

CETA and GDPR - Will the Marriage Last?

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Why would this marriage not last?

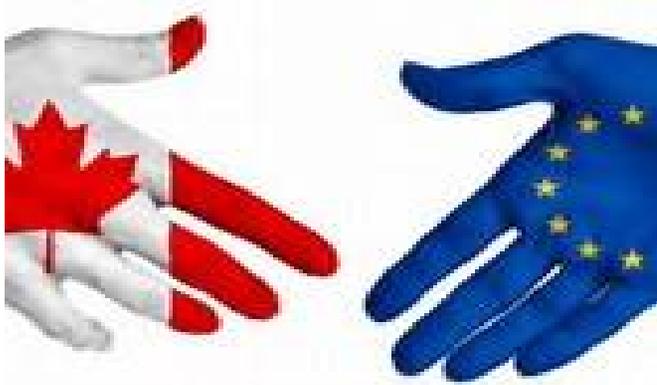
1. The in-laws are not happy
2. The prenup is not clear
3. They both have baggage...

But the secret to a good marriage may be there...

Betting on the marriage

How they came together:

- EU is Canada's 2nd largest trading partner
- Canada is EU's 12th largest trading partner
- Value of bilateral trade exceeds \$100bn



- Both wanted to expand exports by
 - Lowering tariffs
 - Simplifying the rules
 - Opening respective markets to services
 - Opening respective business in bidding for respective government contracts
 - Recognizing respective professional qualifications

How they agreed on their privacy future

Both assert it is a priority

Both boast great privacy records:

- Canada and eight EU Member States rank second in privacy International's Privacy Index;
- Canada and the EU have comprehensive data protection laws for the private and public sectors, and protect privacy as a fundamental right; and
- Both are party to international conventions to protect privacy in cross-border data flows.

Canada-European Union CETA
www.international.gc.ca/CETA

Their vows

“CETA balances the unambiguous obligation to protect personal information under Canadian and EU law with the need to facilitate regulatory and commercial activity under the agreement.”

Canada-European Union CETA
www.international.gc.ca/CETA

- Except “Canadian and EU law” on protecting personal information are different...

Why privacy law matters

“On sait que les données commerciales font partie de la négociation. Or, ces données commerciales sont à 80% des données personnelles.”

*Isabelle Falque-Pierrotin
Regards sur le numérique (2014)*



“We know that commercial data is a part of negotiations. It so happens that 80% of this commercial data is personal data.”

*Isabelle Falque-Pierrotin
Regards sur le numérique (2014)*

How privacy comes into play

- Financial Services: CETA 13.15 supports Canada and the EU's enforcement of privacy legislation governing the cross-border transfer of personal information;
- Telecom: CETA 15.3.4 (4) requires both parties to take appropriate measures to protect the privacy of users of public telecommunications transport services;
- E-Commerce: CETA 16.4 requires that Canada and the EU take into consideration international standards for data protection of E-Commerce users;
- “Exceptions”: CETA 28.3.2 (ii) preserves Canada and the EU’s right to adopt or enforce any measure necessary to protect the privacy of individuals.

Still, the in-laws are not happy

In Europe:



*“CETA e TTIP
minano la tutela della
privacy.”*

Bruno Saetta

The in-laws are not happy

In Canada



*“we just came off a third reading vote on CETA. It is supposedly an agreement to eliminate **non-tariff trade barriers** between Canada and Europe...*

...how do we make it so that Canadian companies are not going to lose an advantage that they currently have, in spite of having just signed an agreement that's supposed to facilitate trade with Europe?”

Daniel Blaikie (Elmwood—Transcona, NDP)
Standing Committee on Access to Information, Privacy and Ethics
House of Commons of Canada:

February 14, 2017

Europe: “My child is marrying a bum”

1. State surveillance:

- CETA 28.6 “*protects Canada from disclosing data on its surveillance activities*”

Bruno Saetta

Art. 28.6

Nothing in this Agreement shall be construed:

(a) to require a Party to furnish or allow access to information if that Party determines that the disclosure of this information would be contrary to its essential security interests; or

(b) to prevent a party from taking an action that is considers necessary to protect its essential security interests

Europe (cont'd)

2. Canada's "accountability gap"

- the Communications Security Establishment (CSE) is allowed to spy on foreigners:

"There are accountability gaps in all democracies, but Canada's accountability gap is particularly pronounced."

*Kent Roach quoted by Ante Wessels, CETA and Mass Surveillance
<https://blog.ffii.org/ceta-and-mass-surveillance/>*

Europe (cont'd)

3. Canada-US links

- *“A significant portion of Canadian Internet traffic transits through the United States, usually via a city where the NSA has splitter interception facilities.”*
- And the US does not provide essentially equivalent privacy protection as the EU as per the European Court of Justice Safe Harbour Ruling of October 6th, 2015 at para 74.

Ante Wessels, CETA and Mass Surveillance , April 13, 2016

Europe:

4. Conflict of rules:

“CETA prevents the EU from ensuring Canada grant an adequate level of [data] protection”

Maryant Fernandez-Perez “CETA puts the protection of our privacy and personal data at risk “, October 5, 2016

- Article 28.3

...nothing in this Agreement shall be construed to prevent the adoption or enforcement by a Party of measures necessary:

[...]

(c) to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:

[...]

(ii) the protection of the privacy of individual in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;

Europe

5. CETA creates an adequacy carve out

- Adequacy under GDPR, 45 based on:
 - rule of law, respect for human rights and relevant legislation
 - access of public authorities to personal data
 - rules for the onward transfer of personal data to another third country
 - independent supervisory authorities with adequate enforcement powers
 - periodic review, at least every four years
- Autonomy under CETA, 28.3.2 means:
 - *“nothing in this Agreement shall be construed to prevent the adoption or enforcement by a Party of measures necessary for*
 - *(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;”*

Canada: is my child marrying up – or down?

1. Trade harmonization brings regulatory standards down

The Council of Canadians

Article 9.3 – National treatment

1. Each Party shall accord to service suppliers and services of the other Party treatment no less favourable than that it accords, in like situations, to its own service suppliers and services.

2. Data protection can constitute a hidden trade barrier

“But there is now a tendency to inappropriately conflate national security and law enforcement with ... commercial privacy practices, which has put a damper on rational debate.”

Adam Schlosser, Director of the Center for Global Regulatory Cooperation at the U.S. Chamber of Commerce, 2014.

Article 9.4 – Formal requirements

Article 9.3 does not prevent a Party from adopting or maintaining (...) requirements provided that such requirements are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination

Canada

3. CETA may increase power over ISPs in favour of law enforcement with criminalization of “*circumvention of technical protection measures*”

CETA Privacy Guide – CIPP Guide 2017

15.3.4 “a Party shall take appropriate measures to protect:

(a) the security and confidentiality of public telecommunications transport services; and

(b) the privacy of users of public telecommunications transport services,

subject to the requirement that these measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade.”

Canada

4. CETA Data a privacy standards are lower in CETA than GDPR - couldn't that lead to conflicts in interpretation?

Annie Blondin-Obernesser,
*Les données personnelles dans les relations entre
l'Union européenne et le Canada,
in Un nouveau pont sur L'Atlantique, 2015*

26.1 .3

*A Party may refer to the CETA Joint Committee any issue . relating to the
implementation and interpretation of this Agreement (...)*

26.3

The decisions made by the CETA Joint Committee shall be binding on the Parties

The prenu is not clear

1. On Telcos: measures shall protect the security and confidentiality of services and the privacy of users without raising a disguised restriction on trade (CETA 15.3.4 b) – when does a measure go from privacy to trade barrier?
2. On Financial Services: Transfers “should” be in accordance with privacy law (CETA 13.15 ,2). Does that lower the standard from “shall”?
3. On E-Commerce: in protecting privacy, due consideration shall be given to “international standards” – how does that relate to GDPR? (CETA 16.4)
4. On Exceptions: Does 28.3 preserving respective privacy legislation tweak the adequacy process under GDPR?

There's baggage

1. The EU refused adequacy to Québec because:
 1. Territorial scope overlaps with PIPEDA
 2. Requirements on CPO contact are not clear
 3. “Sensitive data” is not specifically defined
 4. Provisions on data security in onward transfer are not strong enough

So, what about personal information protected under other provincial laws?

2. GDPR is moving on its own, widening the gap with PIPEDA
3. Both the UK and Canada are part of Five Eyes and both CSE and GCHQ were mentioned in Snowden's revelations.

But the secret to a good marriage may be there

C. C. L.

Compatibility

1. Both Canada and the EU view privacy as a human right
2. Both Canada and the EU have independent DPAs and strong privacy policies
3. Their privacy protection is viewed as equivalent (*Privacy International*)
4. Canada is the only major EU trade partner to have adequacy

Commitment

1. Contrary to traditional trade agreements, CETA addresses privacy
2. CETA was negotiated with full knowledge of GDPR development and implications
3. EU and Canada are both introducing:
 - Stronger consent requirements to meet Internet context (6.1 PIPEDA and 7.2 GDPR)
 - Mandatory breach notification
4. Bill C-22 strengthens Canadian oversight for national security through a Parliamentary Committee

Luck

1. Will CETA be taken into account in GDPR adequacy review of Canada?
2. How will Article 45 of GDPR be applied to determine “essentially equivalent” data protection?
3. How will US privacy policy impact on Canada’s reputation in the EU?
4. How will the anti-Europe movement materialize?

Betting on the marriage

1. Canada and the EU both need the agreement for economic reasons
2. Both economies have moved to a digital economy
3. Digital economy does not work without privacy protection
4. Citizens in both territories will hold them to it

Thank you

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