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EU/US Adequacy Negotiations and the Redress Challenge: Whether a New U.S. Statute is Necessary to Produce an Essentially Equivalent Solution

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Must the U.S. Congress change statutory law to solve the major issue of “redress” in the EU-US adequacy negotiations? This is a crucial question, especially since a series of political, pragmatic and even legal/constitutional difficulties mean that the U.S. might not be able to come up with a short-term statutory solution for redress. In this article we analyse this question for the first time in detail, and argue that, provided the U.S. is able to address the deficiencies highlighted by the Court of Justice of the European Union (CJEU) in its Schrems II judgment (independence of the redress body; ability to substantively review the requests; and authority to issue decisions that are binding on the intelligence agencies), then relying on a non-statutory solution could be compatible with the “essential equivalence” requirements of Article 45 of the EU’s General Data Protection Regulation (GDPR). In a second, forthcoming article, we set forth specific elements of a novel non-statutory solution and assess whether it would meet the substantive European legal requirements for redress.

The CJEU issued its [Schrems II judgment in July, 2020](#), invalidating the EU/U.S. Privacy Shield and creating uncertainty about the use of Standard Contractual Clauses (SCCs) for transfers of personal data to all third countries (see analysis [here](#), [here](#), [here](#), [here](#) and [here](#)). In light of the legal uncertainty and the increasing tensions concerning transatlantic data transfers resulting from the intensification of enforcement actions by European data protection authorities (DPAs) since Schrems II (such as [this](#) and [this](#)), there is both strong reason to reach a new EU/U.S. agreement and also a [stated willingness](#) of both sides to do so. The European Commission, understandably, has emphasized though that [there is no “quick fix”](#) and that any new agreement must meet the full requirements of EU law.

This article focuses on one of the two deficiencies highlighted by the CJEU: the need for the U.S. legal system to provide a redress avenue accessible to all EU data subjects. We do not address here the other deficiency—whether U.S. surveillance statutes and procedures sufficiently incorporate principles of ‘necessity and proportionality’ also required under EU law.

We concentrate our inquiry, from both a U.S. and a European law perspective, on whether the U.S. Congress would necessarily have to enact a new statute in order to create an adequate redress mechanism. Part I of this article explains the pragmatic and political reasons why it would be difficult to adopt a new U.S. statute, and especially to do so quickly. Part II examines the U.S. constitutional requirements for “standing”, and explains the legal difficulties and uncertainty concerning proposals, such as the one [advanced](#) by the American Civil Liberties Union (ACLU), to provide redress through an individual action in U.S. federal courts. Part III then addresses European law concerning whether a statute is necessary, concluding that the substance of the protections of fundamental rights and respect of the essence of the right to an effective remedy are the key considerations, rather than the form by which an independent and effective redress mechanism would be created.

This article will be followed by a second article exploring whether a non-statutory solution for redress is capable of satisfying the strict *substantive* standards required by EU law.

I. Political Difficulties of an Immediate Statutory Approach to Redress

There are important advantages to enacting a new U.S. statute to provide redress:

- There is greater democratic legitimacy if the legislature passes a statute.
- A law can set limits on Executive discretion that only may be changed by a subsequent statute.
- A law can fix in a stable, permanent and objective way the rules and procedures for the appointment of the members of the redress body, the duration of their mandate, and guarantees concerning their independence.

However, there are strong pragmatic and political [reasons](#) why it would be difficult to enact a new statute in the short term to create a new redress mechanism.

- First, it is no secret that the U.S. Congress currently finds it difficult to pass legislation generally, with partisan battles and procedural obstacles slowing passage of even essential legislation. As Politico [recently reported](#), “it is increasingly unlikely that Congress will pass any digital-focused bills before lawmakers shut down ahead of November’s midterms”.
- Second, legislative reform of U.S. surveillance laws is a particularly complex and contentious issue. The national security community in the U.S. has little appetite for sweeping reforms, and even a strong push from the White House may not be sufficient to move such legislation through Congress. In Europe as well, substantial reform of surveillance laws requires a lot of time to seek the necessary political consensus (see for instance [this](#)).¹
- Third, the international dimensions of a redress reform make legislation even more difficult. If a new redress mechanism benefits only EU data subjects, then it is hard to explain to Congress why they should get greater rights than Americans. On the other hand, if redress rights were also to be conferred on U.S. data subjects, then a novel and complex set of institutional changes to the overall U.S. surveillance system would be needed.
- Fourth, it would be difficult for U.S. legislators to vote for a statute without knowing in advance whether the CJEU will accept it as good enough.
- Fifth, Congress historically has been reluctant to regulate in great detail how the President conducts foreign policy and protects national security. For instance, Congress has adopted detailed statutes (such as the Foreign Intelligence Surveillance Act, FISA)) concerning “compelled access”, e.g. how intelligence agencies can request data from service providers. By contrast, it has rarely enacted any statute that applies to “direct” surveillance conducted outside of the U.S. under the standards of [Executive Order \(EO\) 12,333](#). Furthermore, specific actions under that Executive Order have never, so far as we know, been subject to review by federal judges.

For these reasons, we believe at a pragmatic level that it would be extremely difficult for Congress to promptly pass legislation to provide redress to EU persons. By contrast, if an adequate fix to the redress problem can be created at least in large part without new legislation, then it would be considerably easier for Congress subsequently to enact a targeted statute ratifying the new mechanism, perhaps adding other provisions to perfect an initial non-statutory approach. That sort of legislation is far easier to enact than writing a law in Congress from a blank page.

II. Constitutional Difficulties for a U.S. Statutory Approach to Redress: The Problem of Standing

These political and pragmatic reasons alone would justify U.S. government and European Commission negotiators seeking to address the redress deficiencies highlighted in *Schrems II* through a non-statutory solution. But, in addition, there is a constitutional dimension. The U.S. Constitution establishes a “standing” requirement as a prerequisite to a case being heard before judges in the federal court system. Any new U.S. redress mechanism must be consistent with the U.S. Constitution, just as it must meet EU fundamental rights requirements.

U.S. standing doctrine derives from Article III of the U.S. Constitution, which governs the federal court system. The federal judicial power extends only to “cases” and “controversies” – meaning that there has to be an “injury in fact” in order to have a case heard. A related doctrine is the ban on issuance of “advisory opinions” by federal judges, a position of the Supreme Court dating back to the first President, George Washington, and defined most clearly in [Muskra v. United States](#). In sum, a statute that creates a cause of action in the federal courts is unconstitutional unless it meets the requirements of standing and injury in fact, and does not violate the prohibition on advisory opinions.

The ACLU in 2020 [called](#) for a “standing fix” to enable suit in federal court “where a person takes objectively reasonable protective measures in response to a good-faith belief that she is subject to surveillance.” However, since the right to redress under European law also exists for individuals who did *not* take protective measures, the proposal seems too narrow to meet the CJEU requirements.

A second difficulty with the ACLU approach is that the Supreme Court made standing related to privacy injuries even more difficult to establish in its [TransUnion LLC v. Ramirez](#) decision in June, 2021. As discussed [here](#), the majority in that case made it significantly more difficult for privacy plaintiffs henceforth to sue in federal court. The Court restated its 2016 [Spokeo](#) case that a plaintiff does not automatically satisfy “the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.” More bluntly, the Court stated: “An injury in law is not an injury in fact”.² The majority in *TransUnion* found “concrete harm” for some plaintiffs but not others. Even individuals whose credit histories were badly mistaken – stating they were on a government list as “potential terrorists” – did not enjoy a right of action created by statute. In sum, there would be substantial legal uncertainty surrounding a

U.S. statute conferring upon EU data subjects the right to go straight to U.S. courts to get redress (for a similar conclusion see [here](#)).

The standing objection applies only to direct access to federal courts, and not to an independent *non-judicial* redress authority. However, Congress might be reluctant to intervene *ex nihilo* in a field such as “direct” foreign surveillance conducted under EO 12,333, which traditionally belongs to the Executive power under the U.S. Constitution. Congress might be more willing to act and endorse by statute an effective redress mechanism if, as a first step, the Executive branch itself had first created such an independent non-judicial redress authority within the Executive branch. In any case, such a statute does not appear to be a necessary precondition under U.S. law for creating a redress system

III. Is a Non-Statutory Approach to Redress Compatible with European Law?

Since the U.S. government might not be able to produce a short-term statutory solution for redress, the question then arises as to whether a non-statutory approach would be acceptable under EU law. In order for the European Commission to be able to issue an adequacy decision under Article 45 of the GDPR, the U.S. must ensure an “adequate” level of protection.

If the U.S. is able to address by non-statutory means the deficiencies highlighted by the CJEU in *Schrems II* (mentioned above), then such a solution could be compatible with the “essential equivalence” requirements of Article 45 of the GDPR. We defer for now the question of whether a non-statutory path would indeed be able to address these substantive issues, instead focusing only on whether a non-statutory approach in principle is compatible with European law.

A. The Starting Point: The Right to Effective Remedy Under European Human Rights Law

What we call “redress” in the context of transatlantic adequacy negotiations corresponds to the “right to effective remedy” under European law. Article 47(1) of the Charter of Fundamental Rights of the European Union (“Charter”) states that:

“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.”

The [official explanations](#) of Article 47 make clear that this article is “based on Article 13 of the European Convention of Human Rights” (ECHR), according to which:

“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

A comparison of the two articles reveals that in EU law the protection is more extensive than in ECHR law, since the former guarantees the right to an effective remedy before a “tribunal” while the latter only refers to a “national authority”. The term “tribunal” seems to refer to a judicial body, as the official explanation suggests. This is confirmed by reference to non-English language versions of Article 47(1), which translate the word “tribunal” as “court” (e.g. “Gericht” in German and “Gerecht” in Dutch). It is also evident that neither Article 47(1) of the Charter nor Article 13 of the ECHR require that a redress body be created by statute.

However, Article 47 (2) of the Charter adds additional, complicating requirements.:

“Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented”.

As the [official explanations](#) point out, this second paragraph “corresponds to Article 6(1) of the ECHR”, which reads as follows:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”.

Both Article 47(2) of the Charter and Article 6(1) of the ECHR thus require “an independent and impartial tribunal *established by law*”. Yet, what is the *exact relationship* between the provisions on “effective remedy” (Article 47(1) of the Charter and Article 13 of the ECHR), and those on “a fair and public hearing by independent and impartial tribunals established by law” (Article 47(2) of the Charter and Article 6(1) of the ECHR)?

A restrictive analysis would regard the two sets of articles as entirely interlinked, in which case redress bodies would always have to be “*established by law*”.

A second more flexible and plausible interpretation would maintain that this latter set of requirements constitutes *lex specialis* in relation to the former; in other words, the “right to effective remedy” (“redress”) is broader than the “right to a fair trial”. This interpretation finds support in the ECHR, which textually separates the two sets of rights and requirements (Articles 13 and 6(1)). It is also confirmed by the official guide to Article 13 which states that “Article 6 § 1 of the Convention is *lex specialis* in relation to Article 13” ([here](#), at 41), and by the fact that Article 6(1) is limited in scope to civil rights and criminal charges. It therefore would be difficult to merge the obligation of states to put in place an “effective remedy” with the “*established by law*”

requirement, as this latter requirement only concerns the right to a fair trial before a “tribunal” under Article 6(1) – and not the broader right of redress before a “national authority” under Article 13. It seems then that, at least under the ECHR, a redress body need not always be a judicial body nor be “established by law”, provided that it satisfies the substantive requirements of the “right to effective remedy”. As we will see, the standards of the ECHR have always been particularly relevant for the European Data Protection Board (EDPB) in assessing the “essential equivalence” of “redress” mechanisms under Article 45 of the GDPR.

B. Flexibility Introduced by the “Essentially Equivalent” Standard of EU Data Protection Law

A flexible interpretation of the “effective remedy” requirement is also supported by the “essential equivalence” standard of the GDPR for third countries.

In *Schrems I*, the Court clearly acknowledged that “the means to which [a] third country has recourse, [...] for the purpose of ensuring such a level of protection *may differ from those employed within the European Union*, [...] those means must nevertheless prove, in practice, effective in order to ensure protection *essentially equivalent* to that guaranteed within the European Union” ([§74 of the October 6, 2015 judgment](#), emphasis added).

The CJEU Advocate General emphasised in his 2019 [Schrems II Opinion](#) that the “essentially equivalent” standard “*does not mean that the level of protection must be ‘identical’* to that required in the Union”. He explained that:

“It also follows from that judgment, in my view, that *the law of the third State of destination may reflect its own scale of values according to which the respective weight of the various interests involved may diverge from that attributed to them in the EU legal order*. Moreover, the protection of personal data that prevails within the European Union meets a particularly high standard by comparison with the level of protection in force in the rest of the world. The ‘essential equivalence’ test *should therefore in my view be applied in such a way as to preserve a certain flexibility in order to take the various legal and cultural traditions into account*” (§§ 248-249, emphasis added).

The EDPB previously had endorsed this flexible interpretation of the elements for adequacy. In its [2016 Opinion on Privacy Shield](#), for instance, the EDPB’s predecessor (WP29) emphasised that:

“the WP29 does not expect the Privacy Shield to be a mere and exhaustive copy of the EU legal framework [...]. The Court has underlined that the term ‘adequate level of protection’, although not requiring the third country to ensure a level of protection identical to that guaranteed in the EU legal order, must be understood as requiring the third country in fact to ensure, by reason of its domestic law or its international commitments, a level of protection of fundamental rights and freedoms that is essentially equivalent to that guaranteed within the European Union [...]” (p. 3).

It is precisely this flexible approach that allowed EU authorities to set aside the requirement that a redress body should be a “tribunal” – despite clear terms to the contrary in Article 47(1) of the Charter. As the EDPB noted in its [Recommendations 02/2020 on the European Essential Guarantees for surveillance measures of November 10, 2020](#) (§47): “an effective judicial protection against such interferences *can be ensured not only by a court, but also by a body which offers guarantees essentially equivalent to those required by Article 47 of the Charter*” (emphasis added). The EDPB noted that the CJEU itself “expressly” used the word “body” in §197 of *Schrems II*. Indeed, in all its extant positions on U.S. redress mechanisms, the EDPB has recognised that the applicable standards equate with those in Article 13 of the ECHR, which “only obliges Members States to ensure that everyone whose rights and freedoms are violated shall have an effective remedy *before a national authority, which does not necessarily need to be a judicial authority*” (*ibid*, §46, emphasis added).

Therefore, provided that the U.S. redress mechanism meets the *substantive* requirements of Article 13 ECHR as cited in *Schrems II* and the EDPB opinions, a judicial body will not be necessarily required, and an “established by law” standard need not be applied in order to meet the “essential equivalence” test. As the astute European legal observer [Chris Docksey](#) concluded:

“This could be an opportunity for the CJEU to give meaning to the difference between essential equivalence and absolute equivalence mentioned above when deciding on the standard of individual redress to be applied in the specific case of international transfers. If the *content* of the right under Article 47 is ensured, then the *form* should not be an obstacle” (emphasis added).

C. Interpreting “Law” in a Substantive, Not Formal, Sense

European human rights law seems, in fact, to prioritise substance over form even in situations that go beyond an “essential equivalence” assessment. This can be shown by examining interpretations of the “in accordance with the law” requirement found in the ECHR, the Charter and several fundamental EU data protection sources of law, including the GDPR.

ECHR articles concerning human rights, including Article 8 (right to privacy), stipulate that some restrictions to these rights may be acceptable provided they are “in accordance with the law” and “necessary in a democratic society” in order to protect certain legitimate interests (such as national security, public safety, or the prevention of disorder or crime). Similarly, Article 52 of the Charter requires that: “Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law (...)”.

Both the Convention and the Charter, however, interpret the term “law” in a flexible way. The ECtHR, for instance, has emphasised on multiple occasions that:

“[A]s regards the words “in accordance with the law” and “prescribed by law” which appear in Articles 8 to 11 of the Convention, the Court observes that it has always understood the term “law” *in its “substantive” sense, not its “formal” one*; it has included both “written law”, encompassing enactments

of lower ranking statutes and regulatory measures (...), and unwritten law” ([Sanoma Uitgevers B.V. v. the Netherlands, 2010](#), § 83, emphasis added). See also [Sunday Times \(No. 1\) v. the United Kingdom, 1979](#), §47).

Similarly, in EU data protection law, both the [Law Enforcement Data Protection Directive](#) (LED) and the GDPR also understand the term “law” in its *substantive* sense. According to Recital 33 of the LED, for instance:

“Where this Directive refers to Member State law, a legal basis or a legislative measure, *this does not necessarily require a legislative act adopted by a parliament*, without prejudice to requirements pursuant to the constitutional order of the Member State concerned (...)” (emphasis added).

Further, Recital 41 of the GDPR provides:

“Where this Regulation refers to a legal basis or a legislative measure, *this does not necessarily require a legislative act adopted by a parliament*, without prejudice to requirements pursuant to the constitutional order of the Member State concerned. However, such a legal basis or legislative measure should be clear and precise and its application should be foreseeable to persons subject to it, *in accordance with the case-law of the [CJEU] and the European Court of Human Rights*” (emphasis added).

This flexible interpretation of the term “law” in the data protection context for assessing the incursion of state interests on fundamental rights is formally separate from the requirement in Article 47(2) of the Charter that a tribunal be “previously established by law”. However, this analytic flexibility is consistent with how EU bodies have interpreted the “essentially equivalent” standard, including in the context of the Privacy Shield. It therefore supports the conclusion that a U.S. decision to put in place an independent and effective redress mechanism for surveillance would satisfy the requirements of European law even if it does not involve the adoption of a statute. This conclusion is also supported by the European DPAs previous positions concerning the Privacy Shield Ombudsperson.

D. The CJEU and EU DPAs Did Not Object to Non-Statutory Redress

The fact that the Privacy Shield Ombudsperson was not created by statute did not seem to be a primary concern for either the CJEU or the EDPB in assessing whether this mechanism offers “essentially equivalent” protection to European law.

In *Schrems II* the Court did not identify as a deficiency that the Ombudsperson mechanism was not created by statute. Rather, the problems detected were that there was “nothing in [the Privacy Shield Decision] to indicate that the dismissal or revocation of the appointment of the Ombudsperson is accompanied by any particular guarantees” and, also, that there was “nothing in that decision to indicate that the ombudsperson has the power to adopt decisions that are binding on those intelligence services (...)” ([§§ 195-196](#)). Thus, provided there is a

way to fix these deficiencies by non-statutory means, the new redress solution could pass the “essential equivalence” test.

The EDPB also seems to support this argument. In its [2016 Opinion on Privacy Shield](#), the WP29 began by stating that:

“in addition to the question whether the Ombudsperson can be considered a ‘tribunal’, the application of Article 47 (2) Charter implies an additional challenge, since it provides that the tribunal has to be ‘established by law’. It is doubtful however whether a Memorandum which sets forth the workings of a new mechanism can be considered ‘law’” (p. 47).

The WP29 therefore seemed to link Articles 47(1) and 47(2). However, it did not appear to consider the legal form by which the Ombudsperson was created as an insuperable obstacle. It stated:

“As a consequence – *with the principle of essential equivalency in mind – rather than assessing whether an Ombudsperson can formally be considered a tribunal established by law*, the Working Party decided to elaborate further the nuances of the case law as regards the specific requirements necessary to consider ‘legal remedies’ and ‘legal redress’ compliant with the fundamental rights of Articles 7, 8 and 47 Charter and Article 8 (and 13) ECHR” (*ibid.*, emphasis added).

The WP29 then went on to analyse the requirements of European law concerning the “right to effective remedy”, focusing primarily on the case law of the ECtHR, and concluded that the Ombudsperson did not meet these requirements, essentially for the same reasons mentioned by the CJEU in the *Schrems II* Judgment.

In their subsequent assessments of Privacy Shield, the WP29 and the EDPB arrived at the same conclusion. They did not consider that the means by which the Ombudsperson was created represented an obstacle to passing the “essentially equivalent” test. On the contrary, the EDPB “welcomed the establishment of an Ombudsperson mechanism as a new redress mechanism” (see for instance [here](#), §99) and repeated that “having analysed the jurisprudence of the ECtHR in particular”, it “*avored an approach which took into account the powers of the Ombudsperson*” (see [here](#), p.19).

Similarly, the European Data Protection Supervisor (EDPS) did not oppose the creation of the Ombudsperson on the grounds that it was done in a non-statutory way. On the contrary he argued that “in order to *improve* the redress mechanism proposed in the national security area, the *role of the Ombudsperson should also be further developed*, so that she is able to act independently not only from the intelligence community but also from any other authority” ([here](#), at 8, emphasis added).

Conclusion

In sum, European law is flexible in interpreting whether the United States must adopt a new statute to meet redress requirements, especially when the question is viewed through the “essential equivalence” prism of data

protection. Substance prevails over form. It remains true that a statutory approach would *in abstracto* be the easiest way for the United States to establish a permanent and independent redress body for effectively reviewing complaints and adopting decisions that bind intelligence services. However, when one takes into consideration the political, practical and constitutional difficulties confronting negotiators, it makes sense to achieve the same results in a different way.

In a second article, to be published shortly, we will detail specific elements of a non-statutory solution and assess whether it would meet the *substantive* European requirements on redress.

Footnotes

1. As this report shows even in a country like Germany, particularly sensitive to intelligence law questions, its major Signals Intelligence (SIGINT) reform did not provide any judicial redress options for non-Germans: “There is no legally defined path for foreign individuals, such as journalists abroad, who want to find out if their communications have been collected in SIGINT operations and, if so, to verify whether the collection and processing of their data was lawful. What is more, the legislators opted to explicitly waive notification rights for foreigners regarding the bulk collection of their personal data.” (p. 63) [↵](#)

2. The European Court of Human Rights has developed jurisprudence that is more flexible than U.S. standing law in terms of who may bring a suit. European human rights law accepts since *Klass and Others v. Germany* case (1978) that an individual may, under certain conditions, claim to be the victim of a violation occasioned by the mere existence of legislation permitting secret measures of surveillance, without having to allege that such measures were in fact applied to him or that that he has been subject to a concrete measure of surveillance (the famous theory of “potential victim” of a human rights violation, see [here](#), paras 34-38 and [here](#), p. 15 for an updated analysis). Notwithstanding this greater flexibility in European law, we reiterate that the limits on U.S. standing are a matter of U.S. constitutional law, which cannot be overruled by a statute enacted by Congress. [↵](#)