be covered thereby.

In this regard, Austria recalls several proposals that have been made in order to attain more clarity as to the extent of the Working Group’s mandate. These proposals were aimed at reaching clarity as to the Group’s task in addressing the problem of intelligence gathering (such as, but not limited to, programmes known as “PRISM”) in the most comprehensive manner as possible, especially with regard to its effects on fundamental rights of EU undertakings and EU citizens.

Besides, Austria would like to draw the attention of the Member States to the fact, that the LIBE Committee of the European Parliament has recently been instructed by the Plenary to conduct an in-depth inquiry into the matter, in particular “in collaboration with the EU-US expert group set up by the Commission”. Bearing in mind the extensive mandate given to the LIBE Committee (“gathering all relevant information and evidence”) a too narrow remit of the Working Group could be detrimental not only to interinstitutional cooperation but also to the public image of the EU.

2. As to the text version proposed by the Presidency (Doc. No. 12183/2/13 Rev 2 of 17 July 2013)

To begin with, Austria is of the view that due to the last amendments to paragraph two of the draft remit the meaning of the third sentence has changed.

Even more, on closer inspection, the phrase “Any such questions which may arise shall be referred to MS through the appropriate channels” gives cause for some concern in terms of a potential misconstruction. Potentially, it could be understood in such a way that whenever a question relating to intelligence collection by the US is put forward, the discussion could be immediately cut off by assigning the issue to the envisaged “intelligence coordinating group” of Member States or a single Member State specifically concerned.

Austria holds the view that no Member State shall be prevented from mandating the Working Group in order to address concerns falling within the exclusive competence of this Member State. To quote an example: Member State X should be able to put forward the question whether or not and to what extent its citizens, when using electronic communication equipment on the territory of this Member State, are affected by US surveillance programmes. To this end a Member State as far as represented by its national expert in the Working Group could act on its own behalf. Otherwise it should be free to request members of the Group to raise a pertinent question on its behalf.

Ruling out queries of this sort would apparently amount to an undue restriction of the Member States’ competences in the field of national security. Thus, a wording which could give rise to any interpretation implying restrictions on national sovereignty should have been avoided.

3. Conclusion

Although Austria recognizes the efforts made by the Presidency and certain delegations, it regrets that the mandate is still not sufficiently explicit in regard to ensuring a comprehensive fact-finding approach.

Nevertheless, Austria does not intend to prevent the setting up of the EU-US Working Group as such. In order to enable soon clarification of facts Austria is prepared to support the Presidency's draft remit.

At the same time, Austria would like to underline that it will interpret the mandate as encompassing questions related to the harm, caused by massive intelligence gathering, both on the rights of EU undertakings and EU citizens.
