

EU-US Data Privacy Framework Progresses through EU Approval Process

Last week the European Data Protection Board (EDPB) adopted its opinion on the European Commission's draft adequacy decision on the EU-US Data Privacy Framework.¹ While the EDPB welcomes several updates to the Framework's principles, such as the new requirements around necessity and proportionality in US intelligence gathering activities, it still harbors concerns about aspects of the draft decision, such as the rights of data subjects, the protections governing onward transfers of data, and the scope of exemptions. The EDPB recommended the Commission provide clarity on these points.

The current draft adequacy decision, announced by the Commission in December 2022, is the latest iteration in a years' long effort to build an EU-US data transfer framework. Under the EU's data privacy law, the GDPR, data transfers from the EU to other countries are only permissible under circumstances.² Under Article 45 of the statute, an entity may transfer EU personal data to a foreign country that the EU has determined ensures an "adequate level of protection for personal data." Fourteen countries have that status. For all other countries, any transfer of EU personal data to them must comply with Articles 46 and 49 of the GDPR.

The US previously had adequacy under the EU and US's Privacy Shield, a framework adopted in 2016. However, in 2020 the Court of Justice of the European Union struck down that adequacy decision due to concerns over US intelligence surveillance and data collection. The Court had previously struck down an earlier US adequacy decision as well for similar reasons.

In the wake of this decision, the EU and US worked to negotiate a new trans-Atlantic data transfer framework. On March 25, 2022 President Biden and European Commission President von der Leyen announced that the EU and the US had reached an "agreement in principle."

In October 2022, President Biden signed an Executive Order to implement that agreement.³ In particular, the Executive Order:

¹ https://edpb.europa.eu/news/news/2023/edpb-welcomes-improvements-under-eu-us-data-privacy-framework-concerns-remain_en; https://edpb.europa.eu/system/files/2023-02/edpb_opinion52023_eu-us_dpf_en.pdf.

² <https://crsreports.congress.gov/product/pdf/LSB/LSB10846>

³ <https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/07/fact-sheet-president-biden-signs-executive-order-to-implement-the-european-union-u-s-data-privacy-framework/>

- Adds safeguards around US intelligence activities, such as requiring such activities be necessary and proportionate to intelligence priorities and that individuals' privacy and liberties be considered.
- Mandates handling requirements for personal information collected through intelligence activities and requires Intelligence Community elements to update their policies and procedures.
- Creates a multi-layer mechanism for individuals from qualifying states and regional economic integration organizations to obtain independent and binding review of claims that personal information collected through US signals intelligence was collected or handled by the US in violation of US law.
- Calls on the Privacy and Civil Liberties Oversight Board to review Intelligence Community policies and procedures and to review the redress process annually.

On October 7, 2022, the Attorney General signed a new regulation establishing the Data Protection Review Court (DPRC), which will review determinations made by the Office of the Director of National Intelligence's Civil Liberties Protection Officer in response to qualifying complaints alleging violations of US law in the conduct of US signals intelligence activities.⁴ While legal professionals will serve as the judges for the DPRC, the Court is not part of the judicial system and is instead housed within the Executive branch.

Implementation is in progress on the EU side as well. The European Commission's draft adequacy decision concludes that the US legal framework provides comparable safeguards to those of the EU and, as discussed above, the European Data Protection Board has completed its non-binding review of the draft and issued an opinion.

On February 14, 2023, the European Parliamentary Committee on Civil Liberties, Justice, and Home Affairs issued a draft resolution, recommending that the European Commission reject the proposed EU-US Data Privacy Framework.⁵ The Committee maintains that the Framework fails to comply with the GDPR and remains concerned with the ongoing US policy allowing for the large-scale, warrantless collection of user data for national security reasons. The Committee is also concerned that the Executive Order implementing the agreement is too vague and that the Order could be easily reversed or modified on the US side. The Committee also noted the US's lack of a federal data protection law.

The Committee's approval is not required for the Commission's adequacy decision to be adopted, however, and the approval process can continue to progress. The Commission may consider the feedback from the EDPB and the Parliamentary Committee and make revisions to

⁴ <https://www.justice.gov/opcl/redress-data-protection-review-court>

⁵ https://www.europarl.europa.eu/doceo/document/LIBE-RD-740749_EN.pdf

its draft. The Commission will then submit the draft decision to the approval of the EU member states. Once the member states have approved the draft decision, the European Commission can formally adopt it.

After the adequacy decision enters into force, US companies will be able to join the EU-US Data Privacy Framework by committing to comply with certain privacy obligations. The decision will be subject to periodic review by the Commission together with European data protection authorities and US authorities to assess the functioning and implementation of the framework.

In the meantime, there is no adequacy decision in place so transfers of EU data to the US are governed by Articles 46 and 49 of the GDPR. Companies operating in this space should look to those rules and continue to rely on standard contractual clauses and binding corporate rules supported by transfer impact assessments.

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