

Data Privacy and Cybersecurity

US Announces Safeguards for EU-US Data Flows under Trans-Atlantic Data Privacy Framework

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On October 7, 2022, President Biden signed an [Executive Order](#) establishing the US's commitments with respect to the Trans-Atlantic Data Privacy Framework. With it, the Administration took a significant step toward establishing a new, more stable data privacy and cybersecurity environment for data transfers between the EU and US. It also fulfilled commitments the US had agreed to in principle as reflected in the March joint US-EU [announcement](#) of the Trans-Atlantic Data Privacy Framework. The Framework seeks to address perceived gaps in US surveillance law undercutting data protection rights of individuals in the EU that contributed to the European Court of Justice (CJEU) invalidating two previous data transfer frameworks between the EU and the US: the Safe Harbor framework in 2015 (*Schrems I*), and its successor, the Privacy Shield Framework in 2020 (*Schrems II*). The CJEU decisions found that US surveillance law meant that US entities participating in the prior data-transfer frameworks could not provide "adequate" protection for EU personal data as required under the European General Data Protection Regulation (GDPR). For the last two years, companies that exchange data between the EU and the US have faced a great deal of legal uncertainty. The Trans-Atlantic Data Privacy Framework and the EO represent a path toward restoring a legal basis for these economically vital data flows.^[1]

The *Executive Order on Enhancing Safeguards for United States Signals Intelligence Activities* (EO) establishes enhanced safeguards, including oversight and redress mechanisms, to protect privacy and civil liberties in connection with US signals intelligence activities. Enhanced safeguards include "rigorous oversight" of signals intelligence activities ensuring that the activities are necessary and proportionate to advance a validated intelligence collection priority determined by the Director of National Intelligence, updated policies and procedures for data handling and retention, and review by the Privacy and Civil Liberties Oversight Board (PCLOB).^[2]

Additionally, the Executive Order establishes a Signals Intelligence Redress Mechanism for complainants that allege that the US government has violated these new safeguards. The redress mechanism has two steps. First, the Civil Liberties Protection Officer (CLPO) of the Office of the Director of National Intelligence investigates qualifying complaints received from public authorities in a qualifying state.^[3] Second, a Data Protection Review Court—to be established by the Attorney General pursuant to the Executive Order—reviews the CLPO's determinations. On October 7, 2022, Attorney General Merrick Garland signed a regulation establishing the Data Protection Review Court.^[4] The Data Protection Review Court will be overseen by an independent panel of "legal practitioners with appropriate experience in the fields of data privacy and national security law"^[5] who will be appointed by the Attorney General, in consultation with the Secretary of Commerce, the Director of National Intelligence, and the PCLOB.

If the European Commission adopts an adequacy decision, companies that wish to join the Framework will have to commit "to comply with a detailed set of privacy obligations."^[6] A significant number of US and EU companies are affected—there are "more data flows between the United States and Europe than anywhere else in the world, enabling the \$7.1 trillion U.S.-EU economic relationship."^[7] As a result, a significant number of US and EU companies may wish to join the framework.

The new Framework will almost certainly be challenged again by Max Schrems or other privacy

advocates in the EU.^[8] For now, Standard Contractual Clauses remain a valid, if unwieldy, data transfer mechanism between the US and the EU. But if the European Commission grants an adequacy decision, or a determination by the European Commission that a country “offers an adequate level of data protection,”^[9] to the US, “data will be able to flow freely and safely between the EU and US companies certified by the Department of Commerce under the new framework.”^[10] With an adequacy decision, companies can move away from the rigid Standard Contractual Clauses and ill-defined and ambiguous transfer risk assessments that currently facilitate trans-Atlantic transfers.^[11]

The October 7, 2022 [Executive Order](#) creates new risks and opportunities for companies that may find themselves dealing with the US government in connection with data privacy and national security issues. Jenner & Block is well positioned to counsel companies as they assess compliance and navigate challenges that may arise.



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[1] The White House, *Fact Sheet: President Biden Signs Executive Order to Implement the European Union-U.S. Data Privacy Framework* (Oct. 7, 2022), <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/>.

[2] The White House, *Executive Order On Enhancing Safeguards For United States Signals Intelligence Activities § 2* (Oct. 7, 2022), <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/10/07/executive-order-on-enhancing-safeguards-for-united-states-signals-intelligence-activities/> (hereinafter, EO).

[3] EO § 3.

[4] U.S. Dep't of Justice, Office of Privacy and Civil Liberties, *Redress in the Data Protection Review Court*, <https://www.justice.gov/opcl/redress-data-protection-review-court>.

[5] EO § 3.

[6] European Commission, *Questions & Answers: EU-U.S. Data Privacy Framework*, https://ec.europa.eu/commission/presscorner/detail/en/QANDA_22_6045.

[7] *Id.*

[8] Press Release, *New US Executive Order unlikely to satisfy EU law*, Oct. 7, 2022, <https://noyb.eu/en/new-us-executive-order-unlikely-satisfy-eu-law>.

[9] European Commission, *Adequacy Decisions*, https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions_en.

[10] European Commission, *Questions & Answers: EU-U.S. Data Privacy Framework*, https://ec.europa.eu/commission/presscorner/detail/en/QANDA_22_6045.

[11] European Commission, *The New Standard Contractual Clauses – Questions and Answers*, https://ec.europa.eu/info/sites/default/files/questions_answers_on_sccs_en.pdf.