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The National Supervisory Authority for Personal Data Processing

Mrs. Anca Opre
President

cc: **Mrs. Adina Săvoiu**
Head of the Legal and Communication Department

Dear Mrs. Opre,
Dear Mrs. Săvoiu,

The American Chamber of Commerce in Romania (AmCham Romania), would like to express its position with respect to the flows of personal data to countries outside the European Union, in the context of the Court of Justice of the European Union's decision in the Schemes II case.

International transfers of personal data are at the heart of EU economic exchanges and social interactions. The purpose of the present letter is to present you with our view regarding the business model around which transfer of personal data outside the EU take place at the level of companies (in Romania, but also in the EU). The increased level of such flows raises new challenges and concerns regarding the protection of personal data, considering the Schrems II judgment and the need to identify alternative solutions with the observance of mechanisms provided under the GDPR.

Organisations of all sectors within the European Union (EU), whether public or private, big EU multinationals or smaller organisations, heavily rely on the possibility to transfer personal data to third countries in order to be able to provide their services in the EU and around the world. Considering that Schrems II judgment has an impact with respect to cross border transfers not only to United States, but from the EU to the rest of the world, we are of the view that it is essential, in line with EU approach and guidelines in this respect, to build viable solutions for these data flows.

In our view, considering the available means provided under the GDPR with respect to transfers of personal data to third countries, in light of Schrems II judgement, the SCCs remain the viable alternative to implement. Indeed, there is a need for a revised version of SCCs and of more clarity with respect the pre-assessment that needs to be performed when concluding the SCCs.

Therefore, AmCham Romania urges all parties involved to adopt a balanced, workable and realistic position on the implementation of the Schrems II judgment.

In its decisions, the CJEU invalidated the European Commission adequacy decision "Privacy Shield" which enabled EU-US data flows, due to concerns over US surveillance law, without any assessment being made of surveillance practices in the EU Member States. In any event, the Court confirmed the validity of the Standard Contractual Clauses, which have been the GDPR tool most widely used in the EU to enable transfers to any non EU country, including but not limited to the US, and which, depending on the situation

of each transfer, would need to be complemented by additional safeguards. The court placed the burden on EU organisations to assess whether surveillance legislation of all third countries, i.e., not just the US, for example the UK post-Brexit, India, Brazil and Australia, guarantees adequate protection if compared to EU laws and practices.

Currently, organisations are performing various assessments to identify the risks correspondent to their current data transfer practices, reviewing practices, policies and procedures, introducing new organizational and technical controls and reinforcing their data transfer mechanisms. They are preoccupied in presenting their business models and the problems they face in practice with respect to how to address flows of data transfers and they are also in great need of clear, unitary and pragmatic approach at the level of the EU, so as to provide consistency and clarity with respect to the implementation of Schrems II judgment across all EU member states.

In fact, EU companies are part of the global economy and rely on or offer services and structures requiring the possibility to transfer data (cloud storage, analytics tools and advertising tools, social networks for marketing or for enabling social international interactions, clinical trials call centers providing support to European and international consumers). More specifically, such situations involving transfers of personal data to third countries, irrespective of the business industry or size, such as in the context of:

- Using tools provided by non-EU adtech and martech companies for performing analytics on websites and apps and placing advertisements in order to understand user behaviour and enhance its business model;
- Need of non-EU subsidiaries to access information stored in EU, such as for daily operations concerning employees, customers or business partners (for various reporting lines, performance management, centralization of the data base etc.);
- Provision of services which also imply need to transfer personal data as part of business-to-business or business-to-consumer transactions (provision of financial services and need to provide AML or KYC procedures);
- Outsourcing of business processes and activities to various services providers outside EU (either third-party or group service hubs), which also involves transfer of personal data to the respective services provider (cloud storage, software maintenance, IT related services etc.).

Failure to identify an appropriate solution that observes the principles of chapter V from the GDPR as regards international transfers would place the data transfer flows at risk and would jeopardize the normal flow of businesses and their operations. The social impact to EU citizens, SMEs and public sector will be immense with restrictions on communications, IT support, disruptions to daily life and access to information, including digital platforms enabling the development of other fundamental rights and freedoms of the EU Charter, including the freedom of expression and association, the right to education, etc.

GDPR's key goal is to protect the natural persons in relation to the processing of personal data, by striking a fair balance between the provisions of Article 8 (1) of the Charter of Fundamental Rights of the European Union and of Article 16 of the same. To this end, GDPR has set forth a large variety of transferring tools aiming at covering all circumstances entailing transfer of data outside EU (adequacy decision, transfer safeguards – SCCs, BCRs, etc., derogations – Article 49 GDPR).

It is well known that, absent of an adequacy decision and since in most of the cases the derogations under Article 49 GDPR could not stand as suitable transferring tools, the most frequent tools for transferring data outside EU were SCCs and BCRs. By shifting the responsibility to assess the level of protection of a non-EU country for the purpose of further relying on SCCs or BCRs, the CJEU is putting EU companies, especially smaller organizations, which may lack the human and financial resources to do so efficiently, in an unfair and unrealistic position. This is all truer considering that the Commission, with its vast resources, has only been able to conduct this kind of assessment in more than 20 years for a few number of countries

or territories and, as per the CJEU, this assessment was wrong on two occasions. In addition, neither Commission nor the data protection authorities have yet published any operational guidance on how to conduct such assessment and avoid disparate criteria to be used by each organisation in each country or on the nature of the set of eligible additional safeguards that might be implemented in order to be able to fully rely on SCCs where appropriate.

In order to ensure that international transfers of personal data can be maintained in a way that guarantees legal certainty and the fundamental rights and freedoms of all EU citizens and organizations, AmCham Romania urgently call for:

- The European Commission and the European data protection authorities to provide further but workable guidance on the actual and likely serious risks or, otherwise, protection of third countries, in order to support organizations in their assessment prior to the transfer of personal data that requires the same proportionality test, i.e., the appropriate balance with other fundamental rights and freedoms at stake.
    - We expect the EDPB to be issuing guidance on additional safeguards over the coming weeks. It is vital that this guidance is subject to consultation with industry and takes a holistic viewpoint on the importance of data flows.
    - We need pragmatic and a common approach that seeks to enable EU-US (and rest of the world) data flows and include the derogations of art. 49 GDPR as workable and balanced alternatives as well.
- The Commission, jointly with the European Data Protection Board, to issue urgently further and realistic guidance on the nature of an eligible set of eligible additional safeguards that may be required to transfer personal data to third countries on the basis of alternative transfers tools such as SCCs and Binding Corporate Rules, in consultation with the companies.
- The European Commission to update the SCCs, taking into account the decision of the CJEU and the need to ensure a workable and operational environment that facilitates the data transfers that are essential to ensure European economic prosperity and social exchanges.

In our view, considering the available means provided under the GDPR with respect to transfers of personal data to third countries, in light of Schrems II judgement, the quickest and easiest to implement alternative is to continue to use the SCCs. We note, in this respect that, aside from the doubts expressed by Schrems II judgement, concerns on how the SCSs were (or will be) actually filled-in and implemented in practice have been expressed at both local and EU level during the time. In all cases, the solution was to allow the organizations to further rely on SCCs (particularly on the SCCs approved by the EU Commission Decision), while addressing punctually, at the level of the national supervisory authorities, any potential circumstances likely to substantially affect the rights to privacy of the data subjects. It is therefore our believe that this approach is the most suitable and practical, allowing reconciliation of all involved fundamental rights and interests (both of the organizations and of the data subjects).

What we would strongly need from the European Data Protection Board and the European Data Protection Authorities across EU is a practical guideline or recommendation on how to actually perform a pre-contractual screening or due diligence with respect to the manner in which the SCCs are actually completed. This is needed in order to ensure that the manner in which the SCCs are actually filled-in and actually executed in practice makes them efficient and easy to be implemented in practice.

We would be glad to come with more details and explanations in a dedicated meeting with the Authority, if you agree.

Your sincerely,

Silvia Axinescu
Chair of the AmCham Data Protection & ePrivacy Task Force