

EU-US transfers



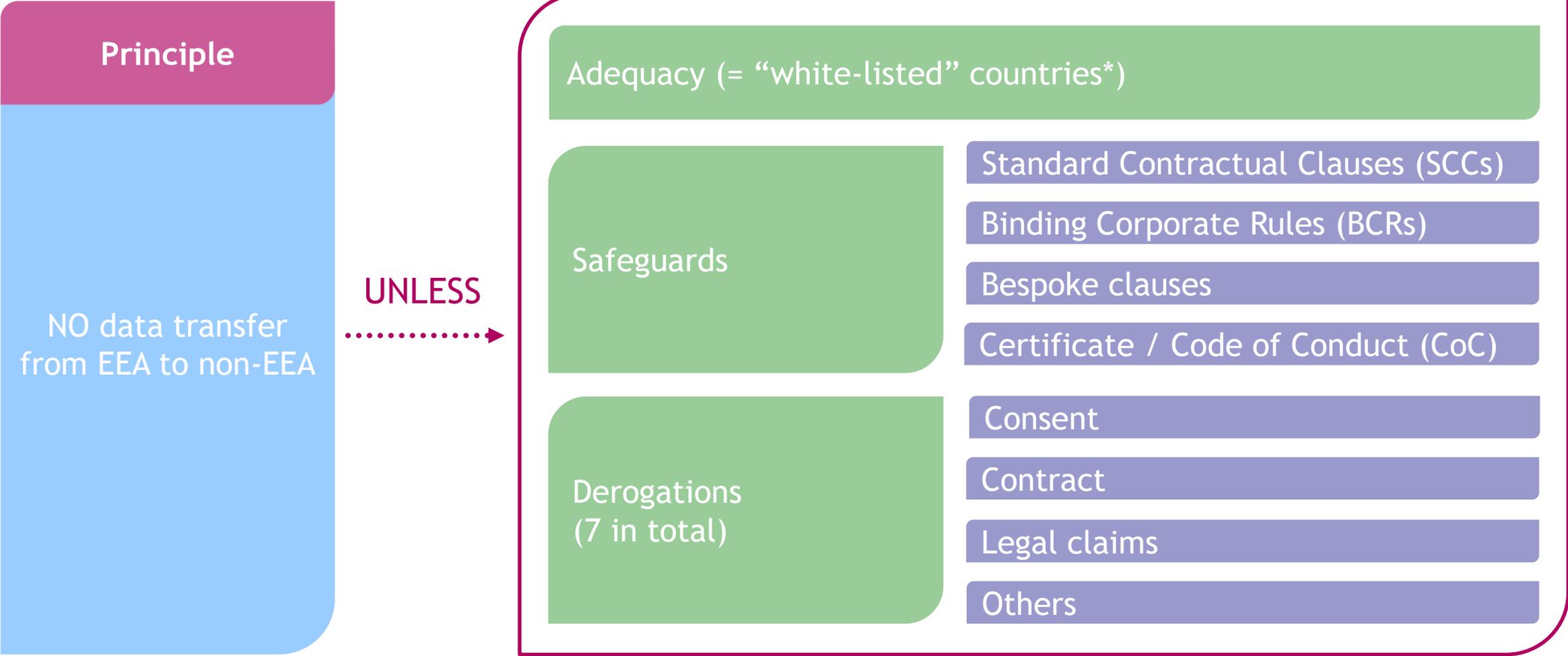
AmCham EU

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17 June 2022

Linklaters

Transfer principles under the GDPR



Review of Adequacy

1 New countries to benefit from adequacy decision with recent adequacy decisions (e.g. UK)

2 Ongoing revision of pre-GDPR adequacy decisions (e.g. Andorra, Switzerland)

3 Awaiting Privacy Shield v2.0

25 March 2022:
EU-U.S. political agreement
(in progress)

Schrems II case

Schrems II - CJEU's judgment of 16 July 2020 in
Data Protection Commissioner v Facebook Ireland Limited, Maximilian Schrems
(Case C-311/18)

Invalidation of the
EU-U.S. Privacy
Shield: 4500+
companies affected
+ their clients &
suppliers

Confirmation
of the validity of
the SCCs for
data transfers

Transfers need to
be assessed on a
case-by-case basis
(transfer impact
assessment or TIA)

> EDPB's guidelines

> Supplementary measures

EDPB recommendations 02/2020

European Essential Guarantees

Processing based on clear, precise and accessible rules
Art. 45(2) GDPR and 8(2) Charter

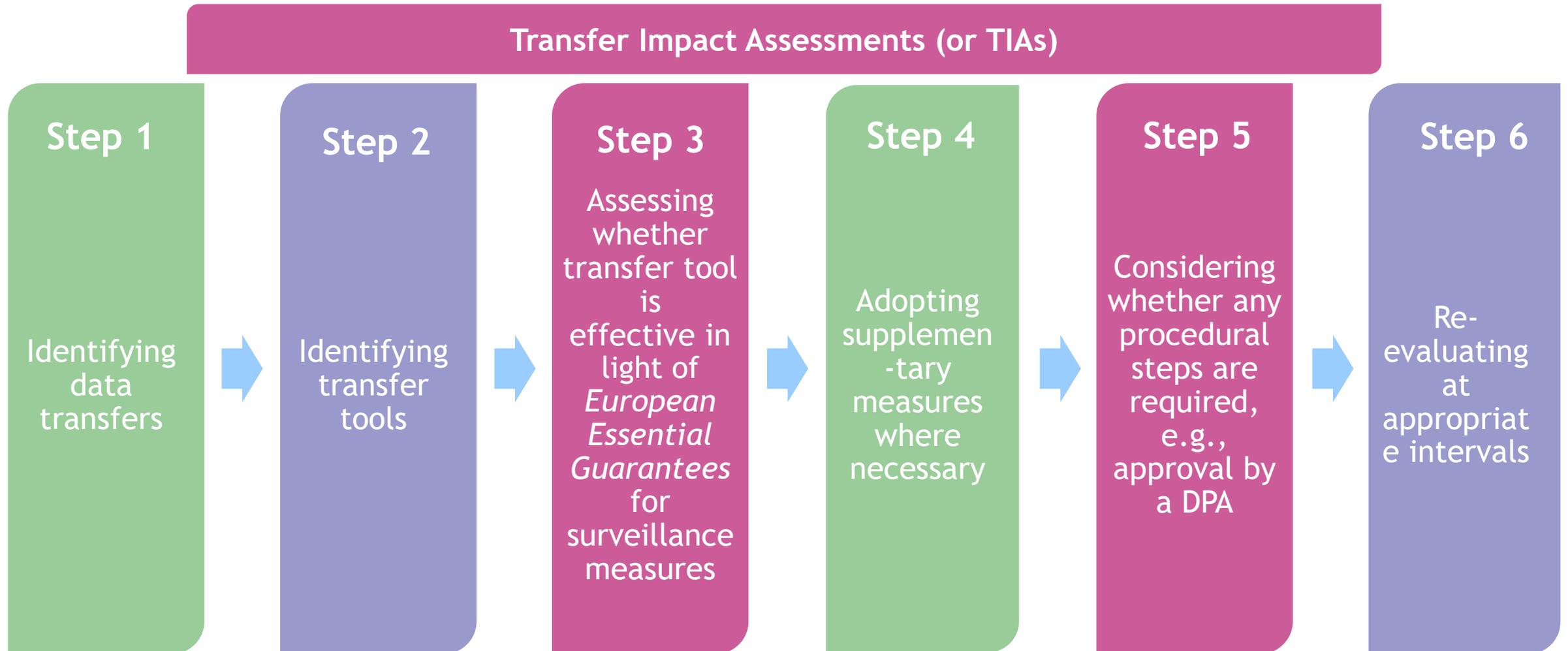
Necessity and proportionality test
Art. 7 and 52(1) Charter

Independent oversight mechanism
Article 45(2)(b) GDPR

Effective remedies available to individuals
Article 45(2)(a) GDPR

- > Some degree of interpretation allowed → “essentially equivalent” test
- > Transparency issue of the third country legal regime
- > Democratic vs. other countries

EDPB recommendations 01/2020



Version 2.0 of the SCCs

New set of SCCs adopted by the European Commission on 4 June 2021

4 modules to cover all transfers:

- > I: C to C
- > II: C to P
- > III: P to P (new)
- > IV: P to C (new)

- > Allowed on multi-party basis, with adhesion mechanism
- > Meet Art. 28 requirements (for C to P and P to P)
- > *Schrems II* specific obligations reflected:
 - > Review + document transfer risk assessment (incl. third country law)
 - > Importer to notify exporter of requests for access, provide transparency report and confirm disclosure requests
- > Burden on data importer, not only data exporter

Repapering exercise due by 27 December 2022

Linklaters SCC Automation Tool



To replace or create new SCCs, starting from your existing SCCs



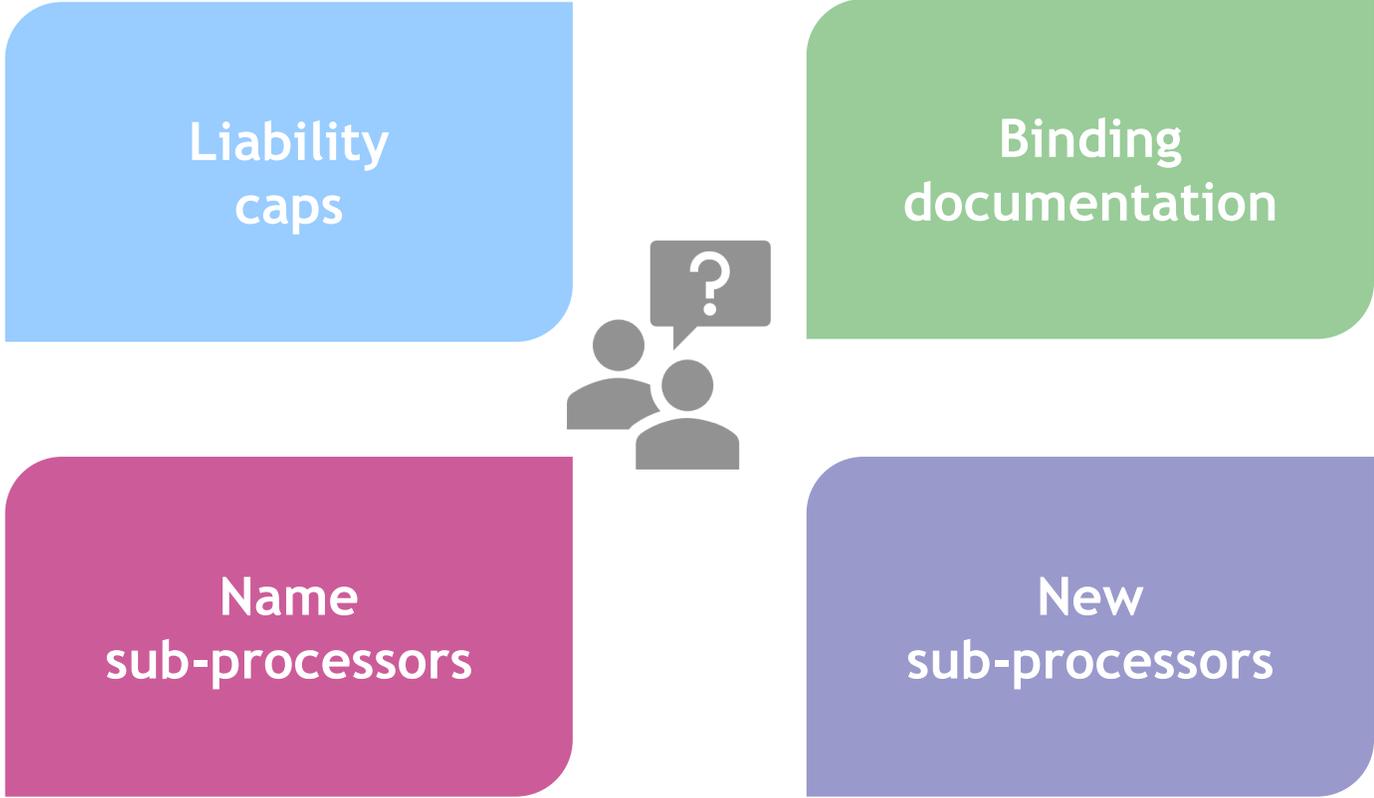
We upload your old SCCs to our in-house AI-powered tool which extracts the relevant data



After validation, our internal automation tool creates your new SCCs

We perform a final quality check

New SCCs – EC FAQ Take aways



Safeguards – BCRs

Rules adopted by multinationals
Binding upon **affiliates + employees**

Sophisticated adequate safeguard for intra-group data transfers

Controller BCR
For intra-group transfers among controllers (and processors)

Processor BCR
For transfers from 3rd party (e.g., customer) to processor with ensuing transfers within processor group

Bindingness often organised via intra-group agreement

Intra-group scope broadened to companies « engaged in a joint economic activity »

Legally recognised:
Art. 47 GDPR

BCRs – Benefits

Gold standard for transfers

Flexibility and self-regulatory approach

Cost efficient in the long run (even if costly and time consuming upfront)

Reducing risks of non-compliance

With GDPR, adoption process more streamlined

Recognition beyond EEA

Companies with BCRs / BPRs

- > Approx. 135 companies had BCR pre-GDR
- > New companies having BCR since entry into application of GDPR: 1 in 2019, 7 in 2020, 12 in 2021 and 1 in 2022 (to date)

Michelin	Hewlett Packard	Linklaters	Airbus	Lego
Salesforce	Rakuten	BNP Paribas	Accenture	Tetra Pak
Astra Zeneca	Exxon Mobil	Mastercard	DocuSign	... and more

Risk of general ban for U.S. providers?

Schrems II - 101 complaints from NOYB regarding the use of Google Analytics/Facebook Connect in EU

Decisions re. Google Analytics are starting to pile up

- > EDPB Taskforce created
- > 22 December 2021: Austrian Data Protection Authority (*Datenschutzbehörde*)
- > 5 January 2022: European Data Protection Supervisor
- > 10 February 2022: French CNIL
- > Communications from DPAs in NL, DK, Norway, etc. (but no decision yet)
- > Others may follow

Lack of effective supplementary measures = future of relations with U.S. IT service providers = uncertain

Towards a culture of “Data Protectionism”?

Cookiebot decision: Administrative Court of Wiesbaden (DE), 1/12/2021

Need to implement data transfer solution for U.S. headquartered companies even in the absence of transfers?

- > German university integrated cookie management tool “Cookiebot” that collected personal data about users
- > Cookiebot based in Denmark, but uses U.S.-based provider
- > No data transfers to U.S. as such but theoretical access from U.S. authorities
- > **Court considered that a data transfer solution and supplementary measures should have been put in place**

Data protectionism is increasing → will “Cookiebot” remain isolated (esp. now that there is a political agreement for a new EU-U.S. Transatlantic framework)?

3. Q&A and Closing Remarks



Thank you



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