



International Transfer after the Schrems II ruling

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Agenda

- **Introduction**
- **Impact of the invalidation of the EU-US Privacy Shield**
- **The concept of Standard Contractual Clauses (SCC)**
- **Practical conclusions**



Overview

The EU General Data Protection Regulation (GDPR) was adopted to serve a dual-purpose: facilitating the free flow of personal data within the European Union, while preserving the fundamental rights and freedoms of individuals, in particular their right to the protection of personal data.

Schrems II Judgement

- The European Union ("**CJEU**") in its judgment on 16 July 2020 in *Data Protection Commissioner v Facebook Ireland Limited, Maximillian Schrems* (Case C-311/1) (also commonly known as "**Schrems II**") declared invalid EU-US Privacy Shield as a lawful mechanism for exporting data to the US
- It upheld the EU Standard Contractual Clauses ("**SCCs**") as a lawful mechanism for data exports, but subject to an assessment of the recipient territory's laws and the potential need to put in place "supplementary measures" to ensure that exported EU data remains protected to a standard that is "essentially equivalent" with EU law

Historical perspective:
standard contractual
clauses (SCC) for the
transfer of personal
data to processors
established in third
countries

Introduced by the Commission Decision 2002/16/EC of 27 December 2001 (under Directive 95/46/EC) in order to **facilitate the transfer of personal data from a data controller established in the European Union to a processor established in a third country which does not offer adequate level of protection.**



Adequate level of protection

- The European Commission has the power to determine, on the basis of article 45 of Regulation (EU) 2016/679 whether a country outside the EU offers an adequate level of data protection.
- The effect of such a decision is that personal data can flow from the EU (and Norway, Liechtenstein and Iceland) to that third country **without any further safeguard being necessary**. In others words, transfers to the country in question will be assimilated to intra-EU transmissions of data.
- The European Commission has so far recognized Andorra, Argentina, Canada (commercial organizations), Faroe Islands, Guernsey, Israel, Isle of Man, Japan, Jersey, New Zealand, Switzerland and Uruguay as providing adequate protection.
- Adequacy talks are ongoing with South Korea.
- Informal talks: next in the queue: UK

Revision of SCC

ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12740-Commission-Implementing-Decision-on-standard-contractual-clauses-between-controllers-and-processors-located-in-t..

Law

Data protection - standard contractual clauses between controllers & processors located in the EU (implementing act)

[Have your say](#) > [Published initiatives](#) > Data protection - standard contractual clauses between controllers & processors located in the EU (implementing act)

Draft act

Feedback period

12 November 2020 - 10
December 2020

FEEDBACK: OPEN

UPCOMING

Commission adoption

About this initiative

Topic	Justice and fundamental rights
Type of act	Implementing decision
Committee	C49000 ↗

Draft act

FEEDBACK: OPEN

Type

Draft implementing decision

[More about draft acts](#)

Feedback period

12 November 2020 - 10 December 2020 (midnight Brussels time)

Public consultations on tools supplementing transfer



https://edpb.europa.eu/our-work-tools/public-consultations-art-704_en

Toolbox | Hejplink | Hazte Miembro | AP... | UK Privacy Assoc | H2020 grants manual | The SUMMIT 2019 -... | On-Demand Webina... | Using and Re

Public Consultations

We organise public consultations to gather the views and concerns of all interested stakeholders and citizens.

Please note that we might publish your answers on our website. Each consultation will have a privacy statement, which states how we process your personal data and what rights you have.

Open Public Consultations

Title	Start Date	End Date
Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data	11 November 2020	21 December 2020

Application of SCC after the Schrems II judgement

- Adding Data Transfer Impact Assessment → detecting a **risk that the EEA data you transfer may be subject to non- EEA government access application of supplementary measures as e.g.:** encryption in transit, Encryption at rest, contractual or policy commitments from the processor limiting or prohibiting government access to data; data hosting in the EEA (to minimise non-EEA data flows)

If not SCC, then what?



- As per Chapter V of GDPR:
international transfer might be possible based on binding corporate rules, code of conduct (art. 46);
derogations (art. 49)

1. ¹ In the absence of an adequacy decision pursuant to [Article 45\(3\)](#), or of appropriate safeguards pursuant to [Article 46](#), including binding corporate rules, a transfer or a set of transfers of personal data to a third country or an international organisation shall take place only on one of the following conditions:
 - (a) the data subject has explicitly consented to the proposed transfer, after having been informed of the possible risks of such transfers for the data subject due to the absence of an adequacy decision and appropriate safeguards;
 - (b) the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of pre-contractual measures taken at the data subject's request;
 - (c) the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and another natural or legal

Derogations (narrow interpretation)



Thank you

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