

Schrems II: The Future of International Data Transfers



Thursday October 29, 2020



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Overview of Data Transfers and the Schrems II Decision



CJEU Judgement “Schrems II” – Overview

CJEU invalidated the EU-US-Privacy Shield as US laws do not offer a level of protection that is "substantially equivalent" to EU laws.

Transfers based on the EU-US-Privacy Shield are unlawful. CJEU did not grant a grace period.

SCCs remain valid. However, an organization (data exporter) must (i) investigate the applicable laws in the destination country, incl. the surveillance laws, and (ii) terminate the transfer if it appears that the SCCs cannot be complied with because of those applicable laws.

If the exporter does not terminate the transfer, the competent data protection authority in Europe may suspend transfers.

CJEU has recognized the possibility for contractual clauses between exporters and importers of personal data to contain supplementary measures to ensure an essentially equivalent level of protection as the one provided in the EEA.



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What is the immediate impact for US companies?



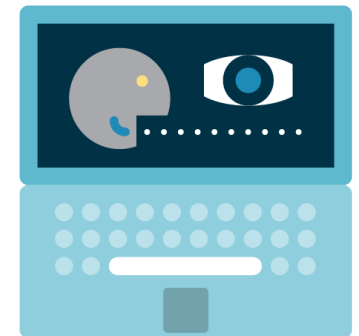
Impact of the CJEU's decision on US controllers and processors

Controllers

1. Stop relying on EU-U.S. Privacy Shield for any US data transfers
2. Identify relevant transfers (including those of processors)
3. Assess alternatives: (A) suspend / end transfer; (B) switch to other transfer mechanism
4. Pro-actively approach processors and enquire about options / require alternative solution
5. Move quickly: no grace period & accountability

Processors

1. Assess whether using the Privacy Shield
2. Externally - Be pro-active by contacting (key) customers, website and FAQs
3. Internally - Train customer support teams to respond to initial queries
4. Review existing agreements
5. Identify sub-processor flow-down arrangements



Practical steps for in-house counsel

1. Carry out customer contract reviews
2. Be ready for audits by customers and other audits on GDPR compliance
3. Consider InterCompany Agreements
4. Assess impact on employee data transfers
5. Identify documents to update:
 - a. SCC addenda language - for customers
 - b. Vendor SCCs; contractors in the EU (personal data going to US company/HQ)
 - c. Privacy Policy
 - d. GDPR Statement - outbound vendors; to customers
 - e. Cookies Banner



3 What are the EU data protection supervisory authorities saying?



Guidance and updates so far.....

- DPA guidance has been harmonized to some extent – EDPB [Q&A](#) dated 23 July 2020
- Various guidance from local EU regulators: *use of SCCs to transfer data to the U.S. is “questionable” (Ireland), “not possible” (Berlin), “still possible” (Federal DPC Germany)*
- Further guidance on supplementary measures expected. Timing?
- Action by Irish DPC in Schrems II case
- Complaints and legal action by data subjects

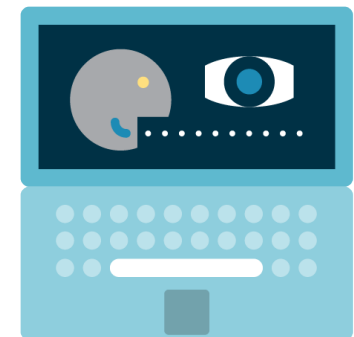
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Using SCCs going forward



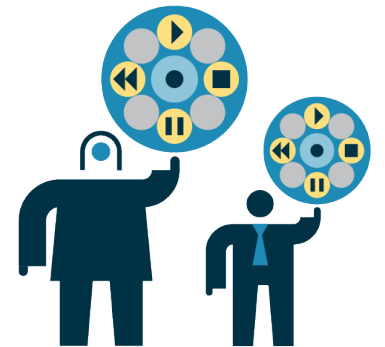
Using SCCs in the future

- Must be a case by case assessment - not a tick box exercise
- Companies should assess the risk
- What are the risk factors:
 - type & volume of the data
 - nature/purpose of processing
 - importing country
 - sector
 - terms of existing contracts
- Keep records



What "supplementary measures" are expected?

- Warrant canary approach (similar to art. 5a of the SCC)
- Provision of information by the importer of the history of requests (e.g. transparency reports)
- Cryptography
- Pseudonymisation
- Access controls
- Keeping data in the EU?



5 What alternative transfer mechanisms are there?



Alternative measures?

- Consent?
- Other derogations under 49 GDPR (EDPB Guidelines 2/2018)
- Future adequacy decisions
- Ad hoc decisions adopted by supervisory authorities
- Binding Corporate Rules
- Codes of conduct / certifications (46e-f GDPR)



6 Impact on data transfers post-Brexit



Post-Brexit transfer issues

- 1 January 2021 - restrictions on transfers from EEA to UK
- Likelihood of an adequacy decision for the UK?
- Will there be a UK/USA version of Privacy Shield?
- Preparation:
 - beware of short timeframe
 - consider options – 'wait and see' v. act now?
 - intra-group arrangements v. third party contracts
 - future-proofing contracts

Q&A



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Reference materials

- EDPB Frequently Asked Questions on the Schrems II case:

https://edpb.europa.eu/our-work-tools/our-documents/other/frequently-asked-questions-judgment-court-justice-european-union_en

- CJEU Case C-311/18 judgment of the Court of Justice of the European Union in Case C-311/18 - Data Protection Commissioner v Facebook Ireland Ltd and Maximillian Schrems - text of judgement:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=228677&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=9791227>

- Osborne Clarke article on Schrems II case – "Latest European privacy decision adds complexity and uncertainty for cross-border data transfers, particularly to the U.S":

<https://www.osborneclarke.com/insights/latest-european-privacy-decision-adds-complexity-uncertainty-cross-border-data-transfers-particularly-u-s/>

Thank you

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