

# Data protection in the EU & in EU-US relations: A dangerous blurring of boundaries between the use of information for criminal investigation purposes and state security purposes?

Rio State University | Law Faculty

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# Background | Building blocks

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## international

- expert participation in EU troika meetings US state in October 2011
- European Commission research projects
- Europol/Council of the EU working groups

## national

- national research projects
- privacy commissioner @ Belgian Data Protection Authority
  - directly involved with Swift & Bics cases and with EU data protection policy
- PhD on EU-US infoex in criminal matters (2010) (annex 1)

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# Approach

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## law enforcement in the EU: information exchange

- within respective MS
- between MS
- between EU bodies/agencies and 3<sup>rd</sup> countries/organisations
- between MS and 3<sup>rd</sup> countries

traditional purpose of law enforcement = criminal investigation,  
aimed at bringing justice

- traditionally: by & between judicial police & justice actors
- vs administrative-governmental-military-political purpose
  - including intelligence activity

# Problems

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## where infoex for law enforcement purposes

- allows/institutionalizes bypassing of criminal procedural guarantees
- leads to purpose deviation/is based on hollow purpose limitation or speciality principles
- is based on rules disrespecting fundamental principles
- is left tot merely control, monitoring, eminent person oversight etc

## application

- in the EU internally
- in 3<sup>rd</sup> states/organisations (case: US internally)
- between EU and 3<sup>rd</sup> states/organisations (case: EU-US)

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# EU internally (pre-Lisbon)

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## directive 95/46/EC (Article 29 Working Party, Council of the EU)

- Article 3: non-applicable to police/justice/criminal law (3<sup>rd</sup> pillar)
- but implemented into that area by certain MS (including Belgium)
- and: 1<sup>st</sup> pillar (commercial) data are relevant for law enforcement
- Safe Harbour (self-regulation)

## 2000 EU MLA Convention (telecom interception)

intelligence services break-in to Europol, SISII, VIS, etc

OLAF investigations

data retention telecom data, EU-PNR + 2006 & 2009 ECJ cases

framework decision 2008/977 data protection 3<sup>rd</sup> pillar

- existing specific regimes/agreements unaffected
- only limited guarantees for further transfer to 3<sup>rd</sup> states
- transfer own information to 3<sup>rd</sup> states not covered
- assessment adequate data protection level: per MS (full discretion)

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# EU internally (post-Lisbon)

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## general institutional changes

### data protection as a subjective right

- Article 8 EU Fundamental Rights Charter ([text](#))
- Article 16 TFEU ([text](#)) - consequences for existing instruments
  - directive 95/46: to be replaced by generally binding regulation!
  - framework decision
    - obligation to adopt new instrument (directive)
    - new framework must also cover
      - domestic information exchange
      - transfer own information to 3<sup>rd</sup> states
  - all other non-data-protection specific instruments (none)

# General institutional changes

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pillar structure not totally abandoned (unlike European Constitution)

- TEU (former 2<sup>nd</sup> pillar) & TFEU (former 1<sup>st</sup> and 3<sup>rd</sup> pillar)
- (slight) domain-specific differences retained in TFEU
- including for: area of freedom, security and justice (AFSJ)
  - Title V TFEU – umbrella chapter for reunited JHA domains

single set of legal instruments (including in former 3<sup>rd</sup> pillar matters)

- regulations and directives
- full introduction supranationality for police/justice/criminal law
- ordinary decision making process for former 3<sup>rd</sup> pillar (exceptions)
  - co-decision (examples)
  - qmv (exceptions) + emergency break
  - right of initiative: Commission (NB 2 commissioners) or 1/4 of MS

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# EU Fundamental Rights Charter (Article 8)

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1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority. [<<<](#)



# TFEU (Article 16)

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1. Everyone has the right to the protection of personal data concerning them.
2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.

The rules adopted on the basis of this Article shall be without prejudice to the specific rules laid down in Article 39 of the Treaty on European Union.



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# US internally

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adequacy data protection level?

safe harbour/not checked/assessed by individual MS, whilst

- inter-agency-sharing
- use for any purpose
- administrative subpoenas (separation of powers?)

Foreign Intelligence Security Act

- non-warranted capturing broadened by Patriot Act changes

# EU in relation to US | Pre-Lisbon

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unaffected unless decided otherwise

- EU-US 2003 MLA Convention - Europol-US Agreement - Eurojust-US Agreement
- PNR EU-US
- Swift (history)

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# EU in relation to US | Post-Lisbon

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- Swift – remaining problems
  - distinction intra-EU and other transactions
  - bulk transfer (cfr pull-push discussion PNR)
  - inadequacy US data protection regime
- High Level Contact Group – Stockholm (2009) – EU-US AFSJ?
  - only relates to law enforcement data (not: all LE relevant data, like PNR, telecom and banking data, ...)
  - no solution for purpose deviation + ...

# EU in relation to US | Post-Snowden

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- Snowden: no real surprises, but
  - magnitude of data capturing/espionage practice
  - bypassing of official EU-US agreements (e.g. Swift)
  - predominantly intelligence services-led (NSA)
- political consequences for EU policy making
  - difficult issue (free trade agreement EU-US pending)
  - general political awakening (finally)
  - especially Commissioner for Justice envisages changes
    - data protection = fundamental right; no bargaining; no price to be paid
    - Evaluation 'Safe Harbour' announced end '13
    - self-regulation (including BCR's) insufficient
    - extra guarantees for EU citizens' data in US?
  - further logical consequences (revision PNR, Europol-US agreement, TFTP2 ...)

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