

## Across the pond and back again:

### An update on data regulation and privacy in the EU and US

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## Overview

- A. Recent events, cases, and legislation in the US
- B. Recent events, cases, and legislation in the EU
- C. How the US data and privacy landscape could affect your business
- D. How the EU data and privacy landscape could affect your business
- E. What you should consider doing now
- F. Questions and comments

## How Important?

- 44% of U.S. CEOs rank data privacy among their top three policies impacting their businesses.
- 52% of tech, media, and telecom CIO respondents rank data privacy among top three policies impacting their businesses.
- 69% of companies are “very actively” looking to shape data privacy policy.
- More than 80% of consumers say they have become increasingly concerned about how companies are using their personal information.
- 75% of consumers say that they have become less likely to trust companies with their personal information over the past year.

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## US Laws & Regulations

### California Consumer Privacy Act (CCPA):

- Became law on January 1, 2020
- Ongoing, evolving rulemaking
- Enforcement to begin this month
- Consumers have the right to:
  - Request a copy of the data the company has on them.
  - Demand that their data be deleted when they no longer want a company to have it.
  - Demand that their data is not sold to third parties.
- The Attorney General can fine corporations up to \$7,500 per violation.

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## US Laws & Regulations

### California Consumer Privacy Act (CCPA):

- Companies like Microsoft applying the rules throughout the United States.
- More than one-third of businesses are fulfilling CCPA requests from anyone, not just California residents.
- 43% of businesses will spend more than \$10 million on compliance.
- 20% plan to spend more than \$100 million.
- Two-thirds of companies expect to field more than 500 calls per day.
- 11% expect over 10,000 daily.

## US Laws & Regulations

### State law proposals resembling the CCPA:

- |                                  |                                |
|----------------------------------|--------------------------------|
| • Florida (SB 1670, HB 963)      | • Vermont (H. 899)             |
| • Hawai'i (SB 418, SB 2451)      | • Virginia (HB 473)            |
| • Illinois (SB 2330)             | • Washington (HB 2759)         |
| • Maryland (NB 249)              | • New Mexico (SB 176)          |
| • Nebraska (LB 746)              | • New York (A 6351, S 4411)    |
| • New Hampshire (HB 1680)        | • Pennsylvania (HB 1049)       |
| • New Jersey (S269, S236, A2188) | • Rhode Island (S 234, H 5930) |
|                                  | • Texas (HB 4518)              |

## US Laws & Regulations

### Illinois' Biometric Privacy Act (BIPA):

- Requires companies to obtain consent prior to collection or use of biometric information.
- Statutory damages for violations.
- Actual harm is not required to sue.
- BIPA has spawned hundreds of putative class action lawsuits in Illinois.
- Additional national class action lawsuits are expected.

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## US Laws & Regulations

### State laws resembling BIPA:

- California
- Arkansas
- Colorado
- Florida
- Massachusetts
- Nebraska
- New York
- Texas
- Washington



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## US Laws & Regulations

### Children's Online Privacy Protection Rule ("COPPA"):

- Federal law, effective April 21, 2000
- Applies to online collection of personal information of children under 13
- Entities U.S. jurisdiction
- Includes children outside the US, if the company is U.S.-based
- Mandates specific privacy policy terms
- Requires verifiable consent from parents
- Requirements to safeguard children's privacy
- Amendments proposed in 2019 to expand scope, e.g., prohibit advertising targeting children

## US Laws & Regulations

### National Institute of Safety and Technology (NIST):

- Privacy Framework: A Tool for Improving Privacy Through Enterprise Management
- Published January 16, 2020
- Goals:
  - Better privacy engineering practices to support privacy by design.
  - Building customers' trust by supporting ethical decision making in product and service design and deployment.
  - Fulfilling current compliance obligations, as well as future-proofing products and services to meet changing obligations.
  - Facilitating communication about privacy practices with individuals, business partners, assessors, and regulators.

## Recent US Case Law

- *America's Communications Association et al. v. Frey* (D. Maine):
  - Court rejected First Amendment challenge to new Maine privacy law, which prohibits internet service providers from using or selling consumer browsing history and other data without first obtaining consent.
- *Phillips v. Vesuvius USA Corp. et al.* (Ohio Court of Appeals):
  - Age discrimination and retaliation suit against the engineering company.
  - Worker demanded access to six EU citizens' personnel files.
  - Court rejected the assertion that Europe's General Data Protection Regulation precludes the disclosure during discovery of EU residents' data.

## Recent US Case Law

- *Rosenbach v. Six Flags* (Illinois):
  - Illinois Supreme Court held that plaintiffs did not need to show any actual harm to have standing under BIPA.
  - National implications: In *Patel v. Facebook*, Ninth Circuit upheld standing decision in CA that relied on *Rosenbach*. Facebook had argued no actual harm.
  - Settled in February 2020 for \$550 million.
- *Equifax data breach* (N.D. Ga):
  - Shareholder lawsuits following data breach.
  - After stock price drop, shareholders alleged securities fraud for misrepresenting the strength and security of its data practices.
  - July 2020- settlement of \$149 million approved.

## Recent US Case Law

- *Flynn v. Harman International Industries* (S.D. Illinois):
  - IOT: consumer class alleged “Infotainment” devices in Jeep/Chrysler vehicles were vulnerable to hack and remote control.
  - Class was certified; Seventh Circuit and Supreme Court declined to reverse certification.
  - But, District Court found---after five years of litigation---that plaintiffs could not show concrete, actual harm.
  - Therefore no standing, and case dismissed.
- Discovery implications:
  - Marriott data breach: Marriott had to produce third party report investigating data breach.
  - Capital One data breach: Capital One had to produce third party report and analysis of its data breach.

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## European Union (EU) General Data Protection Regulation (GDPR)

- Regulation on EU data protection and privacy enacted in May 2018.
- The goal is to provide one set of data protection rules for all EU member states and the European Economic Area (EEA).
- Generally, it applies to businesses that are established in the EU, offer goods or services to individuals in the EU, or monitor individuals' behavior in the EU.



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## European Union (EU) General Data Protection Regulation (GDPR)

- Core objectives
  - Protect personal data
  - Ensure free flow of personal data between member states
  - At the same time, ensure that if personal data is transferred outside the EU and EEA, it is protected to an adequate standard
- Penalties and Fines
  - A maximum fine of €20 million, or 4% of an organization's worldwide annual revenue from the preceding financial year, whichever amount is higher

## Cross-Border Transfers

- Cross-Border Transfer Options
  - Adequacy Decisions
    - Includes EU - US Privacy Shield
  - Appropriate Safeguards
    - Includes Standard Contractual Clauses
  - Derogations
- 88% of companies that transfer data out of the EU rely on standard contractual clauses
- 60% of companies that transfer data out of the EU use the Privacy Shield. This is over 5,000 companies.





## Recent Case on Cross-Border Transfers

- **Schrems II** (*Data Protection Commissioner v. Facebook Ireland Limited, Maximillian Schrems* (Case C-311/18)):
  - Facts arise from a complaint filed by privacy activist, Max Schrems to Irish Data Protection Commissioner in 2015 regarding personal data transfer from Facebook Ireland to Facebook Inc. in the US.
  - Core Issues:
    - Are standard contractual clauses still a valid form of transferring data under the GDPR?
    - Is the EU - US Privacy Shield still a valid form of transferring data under the GDPR?
      - Issues considered in light of national security and EU data protection principles
  - Holding:
    - Standard contractual clauses are still valid (with caveats)
    - EU-US Privacy Shield is invalid



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## Data Processing

- Data Processing
  - collecting data
  - any operation performed upon the data
  - comprises the many possible actions in the data lifecycle
- GDPR processing principles
  - lawfulness, fairness and transparency of processing
  - purpose limitation
  - data minimization
  - accuracy
  - storage limitation
  - integrity and confidentiality
  - accountability
- Protect privacy by avoiding processing, retaining, or divulging personal data needlessly.



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## Processing Data during COVID-19

- On March 19, 2020, the European Data Protection Board issued the following statement on the processing of personal data in the context of the COVID-19 pandemic:
  - “Data protection rules (such as the GDPR) do not hinder measures taken in the fight against the coronavirus pandemic.”
- What are the implications of the statement?
  - Lawfulness of processing
    - Public interest
    - Legitimate interest
    - Contractual necessity
    - Compliance with a Legal Obligation

## What Could be Next in the US?

- Data Protection Act:
  - Proposed by Sen. Kirsten Gillibrand (D-NY) to create a U.S. federal data protection agency to “create and meaningfully enforce” data protection and privacy rights federally.



- Consumer Data Privacy and Security Act of 2020 (“CDPSA”):
  - Proposed by Sen. Jerry Moran (R-KS) to legislation to create an overarching, federal data privacy framework.
  - Thresholds for qualification for “small business” exemptions.
  - No private right of action.
  - Preemption of state laws.

## What Could be Next in the US?

- Consumer Online Privacy Rights Act (COPRA)
  - Proposed by Sen. Maria Cantwell (D-WA).
  - Would create separate agency under the FTC to enforce the law.
  - Fines to companies between \$100 and \$1,000 per violation per day.
  - Private right of action for violations.
- United States Consumer Data Privacy Act (CDPA)
  - Proposed by Sen. Roger Wicker (R-MS).
  - Would be enforced by the FTC.
  - No private right of action.
- DASHBOARD Act
  - Proposed by Sens. Mark Warner (D-VA) and Josh Hawley (R- MO).
  - Would require large commercial data operators disclose their internal valuations of consumer data.

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## What Could be Next in the US?

- Business vs. business litigation
  - Breach of contract
  - Fraud claims regarding data/privacy assurances and representations
  - Indemnity claims
  - Business interruption
  - Tortious interference
  - Misappropriation, trade secret claims



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## What Could be Next under the GDPR? Effects and Considerations

- *Schrems II*

- Data inventory
  - Know and understand what data is being processed, transferred, to whom, where, on what basis and if there are any gaps of information.
  - Having conducted a data inventory will allow organizations to access any impact or necessary alternatives, quickly.
- Contingency Plans
  - Key vendors or third party service providers
- Brief key stakeholders
- Continue monitoring key developments



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## What Could be Next under the GDPR? Effects and Considerations

- Data Processing during COVID -19
  - Lawful processing considerations
  - Proportionality and minimization are important
  - Consult local health authorities, EU member states, and other local law
  - Privacy notice updates



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## Recommendations and Best Practices

- Preparedness
  - Privacy by design
  - Tracking applicable laws and regulations
  - Integrate privacy into all core operations
  - Data inventory
- Transparency
  - Privacy policy clarity and disclosure
  - CCPA rights portal
  - Do Not Sell (DNS) link
- Consistency
  - Consider a single, global data protection/privacy strategy
    - Tailor to individual jurisdictional requirements when needed
  - Develop and maintain policies for consumer identification and verification
  - Review, update, and improve practices



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## Recommendations and Best Practices

- Data privacy compliance as a tool for data security
  - Identify data privacy risks and to design controls to address these risks.
  - Integrate compliance teams into core functions.
- Third party risk management
  - Contract reviews and revisions
  - Indemnification and insurance
  - Policy for regular audits, ongoing diligence
- Talent & expertise
  - Recruit internal and external talent
    - Legal, financial, technological
  - Maintain, train, and build talent



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## Questions or Comments?



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## Thank you

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