

## 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.

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

| DPA     | Guidance                                    | Key messages   |
|---------|---|--|
| Denmark | <a href="#">Press release, 20 July 2020</a> | <ul style="list-style-type: none"> <li>The standard contractual clauses are "generally still valid"</li> <li>A number of issues need to be examined further, and the Datatilsynet will provide updates</li> </ul>  |
| EDPB    | <a href="#">Statement, 17 July 2020</a>     | <ul style="list-style-type: none"> <li>Welcomes the judgment as highlighting the fundamental right to privacy in the context of transferring personal data to third countries</li> <li>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</li> <li>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</li> <li>Will look further into the potential additional measures which could allow the SCCs to provide an essentially equivalent level of protection</li> <li>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</li> </ul> |

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| <b>Estonia</b>   | <a href="#">Press release, 17 July 2020</a> | <ul style="list-style-type: none"> <li>• Anyone transferring data with a US company using the Privacy Shield will need to review transfers of data</li> <li>• One of the other GDPR safeguards should be used</li> <li>• Controllers should always assess standard contractual clauses themselves and determine whether they guarantee protection of personal data. If they do not, they should suspend the transfer</li> </ul>  |
| <b>France</b>  | <a href="#">Press release, 17 July 2020</a> | <ul style="list-style-type: none"> <li>• States that the CJEU "validated" the standard contractual clauses allowing the transfer of data from the European Union to importers established outside the EU</li> <li>• The CNIL is carrying out work in the EDPB to work out the consequences of the ruling</li> </ul>  |
| <b>Germany - Berlin</b>  | <a href="#">Press release, 17 July 2020</a> | <ul style="list-style-type: none"> <li>• <u>Transfers of personal data to the U.S. are currently not possible</u> - especially when using cloud services - since the U.S. do not provide for an adequate level of protection</li> <li>• Controller 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</li> <li>• 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</li> </ul> |
| <b>Germany- Federal Commissioner for Data Protection and Freedom of Information ("BfDI")</b> | <a href="#">Press release, 16 July 2020</a> | <ul style="list-style-type: none"> <li>• The CJEU judgment strengthens the rights of data subjects and the role of DPAs</li> <li>• Data transfers to the U.S. are <u>still possible</u>, but require the implementation of <u>additional safeguards</u></li> <li>• The obligation to implement the requirements set forth by the CJEU rests with the companies as well as the DPAs</li> <li>• The BfDI will publish an additional statement regarding the revision of the current SCC by the European Commission as well as the need for the U.S. to grant EU citizens the same fundamental rights as American citizens</li> </ul>             |

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| <b>Germany - Hamburg</b>                | <a href="#">Press release, 16 July 2020</a> | <ul style="list-style-type: none"> <li>• 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</li> <li>• As a consequence of the Privacy Shield being invalid, SCC are insufficient to legitimate data transfers to the U.S., as they do not protect data subjects from access by US authorities</li> <li>• Companies now have to rely on BCR, individual agreements and SCC</li> <li>• 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</li> <li>• Coordination of DPAs in Germany and Europe is necessary with regard to companies who continue to rely on the Privacy Shield or SCC for data transfers to the U.S.</li> <li>• There are difficult times ahead for international data transfers. DPAs will have to question international data transfers based on SCC 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</li> </ul> |
| <b>Germany – North Rhine-Westphalia</b> | <a href="#">Press release, 22 July 2020</a> | <ul style="list-style-type: none"> <li>• There is no grace period during which the Privacy Shield can still be used in accordance with the GDPR</li> <li>• Companies must carry out case-by-case analyses on whether SCCs provide adequate guarantees, and whether they need to be supplemented by additional guarantees</li> <li>• Where SCCs are not sufficient and no appropriate additional measures have been taken, DPAs may order that the transfer be suspended</li> <li>• The DPA will deal with complaints from data subjects and investigate them appropriately</li> <li>• The German DPAs work on a coordinated guidance with the EDPB</li> </ul>   |

| DPA                                   | Guidance   | Key messages   |
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| <b>Germany - Rhineland-Palatinate</b> | <a href="#">Press release, 16 July 2020</a><br><a href="#">FAQ regarding judgment C-311/18 by the CJEU</a> | <ul style="list-style-type: none"> <li>• <u>Does not grant a "grace period"</u> for companies basing their international data transfer on the Privacy Shield</li> <li>• <u>Data transfers to the U.S. may still be based on SCCs</u>, depending on the parties involved</li> <li>• Proposes a five-step assessment for companies:             <ol style="list-style-type: none"> <li>(1) Do I transfer data to countries outside of the EU/EEA?</li> <li>(2) If yes: Do I use SCC for this third country data transfer?</li> <li>(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"> <li>a. Generally the case for telecommunication companies in the U.S. because of FISA 702</li> <li>b. Unencrypted data over transatlantic cables may be monitored in the U.S. according to Executive Order 12333</li> </ol> </li> <li>(4) If yes: Can an alternative transfer instrument be used in accordance with Chapter V GDPR or does Art. 49 GDPR apply?</li> <li>(5) If no: Data transfers to this recipient are no longer possible.</li> </ol> </li> <li>• Companies are required to constantly monitor the level of protection in the data importer's country</li> <li>• DPAs are currently examining the consequences of the ruling on other transfer instruments such as BCR</li> </ul> |
| <b>Germany - Thuringia</b>            | <a href="#">Press release, 16 July 2020</a>  | <ul style="list-style-type: none"> <li>• Welcomes judgment, in particular with regard to the shortcomings of the ombudsperson mechanism</li> <li>• Questions that SCC can still be "brought to life"</li> </ul>  |

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|----------------------|---|--|
|                      |   | <ul style="list-style-type: none"> <li>• Deems it <u>unlikely</u> that it is still possible to legally transfer data to the U.S. based on SCC</li> <li>• DPAs will need to increase their enforcement activities on this issue</li> </ul>  |
| <b>Ireland</b>       | <a href="#">Statement, 16 July 2020</a>     | <ul style="list-style-type: none"> <li>• 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</li> <li>• 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</li> <li>• In practice, the use of SCCs to transfer data to the U.S. is questionable. This issue will require further and careful examination</li> <li>• Acknowledges the central role for supervisory authorities across the EU and looks forward to giving the judgment meaningful and practical effect</li> </ul> |
| <b>Lithuania</b>     | <a href="#">Press release, 20 July 2020</a> | <ul style="list-style-type: none"> <li>• Neutral statement restating the elements of the decision and stating that the DPA will analyse the ruling and provide additional explanation and practical recommendations</li> </ul>   |
| <b>Liechtenstein</b> | <a href="#">Press release, 17 July 2020</a> | <ul style="list-style-type: none"> <li>• States that the CJEU made it clear that data can still be transferred to the USA on the basis of suitable guarantees under Article 46 GDPR other than the Privacy Shield</li> <li>• Until a new agreement with the U.S. can be reached, controllers should rely on alternative safeguards.</li> <li>• The DPA will analyse the decision and publish further instructions shortly</li> </ul>   |
| <b>Poland</b>        | <a href="#">Statement, 20 July 2020</a>     | <ul style="list-style-type: none"> <li>• Data can no longer be transferred to the USA on the basis of Privacy Shield</li> <li>• Controllers need to make assessments of the level of data protection afforded to cross-border transfers, which must take the legal provisions in the third country into account as well as the terms of the contract</li> </ul>  |

| DPA                    | Guidance                                    | Key messages  |
|------------------------|---|---|
|                        |   | <ul style="list-style-type: none"> <li>• If the level of protection of personal data is not substantially equivalent to that guaranteed in the EU, the transfer of data can be made as long as an equivalent level of protection can be guaranteed by other means</li> <li>• Stresses the necessity of a coherent approach to the assessment of the consequences of the judgment across the EU</li> </ul> |
| <b>The Netherlands</b> | <a href="#">News item, 20 July 2020</a>     | <ul style="list-style-type: none"> <li>• States that the U.S. does not provide an adequate level of data protection, so organisations in the EU should not pass on personal data to the U.S.</li> <li>• The DPA is currently examining the practical consequences of the decision and next steps within the EDPB</li> </ul>   |
| <b>Romania</b>         | <a href="#">Statement, 22 July 2020</a>     | <ul style="list-style-type: none"> <li>• Explains the reasoning behind the decision</li> <li>• States that data transfers, in the absence of an adequacy decision, can be carried out using standard contractual clauses, binding corporate rules, codes of conduct and certification mechanisms or the Article 49 derogations</li> </ul>   |
| <b>Spain</b>           | <a href="#">Statement, 22 July 2020</a>     | <ul style="list-style-type: none"> <li>• Notes the judgment and the continuing validity of standard contractual clauses</li> <li>• States an intention to work with other European DPAs towards a harmonised response at the European level and participate in the work carried out to adopt a common approach</li> </ul>   |
| <b>Switzerland</b>     | <a href="#">Press release, 16 July 2020</a> | <ul style="list-style-type: none"> <li>• Takes note of the ruling, but it is not directly applicable to Switzerland</li> <li>• Plans to examine the judgment in detail and comment in due course</li> </ul>   |
| <b>United Kingdom</b>  | <a href="#">Statement, 16 July 2020</a>     | <ul style="list-style-type: none"> <li>• The ICO is considering the judgment</li> <li>• 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</li> </ul>   |