

**DOING BUSINESS
POST SCHREMS II:**

GDPR compliance
for the international
transfer of personal
data outside the EER



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WHY IS THE SCHREMS II DECISION IMPORTANT?

In this global economy, most, if not all companies transfer data to additional countries aside from the country in which they are established or operate, whether this be to other group companies, clients, partners, contractors, or suppliers. In this context, especially the exchange of data between the US and the EU/Switzerland is very frequent.

The data transferred often includes personal data, whose processing is strongly regulated in many countries, especially in the EU and Switzerland.

Recently, **the European Court of Justice has examined the matter of personal data transfers to the US more closely, leading to the so-called Schrems II judgement.**

WHAT DID THE SCHREMS II JUDGMENT SAY?

The European Court of Justice considered that **the requirements of US law regarding potential access by US public authorities to personal data transferred from the EU to the US for national security purposes, is not in line with EU law data protection standards.**

Consequently, the fundamental rights of persons whose data are transferred to the U.S. are infringed and the European Court of Justice therefore declared the so-called EU-US Privacy Shield adequacy Decision invalid. This decision came immediately into effect.

WHAT HAS THE IMPACT OF SCHREMS II BEEN BEYOND THE BORDERS OF THE EU?

The Schrems II judgement makes clear that existing Standard Contractual Clauses (SCC), which were up to now a very common and simple way to ensure data protection compliance with transfers outside the EER, **do not fulfil today's legal requirements.** These SCC were enacted under the previous Data Protection Directive and do not comply with the more stringent requirements of the GDPR.

Similar to the EU, in a policy paper on the transfer of personal data to the USA, published on 8th September 2020, the Swiss Federal Data Protection and Information Commissioner concluded that the Privacy Shield alone does not grant the protection required by Swiss law.

WHAT ACTION SHOULD BE TAKEN BY EXPORTERS OF PERSONAL DATA FROM THE EU AND SWITZERLAND TO COUNTRIES WHERE AN INADEQUATE LEVEL OF DATA PROTECTION EXISTS?

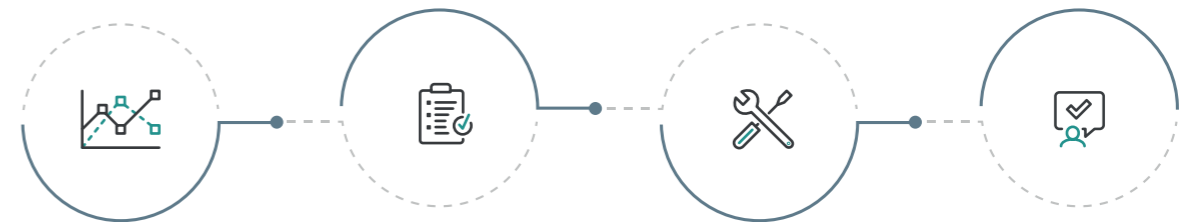
DESPITE SOME CLAIMS TO THE CONTRARY, THERE IS CURRENTLY NO SIMPLE SOLUTION.

Updated SCC may be adopted in early 2021 but will most likely not suffice without supplementary measures, BCR or Codes of Conduct are not options for a quick fix, and obtaining the explicit consent of all data subjects is often too burdensome, if realistic at all.

HOWEVER, THE FACT THAT NO EASY SOLUTION EXISTS IS NOT AN EXCUSE TO DO NOTHING!

Companies must take action to avoid finding themselves in a situation of non-compliance, with the associated risks involved.

BDO Legal recommends taking the following steps:



Assess whether your organisation is in an non-compliant situation

Typically, if you exchange personal data outside the EER, it is likely that measures you are currently taking are no longer satisfactory.

Mapping of data transfer(s) is essential.

Assess the measures currently applied where data is transferred outside the EER to countries without an adequate data protection regime

Typically, if your measures are solely based on the Privacy Shield or on SCC, they alone will no longer be sufficient. You need to assess the current state of privacy safeguards.

Current measures must be weighed up against the new criteria of the Schrems II decision. To appropriately assess potential safeguards, you also need to determine how the recipient country's local legal framework applies to your intended transfers.

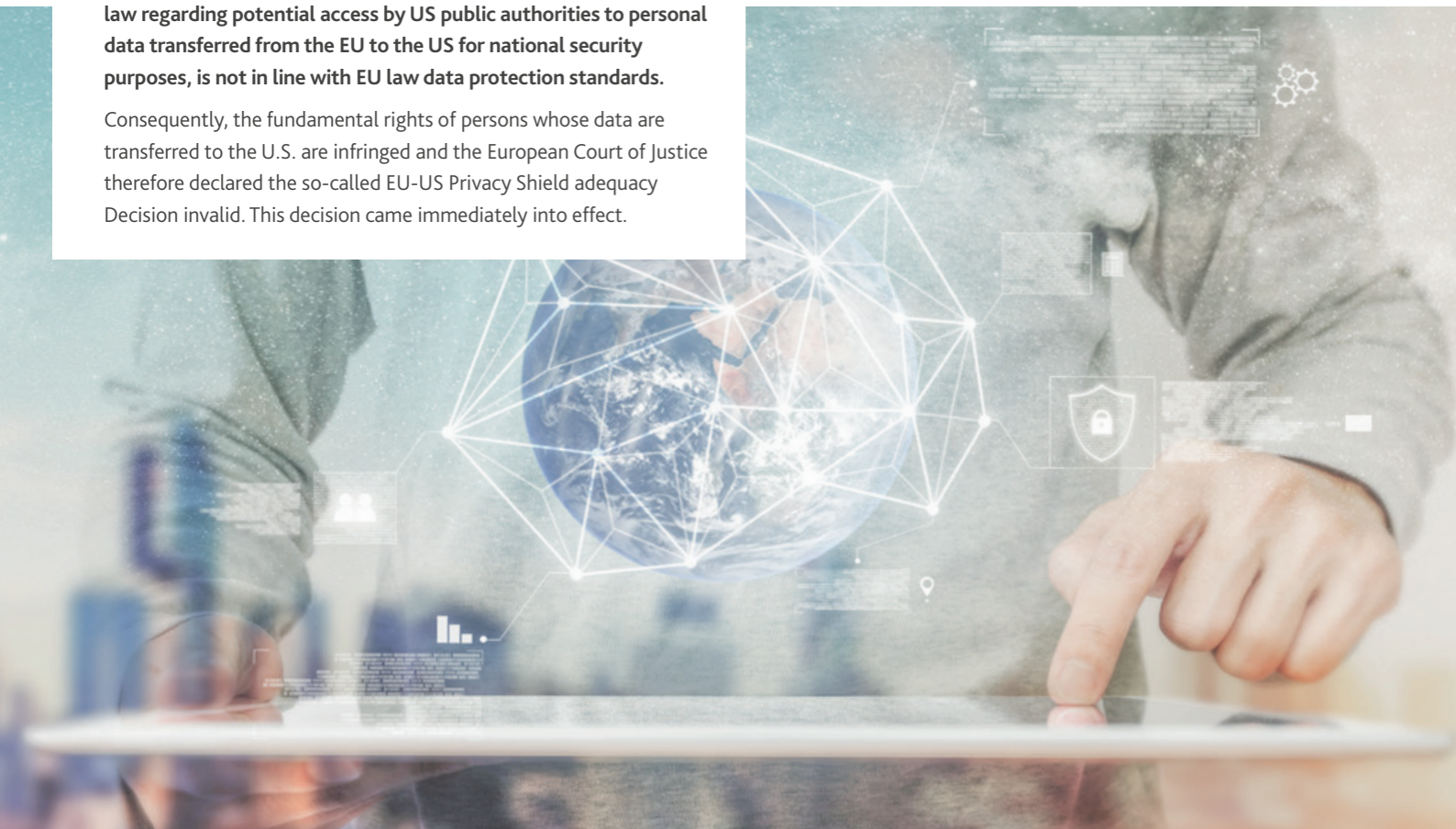
Remedy any gaps to the extent possible and be proactive

Generally speaking, implementing a data transfer agreement as an additional measure may eliminate certain shortcomings. Depending on the country in question and the specific situation, further contractual, organisational and technical measures, such as encryption with your own key (BYOK), may eliminate remaining gaps.

Monitor developments in this area and reassess your situation regularly – if the importer can no longer comply with commitments made and/or measures taken, you may need to promptly suspend the transfer.

Accountability

Even if sufficient steps are taken to ensure compliance with legal requirements, you must be able to prove this to the competent supervisory authority. This includes among others, documenting the assessment of the recipient country's legal system as well as the effectiveness of any supplementary measures taken. Accountability is a continuing obligation as you will be held accountable for the decisions you take.



HOW CAN BDO LEGAL HELP?



RAISING AWARENESS

Webinars about the Schrems II judgment for your staff.



MONITORING DATA PROTECTION AUTHORITIES' ACTIVITIES TO AVOID FINES

Analysis of statements and actions of the data protection authorities in jurisdictions relevant to you.



IMPLEMENTATION OF GDPR COMPLIANCE MEASURES

Audits and training on GDPR requirements.



REVIEW OF YOUR LEGAL TEXTS

Review and drafting of legal texts (data protection information, data protection agreements) and negotiation of agreements.



COMMUNICATION WITH THE IMPORTER ON YOUR BEHALF

Evaluating the importer's technical and organisational measures, negotiating additional measures and collaborating on the implementation of a process that complies with data protection requirements.



MAPPING YOUR DATA TRANSFERS

Identification of your clients located in the EU and Switzerland and analysis of whether you import their data to countries with an inadequate level of protection.



ANALYSIS OF ALTERNATIVE TECHNICAL SOLUTIONS

Research into possibilities to avoid data transfers from the EU and Switzerland to the US or other countries without an adequate data protection regime.



ANALYSIS OF ALTERNATIVE LEGAL SOLUTIONS

Consideration of general principles for transfers of personal data (Art. 44 et seq. GDPR) and development of alternative legal solutions for data transfers to countries with an inadequate level of protection. We can also discuss such solutions with local data protection authorities on your behalf.



ASSESSMENT OF THE RECIPIENT COUNTRY'S LEGAL SYSTEM

With our international network we can provide you with the support you need to assess the legal requirements of potential target countries around the world.

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