



New Recommendations Regarding Data Transfers Outside the EU

Dear Clients,

A new draft of the Standard Contractual Clauses published following a recent Court of Justice of the European Union (“CJEU”) ruling is an important opportunity to revisit these crucial mechanisms and tools and to prepare for the upcoming changes. In this Client Update we will review the backdrop of the changes and their reason and reasoning while in the next Client Update we will dive into the proposed changes to allow our clients to prepare in advance as may be required.

In its recent judgment C-311/18 **Data Protection Commissioner v. Facebook Ireland Limited and Maximillian Schrems** (“Schrems II”), the CJEU invalidated the EU Commission’s decision to acknowledge the adequacy of the level of protection of personal data transferred from the European Economic Area (“EEA”) to organizations in the United States under the EU-US Privacy Shield framework in the context of Section 46 of the GDPR.

In short, this means that transferring personal information of European data subjects to the U.S.A. became more complicated after the Schrems II decision. Luckily, there are other mechanisms for exporting personal information from the EEA to other jurisdictions. Due to Schrems II, data exporters started to rely more and more on such other mechanisms set forth in Section 46 of the GDPR, such as the EU Standard Contractual Clauses (“SCC”) (i.e. a standard agreement that was approved by the EU Commission), which are easy to implement.

However, the validity of the SCC was also challenged in Schrems II, but the CJEU did not invalidate use of the SCC for data exports. Signing a standard agreement as an attachment to your Data Protection Agreement (“DPA”) sounds easy enough, doesn’t it? well, it doesn’t end there.

In Schrems II, the CJEU stated that in some circumstances the SCC by themselves may not be sufficient. When transferring personal information outside of the EEA, controllers and processors must examine the legislation of the third country to which the information is transferred and take into account, *among others*, the relevant legislation in that country in respect of national security and public authorities’ power to access such personal information. The problem with reliance solely on the SCC when transferring personal information outside of the EEA, is that only the processor, or sub-processor, as the case may be, is bound by the SCC and the DPA, but not the government.

Does the above mean that data transfers from the EEA to the U.S.A. is no longer possible? No, but that additional measures are required to be taken in order to transfer the data in compliance with the GDPR. Please note that the foregoing applies to all transfers of personal information from the EEA to other jurisdictions, and is not limited only to transfers to the U.S.A.

For a long time following Schrems II it was unclear what additional measures should be taken by data exporters in order to export data in compliance with the GDPR. A few months ago, on November 10, 2020, the European Data Protection Board has adopted *Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data*. These recommendations set forth guidelines regarding the measures that should be implemented when transferring personal information outside of the EEA, including how to enable the transfer of personal information to jurisdictions where governmental authorities have the power to access personal information in a manner that is inconsistent with the GDPR (e.g. the U.S.A.).

All clients are advised to revisit their data-flow from the EEA to other jurisdictions in light of these recommendations, especially to the U.S.A., including intercompany transfers between affiliated companies.

Please note that a new draft of the SCC was published, but was not yet formally approved and adopted. We closely monitor these developments and hope to follow-up soon with an analysis of these changes and recommendations.

We will be happy to assist you with any question and / or clarification.

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