

INTERNET LAW - CLASS 8



# SCHREMS II

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# TIMELINE

**JUNE 2013 - FIRST IRISH DPA COMPLAINT**

**OCTOBER 2015 - CJEU INVALIDATES SAFE HARBOR**

**JULY 2016 - US-EU PRIVACY SHIELD ADOPTED**

**MAY 2018 - GDPR ENTERS INTO FORCE**

**DECEMBER 2019 - CJEU ISSUES SCHREMS II JUDGEMENT**

**JUNE 2013 - SNOWDEN LEAK**

**JUNE 2014 - IRISH HIGH COURT REFERS CASE TO CJEU**

**DECEMBER 2015 - SECOND IRISH DPC COMPLAINT**

**OCTOBER 2017 - IRISH HIGH COURT REFERS CASE TO CJEU**

**DECEMBER 2019 - ADVOCATE GENERAL OF THE CJEU ISSUES OPINION**

# EU LEGISLATION



## DIRECTIVE 95/46/EC



## GENERAL DATA PROTECTION REGULATION (GDPR)

- **Article 3(2)** - Scope of Directive
- **Article 25** - Third country transfers of personal data where there is "adequate level of protection"
- **Article 26** - Controller may adduce adequate safeguards through contractual clauses
- **Article 28(3)** - Powers endowed to supervisory authorities

- **Article 2(2)** - Material scope
- **Article 23** - Legislation limiting obligations and rights; "necessary and proportionate"
- **Article 45** - Transfers on basis of adequacy decision
- **Article 46** - Transfers subject to appropriate safeguards
- **Article 49** - Derogations for specific situations (in absence of adequacy decision or safeguards)
- **Article 58** - Powers endowed to supervisory authorities



# EU CHARTER OF RIGHTS AND FREEDOMS

## Article 7

Everyone has the right to **respect for his or her private and family life, home and communications.**

## Article 8

1. Everyone has the right to the **protection of personal data** concerning him or her.
2. Such data must be processed **fairly for specified purposes** and on the basis of the **consent of the person concerned or some other legitimate basis** laid down by law. Everyone has the right of **access to data** which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to **control by an independent authority.**

## Article 47

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an **effective remedy before a tribunal** in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law...

# SCC Decision

"The **standard contractual clauses** set out in the Annex are considered as offering **adequate safeguards** with respect to the protection of the privacy and fundamental rights and freedoms of individuals and as regards the exercise of the corresponding rights **as required by Article 26(2) of Directive 95/46/EC.**"

Article 1, 2010/87/: Commission Decision of 5 February 2010 on standard contractual clauses



# Privacy Shield Decision



"The Commission has carefully analysed U.S. law and practice, including these official representations and commitments. Based on the findings developed in recitals 136-140, the Commission concludes that the United States ensures **an adequate level of protection** for personal data transferred under the EU-U.S. Privacy Shield from the Union to self-certified organisations in the United States."

Commission Implementing Decision (EU) 2016/1250


## Key Features and Principles:

- self-certification system
- annual joint reviews
- safeguards on access and use by US authorities for national security purposes
- notice: inform data subjects of "key elements relating to processing of personal data"
- data integrity and purpose limitation: processing limited to what is necessary for its intended use, reliable
- choice: right to opt-out
- access: right to access, collect, amend, delete personal information if inaccurate
- recourse, enforcement, liability: effective redress and compliance mechanisms
- security: reasonable and appropriate safeguards
- onward transfer: only for "limited and specified purposes" on basis of contract providing same level of protection

# Reference Questions:

- Does the transfer of personal data for commercial purposes by an economic operator in one Member State to an economic operator in a third country fall within the **scope of the GDPR**, notwithstanding the fact that the data is liable to be processed by the authorities of that third country for the purposes of public security etc?
- What is the **level of protection required by articles 46(1) and 46(2)(c)** in respect of the transfer of personal data to a third country based on standard data protection clauses? Which factors are to be taken into consideration for the purpose of determining an adequate level of protection in the context of such a transfer?
- Is the **competent supervisory authority required to suspend or prohibit a transfer of personal data** to a third country pursuant to standard data protection clauses if, in the view of the supervisory authority, those clauses cannot be complied with in that third country? Or should this power be confined to exceptional circumstances?
- Does the **SCC Decision**, according to which standard clauses set out in annex are considered adequate safeguards with respect to protection of privacy and fundamental rights and freedoms of individuals, provide an adequate level of protection for personal data transferred to third countries, given that the standard data protection clauses are only binding between the controller in the EU and the recipient in the third country and not on supervisory authorities of those third countries?
- Is the **Privacy Shield Decision**, adopted subsequent to the Commissioner's action in the main proceedings, binding on the supervisory authority of the Member State in respect of the finding of the adequacy of the level of protection ensured by the US?

# What is the level of protection required by articles 46(1) and 46(2)(c) in respect of the transfer of personal data to a third country based on standard data protection clauses?

- A level of protection of fundamental rights and freedoms that is “**essentially equivalent**” to that guaranteed in the EU by virtue of the Regulation read in light of the Charter
  - In the absence of an adequacy decision, personal data transfers to a third country may take place only if (i) the controller or processor has provided **appropriate safeguards** to compensate for the lack of data protection in a third country, and ii) **enforceable data subject rights and effective legal remedies** are available
  - Factors to include in assessment of level of protection:
    - **Contractual clauses between controller or processor** established in EU and the recipient in the third country
    - Relevant aspects of the **third country legal system**, particularly (as regards any access by public authorities of the third country) those set out in **Art. 45(2)**
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## Is the SCC Decision valid?

- "Since, by their inherently contractual nature, standard data protection clauses cannot bind the public authorities of third countries...**it may prove necessary to supplement the guarantees contained in those standard data protection clauses**"
- Various clauses included in Annex to the SCC Decision are designed to ensure that no national legislation in the third country affects the ability of the recipient controller established in the third party to comply with its warranties and obligations under contract.
- Where third country recipient controller is **unable to comply** with obligations and warranties under contract, the EU controller / competent supervisory authority **may suspend the transfer or terminate the contract**

"In light of all the foregoing considerations...**examination of the SCC Decision in the light of Article 7, 8, and 47 of the Charter has disclosed nothing to affect the validity of that decision.**"



## Is the Privacy Shield Decision binding on the Commission?

- Competent supervisory authority cannot contradict Commission's adequacy determination by suspending or prohibiting a personal data transfer consistent with Privacy Shield
- BUT still **required to investigate complaints...**
- **Art. 52(1) of the Charter:** limitations on the exercise of rights and freedoms must have a valid **legal basis** and must be **proportionate**
  - US law does not provide necessary limitations and safeguards with regard to interferences authorised by its national legislation
  - US law does not provide effective judicial protection against such interferences for EU data subjects
    - Privacy Shield Ombudsperson is not a tribunal within the meaning of Art. 47 of the Charter (not sufficiently independent, lacks adequate enforcement powers)

"in light of all the foregoing considerations, it is to be concluded that **the Privacy Shield Decision is invalid.**"

# CONCLUSIONS

**"In my personal view, a long-term solution can only be some form of 'no spy' agreement among democratic nations that protects users' human right to privacy independent of location and citizenship."**

Max Schrems, July 2021 Statement  
on noyb

- Privacy Shield Program still exists, but is invalidated as a legal mechanism to comply with EU data protection requirements for EU-US transfers of personal data
- SCCs are still a legitimate basis for transfer, but transfers that rely on them may be evaluated on a case-by-base basis
- Potentially destabilizing effects on transatlantic economic relations and data flows
- Heightened attention to US surveillance law, government access to commercial information in the context of national intelligence programs

