



**To: Mr. Didier Reynders  
European Commissioner for Justice**

**Ms. Andrea Jelinek  
Chairwoman of the European Data Protection Board**

**Brussels, 5 October 2020**

**Subject: Impact of CJEU Schrems II ruling on the framework for international data transfers**

Dear European Commissioner Reynders and European Data Protection Board Chairwoman Dr Jelinek,

The sectors represented by the undersigned associations remain fully committed to ensuring the protection of EU citizens' data when transferring data to third countries. With this letter, we would therefore like to address **July 16<sup>th</sup> ruling of the Court of Justice of the European Union (CJEU) on the "Schrems II case" and its impact on the framework for the international transfer of personal data from the European Union to the United States (US), and to other third countries. The ruling has far reaching implications for the ways in which European and global businesses operate.**

We understand that the CJEU has upheld the validity of European Commission (EC) decision 2010/87 on Standard Contractual Clauses (SCCs). **However, we are concerned with the substantial legal uncertainty that has followed regarding the conditions under which SCCs can be used for data transfers, especially to the US.** It has also, more generally, raised questions on all other available international data transfer mechanisms, including Binding Corporate Rules (BCRs) and adequacy decisions, and significantly increased the following risks:

- **Fragmentation in the interpretation and enforcement of the judgement by data protection authorities (DPAs) across Europe** and the impact this can have, particularly for financial institutions with cross border activities.
- **Immediate economic impact for companies forced to suspend data transfers in order to comply with the judgement<sup>1</sup>.** Given the volume of data transfers between Europe and the US, which notably includes intra-group transfers,

---

<sup>1</sup> In the absence of Guidance on additional measures.

this would have a substantial impact on the European digital economy. We would also like to remind that the CJEU has not called for the retention of personal data within the boundaries of the EU.

- **Delays in the negotiation of new contracts by businesses given the uncertainty surrounding the judgement and its implications.** Guidance is urgently needed so that companies can continue to provide the products and services clients and consumers come to expect, in full respect of the data protection framework and the CJEU ruling.

To address these risks and in response to the judgement **we call for legal certainty as soon as possible so that European companies can carry out their business activities.**

**We therefore welcome the EDPB's intention to present guidance on the "additional measures" to be put in place alongside SCCs.** In this regard we would like to **highlight the need for a proportionate and risk based approach** with measures that are flexible enough to **be adaptable in a business setting.** The undersigned associations propose a number of recommendations regarding the upcoming EDPB guidance, which can be found in the annex to this letter.

We also **welcome that the EDPB aims for coordinated action** and call on the EDPB to assess and provide **guidance on the possible scenarios** which could emerge as a result of the CJEU's ruling. For example, it must be clarified what will be expected from controllers when the EDPB/DPA, having reviewed specific transfers, finds a jurisdiction inadequate and no risk mitigating measures can be put in place. Are all other controllers be expected to stop their own data transfers to that jurisdiction? **The administrative burden and economic impact of EU data controllers having to continually reassess transfers in light of the EDPB/DPA decisions would be significant.** We believe that placing the burden of assessment on the data exporter will not foster legal certainty.

In addition, while the EDPB FAQ has indicated that there is no grace period following the ruling, **we would urge the EDPB and DPAs not to proceed with sanctions against companies until the EDPB guidance on additional measures has been issued and a sufficient period of time has elapsed to enable businesses to implement the relevant procedures.**

Furthermore, in the absence of the Privacy Shield and SCCs and BCRs that can be used with full legal certainty, we call on the **EC to finalise their work on the new SCCs for international data transfers, in full consistency with the ruling and the future EDPB guidance on additional measures.**

The updated SCCs should take a risk-based approach, provide for transfers in a variety of situations and between a variety of relationships, while aligning with the provisions of Article 28 GDPR. They must also **be available to use as standalone tools and that their use should not be tied to an assessment by the data controller of the privacy standards in the jurisdiction to which the data is transferred.** Moreover, the EC and DPAs should take into consideration the development of international cooperation mechanisms in order to facilitate the effective enforcement of legislation for the protection of personal data, also grounded on Article 50 of GDPR.

Lastly, we welcome that discussions have begun on a replacement for the Privacy Shield and **call on the EC to continue its work to develop an adequacy framework that allows for the lawful transfer of data to the US while respecting the privacy of EU citizens.**



We thank you for your attention and remain available to discuss these issues further. In the meantime, we would be pleased to receive your preliminary views on our points above.

**Enrique Velazquez**

**James Kemp**

**Hervé Guider**

**Wim Mijs**

**Chris De Noose**

**Michaela Koller**

**ACCIS  
Director  
General**

**AFME & GFMA  
Managing  
Director of the  
Global FX  
Division,  
Technology  
and Operations  
and Policy  
Divisions**

**EACB  
Managing  
Director**

**EBF Chief  
Executive  
Officer**

**ESBG  
Managing  
Director**

**Insurance  
Europe  
Director General**

## Annex – Recommendations for the upcoming EDPB guidance on “additional measures”

- **Clarify the role of the data exporter in assessing the adequacy of the level of protection afforded to personal data from the EU** (with respect to the rights and freedoms of individuals) of the jurisdiction to which data is being transferred; i.e. **what needs to be assessed in order to determine how “adequate” a given jurisdiction is and the degree of depth required in the assessment.** Under the GDPR, it is the responsibility of the European Commission to assess the adequacy of the level of data protection for a jurisdiction. Putting such a huge task in the responsibility of companies raises concerns in terms of the available resources and expertise to fully analyse a legal and political system and conclude whether it is “adequate” or not. It should be noted that transfers on the basis of the derogations do not require an assessment by the data controller of the privacy standard of the jurisdictions to which data is transferred.
- **Clarify the process of maintaining existing transfer mechanisms**, even to jurisdictions that have not been deemed adequate, and on the need to declare this to the relevant DPA. Given the immediate economic impact, this cannot mean suspension of the affected data transfers and clarification as regards the consequences of notifying the relevant DPA is needed.
- Take into consideration **the responsibility of both the data exporter and the data importer when it comes to the assessment of the circumstances of the transfer.** In this regard, a clarification on the degree to which the data exporter can rely on a risk assessment by the importer, including where this is a processor, would be welcome.
- **Build flexibility into the possible supplementary measures**, given that different firms may arrive at different conclusions regarding risk and the need for additional safeguards.
- **Recognise that the data type should be a factor in risk assessments** – stricter safeguards could be needed for transferring higher risk data, with reliance solely on SCCs appropriate for lower risk data types. Recognise also that the **use of existing data protection measures** provided for under the GDPR play a role in this risk assessment, while also inviting the EDPB to provide examples.
- **Recognise the difference** between data processors who have their parent company in the US, but undertake storage of data in the EU, and US data processors processing data of EU/EEA data subjects, storing them in the US. Due to the different legal possibilities of US authorities to access the data, clear guidance is needed on the treatment of these different set-ups.



About:

### **Association of Consumer Credit Information Suppliers (ACCIS)**

Established in 1990, the Association of Consumer Credit Information Suppliers (ACCIS) represents the largest group of credit reference agencies in the world. ACCIS brings together 42 members across 28 European countries and 8 associate and affiliate members from all other continents. ACCIS aims to create a legal and regulatory climate in which its members can continue to develop their services, contributing to the better functioning of the credit market in Europe and internationally. For more information please visit the ACCIS website: [www.accis.eu](http://www.accis.eu) . Follow us on Twitter @ACCISeu

### **Association for Financial Markets in Europe (AFME)**

AFME (Association for Financial Markets in Europe) advocates for deep and integrated European capital markets which serve the needs of companies and investors, supporting economic growth and benefiting society. AFME is the voice of all Europe's wholesale financial markets, providing expertise across a broad range of regulatory and capital markets issues. AFME aims to act as a bridge between market participants and policy makers across Europe, drawing on its strong and long-standing relationships, its technical knowledge and fact-based work. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. AFME participates in a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) through the GFMA (Global Financial Markets Association). For more information please visit the AFME website: [www.afme.eu](http://www.afme.eu) Follow us on Twitter @AFME\_EU

### **European Association of Co-operative Banks (EACB)**

The European Association of Co-operative Banks ([EACB](http://www.eacb.eu)) is the voice of the co-operative banks in Europe. It represents, promotes and defends the common interests of its 27 member institutions and of co-operative banks in general. Co-operative banks form decentralised networks which are subject to banking as well as co-operative legislation. Democracy, transparency and proximity are the three key characteristics of the co-operative banks' business model. With 3,000 locally operating banks and 52,000 outlets co-operative banks are widely represented throughout the enlarged European Union, playing a major role in the financial and economic system. They have a long tradition in serving 209 million customers, mainly consumers, retailers and communities. The co-operative banks in Europe represent 84 million members and 742,000 employees and have a total average market share of about 20%.

### **European Banking Federation (EBF)**

The European Banking Federation is the voice of the European banking sector, bringing together national banking associations from across Europe, with active members in 32 countries. The EBF is committed to a thriving European economy that is underpinned by a stable, secure and inclusive financial ecosystem, and to a flourishing society where financing is available to fund the dreams of citizens, businesses and innovators everywhere. More information available at: [www.ebf.eu](http://www.ebf.eu) - @EBFeu .



### **European Savings and Retail Banking Group (ESBG)**

ESBG represents the locally focused European banking sector, helping savings and retail banks in 21 European countries strengthen their unique approach that focuses on providing service to local communities and boosting SMEs. An advocate for a proportionate approach to banking rules, ESBG unites at EU level some 900 banks, which together employ 656,000 people driven to innovate at 48,900 outlets. ESBG members have total assets of €5.3 trillion, provide hundreds of billions of euros in SME loans, and serve 150 million Europeans seeking retail banking services. ESBG members are committed to further unleash the promise of sustainable, responsible 21st century banking. Learn more at [www.wsbi-esbg.org](http://www.wsbi-esbg.org)

### **Insurance Europe**

Insurance Europe is the European insurance and reinsurance federation. Through its 37 member bodies — the national insurance associations — Insurance Europe represents all types of insurance and reinsurance undertakings, eg pan-European companies, monoliners, mutuals and SMEs. Insurance Europe, which is based in Brussels, represents undertakings that account for around 95% of total European premium income. Insurance makes a major contribution to Europe's economic growth and development. European insurers generate premium income of more than €1 300bn, directly employ over 900 000 people and invest nearly €10 200bn in the economy. For more information, please see [www.insuranceeurope.eu](http://www.insuranceeurope.eu)