

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.

This resource is provided for informational purposes only and does not constitute legal advice. All information is subject to change as DPAs update their guidance. The latest version of this resource is available at <http://www.hoganlovells.com/eu-dpa-schremsii-guidance>.

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
EDPB	Statement, 17 July 2020 Frequently Asked Questions, 24 July 2020	<ul style="list-style-type: none"> Data exporters and importers have a duty to ensure that effective mechanisms are in place to ensure essentially equivalent protection to the GDPR. The importer must inform the exporter of any inability to comply with the SCCs and the exporter is obliged to suspend transfers or terminate contracts in such cases The threshold of essentially equivalent protection applies to all appropriate safeguards under Article 46 GDPR used to transfer data from the EEA to any third country There is no grace period during which data can continue to be transferred to the US using the EU-US Privacy Shield The validity of transfers using the SCCs will depend on the result of a case-by-case assessment of the level of protection these provide, taking into account the circumstances of the transfers and supplementary measures which have been put in

DPA	Guidance	Key messages
		<p>place. The EDPB will provide further guidance on supplementary measures that can be used</p> <ul style="list-style-type: none"> • Transfers to the US under the Article 49 derogations can still take place, though these should not become the rule and should be restricted to specific situations • If processors are used for personal data transfers to the U.S. and essentially equivalent level of protection cannot be guaranteed, controllers should negotiate amendments or supplementary clauses to contracts that forbid transfers to the U.S.
Estonia	Press release, 17 July 2020	<ul style="list-style-type: none"> • Anyone transferring data with a US company using the Privacy Shield will need to review transfers of data and one of the other GDPR safeguards should be used • 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
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 – The Conference of Independent Data Protection Authorities of the Federal Government and the Länder (DSK)	Press release, 28 July 2020	<ul style="list-style-type: none"> • The transfer of personal data to the U.S. on the basis of the Privacy Shield is not permitted and must be stopped immediately. • SCCs, and other appropriate safeguards, may still be used for transfers to the U.S. and other third countries but the parties must assess whether data subjects would enjoy essential equivalent protections as those provided in the EU. Data controllers must immediately perform this assessment. • According to the CJEU ruling, SCCs without additional measures are generally not sufficient for data transfers to the U.S. and supplementary measures must be used

DPA	Guidance	Key messages
		<ul style="list-style-type: none"> Article 49 GDPR derogations may still be used to export EU personal data but conditions for the derogations must be met in each case, in according with EDPB guidance.
Germany - Berlin	Press release, 17 July 2020	<ul style="list-style-type: none"> <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 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 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 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
Germany - Hamburg	Press release, 16 July 2020	<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 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 Companies now have to rely on BCR, individual agreements and SCC

DPA	Guidance	Key messages
		<ul style="list-style-type: none"> • 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 SCC 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 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
Germany – North Rhine-Westphalia	Press release, 22 July 2020	<ul style="list-style-type: none"> • There is no grace period during which the Privacy Shield can still be used in accordance with the GDPR • Companies must carry out case-by-case analyses on whether SCCs provide adequate guarantees, and whether they need to be supplemented by additional guarantees • Where SCCs are not sufficient and no appropriate additional measures have been taken, DPAs may order that the transfer be suspended • The DPA will deal with complaints from data subjects and investigate them appropriately • The German DPAs work on a coordinated guidance with the EDPB
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?

DPA	Guidance	Key messages
		<ul style="list-style-type: none"> (2) If yes: Do I use SCC 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? <ul 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. <ul style="list-style-type: none"> • 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 BCR
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 SCC can still be "brought to life" • Deems it <u>unlikely</u> that it is still possible to legally transfer data to the U.S. based on SCC • DPAs will need to increase their enforcement activities on this issue
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

DPA	Guidance	Key messages
		<ul style="list-style-type: none"> • 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
Liechtenstein	Press release, 17 July 2020	<ul style="list-style-type: none"> • 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 • Until a new agreement with the U.S. can be reached, controllers should rely on alternative safeguards. • The DPA will analyse the decision and publish further instructions shortly
Poland	Statement, 20 July 2020	<ul style="list-style-type: none"> • Data can no longer be transferred to the USA on the basis of Privacy Shield • 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 • 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 • Stresses the necessity of a coherent approach to the assessment of the consequences of the judgment across the EU
The Netherlands	News item, 20 July 2020	<ul style="list-style-type: none"> • Emphasizes that the GDPR transfer requirements should be met for any transfer of personal data to a third country

DPA	Guidance	Key messages
		<ul style="list-style-type: none"> • Takes note of the invalidation of the Privacy Shield • States that SCCs can still be used provided that an equivalent level of protection can be safeguarded in the third country, which requires a case by case analysis
Norway	Statement, 16 July 2020	<ul style="list-style-type: none"> • Advises that companies currently using the Privacy Shield mechanism must consider which other transfer bases can be used to transfer personal data to the US • Will provide further guidance on how companies can comply with the decision in the future
Romania	Statement, 22 July 2020	<ul style="list-style-type: none"> • Explains the reasoning behind the decision • 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
Spain	Statement, 22 July 2020	<ul style="list-style-type: none"> • Notes the judgment and the continuing validity of standard contractual clauses • 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
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, updated 27 July 2020	<ul style="list-style-type: none"> • The judgment has wider implications for international data transfers than the invalidation of the EU-US Privacy Shield, and the ICO is still considering what the oversight role of supervisory authorities as regards international data transfers will mean in practice • The EDPB's guidance continues to apply to UK controllers and processors, who should take stock of their international transfers and react promptly as guidance and advice becomes available

DPA	Guidance	Key messages
		<ul style="list-style-type: none"> Emphasizes the challenges UK businesses are facing – the ICO's approach will continue to be risk-based, proportionate and in accordance with the Regulatory Action policy