

INTRODUCING SAFE HARBOUR 2.0: THE EU-US PRIVACY SHIELD

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The EU Commission recently announced that it had come to an agreement with the US on a new framework to facilitate data flows. This announcement follows the decision by the Court of Justice of the European Union (CJEU) in *Schrems v Data Protection Commissioner* invalidating the traditional safe-harbour principles. Click [here](#) to view our earlier bulletin on the *Schrems* decision.

Background

The effect of the CJEU's decision in *Schrems* was to invalidate the safe harbour principles on which companies used to rely to transfer personal data from the European Union (EU) to the United States (US). The CJEU was of the view that the revelations by Edward Snowden demonstrated a broad and indiscriminate lawful access regime in the US that is incompatible with EU data protection laws. The EU Data Protection Directive requires that information being transferred outside of the EU maintain an adequate level of protection as compared to the safeguards that exist under EU law. [1] In *Schrems* the CJEU reasoned that the ability of public agencies to apply broad surveillance frustrates the ability of businesses to provide meaningful data protection assurances with respect to data transferred into the United States. Therefore, the CJEU found that the safe harbour regime could not protect personal information transferred from the EU to the US. The *Schrems* decision created great uncertainty for a number of businesses, since the global nature of business in today's marketplace often requires the transfer of data between the EU and the US.

The Proposed Solution

The EU Commission recently issued a [press release](#) indicating that it had come to an agreement with the US on a new framework for transatlantic data flows that is consistent with the CJEU's requirements in *Schrems*. The press release refers to the agreement as the "EU-US Privacy Shield".

The EU-US Privacy Shield calls for increased cooperation between the European Data Protection Authorities and the US Department of Commerce and Federal Trade Commission. The arrangement includes a commitment by US authorities that the possibility of lawful access will be subject to greater limitations and oversight. The arrangement will require:

- Greater obligations on companies handling personal information from the EU;
- Increased safeguards and transparency regarding US lawful access; and
- Recourse mechanisms for EU citizens whose data has been mishandled.

The EU-US Privacy Shield has not yet come into force. A draft "adequacy decision" is currently being prepared for approval by the College of Commissioners of the EU.

Implications for Canadians

The announcement of the EU-US Privacy Shield is an important development. Firstly, the EU-US Privacy Shield will provide Canadian businesses that transfer data between the EU and the US with an approved mechanism to do so.

In addition, while the EU Commission has previously found that the *Personal Information Protection and Electronic Documents Act* ("PIPEDA") provides adequate protection for personal information,^[2] the EU data protection regime is rapidly developing. It is conceivable that Canada's data protection regime will fall out of sync with the EU's and that a similar decision to *Schrems* could complicate transfers of EU data into Canada. The announcement of the EU-US Privacy Shield demonstrates some flexibility on the part of the EU, and may provide a precedent for an alternate form of arrangement if PIPEDA's adequacy is ever challenged in the future.

by Mitch Kocerginski and Lyndsay Wasser

[1] EU Directive 95/46/EC, Art. 25(1).

[2] 2002/2/EC: Commission Decision of 20 December 2001 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequate protection of personal data provided by the Canadian Personal Information Protection and Electronic Documents Act (notified under document number C(2001) 4539).

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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