How to enable international personal data transfers outside the EU?

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Agenda

1. Linklaters Data Protection Practice
2. Prohibition of transfer outside the EEA
3. Exceptions: Adequacy – Safeguards – Derogations
5. Case study
Linklaters Data Protection Practice

- Delivering market leading expertise
  
  30 year experience advising global clients on DP

- Proven track record

  Wide experience advising on all aspects of DP (compliance audit, regulators’ investigations, transfer solutions, AI, cyber, cookies, etc.)

- Close to the regulators

  Strong relationship with EU and national regulators

- Global network to deliver success

  Strong international DP network, with privacy experts in Europe, Asia, the Americas and the Middle East (over 80 experts worldwide) + allied firms

  ➦ we have covered more than 120 jurisdictions to date

Band 1

Legal 500 2022, EU Regulatory: Privacy and DP
Chambers Europe 2022, TMT: Data Protection
Prohibition of transfer outside the EEA

In principle prohibited

Based on a valid transfer solution

EEA
Exceptions

Adequacy (white listed countries)

Safeguards
- Standard clauses
- BCR
- Bespoke clauses
- Certificate / code

Derogations (e.g. consent, contract, legitimate interest, etc.)
Exceptions

- Adequacy (white listed countries)
- Safeguards
  - Standard clauses
  - BCR
  - Bespoke clauses
  - Certificate / code
- Derogations (e.g. consent, contract, legitimate interest, etc.)
Adequacy – White listed countries

Exception to prohibited transfers **outside EEA**

Recognition as offering an "adequate level of protection"

US: Special recognition mechanisms

- Eu Commission decision
- Per third country
- Assimilation to EU MS

14 countries to date: Andorra, Argentina, Canada (with exceptions), Faroe Islands, Guernsey, Israel, Isle of Man, Japan, Jersey, New Zealand, South Korea, Switzerland, UK and Uruguay

**US: Special recognition mechanisms**

- Safe Harbour
- Privacy Shield
EU-US Transatlantic Framework

- Safe Harbour (self regulatory EU-US transfer solution) from 2001 until 2016
- **Invalidated by CJEU 06.10.2015**: C-362/14 (Schrems I)
- EU Commission/US adopted EU-US Privacy Shield (effect as of 01.08.2016)
- **Invalidated by CJEU 16.07.2020**: C-311/18 (Schrems II)
- US Executive Order issued by President Biden 07.10.2022
- Under review by EU Commission (Draft Adequacy expected early next year)
Exceptions

Adequacy (white listed countries)

Safeguards
- Standard clauses
- BCR
- Bespoke clauses
- Certificate / code

Derogations (e.g. consent, contract, legitimate interest, etc.)
Schrems II = SCCs still valid with TIA

04.06.2021:
> New SCC with 4 modules (C-C, C-P, P-P, P-C)
> Grandfathering until 27.12.2022
## European Data Protection Board Recommendations

### EDPB Recommendations 01/2020 (6 Step Test)

- Identification data flow
- Valid transfer solution
- Assessment third country law
- Supplementary measures?
- Formal procedural steps?
- Regular re-evaluation

### EDPB Recommendations 02/2020 (European Essential Guarantees)

- Processing based on clear, precise & accessible rules
- Necessity and proportionality
- Independent oversight
- Effective remedies
Binding Corporate Rules (BCR)

Internal rules adopted by multinationals (incl. processors), binding on all their affiliates outside the EU for all transfers of personal data within the same group

BCR for processors = e.g. Internet Initiative Japan, Oracle, Workday, HPE
Exceptions

Adequacy (white listed countries incl. US Privacy Shield)

Safeguards
- Standard clauses
- BCR
- Bespoke clauses
- Certificate / code

Derogations (e.g. consent, contract, legitimate interest, etc.)
Derogations

Explicit consent
→ Not for repeated or structural transfers

Necessary for contract performance or conclusion

Important reasons of EU public interest

Establishment, exercise or defence of legal claims
→ No bulk disclosure

Protection of vital interests

Legitimate interests
→ Strict requirements
Case study

Customer = Controller

Supplier = Processor

Contractor = Processor

Subcontractors = Sub-processors

DPA Art. 28

SCC C2P + TIA

SCC P2P + TIA

SCC P2P + TIA

SCC P2P + TIA
Case study

Customer = Controller

DPA Art. 28

Supplier = Processor

Approved BCR (for processors)

Free transfer (no SCC) but TIA required

Affiliates of Supplier = Processor
Case study

Customer = Controller

DPA Art. 28

Supplier = Processor

Contractor = Processor

If US EO is recognised as adequate
⇒ No transfer solution needed for US adhering companies
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> Heads Linklaters’ Global DP Practice and the TMT/IP Practice in Brussels
> Chairs Linklaters’ Data Protection Executive Board
> Comprehensive practice in IT law with strong focus on DP and cloud
> Ranked as leading individual in both IT and Data Protection for years (Chambers Europe/Legal 500)
> Data Protection Issue Lead of the Digital Economy Committee of the American Chamber of Commerce to the EU
> Since 2018, member of the GDPR multi-stakeholder expert group of the EU Commission