COUNCIL OF THE EUROPEAN UNION

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LIMITE

USA 87
JAIEX 75
DATAPROTECT 64

NOTE

from :	Presidency
to :	Justice and Home Affairs Counsellors
Subject :	EU-US High Level Contact Group on data protection and data sharing (HLCG)

1. The Final Report by EU-US High Level Contact Group (HLCG) on information sharing and privacy and personal data protection was presented on 28 May 2008[1]. It contained agreed text on 11 of the 12 privacy and personal data protection principles identified. In addition, the Final Report also identified five issues pertinent to the transatlantic relationship, for which no wording was agreed. During fall 2008 agreement was reached on common wording for three of the five issues identified in the Final Report[2]. During spring 2009, continued work on the outstanding issues lead to agreement on a fourth issue.

2. Therefore, the HLCG still needed to reach consensus regarding one principle (redress) and one of the issues pertinent to the transatlantic relationship (specific agreements regulating information exchanges and privacy and personal data protection).

[1] 9831/08 JAI 275 DATAPROTECT 31 USA 26
[2] 16477/08 JAIEX 6 JAI 677 RELEX 970 USA 45

3. In order to move forward on the issue of redress, a workshop was held in Brussels on 1 October 2009, at which experts from the US Departments of Justice, State and Homeland Security as well as experts from the Presidency, the Commission and several Member States participated. The European Data Protection Supervisor and the Europol Joint Supervisory Board also took part in the proceedings. The workshop provided an opportunity to enhance mutual understanding of the US and the EU frameworks for redress in the context of law enforcement. Questions and answers sessions resulted in a clearer view of the differences and the commonalities in the respective redress arrangements.

4. One important conclusion from the workshop was that although the US Privacy Act is applicable only to citizens of the US and aliens lawfully admitted in the US for permanent residence, the Act provides for extensive possibilities for exceptions for information held in systems which are maintained for law enforcement purposes. If agencies in the US have used this possibility, it may have bearing on the factual discrimination of Europeans.

5. Another important conclusion from the workshop was that while the legal systems, traditions and government structures in the EU and the US differ, both jurisdictions provide multiple mechanisms for administrative and judicial redress. While administrative redress is always provided, the situation regarding redress before an independent court or tribunal is different in the two jurisdictions. In the EU, every individual has a fundamental right to an effective judicial remedy before an impartial and independent tribunal regardless of his or her nationality or place of residence. In the U.S., no comparable general rule exists. Instead judicial redress is available pursuant to a variety of sector-specific legislation but not in all circumstances.

6. The workshop was followed by a meeting of the HLCG experts on 2 October 2009, which resulted in agreement being reached on the issue of specific agreements, the text of which is attached as an annex to this report together with the already agreed text of the other four issues. The experts also deliberated on wording for the redress principle which would reflect the commonalities of the redress arrangements in the EU and the US. The result of these deliberations, which is also set out in the annex, is now being scrutinized by the Commission.

7. It is the view of the Presidency that the wording on the redress principle provides a good resolution to the discussions on the principle, which has been going on for the past couple of years. The work of the HLCG has aimed at defining a set of core principles on privacy and personal data protection, acceptable as minimum standards when processing personal data for law enforcement purposes. As became clear at the redress workshop, the sector-specific redress framework in the US entails that it cannot be guaranteed that there is always a right to judicial redress – neither for Europeans nor for Americans. The wording of the redress principle reflects both systems insofar as it is slightly vague on whether the enumerated paths to redress is disjunctive or conjunctive, both sides being fully aware that our systems differ slightly on this point.

8. It is clear that the EU cannot accept a principle that does not provide for an unconditional right to judicial redress. That, on the other hand, is unacceptable to the US, as judicial redress is not always available in their redress arrangements (neither for Europeans nor for Americans). In the view of the Presidency, the conclusion to be drawn is that any possible gap in the US redress framework which is unacceptable to the EU, cannot be fixed in the redress principle, but must, if necessary, be addressed in a possible future agreement.

9. The Presidency therefore views the text on the redress principle to be acceptable.

10. *Accordingly, the Presidency*

- invites the JAI counselors to take note of the progress of activities of the High Level Contact Group so far during the Swedish Presidency; and
- invites them to comment on what is set out in this document.

10. Redress

Recognizing that both the US and EU provide multiple mechanisms for administrative and judicial redress, wherever an individual's privacy has been infringed or data protection rules have been violated with respect to that individual, that individual [should/shall] have, before an impartial competent authority, independent court or tribunal, an effective remedy and/or appropriate and effective sanctions.

On private entities' obligations, any adverse impact on private entities resulting from data transfers, including those impacts deriving from diverging legal and regulatory requirements, should be avoided to the greatest extent possible.

On preventing undue impact on relations with third countries, when the European Union or the United States has international agreements or arrangements for information sharing with third countries, each should use their best endeavors to avoid putting those third countries in a difficult position because of differences relating to data privacy including legal and regulatory requirements.

On specific agreements relating to information exchanges and privacy and personal data protection, when the European Union and the United States agree that a clear legal necessity arises in particular due to a serious conflict of laws substantiated by one party, the processing of personal information in specific areas should be made subject to specific conditions and should include the necessary safeguards for the protection of privacy and personal data and individual liberties through the negotiation of an information sharing agreement. Such rules may offer individuals a wider measure of protection.

On issues related to the institutional framework of the EU and the U.S., the European Union and the United States intend to consult each other as necessary to discuss and if possible resolve matters arising from divergent legal and regulatory requirements.

On equivalent and reciprocal application of data privacy law, the European Union and the United States should use best efforts to ensure respect for the requirements, taken as a whole as opposed to singular examples, that each asks the other to observe.

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