

## GDPR Decision may facilitate EU-US Data Transfers

Transfers of personal data to the United States from the European union (“EU”) have been problematic in recent years due to inconsistencies in comparative laws and the overturning of the “Privacy Shield” framework in light of the Schrems legal case in the EU. However, following discussions and negotiations between Europe and the United States it appears that going forward such transfers may be made pursuant to an adequacy decision which will allow personal data to be transferred to the United States while still ensuring adequate protection of that data under the new EU-US Data Privacy Framework (the “DPF”).

### Background

At the end of 2022, the European Commission published its draft adequacy decision on EU – US transfers of personal data (the “Draft Decision”) and at the end of February 2023 the European Data Protection Board (the “EDPB”) adopted its opinion on this Draft Decision (the “Opinion”). The Draft Decision is based on the new DPF, which introduces new binding safeguards in the US to address the concerns raised by the European Court of Justice in its Schrems II judgement. The DPF is based on self-certification and in order to self-certify, US organizations must publish a privacy policy that aligns with the DPF privacy principles and ensure that they are implemented when processing personal data from the EU. They must re-certify on an annual basis.

### The Opinion

The Draft Decision concludes that the United States now ensures an adequate level of protection for personal data transferred from the EU to the United States under the DPF. The Opinion also considers commercial aspects and U.S public authorities’ access and use of data. In respect of the commercial aspects, the EDPB welcomed a number of updates to the DPF principles however, it also noted that some of these principles were essentially unchanged from the position under the Privacy Shield. As such the EDPB therefore still have some concerns. Specifically the EDPB has concerns in relation to the exemptions to the right of access, the absence of key definitions and a lack of clarity in relation to the application of the DPF principles to processors. It has invited the European Commission to clarify that the safeguards

imposed by the initial recipient on the importer in the third country must be effective in light of third country legislation, prior to an onward transfer. It has also asked the European Commission to clarify the scope of the exemptions regarding the duty to adhere to the DPF principles and has stressed the importance of effective oversight and enforcement of the DPF.

In regard to the government access to the data transferred to the United States, the United States’ introduction of the principles of necessity and proportionality through Executive Order 14086 was seen as a significant improvement however, it did note that close monitoring of the practical application of the newly introduced principles would be required.

The EDPB has also welcomed the introduction of a redress mechanism for EU data subjects which ensures effective powers to remedy breaches of data subjects’ rights. The EDPB has called on the European Commission to closely monitor this redress mechanism as it has concerns about the general application of the standard reply of the Data Protection Review Court notifying the complainant that no violations were identified or a determination requiring appropriate remediation was issued. This is particularly important as the decision cannot be appealed.

### Conclusion

It is evident that concerns remain in relation to data transfers from the EU to the United States and these will have to be addressed before the adequacy decision can be utilized by data controllers.



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