

EU Data Exports After Schrems II – Guidance by data protection authorities

The table below sets out the guidance provided by data protection authorities (DPA) in response to the European Court of Justice’s landmark judgment in [Case C-311/18 Data Protection Commissioner v. Facebook Ireland and Maximillian Schrems](#) (Schrems II) released on July 16, 2020, in which the Court found that SCCs were valid in principle but declared the Privacy Shield invalid.

Measured	Regulator considering implications
Strict	Regulator warning about risks of non-compliance
Very strict	Regulator openly stating that transfers to the U.S. are unlawful

DPA	Guidance	Key messages
Denmark	Press release, 20 July 2020	<ul style="list-style-type: none"> The standard contractual clauses are "generally still valid" A number of issues need to be examined further, and the Datatilsynet will provide updates
European Data Protection Board (EDPB)	Statement, 17 July 2020	<ul style="list-style-type: none"> Welcomes the judgment as highlighting the fundamental right to privacy in the context of transferring personal data to third countries Takes note of the invalidation of the Privacy Shield and the fact that the EDPB has, in the past, identified some of the main flaws of the Privacy Shield on which the CJEU based its decision States an intention to assist and guide the European Commission to build a new framework with the US that fully complies with EU data protection law Will look further into the potential additional measures which could allow the SCCs to provide an essentially equivalent level of protection Takes note of the duty of the exporter and importer, and of the DPAs, to ensure that the obligations under the SCCs are complied with and that non-compliant transfers of data are suspended

DPA	Guidance	Key messages
France	Press release, 17 July 2020	<ul style="list-style-type: none"> States that the CJEU "validated" the standard contractual clauses allowing the transfer of data from the European Union to importers established outside the EU The CNIL is carrying out work in the EDPB to work out the consequences of the ruling
Germany - Berlin	Press release, 17 July 2020	<ul style="list-style-type: none"> Transfers of personal data to the U.S. are currently not possible - especially when using cloud services - since the U.S. does not provide for an adequate level of protection Controllers who are subject to the supervision of the Berlin DPA are encouraged to switch <u>immediately</u> to service providers within the EU or a country providing an appropriate level of protection The judgment by the CJEU urges DPAs to suspend unlawful third country data transfers not only to the U.S., but also to other countries, such as Russia, China, and India
Germany- Federal Commissioner for Data Protection and Freedom of Information ("BfDI")	Press release, 16 July 2020	<ul style="list-style-type: none"> The CJEU judgment strengthens the rights of data subjects and the role of DPAs Data transfers to the U.S. are <u>still possible</u>, but require the implementation of <u>additional safeguards</u> The obligation to implement the requirements set forth by the CJEU rests with the companies as well as the DPAs The BfDI will publish an additional statement regarding the revision of the current SCCs by the European Commission as well as the need for the U.S. to grant EU citizens the same fundamental rights as American citizens

DPA	Guidance	Key messages
<p>Germany - Hamburg</p>	<p>Press release, 16 July 2020</p>	<ul style="list-style-type: none"> • Welcomes decision on Privacy Shield as the U.S. has only marginally improved the level of protection for data subjects since the Safe Harbor judgment (<i>Schrems I</i>) • As a consequence of the Privacy Shield being invalid, SCCs are insufficient to legitimize data transfers to the U.S., as they do not protect data subjects from access by U.S. authorities • Companies now have to rely on BCRs, individual agreements and SCCs • The EDPB will have to evaluate the legal and factual situation in recipient countries (especially in the U.S. and third countries for which no adequacy decision has been made), taking into consideration data access by local authorities and effective legal remedies for data subjects • Coordination of DPAs in Germany and Europe is necessary with regard to companies who continue to rely on the Privacy Shield or SCCs for data transfers to the U.S. • There are difficult times ahead for international data transfers. DPAs will have to question international data transfers based on SCCs as a whole. This applies to transfers to the U.S., as well as to other countries such as the UK and China. There can be no data transfers to countries without an adequate level of data protection

DPA	Guidance	Key messages
Germany - Rhineland-Palatinate	Press release, 16 July 2020 FAQ regarding judgment C-311/18 by the CJEU	<ul style="list-style-type: none"> • <u>Does not grant a "grace period"</u> for companies basing their international data transfer on the Privacy Shield • <u>Data transfers to the U.S. may still be based on SCCs</u>, depending on the parties involved • Proposes a five-step assessment for companies: <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 Art. 7 or Art. 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. • Companies are required to constantly monitor the level of protection in the data importer's country • DPAs are currently examining the consequences of the ruling on other transfer instruments such as BCRs
Germany - Thuringia	Press release, 16 July 2020	<ul style="list-style-type: none"> • Welcomes judgment, in particular with regard to the shortcomings of the ombudsperson mechanism • Questions that SCCs can still be "brought to life" • Deems it <u>unlikely</u> 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

DPA	Guidance	Key messages
Ireland	Statement, 16 July 2020	<ul style="list-style-type: none"> Strongly welcomes the judgment, as it was of the view that EU-U.S. data transfers were "inherently problematic," whatever the legal mechanism by which such transfers were carried out Whatever the mechanism used to transfer data to a third country, the protection must be essentially equivalent to that which it enjoys within the EU In practice, the use of SCCs to transfer data to the U.S. is questionable. This issue will require further and careful examination Acknowledges the central role for supervisory authorities across the EU and looks forward to giving the judgment meaningful and practical effect
Lithuania	Press release, 20 July 2020	<ul style="list-style-type: none"> Neutral statement restating the elements of the decision and stating that the DPA will analyse the ruling and provide additional explanation and practical recommendations
Netherlands	News item, 20 July 2020	<ul style="list-style-type: none"> States that the US does not provide an adequate level of data protection, so organisations in the EU should not pass on personal data to the U.S. Currently examining the practical consequences of the decision and next steps within the EDPB
Switzerland	Press release, 16 July 2020	<ul style="list-style-type: none"> Takes note of the ruling, but it is not directly applicable to Switzerland Plans to examine the judgment in detail and comment in due course
United Kingdom	Statement, 16 July 2020	<ul style="list-style-type: none"> The ICO is considering the judgment States readiness to support UK organisations and to work with the government and international agencies to ensure that global data flows can continue, with personal data protection