

TaylorWessing

# Data Protection Webinar

## The new standard contractual clauses

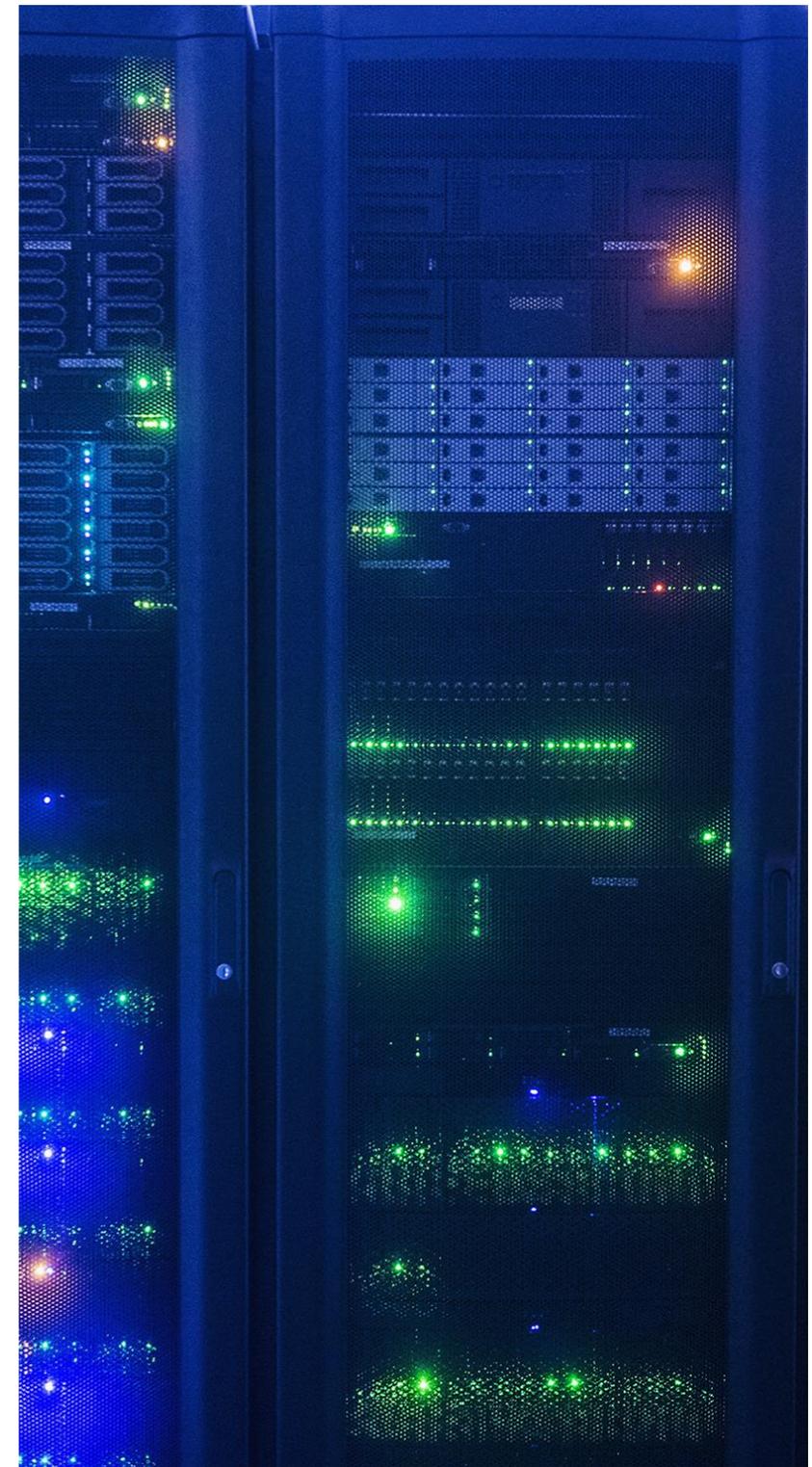
What does this mean for data transfers?

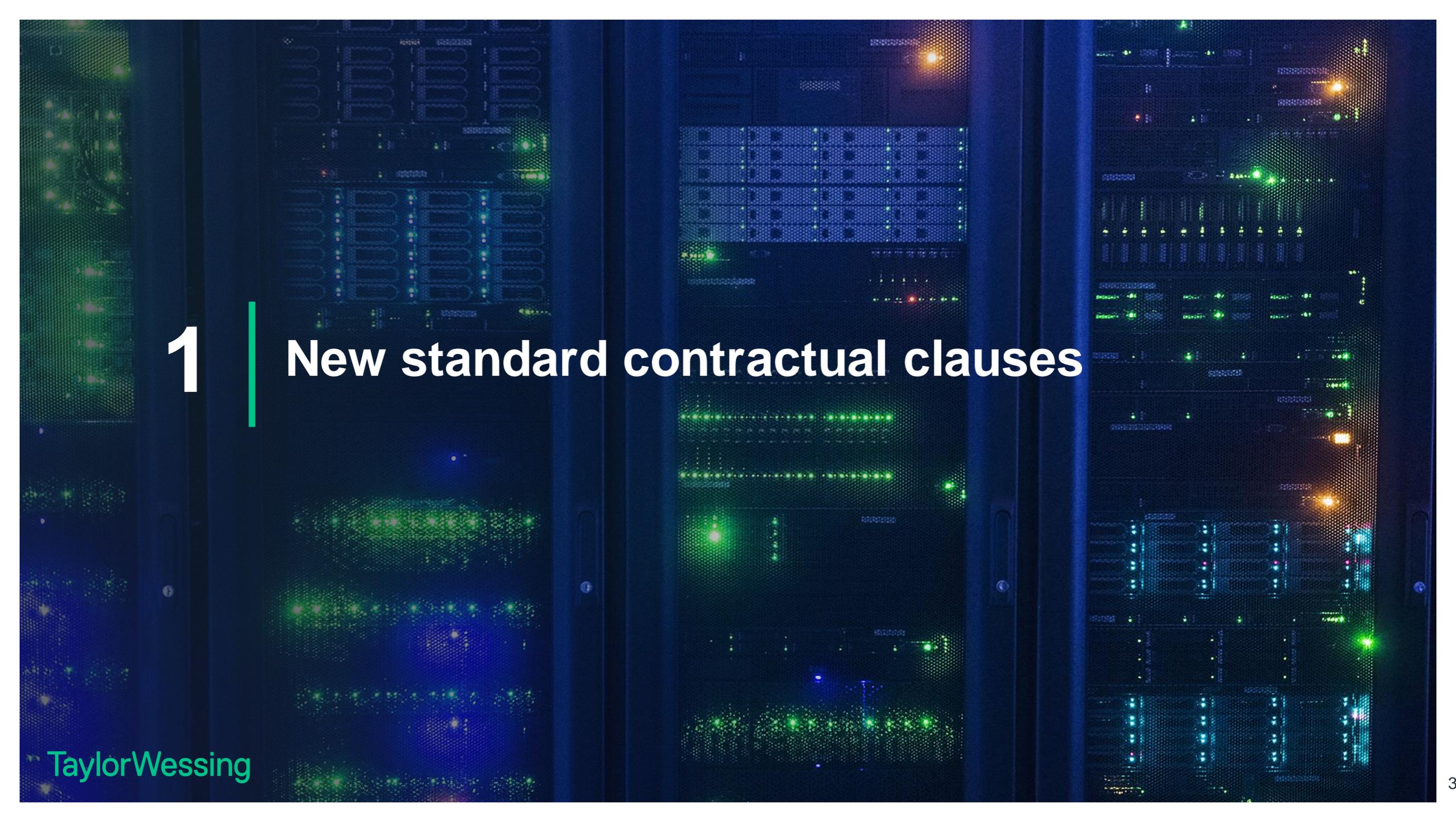
8 July 2021

Private and confidential

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# New standard contractual clauses

# New standard contractual clauses



## Overview

- Publication in the Official Journal of the European Union **on 7 June**
- **Which means**
  - **As of 27 September 2021:** new SCCs must be **used** on any new transfer (or existing transfer when processing operations changed) – 3-months period, Art. 4(2), (3)
  - **As of 27 December 2022:** updating **all existing** SCCs to the new SCCs, as the 'old' SCCs C2P and C2C are repealed then – 18-months period, Art. 4(4)

# New standard contractual clauses

## Scope of application

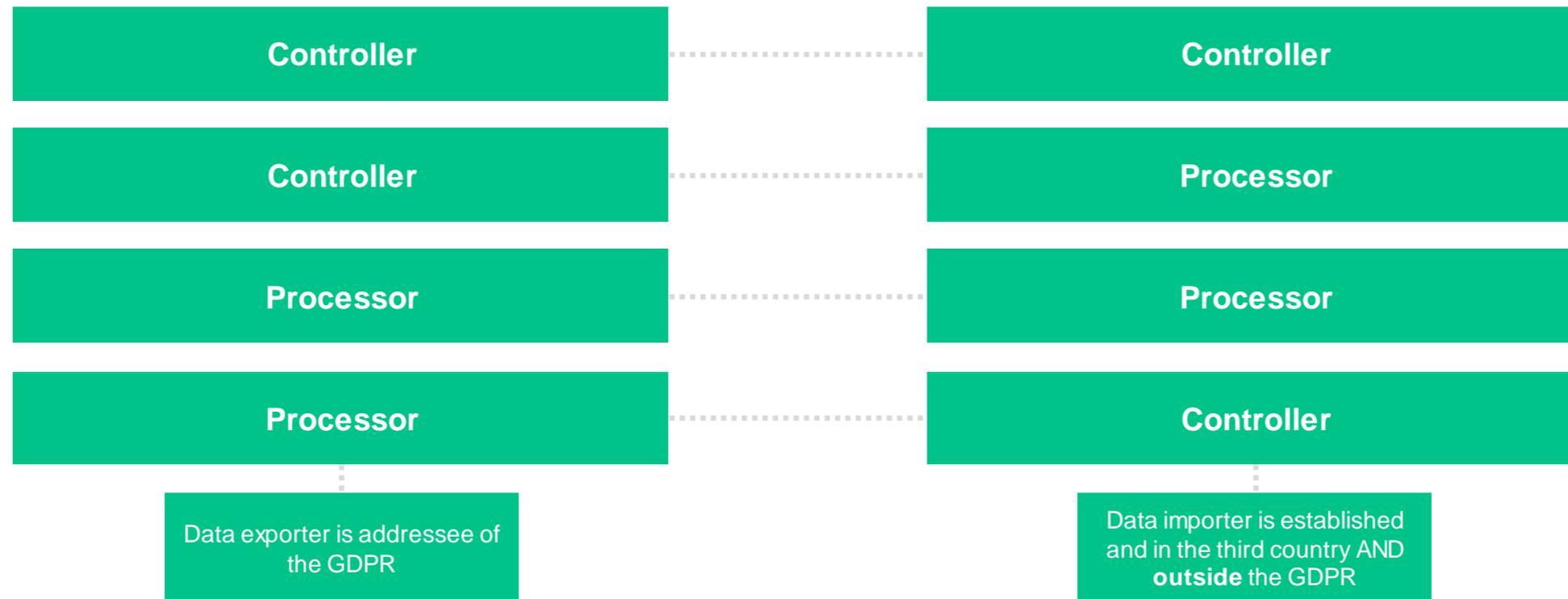
- For data exporters inside and outside the EU
- For data importers: only if the GDPR does not apply!



# New standard contractual clauses



## Constellations and scope of application



# New standard contractual clauses



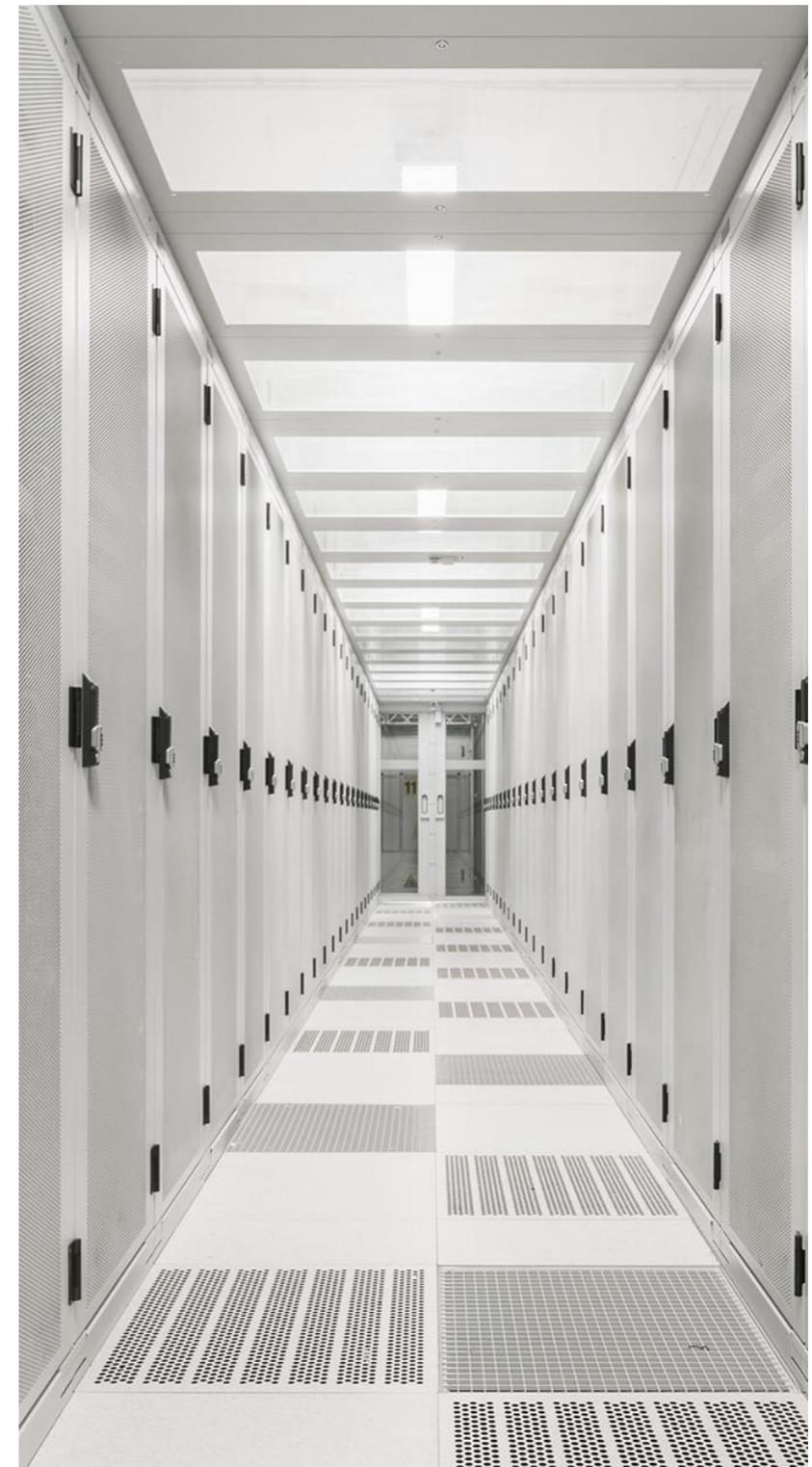
## Modular structure

- a) C2C – largely unchanged, but more detailed
- b) C2P – contains requirements according to Art. 28(3) GDPR
- c) P2P – new and long awaited
- d) P2C – barriers to competition for EU processors?

# New standard contractual clauses

## Introduction

- No additional agreement under Art. 28(3) GDPR required for C2P and P2P (unless some processing in EEA)
- Inclusion of the constellation Processor-to-Processor (long awaited)
- P2C – obstacle of competition for EU processors?
- Multi-party possibilities for both data importers and exporters
- Choice of law and jurisdiction within the EU



# New standard contractual clauses

Relevance with regard to the *Schrems II* judgement

- The parties' warrant for the level of protection in the third country\*
- Transparency/information obligations\*
- Obligation to examine official requests for data disclosure\*
- Obligation to minimise data when replying to a request for disclosure\*
- Exhaustion of the legal remedy in the context of the defence against official requests for disclosure
- Documentation obligations

\* Some of the EDPB's recommendations already taken into account



# New standard contractual clauses



## Schrems II

Transfer Impact Assessment, clause 14

- Assessment of third-country laws and practices on data protection standard
- Risk-orientated approach?
- Obligation to document and to provide on request

Obligations in case of access by public authorities, clause 15

- Notification of the data exporter and, where possible, the data subject promptly
- Review of legality of the request and judicial action when chance of success
- Documentation of legal assessment and any challenge to the request
- Data minimisation when responding

# New standard contractual clauses



## Other

- a) Fixed character
- b) Third-party preference, Clause 3
  - Additional third parties are included in the protective effect of certain SCC clauses (e.g. customers of companies)
- c) Hierarchy, Clause 5
  - The SCCs contain a strict hierarchy clause (as well as a liability clause) that will make it very difficult for data importers to limit their liability with respect to data transfers under the new standard contractual clauses
- d) Liability, Clause 12
  - For data importers harder to limit their liability
- e) Docking Clause, Clause 7
  - Usually, the SCCs will be entered between and binding for the parties signing the SCCs in first place. However, there are situations where additional parties might be involved in the transfer of personal data subject to the SCCs, e.g. an additional Processor. The Docking Clause facilitates adding new parties to join the SCCs

# New standard contractual clauses



- g) Supervision, Clause 13
- h) Choice of law and jurisdiction, Clause 18
  - For module 4 even of third-country
- i) More, including
  - Obligation to make available a copy of the SCC to people affected
  - Documentation of measures taken Clauses 8.9, 14 (d)
  - Special termination rights for breaches, Clause 16
  - Specific rules on legal remedies

# New standard contractual clauses



## Data exporter

- As data controllers in the sense of data protection law, the users of business software are primarily obliged to implement the requirements of the ECJ and the EDPB.
- All transfers to third countries and the legal basis used (standard contractual clauses, Privacy Shield, adequacy decision, BCR) must be identified as part of a data mapping. The problems of a so-called onward transfer from a secure third country to an insecure one must also be taken into account.
- Possible risks must be identified for affected data transfers, especially on the basis of standard contractual clauses or Privacy Shield. Questionnaires to the relevant software providers or so-called transfer impact assessments can be used for this purpose.
- If standard contractual clauses alone do not provide sufficient guarantee of an adequate level of data protection due to the legal situation in the recipient country, supplementary contractual, technical or organisational measures must be introduced. For example, supplements to the standard contractual clauses, encryption or anonymisation/pseudonymisation of the data may be considered.

# New standard contractual clauses



## Data importer

- In order to maintain competitiveness, providers must have suitable and convincing answers to user enquiries and be able to explain why a data transfer is possible in this case in compliance with the law. Otherwise, they run the risk of not being awarded a contract or losing existing customers.
- Standard contract clauses should be understood and conclusion should be made possible at any time, also for existing customers.
- Standard answers for user questionnaires and, if necessary, own transfer impact assessments or assessments of the legal situation in the recipient country should be kept ready.
- Additional safeguards, such as supplemented standard contractual clauses or technical solutions with a higher level of data protection, such as encryption, should be examined and introduced if necessary.
- The infrastructure offered and the use of subcontractors must be checked according to data protection compliance aspects.
- Customers should also be provided with regular updates on the data protection situation in the recipient country upon request.

# 2

## EDBP Recommendations

# EDPB recommendations



Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data

[Version 2.0](#)

Adopted on ~~10 November 2020~~ 18 June 2021

## Recommendations on additional measures

- Binding on DPAs
- 6-step plan for the identification and evaluation of data transfers
- Examples of supplementary measures



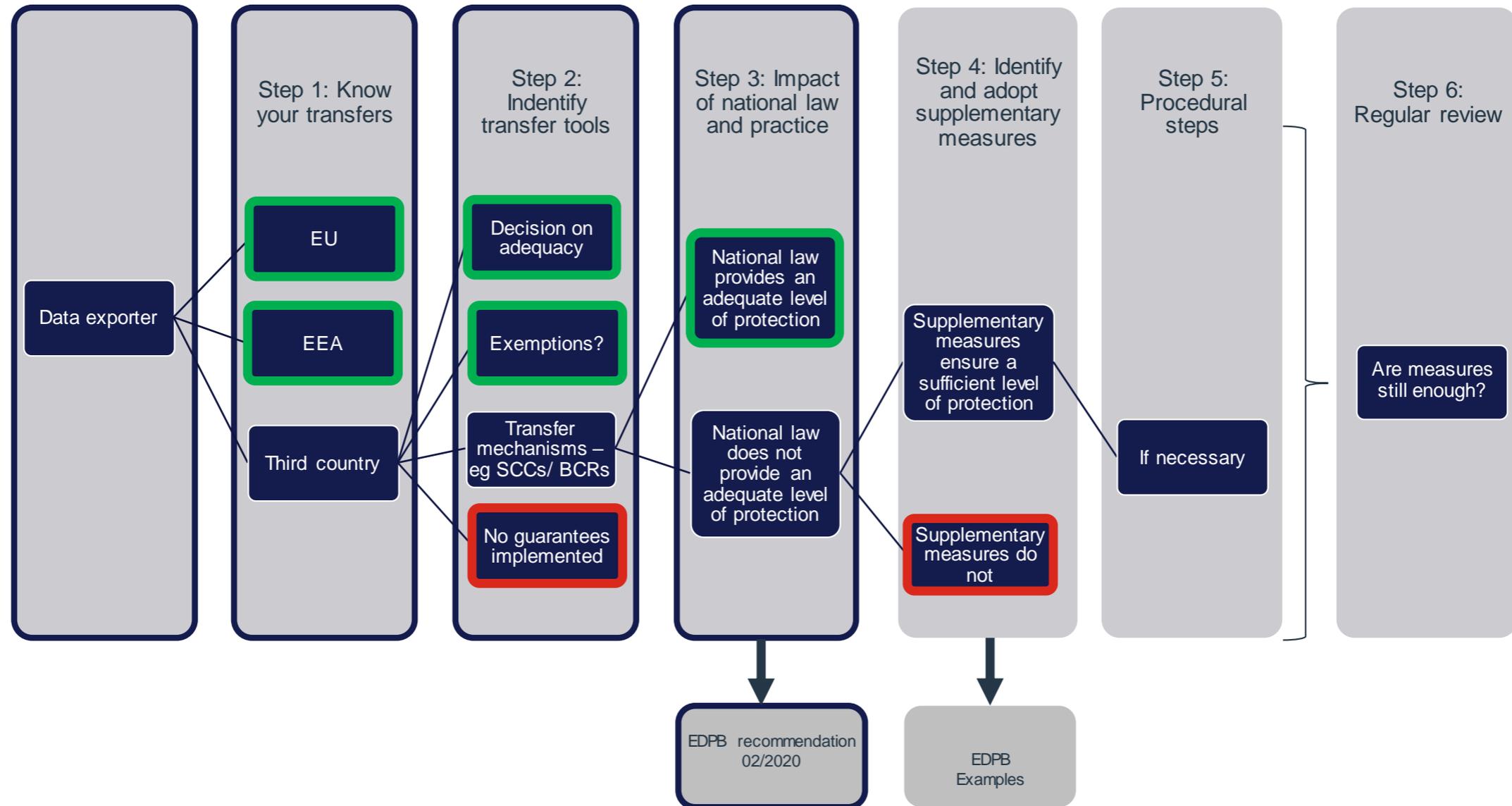
Recommendations 02/2020 on the European Essential Guarantees for surveillance measures

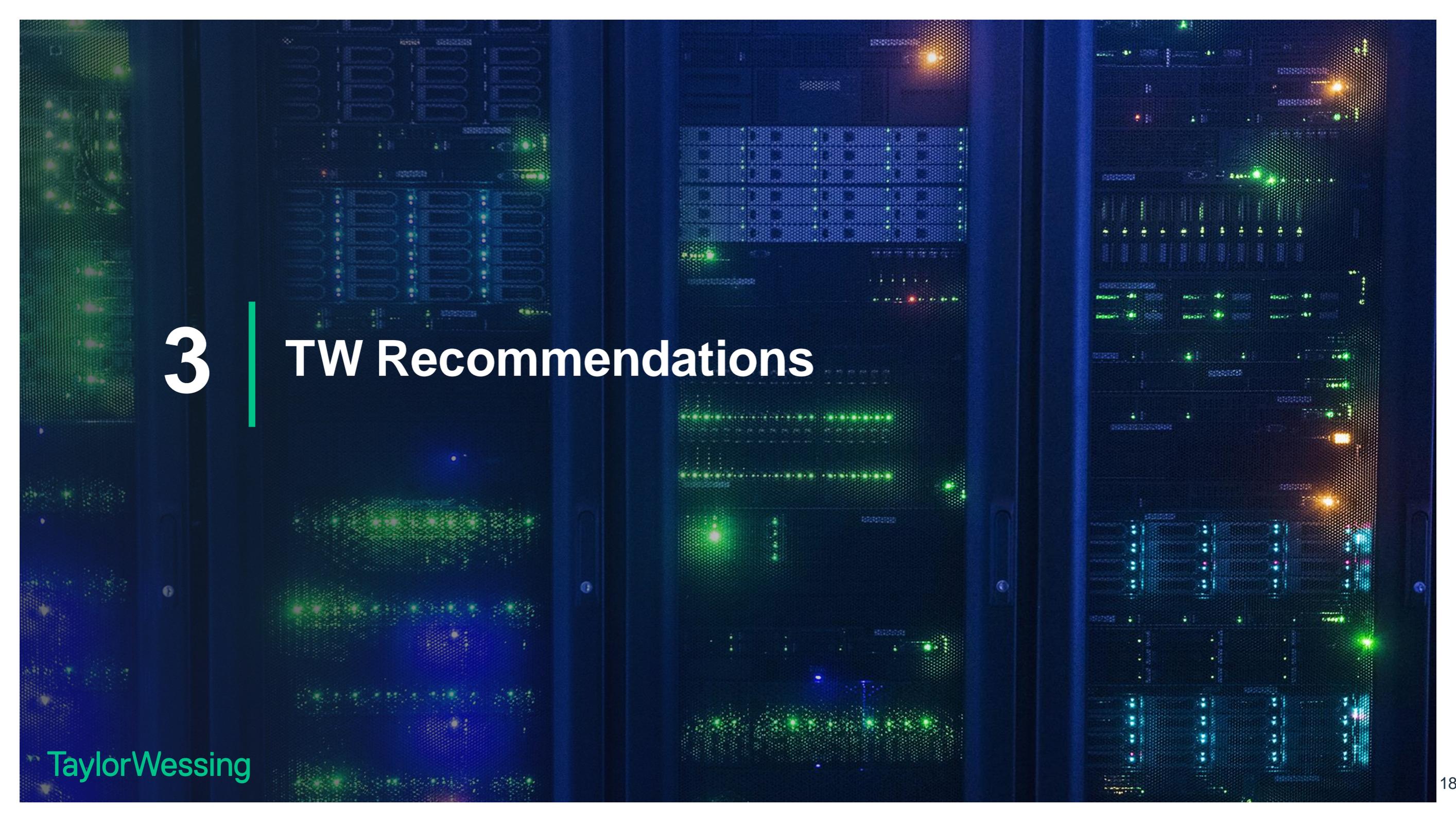
Adopted on 10 November 2020

## Recommendations on EU guarantees for surveillance measures

- Guidance on how to check national law against four key guarantees at EU level

# Step plan according to EDPB





3

## TW Recommendations

# Initial thoughts/expectations



- Some good stuff: modular, processor-to-processor, flexibility to use fold into MSA or other contract documents
- EU customers likely to start asking before September, especially as the new SCCs present an (incomplete) answer to Schrems II concerns
- So data importers do not have much time to get their own templates together
- Article 28 DPA also published – don't forget that, EU customers likely to push for it too for processing in the EEA
- Flexibility to embody the new SCCs in an MSA, DPA or as own standalone document. Either way still a "sacred text" which cannot be amended

# Quick word about the UK & Switzerland

- New EU SCCs not valid under UK or (yet?) under Swiss law
- UK will issue own new SCCs but not clear when or how similar
- Please note the new adequacy decision for UK of 28 June 2021
- For now, old SCCs work for Switzerland too but not the new ones – expected that the Swiss regulator will adopt the new ones but tbc



# Pain points & operationalisation



- Third country assessments and information under clause 15? What should vendor-importers provide to EU customers? Full DTIA, or list of countries and country assessments?
- What does reporting to exporters at regular intervals mean – how exactly do we operationalise? Has to be consistent
- Audit rights – rights to information and audit at reasonable intervals and where indications of non-compliance – vendor certifications *may be taken into account and may include inspections at premises or physical facilities*
- Sub-processors – options around specific consent or general authorization and objection process for new sub-processors, processors to give enough information to assess – specific notification?
- Security measures – annex with TOMs as before but driving for more detail than we are used to

# What to do?



- Game-plan –complicated project: contract amendment and operationalisation – internal & external resources, and comms internally – will be a long process
- Data-Mapping – including which module fits where
- “Customizing” the SCC
- Process of transfer impact assessment
- Switch to the new SCC
  - by 27 September 2021 use on for new agreements only new SCC
  - by 27 December 2022 all existing SCC to be replaced with new SCC
- Documentation and constant re-evaluation of taken measures
- **Any questions?**

# Who we are



**Taylor Wessing is a global law firm that serves the world's most innovative people and businesses.**

Deeply embedded within our sectors, we work closely together with our clients to crack complex problems, enabling ideas and aspirations to thrive.

Together we challenge expectation and create extraordinary results.

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# International data protection practice

Taylor Wessing advises on all areas of data protection across all sectors. As businesses strive to create more value from data, and find even more creative ways of interacting with customers, the various laws that govern use of data and protection of information touch more businesses.

## **We regularly advise businesses on issues such as:**

- Implementing national and international corporate data protection policies, structures and departments
- GDPR audits and implementation
- Risk remediation
- Data protection and data security Data protection issues in transactions

# International data protection practice (cont'd)



- Worldwide roll out of contracts
- Employee data protection (e.g. implementation of HR database)
- Assessment of new processes and IT systems (e.g. HR or CRM systems)
- Advising companies in audits of regulatory authorities and in potential disclosure or summary proceedings
- Authorization concepts
- International data protection requirements (SCC, BCR, Privacy Shield, ad hoc contracts, opt-ins)
- Advising on the introduction of new products and services (preliminary evaluation).

# Global Data Hub



The Global Data Hub is Taylor Wessing's international thought leadership in the area of data protection. The Global Data Hub draws on the firm's international expertise to provide you with insight and practical guidance on the data protection issues most likely to affect your organisation. [www.taylorwessing.com/globaldatahub](http://www.taylorwessing.com/globaldatahub)

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Michael Yates looks at reputation management the wake of a GDPR data breach.

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Use our checklists to help ensure you comply with the GDPR and put the right procedures and priorities in place.

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This free assessment tool identifies key areas of GDPR risk focusing on the employee data environment by using a streamlined question flow approach.

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**Global Data Protection Guide**

The Guide spans more than 60 countries and takes the form of an interactive online map, which clients can use to compare national data protection laws in multiple jurisdictions.

[VISIT GUIDE](#)

### Hot topics



**GDPR**

The GDPR is a complete overhaul of EU data protection law. Compliance is an ongoing obligation which you must be able to demonstrate. Get to grips with the most pressing GDPR issues.

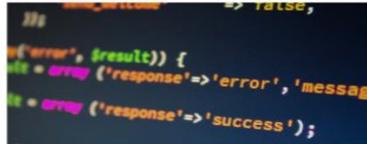
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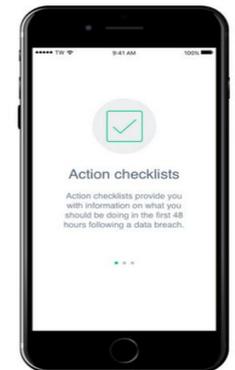
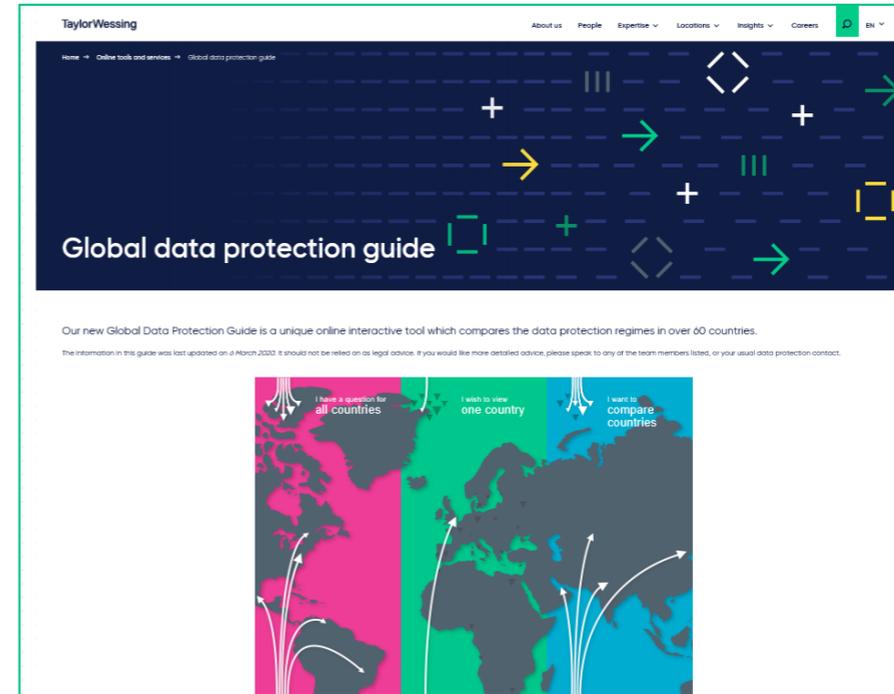
Getting cybersecurity wrong can lead to reputational damage, financial loss and damaging litigation. Using our Global Data Hub resources can help you get cybersecurity right.

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# Global Data Protection Guide

- Cyber-attacks are on the increase. It is estimated that 68% of all large businesses, and 52% of small businesses, have fallen victim to a security attack in the last year. Yet only 29% of companies have a formal cybersecurity policy in place and just 13% of businesses set security standards for suppliers or contractors to adhere to. When the GDPR comes into effect in May 2018, companies face potential multi-million pound fines for data breaches.
- TW: Cyber Response has been developed and designed to help companies respond quickly and effectively should a breach occur. In essence, it provides companies with practical assistance to help them minimise their exposure to regulatory action, litigation risk and reputational damage should a breach occur
- The app is available from the Apple App Store and the Google Play Store.



Our Global Data Protection Guide looks at the data protection regimes in over 60 countries across the world. Data Protection is a core business issue for all companies in all sectors at the moment and this product helps to demonstrate to clients that we are always thinking about their business needs.



# Legal Tech Services | SCC Generator

**One Tool for all new SCCs:** Our SCC Generator will help you to determine the right set of Standard Contractual Clauses (SCC) in accordance with the European Commission’s Decisions 2021/914 and 2021/915 form 4 June 2021.

The Generator is capable to assemble the comprehensive SCC template for the following processing situations:

Art. 28 (7) GDPR Template	Templates for Third Country Transfers
Controller to Processor	Controller to Controller
	Controller to Processor
	Processor to Processor
	Processor to Controller

Our SCC Generator will guide you with questions through the process and will provide you with the relevant contract template that includes the clauses applying to your processing situation.

After answering a few questions, you can download a suitable template in DOC format.

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# Your Taylor Wessing team

Axel von dem Bussche is a specialist lawyer for information technology law. He heads up the Technology, Media & Telecoms practice group and coordinates Taylor Wessing's international US Group for Germany.

With his considerable years of experience and outstanding expertise, he routinely guides clients from the technology sector through complex international transactions, contract drafting and regulatory issues. Axel is an accomplished data protection and GDPR expert. He supports corporate groups with the transformation to digital and global business models and also conducts negotiations with the responsible regulatory authorities.



**Data protection specialist Axel von dem Bussche advises well-known clients on data issues (...). He also represents clients in proceedings on a regional and national level against data protection supervisory authorities.**

Chambers & Partners Europe 2021



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#### **Key areas of expertise**

- IT & Telecoms
- Data Protection
- Copyright & Media Law
- Litigation & Dispute Resolution
- Technology, Media & Communications

#### **Languages:**

- German, English, French

# Your Taylor Wessing contacts for Japan and China



Dr. Michael Johannes Pils

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Michael advises on the employment law issues of company purchases as well as post-merger integration. He specializes in tailor-made advice for the structure of remuneration systems, questions of employment protection, data protection and health protection as well as company pensions.

He has been supporting the Japan Practice Group of Taylor Wessing as co-head of the Japan desk with his excellent network for many years. Michael is known for building bridges between Asia and Europe; especially when it comes to projects that are related to Japan, numerous recommendations underline his expertise.

## Key areas of expertise

- Employment, Pensions & Mobility

## Languages

- German, English, Japanese



Dr. Michael Tan

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Michael has more than 20 years of experience in advising international companies on their operations in and with China. He has profound experience advising industrial clients in various sectors, converging his energy on technology driven business and has built up his reputation and connections in the circle.

As the first Chinese partner of Taylor Wessing, Michael is now heading the firm's TMC practice for China. Besides his expertise regarding general corporate and commercial matters, he specializes in IT regulatory and data/privacy protection areas.

## Key areas of expertise

- TMC / Data Protection
- Corporate / M&A
- Dispute Resolution / Arbitration

## Languages

- English, Mandarin

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