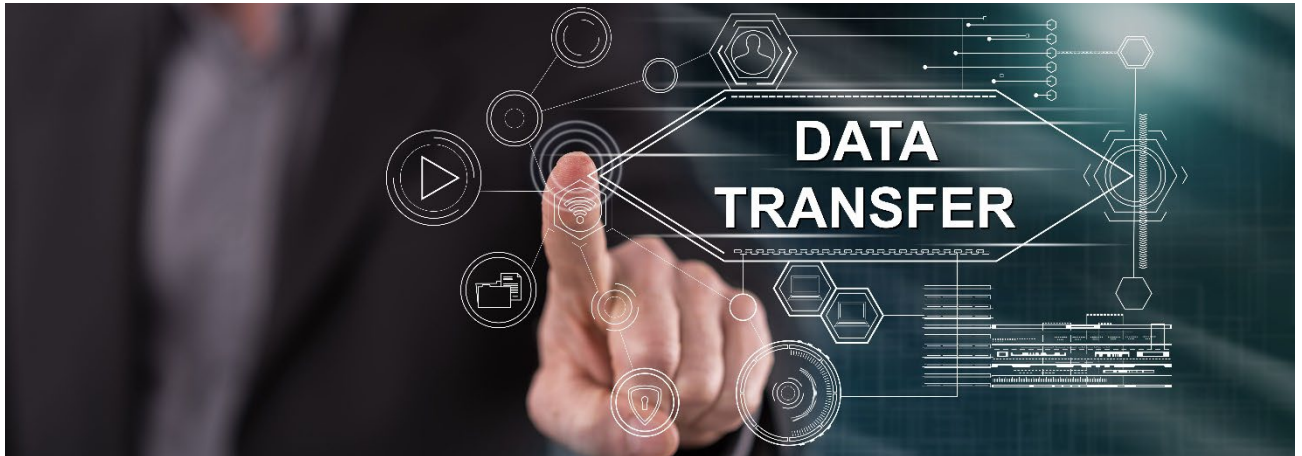


Data Privacy Framework: Re-establishing (more) legal certainty when transferring data to the USA



Executive Summary

- On 10 July 2023, the European Commission paved the way for the legally secure transfer of data between the USA and the EU by adopting a data protection adequacy decision concerning the USA (also known as the “Data Privacy Framework” or “Privacy Shield II”).
- This immediately makes it much easier to transfer personal data to US companies if they are certified under the Framework.
- In particular, data processing by US cloud services will now be considerably less risky.
- Though it is likely that the new agreement (like previous agreements) will be challenged, there is now significantly more legal certainty, at least until restrictions are imposed by a future court decision.

A period of uncertainty in transatlantic data transfers is coming to an end. The European Commission has issued its long-awaited adequacy decision concerning the United States. This means that data transfers to the USA have gone back to being significantly less risky.

From a data protection point of view, the USA can in principle once again be regarded as a country where personal data is protected at a level comparable to the EU’s General Data Protection Regulation (GDPR). This means that personal data can be transferred to the USA without so-called “standard data protection clauses”, for example, provided that the receiving US company is certified under the Data Privacy Framework.

I. Introduction: Background

Under the GDPR, transferring personal data to countries outside the EU or the EEA is subject to stricter formal and content-related requirements. Data can generally be transferred to these countries without much concern or the need for further intermediate legal steps provided the EU Commission has issued an “adequacy decision” confirming that the recipient country has established an adequate level of data protection comparable to the GDPR.

Such adequacy decisions had been issued for the USA, namely with regard to the previous Safe Harbour and Privacy Shield I agreements. However, as a result of lawsuits filed by data protection activist Max Schrems in 2015 (Schrems I) and 2020 (Schrems II), these were both declared invalid by the European Court of Justice.



While the GDPR does provide for other transfer mechanisms beyond adequacy decisions (e.g. standard data protection clauses), the ECJ had in its Schrems II ruling from 2020 imposed requirements on such transfer mechanisms that in many cases were difficult to implement in practice and created considerable uncertainties. Consequently, there was always a remaining risk that was almost impossible to eliminate, especially when relying on standard data protection clauses, e.g. for cloud services. Additionally, data protection authorities or institutions – most notably the European Data Protection Authority (EDSA) – interpreted the ECJ's decision very restrictively, which further complicated structuring and implementing transfers to the USA.

As a result, many larger projects with a US-based component (e.g. in the cloud sector) were called into question, postponed or abandoned altogether.

II. More certainty thanks to new adequacy decision

The Commission's decision is nothing less than a game changer. The new adequacy decision dated 10 July 2023 essentially states that the USA now offers a level of data protection that is substantially comparable to the GDPR (as a result of adjustments made to US laws).

The decision provides the legal basis to apply the same requirements when transferring personal data to the United States as if the transfer were being carried out within the European Union.

The only additional requirement is that the US company receiving the personal data comply with the rules of the Data Privacy Framework. This is done through self-certification by registering the company on a list maintained by the US Department of Commerce. US companies are able to certify under the framework since 17 July 2023. Already more than 2,500 companies have self-certified themselves. Especially the use of US-based cloud services will be significantly less risky as a result of the adequacy decision. Whether a company is certified in accordance with the Data Privacy Framework can be checked at <https://www.dataprivacyframework.gov/s/>.

III. Outlook

Similar to its predecessors, the new Data Privacy Framework has faced criticism from data protection activists/experts and associations. It is highly likely that this new adequacy decision will also be challenged in court and reviewed by the ECJ in the coming years. However, the EU and the US have done their best to incorporate the points criticised by the ECJ in the previous (Schrems) rulings and have included appropriate precautions in the new agreement. The outcome of the expected lawsuits already announced by Max Schrems and others is therefore less than certain and the new agreement could very well withstand legal attacks.

In any case, the new adequacy decision is applicable law for the time being and it is likely that the Data Privacy Framework Agreement will be used in many cases for data transfers to the United States from now on.

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