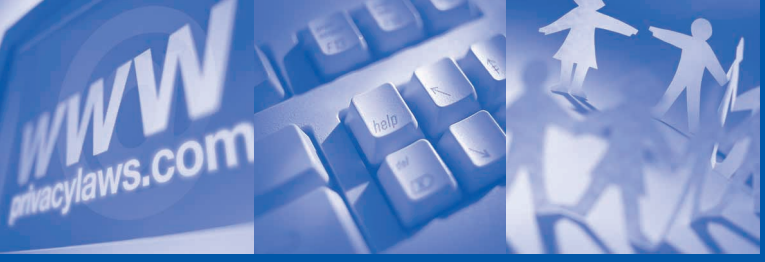

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INTERNATIONAL REPORT

PRIVACY LAWS & BUSINESS
DATA PROTECTION & PRIVACY INFORMATION WORLDWIDE

Generative AI – implications, risks and challenges

Generative AI dominated the Davos World Economic Forum discussions recently. **Frank Madden** of IBM provides an update on the management of Generative AI.[1]

Generative AI[2] (GenAI) raises societal as well as technical questions that are relevant to the privacy professional and others involved in GenAI governance. While many socio-technical challenges have been identified, solutions already exist in some areas.

Data protection

There are 162+ jurisdictions with data protection laws[3] (not including

Continued on p.3

EU retains all existing adequacy decisions

A sigh of relief for the jurisdictions in question, and welcome news for organisations. **Laura Linkomies** reports.

The European Commission finally issued, on 15 January, its Report on the countries that were originally granted adequacy under the Data Protection Directive. The Commission finds that personal data transferred from the European Union to Andorra, Argentina, Canada, Faroe Islands, Guernsey, the Isle of Man, Israel, Jersey, New Zealand, Switzerland and Uruguay continues to benefit from an adequacy decision under the GDPR.

"The review has demonstrated

Continued on p.6

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comment

Old EU adequacy decisions survive scrutiny

The EU Commission announced on 15 January that it has approved as adequate all 11 jurisdictions which received their original decision under the EU Data Protection Directive (p.1). This is rather convenient and it makes one wonder why it took such a long time to issue these decisions.

The EU recognises that these countries have made changes to their laws and/or strengthened DPA independence. The decisions can be seen as a positive signpost for other countries striving for adequacy, or "essential equivalence" such as Mexico (p.14), or wishing to retain it, such as the UK. However, Canada, which is still in the middle of its law revision, was also approved, as it has shown enough progress at this stage.

The EU Commission is preparing its Report on how the GDPR is applied in Member States and anyone can send feedback until 8 February (ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14054-Report-on-the-General-Data-Protection-Regulation_en). Other notable European level developments include the drafting of an AI Convention by the Council of Europe (p.7).

Professor Kaori Ishii from Chuo University, Tokyo, reports in this edition about recent discussions regarding the protection of personal information in Japan (p.16). Professor Graham Greenleaf analyses the impact of the Dubai Financial Centre adequacy decision on California, and presents his proposal for a way forward for international transfers (p.8).

In addition, we bring you the latest AI and data privacy news from the Davos World Economic Forum (p.1). Much is happening in this field – the EU AI Act has been adopted at a political level, but technical meetings have resulted in some further details. A leaked document has been circulating and no doubt the "real thing" will be available soon.

All these aspects and more will be covered at our Cambridge Conference in July. Join the discussion with regulators, policy influencers, companies, law firms and academics from many regions (see www.privacylaws.com/events for details).

Laura Linkomies, Editor
PRIVACY LAWS & BUSINESS

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Do you have a case study or opinion you wish us to publish? Contributions to this publication and books for review are always welcome. If you wish to offer reports or news items, please contact Laura Linkomies on Tel: +44 (0)20 8868 9200 or email laura.linkomies@privacylaws.com.

Adequacy.. from p.1

that the data protection frameworks in these countries and territories have further converged with the EU's framework and strengthened protection of personal data in their jurisdictions," the Commission says.

The Commission mentions that these reforms reinforced, for example, the independence and enforcement powers of Data Protection Authorities, as required by the GDPR. However, some reforms are still ongoing, for example in Canada.

The Commission says that its findings promote convergence between privacy systems. Rather than being an 'end point', adequacy decisions have laid the foundation for closer cooperation. To step up dialogue, the Commission intends to organise a high-level meeting in 2024, bringing together representatives from the EU and all countries that benefit from an adequacy decision.

Canada

Canada has not yet completed its law reform. The intention is to replace the privacy provisions in the Personal Information Protection and Electronic Documents Act (PIPEDA) with a modernised Consumer Privacy Protection Act. Emeritus Professor *Colin Bennett*, University of Victoria, Canada, commented on Canada's renewed adequacy:

"I was surprised to see the inclusion of Canada on the list of countries. I understand the incentive to give some certainty to Canadian business, but why rush to judgement while Bill C-27, including the reform of PIPEDA in the Consumer Privacy Protection Act, is still going through Parliament, and is subject to review by the House of Commons Industry Committee. This decision has the potential to take the pressure off the government, and might fuel the arguments of business lobbyists who would want to see the current bill weakened. It also tends to undermine the arguments of those of us who have been contending that PIPEDA does not meet the new standard of 'essential equivalence.' At the same time, there are very important domestic reasons why PIPEDA needs reform, not least of which is the need for alignment with the new Quebec legislation, which has been designed to align with the GDPR."

As to the factors that in particular contributed to Canada retaining its decision, Bennett said:

"I suspect that the Comprehensive Economic and Trade Agreement between Canada and the EU was an important factor. As were the investigations of our Privacy Commissioners against some of the Big Tech companies, and the leadership that Canada has shown in privacy protection policy over the years. I also note this comment in the report: 'At the same time, the Commission recommends enshrining some of the protections that have been developed at sub-legislative level in legislation to enhance legal certainty and consolidate these requirements. The ongoing legislative reform of PIPEDA could notably offer an opportunity to codify such developments, and thereby further strengthen the Canadian privacy framework. The Commission will closely monitor future developments in this area.'"

When asked how these 11 decisions will affect the global data transfer landscape – i.e. can we assume that more (new) countries could achieve adequacy in the future, Bennett said:

"This is difficult to assess. The decisions will further fuel the arguments of the sceptics who say that the adequacy process is inherently broken. But it also important to note the time and effort devoted to the analysis of the various legal protections for access by public authorities to personal data. For example, there is a thorough assessment of Canadian constitutional provisions and statutory law, as well as the various mechanisms of redress and oversight. The judgement that the Canadian regime is adequate stands in contrast, of course, to the ongoing disputes with the US in the light of the two *Schrems* decisions, and the current challenges to the Transatlantic Data Privacy Framework. I suspect that this positive analysis of Canadian law is designed to send a message to the US and will be examined very closely by American legal experts."

Switzerland

David Rosenthal, a Partner at Vischer in Switzerland, told *PL&B* that he is not surprised at the EU decisions.

"No surprise, but keep in mind that adequacy decisions are always also political decisions. For example, they are a strategic tool for exporting EU data protection law standards into the rest of the world, and this has so far worked pretty well. The Commission wanted to renew all countries at once, which is why it took so long. In Switzerland, too, the pending adequacy decision was generally considered an important reason for updating the Swiss Data Protection Act. I personally believe it was overrated, and that it would have taken really a lot for Switzerland not to retain the decision. But for foreign lawmakers, making sure that data flows from the European Economic Area stay alive is a good argument to move ahead."

"For me, it was always clear that Switzerland would keep adequacy. After all, our data protection law and our lawful access regime, which was considered as well, is very similar to what you see in the EU. One key element was, of course, Switzerland updating its own Data Protection Act, which it had to do also because of the revised Council of Europe Convention 108. Some feared that the Swiss Data Protection Act was too soft in some areas, such as fines or accountability, but I don't believe that is true. The level of data protection in Switzerland is not lower than in the rest of the Europe."

Switzerland has its own adequacy list from 2021 which does not include Japan and South Korea (which have an adequacy decision from the EU). Rosenthal told *PL&B* that these have not yet been added.

"No, and we are still awaiting the adequacy decision for the Switzerland - US Data Protection Framework, as Switzerland is currently being reviewed for adequacy by the US for the purpose of becoming a qualifying state under Executive Order 14086. The reason for Japan and South Korea missing on the Swiss adequacy list is that some of the data protection assurances that were given to the EU by these countries do not apply to Switzerland. However, using the EU Standard Contractual Clauses as a transfer method is no problem nowadays. In fact, our Intra-Group Data Transfer Agreement has been one of our best-selling products, as groups of companies will always also have data flows into countries without adequacy decisions. And don't forget about more and more foreign data protection laws requiring their own transfer safeguards, as well."

Argentina

Pablo A. Palazzi, Director at CETyS University told *PL&B*: "Argentina's data protection law is 24 years old, nearly a quarter of a century. Despite that, Argentina managed to maintain adequacy due to a legal change in 2017 of the DPA structure created the required independence. Basically the government moved the data protection unit (the then existing DPA) from the Ministry of Justice and put it under the umbrella of the FOIA agency that was already independent by law."

"Argentina also approved Convention 108 and Convention 108+ within three years. According to the Constitution of Argentina, international treaties are superior to the law and self-executory in some of their clauses, so the Argentine legal system was automatically modernized with these two treaties. For example, automatic decision-making rules to be applied against the private sector are not recognized in the law, but Convention 108+ applies and fills the gap. There are also important supreme court cases that have shaped the law in these 24 years."

Guernsey

Guernsey, a self-governing British Crown dependency in the English Channel, received its original adequacy decision in 2003. The renewed adequacy decision was welcomed by Bailiwick of Guernsey's new Data Protection Commissioner, *Brent Homan*: "This is excellent news for Guernsey residents and the Bailiwick economy which is largely driven by a financial services sector where protected data flows are paramount."

"We look forward to further partnership with our regulated community towards preserving Adequacy, with a public and private sector that embraces compliance and elevates the level of trust and consumer confidence."

Commenting on the decision, *Richard Thomas*, Chairman of the Data Protection Authority, and previous UK Data Protection Commissioner said: "The Adequacy decision is based on both the substance of the Bailiwick's Data Protection Law and how it is enforced in practice. We can all be very proud that the independence and the effectiveness of Guernsey's data protection regime has been recognised in this way."

New Zealand

Commenting on New Zealand's decision, Privacy Commissioner, *Michael Webster* said: "Privacy regulation supports the digital economy, with the Privacy Act being the only statute that requires data security safeguards to be in place; that underpins our relationships with key trading partners, which is crucial for any global operator. An example of that is New Zealand's $400 million video and computer games sector, which is enabled by good data protection standards."

"Now is the time for New Zealand to evolve our data protection laws if we want to retain adequacy. We live in dynamic times with significant technological advancements, yet we're operating on a Privacy Act that is based on policies agreed in 2013."

The European Commission noted the Privacy Amendment Bill 2023 as a positive move. The Commissioner is keen to support progress on that, and has made recommendations.

INFORMATION

See the EU Commission's report at ec.europa.eu/commission/presscorner/detail/en/ip_24_161
and country reports at commission.europa.eu/document/f8229eb2-1a36-4cf5-a099-1cd001664bff_en

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