

# SCHREMS II – DATA LOCALIZATION IS NOT SUFFICIENT

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# Speakers

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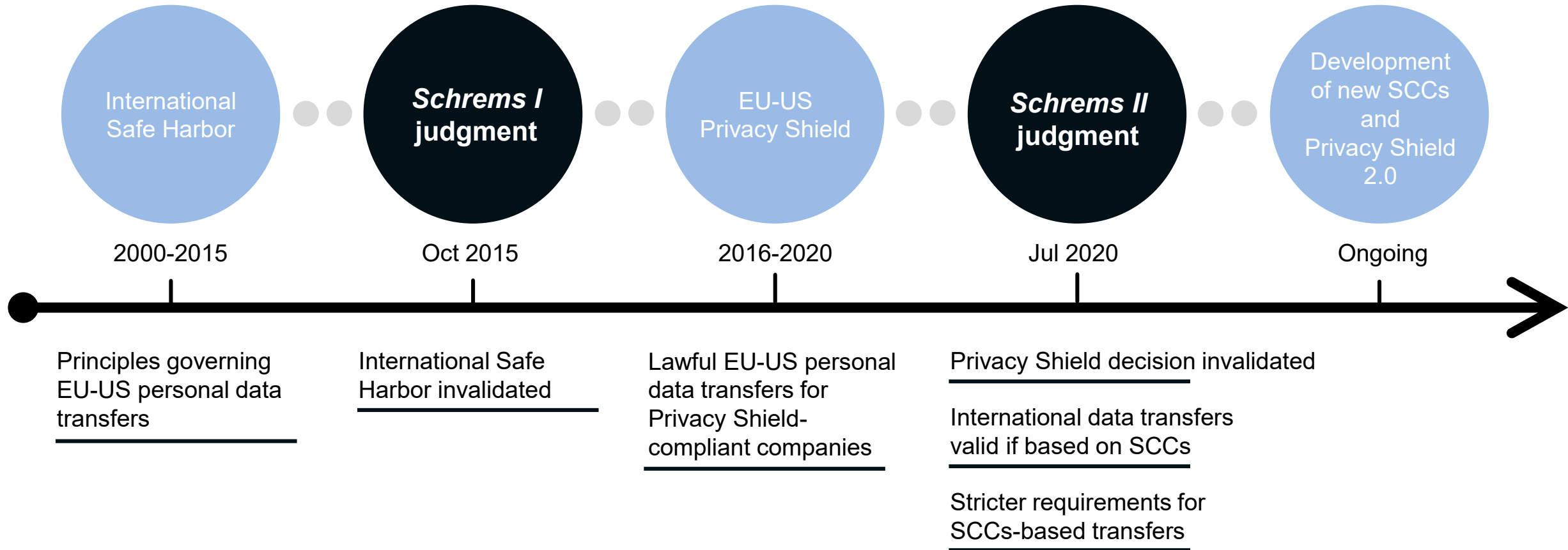
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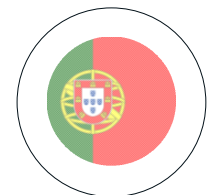
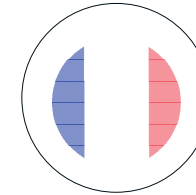
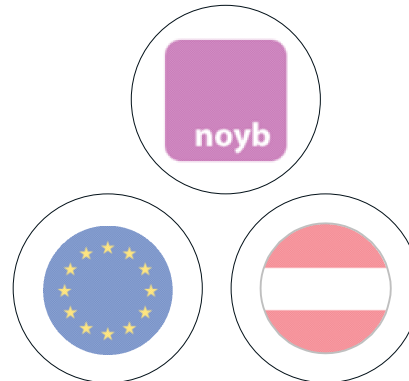
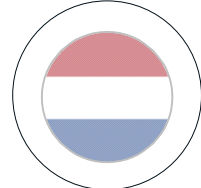
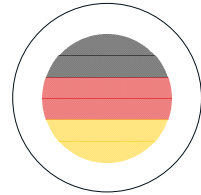
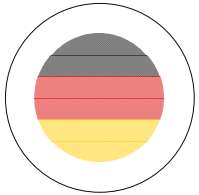
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# Where we are and what it means



# Regulatory response to Schrems II – so far...



- Bavarian DPA calls for German company to cease the use of the 'Mailchimp' tool
- Advice from Berlin, Hamburg and Dutch DPAs to halt transfers to the US
- NOYB filed 101 complaints concerning companies in 30 EU/EEA states
- NOYB announcement that it made submissions to the Austrian DPA urging it to consider imposing a EUR6bn fine against Google
- Conseil d'Etat's refusal to suspend Microsoft's hosting of public health data lake, despite CNIL opinion
- Conseil d'Etat's ruling that personal data on an AWS-hosted platform to book COVID-19 vaccinations was sufficiently safeguarded (note: processor in the EU a subsidiary of a US company – no transfer of data to the US)
- Suspension of data flows to the US (Census 2021)

# European Data Protection Board recommendations – 'six-step' test



What does this mean for BCRs?

What does this mean for Article 49 GDPR derogations?

# Step 3 of the EDPB recommendations – 'Transfer impact assessments'

Take into account **European Essential Guarantees** when evaluating foreign laws

Clear, Precise & accessible rules

Processing based on clear, precise & accessible rules

Necessity & proportionality

Demonstrate this regarding the legitimate objectives pursued

Independent oversight

Existence of an independent oversight mechanism

Effective remedies

Effective remedies available to the individual



Don't rely upon 'subjective factors'



- legal requirements and authorities to be given greater weight
- practical likelihood that data will be of interest to and accessed by government authorities

# Step 4 of the EDPB recommendations – Supplementary measures

Take into account **European Essential Guarantees**  
when evaluating foreign laws

## Technical measures

- Encryption
- Additional examples:  
pseudonymisation and split/  
multi-party processing
- Use cases 6 & 7

## Contractual measures

- Cannot bind government  
authorities
- Transparency obligations,  
obligations to take specific  
actions, empowering data  
subjects to exercise their  
rights

## Organisational measures

- Pair with contractual  
guarantees & technical  
measures
- E.g. internal policies for  
governance of transfers,  
transparency and  
accountability, internationally  
recognised standards



# What can organisations do, practically?

## Importer organisations

- Providing FAQs to exporter customers for up-front reassurance and contractual addendums (e.g. Microsoft's 'Defending Your Data' initiative)
- Assisting exporter customers to carry out transfer analysis

## Exporter organisations

- Issuing requests for information to carry out assessments of international transfers (see NOYB's model requests)
- Reviewing Article 30 GDPR records of processing to assess transfers

## Data localisation

- For example, Microsoft will allow its EU cloud services customers to keep data in the EU ('EU Data Boundary')



'Transfer impact assessments' and FAQs are not static documents and should be reviewed on an ongoing basis - they cannot "sit on the shelf".

# New draft SCCs

## Schrems II requirements

Obligation/  
warranty  
re. equivalent  
level of  
protection

Government  
access  
requests

## Eligible parties

Controller,  
processor and  
non-EU data  
exporters

Multi-party use

## Obligations

Mandatory  
data  
processing  
terms

Passing on  
of importer  
obligations

## Individuals' rights

Third-party  
beneficiaries

Compensation



## What next?

**Data localisation  
- is it sufficient?**

**Privacy Shield 2.0?**



# QUESTIONS?

# Contacts & Resources



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## About Orrick

Christian and Shannon are members of Orrick's award-winning Cyber, Privacy & Data Innovation Group. They collaborate with innovative companies globally to bring data-driven products and services to market, address global data privacy requirements and proactively reduce security risks. They lead companies through legal pitfalls as they transfer data across borders, respond to incidents, create new products, resolve high-stakes litigation and make the tough judgment calls presented by risk management matters.

## Cross-Border Tool

If you relied on the EU-US Privacy Shield for transferring personal data from Europe to the US – or you are using SCCs or BCRs for data transfers – [sign up](#) for access to our forthcoming complimentary Cross-Border Data Transfer Tool (the XBT Tool!).



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