Schrems II.

International Data Transfer Update

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Schrems II

- **European Court of Justice** (ECJ) on July 16, 2020, publishes its decision C-311/18 ("Schrems II")
  - Approval of Privacy Shield lifted → PS no longer relevant
  - Use of standard contractual clauses (SCC) confirmed, but additional measures are required
- **European Data Protection Board** (EDPB)
  - Adopted an opinion on additional measures on November 10, 2020, then release 2.0 on June 18, 2021
  - Initially, the EDPB took a "no risk" approach
  - Now, risk based transfers are possible, but a detailed transfer impact assessment (TIA) is necessary
- **European Commission** released new SCC on June 4, 2021
Alternatively, you may decide to proceed with the transfer without being required to implement supplementary measures, if you consider that you have no reason to believe that relevant and problematic legislation will be applied, in practice, to your transferred data and/or importer. You will need to have demonstrated and documented through your assessment, where appropriate in collaboration with the importer, that the law is not interpreted and/or applied in practice so as to cover your transferred data and importer, also taking into account the experience of other actors operating within the same sector and/or related to similar transferred personal data and the additional sources of information described further below.53

Therefore, you will need to have demonstrated and documented with a detailed report54 that problematic legislation will not be applied in practice to your transferred data and/or importer, and, consequently, that it will not prevent the importer from fulfilling its obligations under the Article 46 GDPR transfer tool.55
Problematic legislation is understood as legislation that
1) imposes on the recipient of personal data from the European
   Union obligations and/or affect the data transferred in a manner
   that may impinge on the transfer tools’ contractual guarantee of
   an essentially equivalent level of protection and
2) does not respect the essence of the fundamental rights and
   freedoms recognised by the EU Charter of Fundamental Rights or
   exceeds what is necessary and proportionate in a democratic
   society to safeguard one of the important objectives as also
   recognised in Union or EU Member States’ law, such as those
   listed in Article 23 (1) GDPR.

EDPB Recommendation
01/2020, Footnote 50

Foreign Lawful Access
Without the possibility to appeal before an independent
court of justice
= Sec. 702 FISA
+ EO 12.333
c) Probability that the provider or a subcontractor in the country above may be legally required to perform such as search (also) with the company's data

d) Probability that the data is regarded as content that it is typically the subject of intelligence

Overall probability of a successful lawful access via the cloud provider in the observation period: *** 0.67%

Description in words (based on Hillson****):

Very low

With a probability of 90 percent, successful lawful access occurs at least once after this number of years:

1705

With a probability of 50 percent, successful lawful access occurs at least once after this number of years:

513

... assuming that the probability neither increases nor decreases over time (like tossing a coin)
Main advice of data protection authorities is to keep personal data in Europe or otherwise fully encrypt it before exposing it.
Two versions: International transfers + data processing

New SCC have to be customized (cannot be signed as such)

- Select the transfer scenario and certain options
- Complete description of transfer, of technical and organisational measures of data security and of subprocessors
- Agree on further terms

Beware: SCC cannot be changed or overruled

- Unlimited liability among parties, third party rights for individuals
- Any onward transfer of data is prohibited, unless, *inter alia*, "it is necessary for the establishment, exercise or defence of legal claims in the context of specific administrative, regulatory or judicial proceedings"
Last date to enter into existing SCC is September 27, 2021
Any existing SCC will have to be replaced
- If processing at issue changes following September 27, 2021
- If personal data is no longer protected sufficiently abroad (in particular from foreign lawful access without guarantee of legal recourse)
  - At the latest by December 27, 2022
What to do?
- Determine where SCC are in use today (e.g., with US counsel for eDiscovery, IGDTAs, service providers)
- Perform a TIA (also required as per the SCC)
- Enter into the new SCC
Thank you!

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https://bit.ly/3xTJ2YC (German)
https://bit.ly/3dhwaDB (English)