

# INTERNATIONAL DATA TRANSFERS

POST SCHREMS II AND BREXIT

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# EU and UK GDPR

## Topics

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- ❑ Schrems II Decision
- ❑ Current international data transfer solutions
- ❑ Now there is no Privacy Shield, what to do?
- ❑ Are Standard Contractual Clauses OK to use?
- ❑ How about BCR?
- ❑ What should Controllers and Processors do?
- ❑ ICO, EDPB Guidance and DPC Commentary
- ❑ Does it get better or worse with Brexit?

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# Schrems I and II

- ❑ Schrems I related to the impact of the Snowden revelations re US intelligence agencies accessing communications and led to the demise of Safe Harbour
- ❑ Schrems II was the claim by Max Schrems that Facebook's reliance on SCC for data transfers between Ireland and USA was also flawed on similar basis to Schrems I

# Schrems II Decision

## Case C-311/18 – Data Protection Commissioner v Facebook Ireland Limited and Maximilian Schrems

- ❑ EC Decision 2010/87/EC on SCC examined by CJEU
- ❑ SCC found valid... but exporter and importer must assess level of protection afforded in country of importer
- ❑ CJEU also examined Privacy Shield Decision 2016/1250 as between EU and US and held that US domestic law regarding interception of communications for national security resulted in inadequate protection of personal data transferred from EU.
- ❑ Although not part of the Decision, BCR are also impacted for the same reasons as above.

# Adequacy Assessment



- CJEU pointed out that 2010/87/EC Decision imposes an obligation on a data exporter and the data importer to verify, prior to any transfer, the adequacy of the levels of protection for personal data in the country of the data importer.
- The data importer also has an obligation to inform the data exporter of any inability to comply its obligations under the SCC

# Art.45(2)a

## Obligation on EC to assess adequacy

- EC in making an adequacy decision must consider
- “rule of law... including concerning national security... and the access of public authorities to personal data... as well as effective and enforceable data subject rights and effective administrative and judicial redress for the data subjects whose personal data are being transferred.”

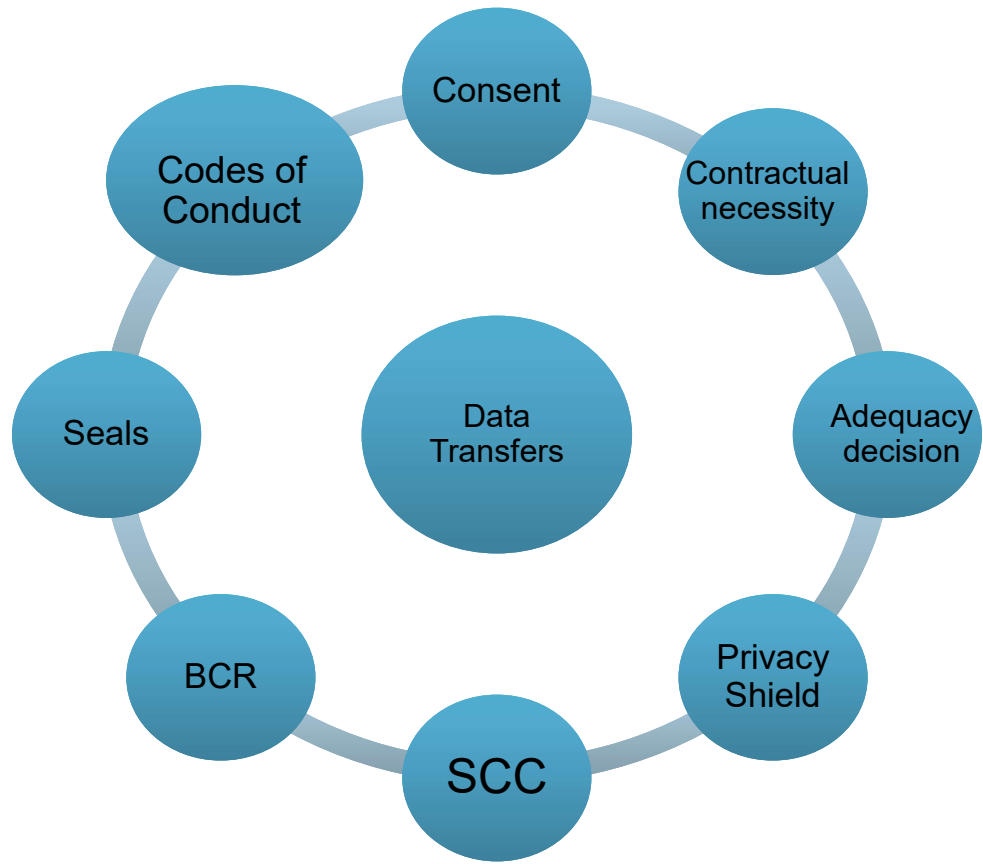
# CJEU and US law

## Laws of surveillance and interception

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- S.702 of the Foreign Intelligence Surveillance Act (FISA)
- Executive Order 12333 (EO 12333)
- Presidential Policy Directive 28 (PPD 28)

# Data Transfer Solutions pre Schrems II





# Transferring Data Abroad

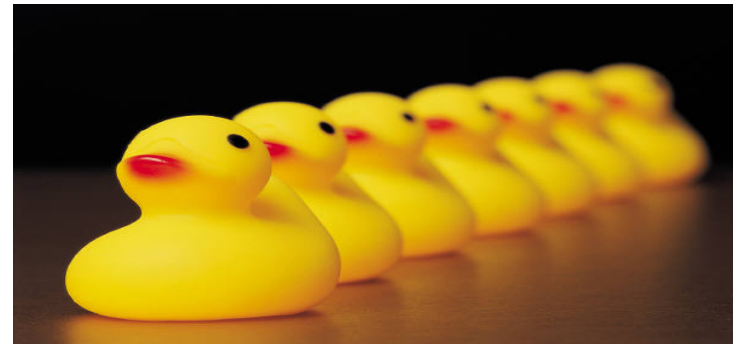
- Article 49 – derogations
- explicit consent to the transfer
- transfer necessary for the performance of a contract between the data subject and the controller or the implementation of pre-contractual measures taken at the data subject's request
- transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and another natural or legal person
- transfer is necessary for important reasons of public interest

# Transferring Data Abroad

- Article 49 – derogations
- transfer is necessary for the establishment, exercise or defence of legal claims
- transfer is necessary in order to protect the vital interests of the data subject or of other persons, where the data subject is physically or legally incapable of giving consent
- transfer is made from a register which according to Union or Member State law is intended to provide information to the public and which is open to consultation

# So now what?

- ❑ Doing nothing is not an option
- ❑ Keep on the due diligence and assessment journey
- ❑ Stay up to date with advice from ICO and other DPA



# Controller

- ❑ What are our data flows?
- ❑ Check ROPA
- ❑ Do we share personal data under Privacy Shield?
- ❑ If the answer is yes, find an alternative solution
- ❑ Do we share personal data with a controller in the US?
- ❑ If the answer is yes, review the contract.

# Controller continued

- ❑ What do we use for data transfers to US Controller?
- ❑ SCC, BCR or something else?
- ❑ Carry out an “adequacy” assessment
- ❑ Get input from the US Controller
- ❑ Are they subject to s.702 FISA, EO12333 or PPD-28?
- ❑ Consider additional contractual requirements

# US Controllers

- ❑ Stop relying on Privacy Shield
- ❑ Find an alternative solution – SCC will be quickest
- ❑ Offer reassurance to EU customers
- ❑ Consider GDPR derogations
- ❑ Can you silo EU personal data in EU?

# Processors

- ❑ EU Processors should assess location of their sub-processors
- ❑ Are sub-processors in US and what data transfer mechanism are they relying on?
- ❑ Anticipate due diligence and assessment questions from customers

# What about transfers to other countries outside EU?

- ❑ Schrems II requires an assessment of “adequacy” for all jurisdictions.
- ❑ So what about transfers to China, Russia, Korea, Saudi Arabia etc?
- ❑ UK, post Brexit? Will we be seen as inadequate?



# Recent DPA investigations & court decisions

- Mailchimp (Bavaria)
- Doctolib/AWS (France)
- National Institute of Statistics/Cloudflare (Portugal)

# Regulatory guidance and commentary

- EDPB

[https://edpb.europa.eu/news/news/2020/european-data-protection-board-publishes-faq-document-cjeu-judgment-c-31118-schrems\\_en](https://edpb.europa.eu/news/news/2020/european-data-protection-board-publishes-faq-document-cjeu-judgment-c-31118-schrems_en)

- ICO <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2020/07/updated-ico-statement-on-the-judgment-of-the-european-court-of-justice-in-the-schrems-ii-case/>

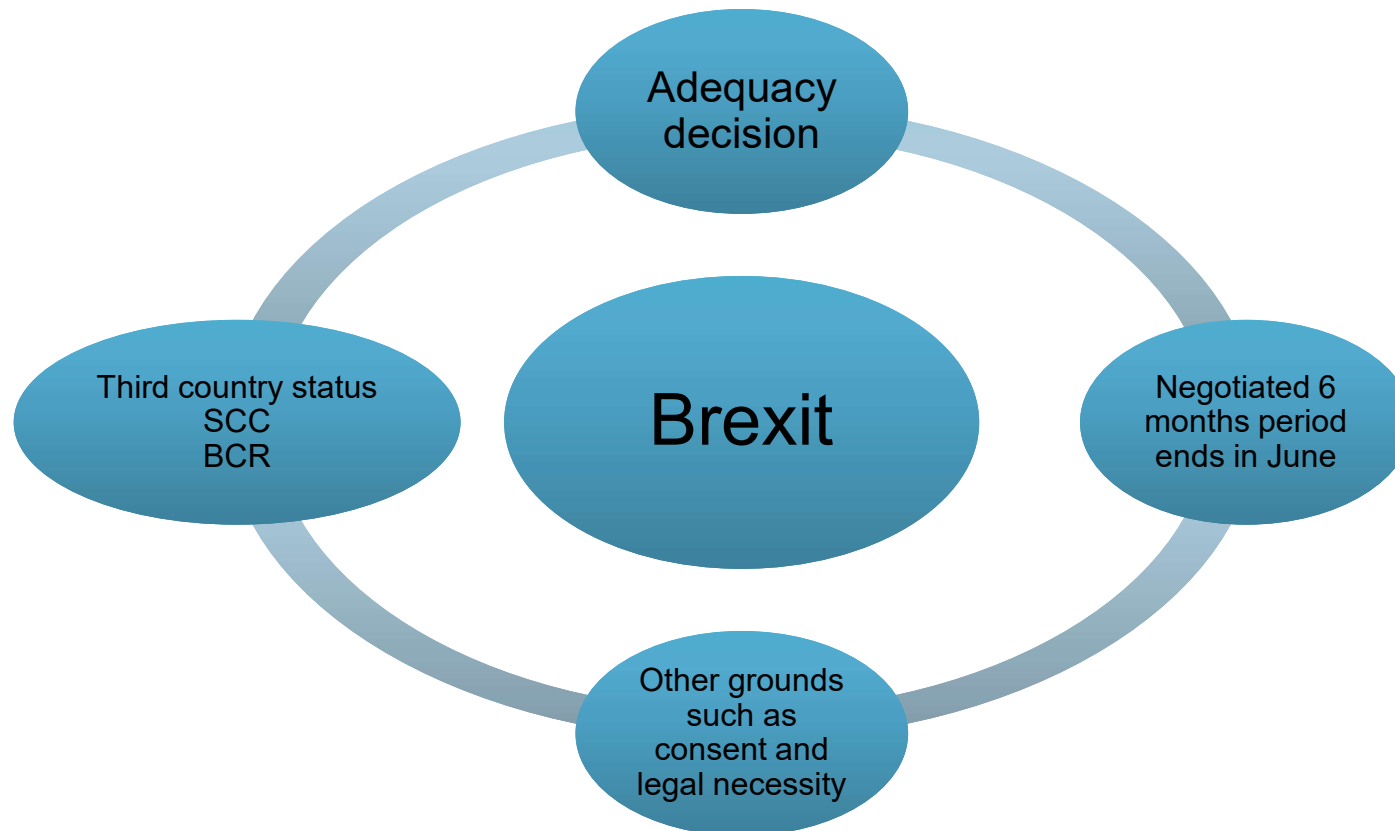
- DPC

<https://www.dataprotection.ie/en/news-media/press-releases/dpc-statement-cjeu-decision>

- SCC Drafts

<https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12741-Data-protection-standard-contractual-clauses-for-transferring-personal-data-to-non-EU-countries-implementing-act->

# Brexit and data transfers



Questions?  
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