

# International Data Transfers

## Considering your options

The decision invalidating the adequacy of the EU-US Safe Harbor framework left a considerable gap in the options available to organisations seeking to legitimize data transfers to the US. However, the EU data protection authorities made it clear that they expected those organisations to ensure an adequate level of protection for European data at all times.

Following the adoption of the EU-US Privacy Shield, here is our high level analysis of the possible options available and our recommendations for choosing the right one:

### Standard Contractual Clauses (SCC)

#### PROS

- Freely available and no substantial drafting required
- Pre-approved as lawful transfer method across the EU
- Filing formalities relatively straightforward
- Suitable for one-off transfers

#### CONS

- Cumbersome as very strict non-negotiable requirements
- Unworkable for multiple and evolving transfers
- Subject to administrative requirements in most of the EU
- Risk of non-observance by data importers

**Our verdict:** A relatively 'quick-fix' which is widely used and accepted, but unlikely to be suitable for dynamic organizations seeking a long-term solution. Potentially subject to the same challenges that caused the invalidation of Safe Harbor.

### Intra-Group Agreements and ad-hoc contracts

#### PROS

- Greater flexibility than SCC
- If mirroring SCC, less likely to be challenged
- Greater likelihood of compliance with requirements
- Suitable for evolving transfers

#### CONS

- Greater expenditure due to bespoke drafting
- More cumbersome filing and authorisation requirements
- Delay caused by dialogue with data protection regulators
- Risk of eventual non-approval

**Our verdict:** A more realistic solution than SCC with welcomed flexibility, but requiring a greater effort in terms of drafting and interaction with regulators. A good interim option to avoid legal uncertainty in the medium term.

### Binding Corporate Rules (BCR)

#### PROS

- Globally regarded as the 'gold standard' of compliance
- Obvious choice for flexibility and legal certainty
- Perfect model for meeting accountability obligations
- Natural evolution from Safe Harbor compliance programs

#### CONS

- Cumbersome and demanding approval process
- Lack of regulators' resources can delay approval
- Top management buy-in is essential
- Need for sufficient internal resources

**Our verdict:** Growing support of BCR by law makers and regulators worldwide have turned it into an ideal framework for global privacy compliance, but it should be seen as an investment more than a simple mechanism to overcome transfers restrictions.

### Privacy Shield

#### PROS

- European Commission and US Government have purposely addressed Safe Harbor's weaknesses
- Improvements to its original version will help overcome objections from EU data protection authorities
- It provides a basis for global compliance programs
- It helps avoid cumbersome contract negotiations compared to SCC and ad-hoc contracts

#### CONS

- Adequacy likely to be challenged in the Court of Justice of the European Union, so legal uncertainty will continue
- Continued scepticism by some EU data protection authorities
- Likely to be additional compliance scrutiny from US regulators, as compared to Safe Harbor

**Our verdict:** While there is some uncertainty associated with a possible challenge to its validity in court, it provides a more solid basis for data transfers to the US than Safe Harbor and it should meet the necessary adequacy requirements.

## Consent

### PROS

- Derogation expressly mentioned by the Directive
- No compliance mechanisms by importer required

### CONS

- Practical impossibility of obtaining consent in this context that is informed, specific, and freely given
- Individuals able to subsequently withdraw consent

**Our verdict:** Like any of the other derogations, it is only a 'last resort' option where providing an adequate level of protection is not possible, as the ability to rely on it in practice is extremely limited and unlikely to be accepted by regulators.

**For more detailed advice on how to proceed and assess the risk of non-compliance please contact:**



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