ELVINGER HOSS PRUSSEN

ELVINGER HOSS LUXEMBOURG LAW

ICT, IP, media and data protection NEWS

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Reminder: 27 December 2022 deadline to adopt the new EU Standard Contractual Clauses for transfers

Controllers and processors wishing to rely or continue to rely on the European Commission's standard contractual clauses (SCCs) mechanism for transfers of personal data outside the European Union must adopt or, where applicable, replace existing clauses with the new SCCs before 27 December 2027.

The new modular SCCs for transfers were adopted on 4 June 2021 as more specifically detailed in our previous article **GDPR compliance – New standard contractual clauses** .

They provide the flexibility to cover various transfer scenarios within one single document, i.e. transfers from controller to controller, from controller to processor; from processor to processor and from processor to controller. Elvinger Hoss Prussen uses a specific tool to prepare efficiently any module or any combination of modules of standard contractual clauses.

Although the new SCCs reflect some requirements deriving from the GDPR as interpreted in the light of the famous "Schrems II" case, they do not remove the consequences of the CJEU ruling and the need to assess the necessity to adopt supplemental measures as recommended by the European Data Protection Board. See the articles referred to below for more information.

This may also interest you :

- GDPR - Transfers of personal data in the UCI world after Schrems II
- Fiche pratique : Arrêt Schrems II de la CJUE : que faire ?
- EDPB Recommendations 01/2020 and 02/2020 on transfers of personal data after Schrems II
- EDPB's FAQ about the invalidation of the Privacy Shield
- CJEU invalidates the Privacy Shield: implications for EU-US personal data transfers

EU-US Data Transfers: New Executive order finally to provide clarity and durability

Introduction

Since **the invalidation of the EU-US Privacy Shield by the Court of Justice of the European Union** (the "**CJEU**"), the long-term lawfulness of cross-border transfers of personal data from the European Union to the United States remain uncertain. Private and public players must therefore rely on alternative tools provided by Chapter V of Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data (the "**GDPR**"). Recently, the President of the United States has signed an **Executive Order on Enhancing Safeguards for United States Signals Intelligence Activities** (the "**Executive Order**") which will provide enhanced protection for the free flow of personal data between the European Union and the United States for a "durable and reliable legal basis for transatlantic data flows".[1]

Enhanced protection provided by the Executive Order

The Executive Order builds upon the preliminary agreement in principle[2] which the European Commission and the United States have reached on a new EU-U.S. Data Privacy Framework. Essentially, the Executive Order addresses the concerns raised by the CJEU when invalidating the EU-U.S Privacy Shield in 2020. More precisely, it (i) establishes binding enhanced protections for European data subjects and (ii) reinforces their safeguards when personal data is collected through the activities of the members of the Intelligence Community.[3] These enhanced protections imply:

- that personal data collected through said activities may only be collected for a defined national security objective and only when necessary to advance a validated and proportionate priority
- the establishment of an independent and impartial two-step redress mechanism which includes a Civil Liberties Protection Officer as well as a Data Protection Review Court to investigate and to resolve complaints and access requests by European data subjects.

What are the next steps?

Based on the Executive Order, the European Commission has announced the preparation of a draft adequacy decision, which is the first step of a longer process involving the review by Member States and of the European Data Protection Board. This process could, in principle, take between six months and one year.

What should companies (and other data exporters) do in the meantime?

Until an adequacy decision is adopted, all transfers of personal data to the United States must be performed via the alternative tools provided by Chapter V of the GDPR. Currently, standard contractual clauses (the "**SCCs**") remain the most common used transfer. In June 2021, the European Commission adopted its most recent SCCs which will provide more flexibility and which should cover various transfer scenarios in one single document. The deadline to transition existing data transfer arrangements based on the "old" SCCs to the 2021 SCCs is set for 27 December 2022. Companies and other players must therefore replace existing data transfer agreements with the most recent SCCs before the end of this year.

Towards Schrems III?

Once drafted and adopted, a final adequacy decision can, however, still be challenged before the CJUE. Several privacy rights agencies have already expressed their scepticism as to whether the Executive Order will be sufficiently protective or address in a satisfactory manner the concerns raised by the CJUE in their Schrems II ruling. It remains uncertain therefore whether the Executive Order is setting the base for a durable framework for international data transfers.

This may also interest you:

- **CJEU invalidates the Privacy Shield: implications for EU-US personal data transfers**
- **EDPB's FAQ about the invalidation of the Privacy Shield**
- **EDPB Recommendations 01/2020 and 02/2020 on transfers of personal data after Schrems II**
- **Factsheet: Schrems II judgment of the CJEU: what to do?**
- **GDPR – Transfers of personal data in the UCI world after Schrems II**
- **GDPR compliance – New standard contractual clauses**
- **GDPR: EU Commission's Q&A about the New Standard Contractual Clauses for Transfers**

> 1 Press Release: Questions & Answers: EU-U.S. Data Privacy Framework 7 October 2022 (**here**)
> 2 European Commission and United States Joint Statement on Trans-Atlantic Data Privacy Framework (**here**)
> 3 The U.S. Intelligence Community is composed of the following 18 organizations (**here**)

For any questions, please contact

View profile

Gary Cywie

Partner

EU legal framework for crypto assets and financial sector resilience: quick update

The EU is working on setting out the legal framework for Fintech. On a separate but connected note, the EU legislator also addresses risks carried by technological evolutions. This paper focuses on three pieces of legislation and legislation in preparation for shaping the future of financial markets.

The Pilot Regime for market infrastructure based on distributed Ledger Technology Regulation (the "EU DLT Pilot Regime")

- The EU DLT Pilot Regime provides for a temporary testing environment offering derogations from existing rules, which provides a legal framework for the trading and settlement of transactions in crypto assets that qualify as financial instruments within the meaning of MiFID II (true digital securities or security tokens).
- Through their relevant national authorities, authorised investment firms and market operators may apply to trading on a DLT Multilateral trading facility. Authorised Central securities depositary (CSD) can apply for specific permission to operate a DLT settlement system. These two groups may apply for the operation of a combined DLT trading and settlement system, whereas new entrants will have the option to apply for temporary authorisations as investment firms, market operators or CSD to apply for the pilot regime.
- Adopted in May 2022, the EU DLT Pilot Regime will enter into force on 23 March 2023.
- On 27 September 2022, a bill of law was filed aiming at implementing the EU DLT Pilot Regime in Luxembourg by amending the Law of 5 April 1993 on the financial sector, the Law of 5 August 2005 on financial collateral arrangements and the Law of 30 May 2018 on markets in financial instruments. The bill of law is currently receiving the opinions of professional chambers and should thereafter be discussed in Parliament.

The Market in Crypto Assets Regulation proposal ("MiCA")

- MiCA is set to regulate the market of crypto-assets and set up obligations of registrations, authorisations, publication to the competent authorities, governance and compliance for the issuers of crypto-assets.
- Once adopted, the Regulation will apply to all natural and legal persons and other undertakings that are engaged in the issuance, offer to the public and admission to trading of crypto assets or that provide services related to crypto assets in the Union. However, the Regulation will not apply to crypto assets qualifying as financial instruments under MiFID I and to UCITS funds.
- The European Parliament approved the current text of MiCA on 10 October 2022. The legislative procedure will continue through 2023. Formal adoption is expected in 2024-2025.

The Digital Operational Resilience for the financial sector Regulation proposal ("DORA")

- DORA sets out rules for financial entities, including full responsibility of the management body in ICT risks, the requirement to set up, maintain and test resilient ICT systems and tools or the requirement to report to the competent authorities only deemed major ICT-related incidents.
- All investment firms, managers of alternative investment funds, management companies and multiple other financial entities regulated at EU level will fall under DORA's scope of application.
- The Council of the European Union and the European Parliament are discussing the proposal in first reading under the ordinary legislative procedure. Formal adoption is expected in 2024-2025.

What's next?

Once adopted, the Regulations will be directly applicable across the European Union.

This may also interest you:

- **EU pilot regime for market infrastructures based on DLT**
- **CSSF White Paper on DLT and blockchain**
- **The CSSF publishes a White Paper on Distributed Ledger Technologies (DLT) and blockchain**
- **Issues with trading of tokenized securities in Luxembourg: the DLT Pilot Regime as solution?**
- **Luxembourg law recognises issuance of dematerialised securities in blockchains**
- **Luxembourg Bill of law to allow issuance of securities in DLT**
- **Securities can legally be held through blockchains**
- **Bill of Law 7363 was approved on 14 February 2019 – Luxembourg's confirmation that securities can be held through DLT-like technologies, including blockchains!**

Unified Patent Court: final stretch!

What happened?

On 6 October 2022, the Administrative Committee of the Unified Patent Court (UPC) announced via the publishing of an **implementation roadmap** that the **entry into force of the UPC Agreement was expected for 1 April 2023**.

Indeed, Germany has finally[1] scheduled the ratification of the UPC Agreement for the week of 19 December 2022. The UPC Agreement, which is already ratified by 16 Member States among which are Luxembourg, Belgium, the Netherlands and France, provides that it will enter into force only after its ratification by Germany.

This announcement by the UPC Administrative Committee followed another milestone which occurred on 1 September 2022 with the entry into force of the UPC's Rules of Procedure.

More than ten years after 24 Member States signed the UPC Agreement on 19 February 2013[2] , the patent law landscape is about to evolve significantly with the implementation of the European patents having a unitary effect (the "Unitary Patents")[3] and a cross-border patent court, the Unified Patent Court, the Court of Appeal of which will be located in Luxembourg.

It is worth remembering that once a European patent is granted by the European Patent Office, the owner of that European patent must request the application of the unitary effect. Then the European patent will turn into a Unitary Patent, which will provide uniform protection and have equal effects in all the Member States which participate in the Unitary Patent system and which have ratified the UPC Agreement. **There will be no need for a separate national validation and a single annual tax will be payable after the grant of the Unitary Patent**.

By contrast, when a classical European patent is granted, it has, in each of the contracting States for which it is granted, the effect of and is subject to the same conditions as a national patent granted by that State, unless otherwise provided in the European Patent Convention. A European patent still needs to receive a national validation in every country where patent protection is sought, and national taxes shall be paid annually in each country chosen to maintain the national title.

What's new?

Considering the scope of the UPC jurisdiction, the UPC is expected to rapidly become a leading patent court at EU level even if all EU Member States do not participate in this new judicial system (such as Spain, Croatia and Poland).

- Unitary Patents will of course fall under the exclusive jurisdiction of the UPC.
- The UPC also has jurisdiction for the classic European patents (or the European patent applications) (the "European Patents") which do not have a unitary effect and for which the owners have not requested an opt-out from the UPC judicial system.

Indeed, for a certain period, the jurisdiction of the UPC over the classic European Patents will not be mandatory; the owners of classic European Patents will have the possibility to escape the jurisdiction of the

UPC if they deem that their interests may be put at risk before the UPC. During a transitional period of seven years[4] after the date of entry into force of the UPC Agreement, infringement or revocation actions with respect to European Patents may still be brought before national courts or other competent national authorities.

This is an important topic because the decisions of the UPC with respect to European Patents will cover the territory of all the Member States that are party to the UPC Agreement for which the European Patent has effect (while decisions of national courts with respect to European Patents only cover the territory of the concerned Member State).

To complicate matters, during the transitional period mentioned above, the owners of European Patents may opt out from the exclusive jurisdiction of the UPC only if no action involving their European Patents has already been brought before the UPC. Opt-outs can be withdrawn at any moment as long as no action has been brought before a national court.

Opting out from the UPC judicial system will be possible from the beginning of the so-called "sunrise period" which is supposed to start on 1 January 2023 according to the implementation roadmap. It should be noted that all the co-owners of the European Patent need to agree on and ask for the opt-out. On the contrary, licensees do not have the possibility to choose to opt out from the UPC judicial system. However, the owners of European patents must be careful not to fall "unintentionally" under the jurisdiction of the UPC because of an action initiated by an exclusive licensee as provided for under Article 47.2 of the UPC Agreement.

Further point of attention

It is interesting to observe that after any future enlargement of the European Union any EU trademark and EU registered Community[5] design registered or applied for before the accession of new countries will automatically extend to the new Member State(s) without any formalities or fees. This will not be the case for the Unitary Patent. A Unitary Patent shall take effect only in the participating Member States at the time of the grant of the Unitary Patent[6].

Conclusion

It is really time now for the owners of classic European Patents to think about their litigation strategy and make choices regarding the type of court that will be competent in the event legal disputes arise with respect to their European Patents. They must also review and amend their licensing agreements to ensure that the question of the Unitary Patents and the competent court is dealt with and that the patent protection strategy is not indirectly put at risk by the potential actions of exclusive licensees.

At the time Luxembourg adopted the law approving the UPC Agreement (12 April 2015), we wrote an article on the **Unified Patent Court system and the Unitary Patent** in which you will find more information. Please note, however, that some information has since changed. Due to Brexit, a section of the central division will not be located in London. The new location has not yet been decided and a decision will most probably be made at the highest political level. Also, Italy is now part of the enhanced cooperation since it ratified the UPC Agreement in February 2017.

> 1 The ratification process in Germany was significantly delayed by two judicial proceedings before the German Constitutional Court.
> 2 While 24 Member States signed the UPC Agreement, only 17 of them have ratified the UPC Agreement and will participate for the moment.

3 As provided for in Regulation (EU) 1257/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, the rules governing the new unitary patent title shall only apply from the date of entry into force of the UPC Agreement.
4 The UPC Agreements provides that the 7-year transitional period may be renewed for a period up to 7 years under certain circumstances.
5 Both EU trademarks and EU registered Community have a unitary effect.
6 Article 4 of the Regulation (EU) No 1257/2012.

For any questions, please contact

View profile

Emmanuèle de Dampierre

Counsel

European Commission's proposal for an EU Media Freedom Act

What happened?

On 16 September 2022, the European Commission unveiled the EU Media Freedom Act Package, which includes two significant proposals:

- A proposal for a Regulation establishing a common framework for media services in the internal market (European Media Freedom Act, "**EMFA**" or "**EFMA Proposal**") and amending Directive 2010/13/EU (the "revised Audiovisual Media Service Directive").
- A proposal for a Commission Recommendation on internal safeguards for editorial independence and ownership transparency in the media sector (the "**Recommendation**").

These proposals are expected to affect various types of media service providers and public service media providers in the European Union (the "EU") and create a pluralistic and independent EU information space while further developing the European internal media market. The choice of a regulation that will be directly applicable in all Member States (instead of a directive) shall guarantee the implementation of uniform rights and obligations for users and providers throughout the EU and improve legal certainty. However, this would only cover the proposal for an EMFA Regulation and not the Commission Recommendation, as this text is a

non-binding voluntary based instrument for companies in the media sector. Thus, compared to the Digital Media Act (DMA), Digital Service Act (DSA)[1] and General Data Protection Regulation, the Commission's Proposals follow a multi-layered and flexible approach for strengthening and protecting the media pluralism and independence in the EU.

The EFMA will impose rights and duties for recipients of media services and media providers and a framework for regulatory cooperation and enforcement in the media internal market. The EFMA aims to protect the media pluralism and media independence in the European information space and ensure that recipients of media services have access to transparent independent media services and the right to customise their media offers.

What is the context?

The Commission's EFMA Proposal is part of a general trend aimed at implementing rules at EU level to further protect media pluralism and media independence for recipients of the media services and journalists within the EU information space, and to regulate and supervise more strictly the activities of the various providers of digital and traditional media services. The Commission's EFMA Proposal has a general scope and is designed to complement existing sector-specific legislation.[2]

Entities targeted by the EMFA Proposal and the Commission Recommendation

The EFMA Proposal and the Commission Recommendation would apply to all entities providing media services in the EU irrespective of their place of establishment as long as the recipients of their services have their places of establishment or residence in the EU. This would apply thus to third-country media service providers.

The proposal determines recipients of media services in the Union as natural persons who are nationals of Member States or benefit from rights conferred upon them by Union law and legal persons established in the Union (Recital 6). Likewise, a media service is defined under Art. 2(1) of the EFMA Proposal "as a service defined by Articles 56 and 57 of the Treaty, where the principle purpose of the service or a dissociable section thereof consists in providing programmes or press publications to the general public, by any means, in order to inform, entertain or educate, under the editorial responsibility of a media service provider".

What would be the key obligations imposed by the EMFA Proposal?

The EMFA Proposal key obligations can be summarised in 8 points, as follows:

- The protection of the editorial independence by the Member State, through ensuring transparency of ownership by publicly disclosing such information and taking measures with a view to guaranteeing the independence of individual editorial decisions.
- No use of spyware against media, thereby including strong safeguards to protect media, journalists and their families.
- Obligations regarding independent public service media concerning their funding that should be adequate and stable to ensure editorial independence, the appointment procedure of the head and governing board and the plurality of information and opinions to be provided.
- The Member States for media market concentrations on media pluralism and editorial independence will give Media pluralism impact assessment tests. Any national measure affecting the media would

need to be justified and proportionate.

- State advertising will have to comply with new requirements of transparency and non-discriminatory use of the allocation. This includes the enhancing of transparency and objectivity of audience measurement systems, thus affecting the media online advertising revenues.
- For protection of media online content, the Proposal includes safeguards against the unjustified removal of media content produced according to professional standards. Therefore, large online platforms that intend to take down certain legal media content considered to be contrary to the platform's policies will have to inform the media service providers about the reasons, before any such take down takes effect.
- The EFMA Proposal introduces a new user right to customise your media offer on devices and interfaces in order to reflect their own preferences. Thus, implicitly, this new right creates new obligations for device and interface service providers to create this customisation in the hardware products.

In parallel, the Recommendation sets out a catalogue of proposed measures for editorial independency and media ownership transparency, divided into 2 sections:

- For editorial independency:
    - Media service providers are encouraged to lay down internal rules and these rules are to be recognised and endorsed by the owners and management of the media company. These internal rules would contain, non-exhaustively, rules ensuring the integrity of the editorial content, prevent or disclose conflicts of interest or complaint mechanisms.
    - Other mechanisms are recommended for the protection of the editorial staff independence against any form of undue interference, including for instance a right of opposition to sign articles or other content which have been modified without their knowledge or their will, clauses protecting the editorial staff from disciplinary sanctions or arbitrary dismissals when they refuse assignments against professional standards.
    - The establishment of internal ethics bodies or structures are recommended.
    - Media service providers are encouraged to foster the involvement of members of the editorial staff in governance and decision-making processes. This involvement is fostered in information rights, consultation rights, participation rights, or a combination thereof.
    - They are encouraged to improve the sustainability of their services and long-term investment in content product, such as with new business models adapting new consumption habits, transparent algorithms, corporate governance structures, re-invest revenues, or profit strategies.

- For media ownership transparency:
    - In this case, media service providers are encouraged to ensure that detailed, comprehensive and up-to-date information on their ownership is easily and directly accessible to the public.
    - This information includes; (a) whether and if so to what extent their direct or beneficial

ownership is held by the government, a state institution, state-owned enterprise or other public body, (b) the interests, links or activities of their owners in other media or non-media businesses, (c) any other interests that could influence their strategic decision-making or their editorial line, (d) any changes to their ownership or control arrangements.

Compared to its bigger brothers (the GDPR, DSA and DMA), the EFMA does not compile a range of sanctions or penalties in the event of non-compliance of the provisions.

Implementation of strengthened supervisory framework

Like the DSA Proposal, the EFMA Proposal provides in its Chapter III that the enforcement of the EFMA would be monitored at Member State level and at EU level.

At Member State level, the audiovisual media services national regulatory authorities or bodies shall be responsible for the application and enforcement of the EFMA. The national regulatory authorities or bodies will have powers of investigations, with regard to the conduct of natural or legal persons, for carrying out their tasks under this Regulation. Particularly, the power to request such persons to provide, within a reasonable time period, information that is proportionate and necessary for carrying out the tasks.

At EU level, the EFMA Proposal provides for the establishment of the European Board for Media Services ("the Board", an independent advisory body composed in particular of the representatives of audiovisual media services national regulatory authorities or bodies. The Board would support and advise the Commission through technical expertise on regulatory, technical or practical aspects and promote cooperation between the national regulatory authorities and bodies. It would issue opinions and mediation to the authorities and bodies and promote the development and implementation of guidelines and reports on topics addressed by the EFMA.

Such tasks remind those of the European Data Protection Board set up under the General Data Protection Regulation ("GDPR") and those of the European Board for Digital Services under the Data Service Act ("DSA"). The Board would also assist the Commission in drawing up guidelines with respect to factors to be taken into account when applying the criteria for assessing the impact of media market concentrations.

What's next?

The EU Media Freedom Act and its Recommendation will be discussed by the members of the European Parliament and the Council of the EU. Given the impact on the media sector, the EMFA Proposal will certainly be highly debated and further amended (just as the DMA, DSA, or GDPR in its time). We expect the legislative process to be lengthy and the final text will not be voted on for several months.

For more information on this EFMA Proposal and its future implications, please contact our dedicated **ICT, IP, media and data protection team**.

This may also interest you:

- **Digital Market Act, Digital Services Act, Data Governance Act and Data Act: quick guide to EU regulations on digital and data strategy!**

1 See our article in this respect **here**.
2 Such as the DSA, DMA, Code of Practice on Disinformation, Revised Audiovisual Media Service Directive, etc.