

PAUL
HASTINGS

RESPONSES TO THE DECISION IN CASE C-311/18 (SCHREMS II)

How Are Governments Reacting
To The Invalidation of Privacy Shield?



Table of Contents – click to go to page

DPAs			
<u>Austria</u>	3	<u>Italy</u>	7
<u>Belgium</u>	3	<u>Jersey</u>	7
<u>Bulgaria</u>	3	<u>Latvia</u>	7
<u>Croatia</u>	3	<u>Liechtenstein</u>	7
<u>Cyprus</u>	3	<u>Lithuania</u>	7
<u>Denmark</u>	3	<u>Luxembourg</u>	7
<u>Estonia</u>	3	<u>Malta</u>	8
<u>Finland</u>	3	<u>The Netherlands</u>	8
<u>France</u>	3	<u>Norway</u>	8
<u>Germany – Baden-Württemberg</u>	4	<u>Poland</u>	8
<u>Germany – Bavaria</u>	4	<u>Romania</u>	9
<u>Germany – Berlin</u>	4	<u>Slovakia</u>	9
<u>Germany – Brandenburg</u>	4	<u>Slovenia</u>	9
<u>Germany – Federal Commissioner for Data Protection and Freedom of Information (BfDI)</u>	4	<u>Spain</u>	9
<u>Germany – Hamburg</u>	5	<u>Sweden</u>	9
<u>Germany – Rhineland-Palatinate</u>	5	<u>Switzerland</u>	10
<u>Germany – Saxony-Anhalt</u>	5	<u>United Kingdom</u>	10
<u>Germany – Thuringia</u>	6	Other Bodies	
<u>Hungary</u>	6	<u>Germany Datenschutzkonferenz (DSK)</u>	11
<u>Ireland</u>	6	<u>European Commission</u>	11
		<u>European Data Protection Board</u>	12
		▪ <u>EDPB FAQs</u>	12
		<u>European Data Protection Supervisor</u>	15
		<u>European Parliament</u>	15
		<u>U.S. Department of Commerce</u>	16

DPA	Response	Source
Austria	<ul style="list-style-type: none"> Acknowledged the decision and provided links to the CJEU official documents and the EDPB FAQs. It was also noted that whilst Privacy Shield was declared invalid, this does not mean all transfers of personal data to the U.S. are prevented. 	Click here
Belgium	<ul style="list-style-type: none"> The DPA acknowledged and summarised the decision, and confirmed it is working with the EDPB to examine the consequences. The DPA stated that it is making every effort to protect the fundamental right to data protection whilst also the ability to transfer personal data from the EU to third countries. 	Click here
Bulgaria	<ul style="list-style-type: none"> Acknowledged the decision and provided links to the CJEU official documents and the EDPB FAQs. 	Click here
Croatia	<ul style="list-style-type: none"> Acknowledged the decision and provided links to the CJEU official documents and the EDPB FAQs. 	Click here
Cyprus	<ul style="list-style-type: none"> Acknowledged the decision and confirmed that while SCCs remain in force, organisations that use or intend to use the SCCs should consider the surveillance status of the country. If a satisfactory level of protection is not provided then the organisation should not allow or suspend any transmission of data and take additional protection measures where needed. 	Click here
Denmark	<ul style="list-style-type: none"> Acknowledged the decision and referred to the initial statement and further FAQs from the European Data Protection Board (each as detailed below). DPA will continue to monitor and provide updates on the decision. 	Click here Click here: EDPB FAQs
Estonia	<ul style="list-style-type: none"> Organisations relying on Privacy Shield need to review current transfers of personal data and consider implementing replacement mechanism to transfer affected personal data, including the SCCs. 	Click here
Finland	<ul style="list-style-type: none"> Acknowledged the decision and concluded to provide further information on the effects of the judgment in due course. The DPA acknowledged the judgment and made reference to the initial FAQs of the EDPB, explaining that the aim of these is to provide initial clarification and preliminary guidance on the use of tools to transfer personal data to third countries. The DPA confirmed that it will provide updates with further guidance as the EDPB continues to examine and assess this CJEU judgment. 	Click here Click here: EDPB FAQs
France	<ul style="list-style-type: none"> Acknowledged the decision and confirmed it is currently conducting a precise analysis of the judgment. Acknowledges and restates the EDPB FAQs (as detailed further below). 	Click here Click here: EDPB FAQs

DPA		Source
Germany - Baden-Württemberg	<ul style="list-style-type: none"> The DPA published guidelines on how to apply the decision, particularly what immediate steps companies transferring personal data internationally should take and what measures can be implemented to ensure data is protected. The immediate steps include making an inventory of international data transfers and contacting all relevant service providers to make them aware of the decision. With respect to measures to implement, the DPA suggested certain amendments that could be made to the text of the SCCs, including extending the notification requirement under 5(d)(i) to the relevant data subjects and also confirming that if disclosure is not permitting by the laws of the importing jurisdiction, the entity should discuss the matter with the supervisory authority. 	Click here: Guidelines
Germany – Bavaria	<ul style="list-style-type: none"> The DPA summarises the DSK press release and publishes a link to the statement (as detailed further below). 	Click here
Germany – Berlin	<ul style="list-style-type: none"> Transfers of personal data to the U.S. are currently not possible since U.S. law does not provide for an adequate level of protection. Controllers who are subject to the supervision of the Berlin DPA are encouraged to switch immediately to service providers within the EU or a country providing an appropriate level of protection. 	Click here: full statement Click here
Germany- Brandenburg	<ul style="list-style-type: none"> The DPA summarises the DSK press release and publishes a link to the statement (as detailed further below). 	Click here
Germany – Federal Commissioner for Data Protection and Freedom of Information (BfDI)	<ul style="list-style-type: none"> The decision has confirmed and strengthened the role of data protection supervisory authorities. Transfers of personal data to the U.S. are still possible subject to implementing the additional safeguards explained by the CJEU. Both companies and authorities as well as the supervisory authorities now have the complex task of practising the judgment. The BfDI will make further comments in due course with the main focus being on the revision of the standard contractual clauses by the European Commission, as well as the need for the U.S. to ensure that the fundamental rights of the EU citizens are assimilated to those of U.S. nationals. The Federal Commissioner, Professor Ulrich Kelber issued a statement on the back of the EDPB FAQs publication, stating that “it is important that the European data protection supervisory authorities give their supervised bodies intensive advice on alternative bases for international data exchange.” 	Click here

DPA	Response	Source
Germany – Rhineland-Palatinate (continued)	<ul style="list-style-type: none"> • Proposes a five-step assessment for companies that wish to use SCCs: <ol style="list-style-type: none"> 1. Do I transfer data to countries outside of the EU/EEA? 2. If yes: Do I use SCCs for this third country data transfer? 3. If yes: Is the data importer in the third country, or one of its sub-contractors, subject to obligations that violate Article 7 or Article 8 of the Charter? <ol style="list-style-type: none"> a) Generally the case for telecommunication companies in the U.S. because of FISA 702. b) Unencrypted data over transatlantic cables may be monitored in the U.S. according to Executive Order 12333. 4. If yes: Can an alternative transfer instrument be used in accordance with Chapter V GDPR or does Art. 49 GDPR apply? 5. If no: Data transfers to this recipient are no longer possible. • The DPA also published a link to the DSK press release (as detailed further below), stating that the German data protection supervisory authorities have clarified their common stance on the matters. 	Click here: DSK press release
Germany – Thuringia	<ul style="list-style-type: none"> • The decision by the CJEU is welcomed by the DPA, in particular with respect to the shortcomings of the ombudsperson mechanism. • Deems it unlikely that it is still possible to legally transfer data to the U.S. using SCCs. • DPAs will need to increase their enforcement activities on this issue. 	Click here
Hungary	<ul style="list-style-type: none"> • The supervisory authorities should suspend or prohibit the transfer of personal data to a third country if they consider that the transfer does not comply with the general data protection clauses in the third country or the clauses cannot be respected there. 	Click here
Ireland	<ul style="list-style-type: none"> • The decision by the CJEU is welcomed by the DPA, noting that the judgment firmly endorses the substance of the concerns expressed by the DPA in the original proceedings. • The use of the SCCs to transfer personal data to the U.S. is “questionable”. This an issue that will require further examination. • Acknowledges the central role for supervisory authorities across the EU and looks forward to giving the judgment meaningful and practical effect. • Following the decision of the CJEU, initial reports of the preliminary order issued by the DPA suggest that transfers of personal data to the U.S. have been ordered to cease. Official confirmation of this order and its content are yet to be publicised. 	Click here

DPA	Response	Source
Italy	<ul style="list-style-type: none"> The DPA has acknowledged the CJEU judgment and provided access to the initial EDPB FAQs (as detailed further below). 	Click here
Jersey	<ul style="list-style-type: none"> The DPA is considering the decision of the CJEU and its potential impact upon Jersey-based businesses who use the EU-U.S. Privacy Shield mechanism for data transfers to the U.S.. It stated that “we understand there may be significant implications for businesses using the Privacy Shield mechanism for international data transfers (...) we will be working with local business sectors to understand the implications and will be revising our current guidance note on international data transfers in due course.” The DPA issued a blog post which provides a list of five steps Jersey companies should consider before transferring personal data to the U.S., including mapping out data flows, re-assessing affected processor contracts and monitoring the news for the updates. The DPA published a blog on applying the decision which focused on the “unanswered questions” which arose from the decision, such as: how should data exporters analyse the access to personal data by public authorities in importing jurisdictions; and, with respect to implementing it as an additional safeguard, how will encryption be used in practice and to what degree of success? 	Click here Click here: Blog Click here: Blog
Latvia	<ul style="list-style-type: none"> Acknowledged the decision and provided links to the CJEU official documents and the EDPB FAQs. 	Click here
Liechtenstein	<ul style="list-style-type: none"> Data transfers made using Privacy Shield are no longer permitted, and those organisations relying on Privacy Shield should immediately switch to another mechanism. The DPA refers to the possibility of a replacement agreement between the U.S. and the EU Commission relating to data transfers. The DPA is in the process of analysing the decision and its consequences for data transfers to third countries and will publish further instructions on this shortly. 	Click here Click here: International Transfers
Lithuania	<ul style="list-style-type: none"> Acknowledged the decision and concluded to provide further information on the effects of the judgment in due course. 	Click here
Luxembourg	<ul style="list-style-type: none"> The DPA has acknowledged the CJEU judgment and provided access to the initial FAQs of the EDPB (as detailed further below). 	Click here

DPA	Response	Source
Malta	<ul style="list-style-type: none"> The DPA has acknowledged the CJEU judgment and provided access to the initial FAQs of the EDPB (as detailed further below). 	Click here
The Netherlands	<ul style="list-style-type: none"> Organisations currently relying on Privacy Shield must consider what other mechanisms may be used to transfer personal data to the U.S. Currently examining the practical consequences of the decision and next steps within the EDPB. 	Click here
Norway	<ul style="list-style-type: none"> Organisations currently relying on Privacy Shield must consider what other mechanisms may be used to transfer personal data to the U.S. The DPA will, in collaboration with other DPAs, provide further guidance on how companies can comply with the decision. The DPA published Q&As, largely reflecting those of the EDPB and also stated that it will no longer be sufficient to use a valid transfer basis such as the SCCs or BCRs alone – additional considerations are required as outlined in the CJEU decision. The DPA further confirms in the Q&As that any transfer of personal data to a third country would be illegal if the relevant organisation: lacks the resources or expertise to carry out the necessary assessments as required by the judgment; is unsure as to the outcome of the assessment; or if additional measures are required following the assessment and it does not know what measures would be sufficient. 	Click here Click here: Q&A
Poland	<ul style="list-style-type: none"> The DPA underlines the necessity of a “coherent approach” to the assessment of the consequences of the CJEU decision throughout the EU and the necessity of joint actions in this respect by national supervisory authorities cooperating within the EDPB, in which the DPA is involved. The DPA has referenced the initial FAQs and confirmed that it will provide updates as the EDPB continues to examine and assess the CJEU judgment. 	Click here Click here: FAQs

DPA	Response	Source
Romania	<ul style="list-style-type: none"> Organisations currently relying on Privacy Shield must consider what other mechanisms may be used to transfer personal data to the U.S. SCCs are still a valid mechanism for transferring personal data to the U.S. The DPA acknowledged the judgment and made reference to the initial FAQs, explaining that the aim of these is to provide initial clarification and preliminary guidance on the use of tools to transfer personal data to third countries. The DPA confirmed that it will provide updates with further guidance as the EDPB continues to examine and assess this CJEU judgment. The DPA has acknowledged the CJEU judgment and provided access to the initial FAQs of the EDPB (as detailed further below). 	Click here Click here: EDPB FAQs
Slovakia	<ul style="list-style-type: none"> The DPA acknowledged the judgment and made reference to the initial FAQs of the EDPB (as detailed further below), explaining that the aim of these is to provide initial clarification and preliminary guidance on the use of tools to transfer personal data to third countries. The DPA confirmed that it will provide updates with further guidance as the EDPB continues to examine and assess this CJEU judgment. 	Click here: Statement Click here: FAQs
Slovenia	<ul style="list-style-type: none"> Organisations currently relying on Privacy Shield must ensure that an alternative transfer mechanism is implemented as soon as possible to transfer personal data to the U.S. If this is not possible, personal data must not be transferred to the U.S. 	Click here
Spain	<ul style="list-style-type: none"> The DPA indicates the importance of the CJEU decision regarding the fundamental right of data protection, particularly in the framework of international transfers to third countries. The DPA will continue to work together with the other the DPAs on a harmonised response at an EU level and will participate in the work carried out to adopt a common approach, thus guaranteeing a consistent application of the judgment in all the countries of the EU. The DPA provided a translation of the EDPB FAQ document. 	Click here Click here: FAQ Translation
Sweden	<ul style="list-style-type: none"> Transfers of personal data pursuant to Privacy Shield are no longer allowed. The DPA acknowledged the decision and explained the effects on transfers of personal data to third countries. The DPA stated that, following the decision, organisations should map their data flows and undertake a review of the regimes of those third countries which personal data is transferred to. 	Click here Click here: Guidance

DPA	Response	Source
Switzerland	<ul style="list-style-type: none"> The DPA acknowledged the CJEU ruling and posted a link to the CJEU press release, but stated that it is not directly applicable to Switzerland. The DPA published a policy paper as part of its annual assessment of the Swiss-US Privacy Shield whereby it declared that it no longer considers the Swiss-U.S. Privacy Shield adequate for the purposes of transferring personal data from Switzerland to the U.S. Whilst the DPA does not have the authority to invalidate the Swiss-U.S. Privacy Shield it has removed the U.S. from its list of adequate countries and therefore it is likely that companies based in Switzerland will follow the DPA's declaration. The key justifications of the DPA in its determination are very similar to those of the CJEU in its decision to invalidate Privacy Shield. In the policy paper, the DPA also referred to the SCCs and, following the CJEU decision, noted that in certain circumstances, personal data may not be adequately protected when using such. The DPA stated that when using the SCCs, a risk assessment should be undertaken to determine whether the SCCs cater for the risks presented to personal data in that country. If the SCCs do not, the clauses should be "expanded" although the DPA acknowledges that this may be of "limited effect if the public law of the...[importing] country takes precedence and deviates from these". In addition, the exporter must consider technical measures that protect the personal data such as encryption. If the implementation of additional measures is not possible, the DPA recommends "refraining" from transferring personal data. 	<p>Click here</p> <p>Click here: statement</p> <p>Click here: Policy Paper</p>
United Kingdom	<ul style="list-style-type: none"> Acknowledged the decision and concluded to provide further information on the effects of the judgment in due course. The decision confirms the importance of safeguards for personal data transferred out of the UK. The European Commission and EDPB will provide more comprehensive guidance on necessary extra measures that may be needed. In the meantime all international transfers should be monitored so that swift action can be taken as guidance and advice becomes available. The EDPB has recommended that a risk assessment must be conducted as to whether SCCs provide enough protection within the local legal framework, whether the transfer is to the U.S. or elsewhere. The receiver of the data may be able to assist with this. The CJEU judgment confirmed that supervisory authorities have an important role to play in the oversight of international transfers. Further consideration is being taken for what this means in practice but the DPA states it will continue to apply a risk-based and proportionate approach in accordance with its Regulatory Action Policy. 	<p>Click here: Statement</p> <p>Click here: Updated Statement</p>

Other Body	Response	Source
<p>European Commission Continued</p>	<p>The European Commission has issued its draft Implementing Decision on standard contractual clauses for the transfer of personal data to third countries (the “Draft SCCs”) which will be open for feedback until 10 December 2020. Key takeaways from the Draft SCCs are as follows:</p> <ul style="list-style-type: none"> • The Draft SCCs are in line with the principles of the GDPR, and include obligations on the parties that closely follow the obligations on organisations processing personal data under the GDPR. • The terms of the Draft SCCs are broken down into 4 modules which represent the 4 possible transfer relationships, i.e. controller to controller, controller to processor, processor to sub-processor, and processor to controller. • Certain of the provisions in the Draft SCCs appear to have been updated in light of the Schrems II decision, for example clauses 2 and 3. 	<p>Click here: Draft SCCs</p>
<p>European Data Protection Board (EDPB) Continued on next slide</p>	<ul style="list-style-type: none"> • The EDPB welcomes the CJEU’s decision as it highlights the right to privacy in the context of the transfer of personal data to third countries, and is “one of great importance”. • The EDPB notes that it previously questioned Privacy Shield in its reports. • With respect to the assessment of whether the countries which data are sent offer adequate protection, the EDPB states that the exporter shall take into consideration the content of the SCCs, the specific circumstances of the transfer, as well as the legal regime applicable in the importer’s country. The examination of the latter shall be done in light of the non-exhaustive factors set out under Art 45(2) GDPR. • The EDPB is looking further into what the additional measures could consist of. 	

Other Body	Response	Source
<p>European Data Protection Board (EDPB) Continued</p> <p>Paul Hastings LLP</p>	<p>The EDPB issued a statement in which the following points were conveyed:</p> <ul style="list-style-type: none"> • The EDPB confirmed it has created a taskforce to consider the 101 complaints filed by the NOYB with DPAs across the EU. • The EDPB also confirmed it has created another taskforce with the purpose of preparing recommendations to assist controllers and processors with their duty to identify and implement appropriate supplementary measures to ensure adequate protection when transferring data to third countries. <p>The EDPB has released its Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data (the “Recommendations”). On 19 November 2020, the EDPB met for its 42nd plenary discussion to discuss further updates to the Recommendations. The members of the EDPB agreed to extend the deadline for the public consultations to the Recommendations, from 30 November 2020 until 21 December 2020. The Recommendations are intended to assist exporters with assessing third countries and identifying appropriate supplementary measures to protect personal data where needed. The Recommendations provide exporters with six steps to follow when transferring personal data to a third country:</p> <ol style="list-style-type: none"> 1. Know your transfers: all transfers of personal data should be recorded and mapped, including onward transfers. 2. Identify transfer tools: for the transfers mapped, identify which transfer tool under Chapter V of the GDPR (e.g., an adequacy decision or Standard Contractual Clauses (“SCCs”)) is currently relied upon. 3. Assess whether the transfer tool is effective: this step requires an analysis be undertaken (in collaboration with the importer if relevant) of the laws and practices of the third country to determine whether any such may “impinge on the effectiveness of the appropriate safeguards” provided by the transfer tool being relied upon. 4. Adopt supplementary measures: if step 3 has revealed the transfer tool is not effective, the exporter must consider (in collaboration with the importer if relevant) if supplementary measures, when added to the existing safeguards, could ensure the personal data is afforded protection essentially equivalent to that guaranteed in the EU. In this respect, Annex 2 of the Recommendations provides a non-exhaustive list of example technical, contractual and organisational measures that could be considered. 5. Procedural steps: if effective supplementary measures have been identified, the EDPB notes certain procedural steps that may be required before use. 6. Re-evaluate at appropriate intervals: the exporter must monitor, on an ongoing basis, developments in the third country that could affect the initial assessment. 	<p>Click here</p> <p>Click here: Recommendations</p>

Other Body	Response	Source
European Data Protection Supervisor (EDPS)	<p>The EDPS issued a statement in which the following points were conveyed:</p> <ul style="list-style-type: none"> The EDPS welcomes the CJEU's decision as it reaffirmed the importance of maintaining a high level of protection of personal data transferred from the EU to third countries. DPAs have the duty to diligently enforce the applicable data protection legislation and, where appropriate, to suspend or prohibit transfers of data to a third country. As the supervisory authority of the EU institutions, bodies, offices and agencies, the EDPS is carefully analysing the consequences of the judgment on the contracts concluded by EU institutions, bodies, offices and agencies. <p>The EDPS issued its <i>Strategy for Union institutions, offices, bodies and agencies to comply with the 'Schrems' II Ruling</i>. The Strategy includes the following:</p> <ul style="list-style-type: none"> The Strategy seeks to address both short and medium term actions for EU institutions, bodies, offices and agencies ("EUIs") and the EDPS to monitor and ensure EUIs compliance with the judgment. The EDPS issued an order to EUIs for them to complete a mapping exercise identifying which on-going contracts, procurement procedures and other types of cooperation involve transfers of data. The EDPS will provide guidance and pursue compliance and/or enforcement actions for transfers towards the U.S. or other third countries on a case-by-case basis. EUIs will be asked to carry out case-by-case Transfer Impact Assessments to identify whether an essentially equivalent level of protection as provided in the EU is afforded in the third country of destination. With regard to new processing operations or new contracts with service providers, the EDPS strongly encourages EUIs to avoid processing activities that involve transfers of personal data to the U.S. The EDPS will continue to cooperate closely with other regulators and the EDPB to ensure the consistent implementation of the judgment in the EEA. 	<p>Click here: Statement</p> <p>Click here: Strategy</p>
European Parliament Continued on next slide	<ul style="list-style-type: none"> On 3 September 2020, the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament held a meeting to discuss the future of EU-U.S. data flows following the CJEU decision. There were several speakers at the meeting, including Commissioner Reynder and Max Schrems, and the key takeaways are as follows: 	<p>Click here</p>

Other Body	Response	Source
<p>European Parliament Continued</p>	<ul style="list-style-type: none"> The European Commission is focusing on the following tasks: 1) working with DPAs and the EDPB to prepare guidance on transferring personal data internationally; 2) updating the SCCs; and 3) working with the U.S. on a strengthened framework for transferring personal data. The Commission is planning to launch the adoption process for the new SCCs in the coming months with the hope of finalizing by the end of 2020. The new SCCs will take into account the updates to the law introduced by the GDPR (including Article 28) and the recent CJEU decision. As regards the 101 complaints filed in August by NOYB across the EU, EDPB has created a taskforce to ensure the complaints are handled uniformly. 	
<p>U.S. Department of Commerce Continued on next slide</p>	<ul style="list-style-type: none"> The U.S. Department of Commerce will continue to administer the Privacy Shield program, including processing submissions for self-certification and re-certification to the Privacy Shield Frameworks and maintaining the Privacy Shield List. <p>The Department has published its own set of 5 FAQs following the Schrems II judgment. The key messages:</p> <ul style="list-style-type: none"> The Privacy Shield is no longer a valid mechanism to comply with EU data protection requirements when transferring personal data from the EU to the U.S.. The CJEU decision does not relieve participants in the Privacy Shield of their obligations under the Privacy Shield Framework. There is no grace period during which an organization can continue transferring data to the U.S. without assessing its legal basis for the transfer – there will be no delay or moratorium on enforcement by EU DPAs. The U.S. remains committed to working with the EU to ensure continuity in transatlantic data flows and privacy protections. U.S. based participants of Privacy Shield should continue to comply with their obligations under the framework. This is expected by the Federal Trade Commission and will demonstrate a “serious commitment” to protecting personal data. The U.S. Department of Commerce will continue to administer the Privacy Shield program, including processing submissions for self-certification and re-certification to the Privacy Shield Frameworks and maintaining the Privacy Shield List. 	<p>Click here</p> <p>Click here: FAQs</p>

Other Body	Response	Source
<p>U.S. Department of Commerce Continued</p>	<p>The Department has published its own set of 5 FAQs following the Schrems II judgment. The key messages:</p> <ul style="list-style-type: none"> • The Privacy Shield is no longer a valid mechanism to comply with EU data protection requirements when transferring personal data from the EU to the U.S.. • The CJEU decision does not relieve participants in the Privacy Shield of their obligations under the Privacy Shield Framework. • There is no grace period during which an organization can continue transferring data to the U.S. without assessing its legal basis for the transfer – there will be no delay or moratorium on enforcement by EU DPAs. • The U.S. remains committed to working with the EU to ensure continuity in transatlantic data flows and privacy protections. • U.S. based participants of Privacy Shield should continue to comply with their obligations under the framework. This is expected by the Federal Trade Commission and will demonstrate a “serious commitment” to protecting personal data. <p>The European Commission and U.S. Department of Commerce released a statement to confirm they have initiated discussions to evaluate the potential for an enhanced EU-U.S. Privacy Shield framework to comply with the CJEU judgment.</p> <p>The U.S. Department of Commerce, alongside the Department of Justice and the Office of the Director of National Intelligence, published a White Paper aimed at providing information on the privacy practices in the U.S., focusing on intelligence agency access. The White Paper is intended to aid those organisations undertaking a review of the U.S. as an importing jurisdiction following the CJEU's commentary on the SCCs. The White Paper discusses three key areas:</p> <ul style="list-style-type: none"> • Most companies do not process data that would be “of any interest” to the U.S. intelligence agencies. • The U.S. government frequently shares intelligence information with EU Member States, including that held by the U.S. government pursuant to a FISA 702 order, to counter threats such as terrorism. • U.S. law provides privacy protections that are publically available and were not considered by the CJEU in its decision. 	<p>Click here</p> <p>Click here: FAQs</p> <p>Click here: Joint Statement</p> <p>Click here: White Paper press release</p> <p>Click here: White Paper:</p>

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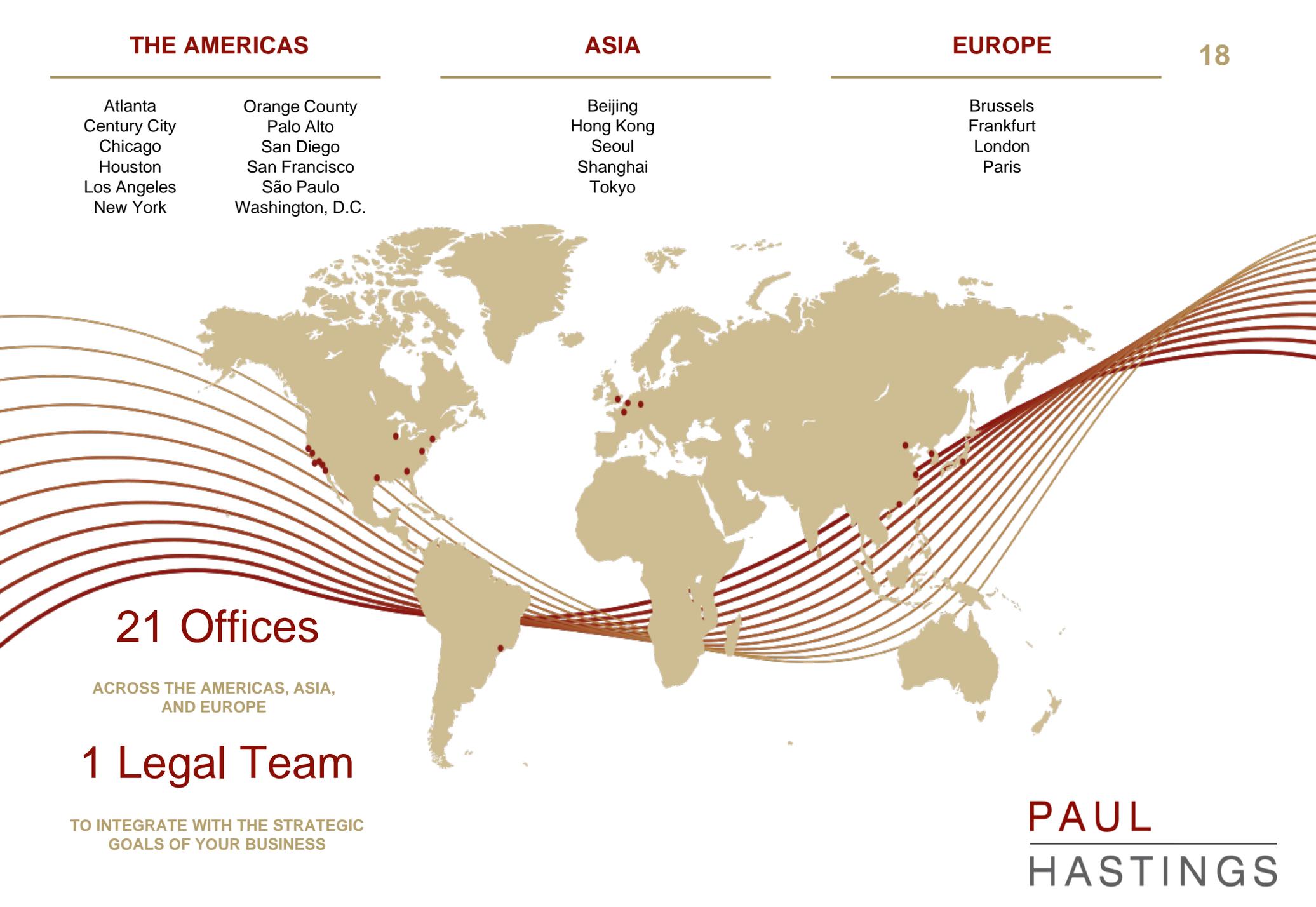
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