

EU-U.S. Data Privacy Framework: Overview of the New Independent, Binding Redress Mechanism



March 27, 2023

Webinar 11:00-12:00 EST

EU-U.S. DPF: Independent, Binding Redress

Welcome and Introductions

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Presentation originally hosted as webinar by the International Association of Privacy Professionals (IAPP). A video recording is available: <https://iapp.org/resources/article/web-conference-eu-u-s-data-privacy-framework-new-independent-binding-redress-mechanism/>

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Background

EU-U.S. Data Privacy Framework:

- Executive Order 14086, “Enhancing Safeguards for United States Signals Intelligence Activities” (Oct. 7, 2022)

Designed to restore a legal basis for trans-Atlantic data flows.

Established enhanced safeguards and new independent, binding redress mechanism.

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Enhanced Privacy Safeguards

Requires U.S. signals intelligence (SIGINT) activities:

- Take into consideration privacy and civil liberties of all persons regardless of nationality or residence
- Be conducted only when **necessary** to advance a validated intelligence priority and only to extent and in manner **proportionate** to that priority
- U.S. Intelligence Community (IC) elements to update procedures to reflect new safeguards

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State of Play - European Commission “adequacy” finding

U.S. side:

- EO in effect, date of signing; set out timing for additional U.S. steps
- Completed -- CLPO redress procedures due 60 days after signing; signed and effective 6 Dec. 2022
- Completed -- AG regulation for DPRC due 60 days after signing; final rule published 14 Oct. 2022
- In progress -- IC procedures due within 1 year; working to complete before deadline, including the review by Privacy & Civil Liberties Oversight Board (PCLOB)

EU side:

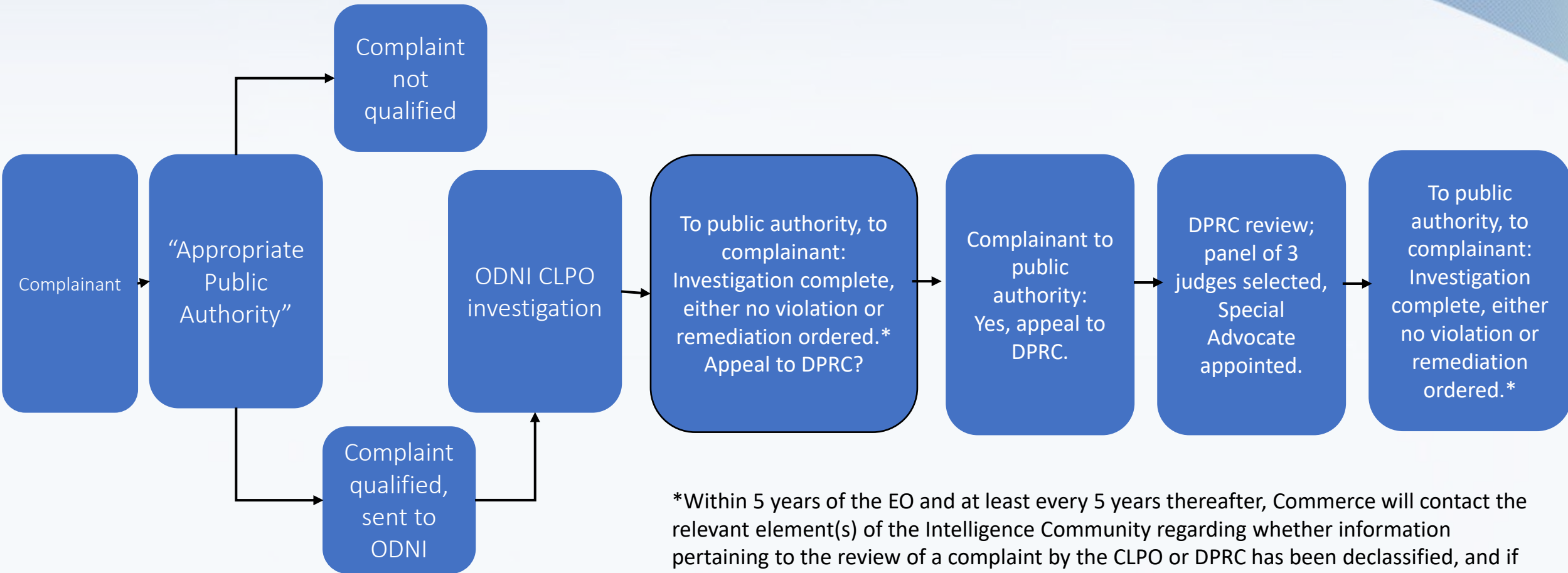
- EC issued draft adequacy decision, 13 Dec. 2022
- Draft decision going through EU approval process

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Redress – Preliminary Steps

- AG designates “qualifying states” - countries/regional economic integration organizations
- Qualifying states officially select “appropriate public authority” to convey complaints to U.S.
- Individuals from qualifying states may submit complaint to that public authority
- Public authority verifies identity of complainant and that complaint satisfies the condition of the EO to be a “qualifying complaint”
- Public authority sends complaint to ODNI CLPO

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*Within 5 years of the EO and at least every 5 years thereafter, Commerce will contact the relevant element(s) of the Intelligence Community regarding whether information pertaining to the review of a complaint by the CLPO or DPRC has been declassified, and if so, notify the complainant through the public authority that such information may be available under applicable law. EO § 3(d)(v).

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Redress – Level 1 – ODNI CLPO

CLPO to review, investigate and as necessary, order appropriate remediation

Qualifying Complaint:

- Allege violation arising from U.S. SIGINT activities of data reasonably believed transferred from Qualifying State to U.S.
 - *No need to demonstrate that the complainant's data has in fact been subject to U.S. signals intelligence activities, EO §4(k)(ii).*
- Allege the violation adversely affected the complainant's privacy and civil liberties interests
- Submit on behalf of complainant (person), not organization
- Submit in good faith, not vexatious
- Provide basic info to enable review (e.g., complainant's email or tel.)

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Redress – Level 1 — ODNI CLPO

- CLPO position created by statute, reports directly to the DNI (Section 103D, National Security Act of 1947)
- EO specifies CLPO's redress function and independence from interference:
 - IC elements “shall not take any actions designed to impede or improperly influence the CLPO's reviews,” EO §3(c)(iii)
 - Director “shall not interfere” with the CLPO's review or remove the CLPO except for specified cause, EO §3(c)(iv)
- IC elements “shall provide the CLPO with access to information necessary to conduct the reviews,” EO §3(c)(iii)
- IC privacy/civil liberties officers assist

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Redress – Level 1 – ODNI CLPO

Binding:

- Each IC element “shall comply with any determination by the CLPO to undertake appropriate remediation . . . subject to any contrary determination by the [DPRC],” EO §3(c)(ii)

Notice of completion of CLPO review:

- “Review either did not identify any covered violations or the [CLPO] issued a determination requiring appropriate remediation,” EO §3(c)(i)(E)(1)

Request for review:

- Complainant or IC element may seek review of ODNI CLPO decision with the Data Protection Review Court (DPRC), EO § 3(c)(i)(E)(2)

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Redress – Level 2 — Appeal to Data Protection Review Court

Process:

- Send request for review of CLPO decision to DPRC (via OPCL*)
- 3-judge panel convened (by OPCL) from judge pool
- Presiding judge selects Special Advocate (SA); advocates re: complainant's interests
- Judges and SA review records from CLPO review, supplemented by info from complainant, SA, or IC element

**The AG regulation directs OPCL to provide administrative support to the DPRC. 28 CFR §201.5.*

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Redress – Level 2 — Appeal to DPRC

Access to information:

- Judges and special advocates cleared for access to classified info; judges and SA review classified, privileged, protected info
- Judges may request additional information from CLPO
- IC “shall provide the CLPO with access to information necessary to conduct the review . . . that a [DPRC] panel requests . . . and shall not take any actions for the purpose of impeding or improperly influencing a panel’s review,” EO §3(d)(iii).

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Redress – Level 2 – Appeal to DPRC

DPRC makes its own decision:

- Was CLPO's determination regarding whether a covered violation occurred legally correct under applicable law and supported by substantial evidence?
- Was remediation consistent with the EO?

Binding:

- “The decision of each DPRC panel shall be final and binding,” 28 CFR §201.9(g).
- Each IC element “shall comply with any determination by a [DPRC] panel to undertake appropriate remediation,” EO §3(d)(ii).

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Redress – Level 2 — Appeal to DPRC

Independence:

- Attorney General selects at least 6 Judges and 2 Special Advocates
- Required consultation with DoC, ODNI, PCLOB
- Exercises authority in EO and statutory authority delegated by the AG
- “To facilitate their independent and impartial review of the application for review, the judges will not be subject to the day-to-day supervision of the Attorney General and may not be removed or subjected to other adverse action arising from their service on the DPRC, except for instances of misconduct, malfeasance, breach of security, neglect of duty, or incapacity.”
87 Fed. Reg. 62303, 62304; see also 28 CFR §201.9(g).
- Term appointments, renewable

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Commerce Contact with the IC Regarding Classification

Department of Commerce:

- Maintains a record of the complainant.
- Within 5 years of the EO and at least every 5 years thereafter, Commerce will contact the relevant Intelligence Community element(s) regarding whether information pertaining to the review of a complaint by the CLPO or DPRC has been declassified.
- If so, Commerce will notify the complainant through the public authority that such information may be available under applicable law. EO § 3(d)(v).

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Additional Oversight – PCLOB Annual Review

Independent agency -- EO requests its review of the implementation of the EO and AG regulation

- Requests annual review of the redress mechanism, including whether the IC fully complied with determinations made by the CLPO and DPRC
- PCLOB agreed to conduct these reviews: [PCLOB Oct. 7, 2022 Press Release](#)

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Frequently Asked Questions

- 1. What is the role of the Special Advocate?***
- 2. How will classified information be protected and why?***
- 3. Who is the CLPO?***
- 4. Who can submit a complaint?***
- 5. When can a complaint be submitted (timing)?***
- 6. How can a complaint be submitted?***
- 7. Has the DPRC been set up yet?***
- 8. What is the Attorney General “designation” of a country?***
- 9. What steps can the CLPO or DPRC take to remedy a covered violation of law?***

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1. What is the role of the Special Advocate?

- “The special advocate shall assist the panel in its consideration of the application for review, including by advocating regarding the complainant’s interest in the matter and ensuring that the [DPRC] panel is well informed regarding the issues and the law.” EO §3(d)(1)(C); 28 CFR §201.8(e).
- Not an agent of complainant; no attorney-client relationship

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2. How will classified information be protected and why?

- EO and regulation require protection of classified or otherwise privileged/protected information
- These rules protect information that, if released, could harm national security
- After CLPO completion of review, notice: “Review either did not identify any covered violations or the CLPO issued a determination requiring appropriate remediation.” EO §3(c)(i)(E)(1).
- After DPRC completion of review, complainant is notified: “the review either did not identify any covered violations or the [DPRC] issued a determination requiring appropriate remediation.” EO §3(d)(i)(H).
- Within 5 years of the EO and at least every 5 years thereafter, Commerce will contact the relevant IC element(s) regarding whether information pertaining to the review of a complaint by the CLPO or DPRC has been declassified, and if so, notify the complainant through the public authority that such information may be available under applicable law. EO § 3(d)(v).

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3. Who is the CLPO?

- Within the ODNI - DNI leads the Intelligence Community (“IC”)
- CLPO reports directly to the DNI per law (Section 103D, National Security Act)
- Protects civil liberties and privacy; facilitates IC in such; conducts oversight; handles complaints alleging programmatic abuses (Section 103D)
- EO 14086 created the CLPO redress mechanism and emphasized CLPO independence in investigating qualifying complaints

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4. Who can submit a complaint?

- An individual, or on behalf of an individual

5. When can a complaint be submitted (timing)?

- After date of EO signing (Oct. 7, 2022)
- Reasonably believes their data transferred after their country was designated by the AG as a qualifying state

6. How can a complaint be submitted?

- Qualifying complaint must be submitted to the CLPO by the appropriate public authority in a designated country

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7. Has the DPRC been set up yet?

Yes, the DPRC was formally established Fall 2022

- Completed to date:
 - Budget and funding for FY 2023
 - Classified facilities (“SCIFs”)
 - Classified computers, safes, phones, and other equipment
 - DPRC website (more content to be published going forward)
 - Selected new attorney to be dedicated to supporting the DPRC
 - Consultation with ODNI, Commerce, PCLOB on judge and special advocate candidate list
 - Privacy Act “System of Records Notice” (now under review by Congress and OMB)
- In progress:
 - Budget planning FY 2024 and beyond
 - Final selection of judges and special advocates; security clearances for each
 - Draft court procedures for judges to review, revise, adopt

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8. What is the Attorney General “designation” of a country?

The AG determines that:

- (A) The laws of the country/regional economic integration organization or its member countries, “require appropriate safeguards” in conducting signals intelligence of U.S. persons’ personal information, transferred from U.S. to that country/organization;
- (B) That country/organization “permit[s], or are anticipated to permit, the transfer of personal information for commercial purposes” between it and the U.S.; and
- (C) Such designation would advance U.S. national interests. EO §3(f)(i).

Determination made in consultation with Secretary of State, Secretary of Commerce, and DNI

No designations at this point; reviewing requests for designation now

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9. What steps can the CLPO or DPRC take to remedy a covered violation of law?

- “Appropriate remediation”: Lawful measures designed to fully redress an identified covered violation regarding a specific complainant and complaint
- May include (examples):
 - Administrative measures to remedy procedural or technical violations relating to otherwise lawful access
 - Terminating acquisition of data where collection is not lawfully authorized
 - Deleting data acquired without lawful authorization
 - Deleting results of inappropriate queries on lawfully collected data
 - Restricting access to data

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Resources

[Executive Order On Enhancing Safeguards For United States Signals Intelligence Activities \(Oct. 7, 2022\)](#)

[Intelligence Community Directive 126 - Implementation Procedures for the Signals Intelligence Redress Mechanism under Executive Order 14086](#)

[DOJ Attorney General Regulation - 28 C.F.R. Part 201](#)

[DOJ OPCL Redress in the Data Protection Review Court](#)

For additional questions, privacy@usdoj.gov

Redress in the Data Protection Review Court

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Section 3 of the Executive Order of October 7, 2022, "Enhancing Safeguards for United States Signals Intelligence Activities," authorizes and directs the Attorney General to issue regulations to establish a Data Protection Review Court ("DPRC") as the second level of a two-level redress mechanism. On October 7, 2022, Attorney General Merrick Garland signed a new regulation establishing the DPRC. The DPRC will independently review determinations made by the Civil Liberties Protection Officer of the Office of the Director of National Intelligence ("ODNI CLPO") in response to qualifying complaints sent by individuals through appropriate public authorities that allege certain violations of United States law in the conduct of United States signals intelligence activities.

Links are set out below to the Executive Order of October 7, 2022, the Department of Justice rule establishing the DPRC, and ODNI CLPO's Signals Intelligence Redress Mechanism website. Additional information about the DPRC will be posted soon, including the process for individuals to submit applications for independent review by the DPRC of determinations made by the ODNI CLPO.

- [Attorney General Regulation - 28 CFR Part 201 - Data Protection Review Court](#)
 - [Federal Register Notice for 87 FR 198, October 14, 2022](#)
- [Executive Order on Enhancing Safeguards for United States Signals Intelligence Activities](#), October 7, 2022
- [FACT SHEET: President Biden Signs Executive Order to Implement the European Union-U.S. Data Privacy Framework](#)
- [ODNI - Signals Intelligence Redress Mechanism](#)

The Department of Justice Office of Privacy and Civil Liberties (OPCL) will provide administrative support to the DPRC.

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The Principal Deputy Chief of the ODNI Office of Civil Liberties, Privacy, and Transparency and the Acting Director of OPCL held a webinar on 27 March 2023 concerning the new redress mechanism, hosted by the International Association of Privacy Professionals (IAPP). IAPP has released a recording of the program, available at <https://iapp.org/resources/article/web-conference-eu-u-s-data-privacy-framework-new-independent-binding-redress-mechanism/>.

For any questions, please contact OPCL at privacy@usdoj.gov.

Updated April 6, 2023