

EU-US DATA PRIVACY FRAMEWORK: KEY TAKEAWAYS

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On 10 July 2023, the European Commission adopted its adequacy decision for the EU-US Data Privacy Framework (**DPF**). We set out below the background and key takeaways.

WHAT IS THE DPF?

The DPF is a self-certification programme designed to support transfers of personal data from the EU to organisations in the US.

Such transfers have long been in a state of flux following the *Schrems II* ruling of the Court of Justice of the European Union in July 2020, which invalidated the EU-US Privacy Shield. The DPF fills this EU-US Privacy Shield-shaped hole.

The European Commission adequacy decision in respect of the DPF means that organisations can now lawfully transfer EU data to third parties in the US, without any additional safeguards in place, provided that third party has self-certified compliance with the DPF and is on the Data Privacy Framework List. This brings some much-needed certainty to transfers from the EU to the US (at least for now).

HOW TO SELF-CERTIFY TO THE DPF?

Organisations are able to self-certify on the [official DPF website](#), which includes instructions, information and FAQs. A fee, determined by the organisation's annual revenue, is payable.

Organisations will need to commit to adhering to the [seven DPF principles](#) and supplementary principles (**DPF Principles**). Practically this will involve organisations, amongst others, having an effective complaints process in place, providing an independent recourse mechanism, and updating its privacy notice for compliance with the DPF Principles.

Following self-certification, if complete, the US Department of Commerce (**DOC**) will add the organisation to the Data Privacy Framework List. Re-certification is required annually.

Once an organisation self-certifies and publicly declares its commitment to adhering to the DPF Principles, that commitment becomes enforceable under US law.

ONLY ORGANISATIONS SUBJECT TO THE JURISDICTION OF THE FTC OR DOT CAN SELF-CERTIFY

In order to be eligible to self-certify, organisations must fall under the authority of either the US Federal Trade Commission (**FTC**) or the US Department of Transport (**DOT**), the bodies responsible for

enforcing the DPF. This means some organisations, for example banking, insurance and telecommunications organisations, will be unable to participate in the DPF.

ELIGIBLE ORGANISATIONS IN THE US WHO HAVE MAINTAINED THEIR PRIVACY SHIELD CERTIFICATIONS ARE AUTOMATICALLY REGISTERED BUT NEED TO COMPLY WITH THE DPF PRINCIPLES

Organisations that were previously certified under EU-US Privacy Shield, who have maintained their certifications, are automatically enrolled but need to come into compliance with the DPF Principles by 11 October 2023 (unless its re-certification date is sooner). If not, the organisation should withdraw.

As the DPF Principles largely mirror those of the EU-US Privacy Shield, the DPF doesn't create a raft of additional compliance obligations, although a review of relevant processes and policies should be undertaken. It is likely that the primary action will be to update privacy notices so that they contain all disclosures required under the DPF Principles.

ORGANISATIONS TRANSFERRING EU PERSONAL DATA WILL ALSO NEED TO UPDATE PRIVACY NOTICES, AND POTENTIALLY AGREEMENTS WITH US COUNTERPARTIES

Organisations sending EU personal data to the US will also need to update their privacy notices to confirm that their personal data is transferred to the US under the DPF.

Such organisations may also need to update any contractual documents to reflect that the DPF is the mechanism relied upon for transfers of personal data to the US.

GOODBYE TO TRANSFER RISK IMPACT ASSESSMENTS, EXCEPT WHERE STANDARD CONTRACTUAL CLAUSES ARE RELIED UPON

The DPF brings a welcome sigh of relief as it also means the end of transfer risk impact assessments.

However, for organisations continuing to rely on the EU Standard Contractual Clauses or the BCRs, this remains a requirement. Still, these assessments should be simpler given the DPF and the Executive Order 14086, which curbs US intelligence activities and establishes independent and impartial redress mechanisms, including the new data protection review court – thereby addressing key concerns raised in the *Schrems II* ruling.

THE DPF WILL BE CHALLENGED

Unsurprisingly, the non-profit group founded by privacy activist Max Schrems, *noyb*, has already announced that the DPF is largely a copy of the failed 'Privacy Shield' and that it will challenge the DPF in court.

For now organisations have some breathing room, but the possibility of a legal challenge to its validity should be considered when drafting any data transfer provisions.

UK AND SWITZERLAND ADEQUACY DECISIONS FOR THE UK EXTENSION AND THE SWISS-US DPF ARE EXPECTED TO FOLLOW

Since 17 July 2023, organisations in the US have also been able to certify to the UK Extension to the EU-US DPF, a "data bridge" to allow the free flow of data from the UK to the US. However, UK-US transfers cannot be made until the UK adopts its own adequacy decision in respect of the UK Extension to the EU-US DPF. It is also important to note that organisations can only participate in the UK extension if they are EU-US DPF certified.

17 July 2023 also saw the Swiss-US DPF become effective and the ability for organisations to self-certify to compliance with the same. There will also be an automatic transition for those organisations that were previously Swiss-US Privacy Shield certified. However, as with the UK, Swiss-US transfers cannot be made under the Swiss-US DPF until Switzerland grants the Swiss-US DPF adequacy recognition.

FOR MORE INFORMATION

If you would like more information about the topics raised in this briefing, please speak to your regular contact at Weil or to any of the authors listed below.



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