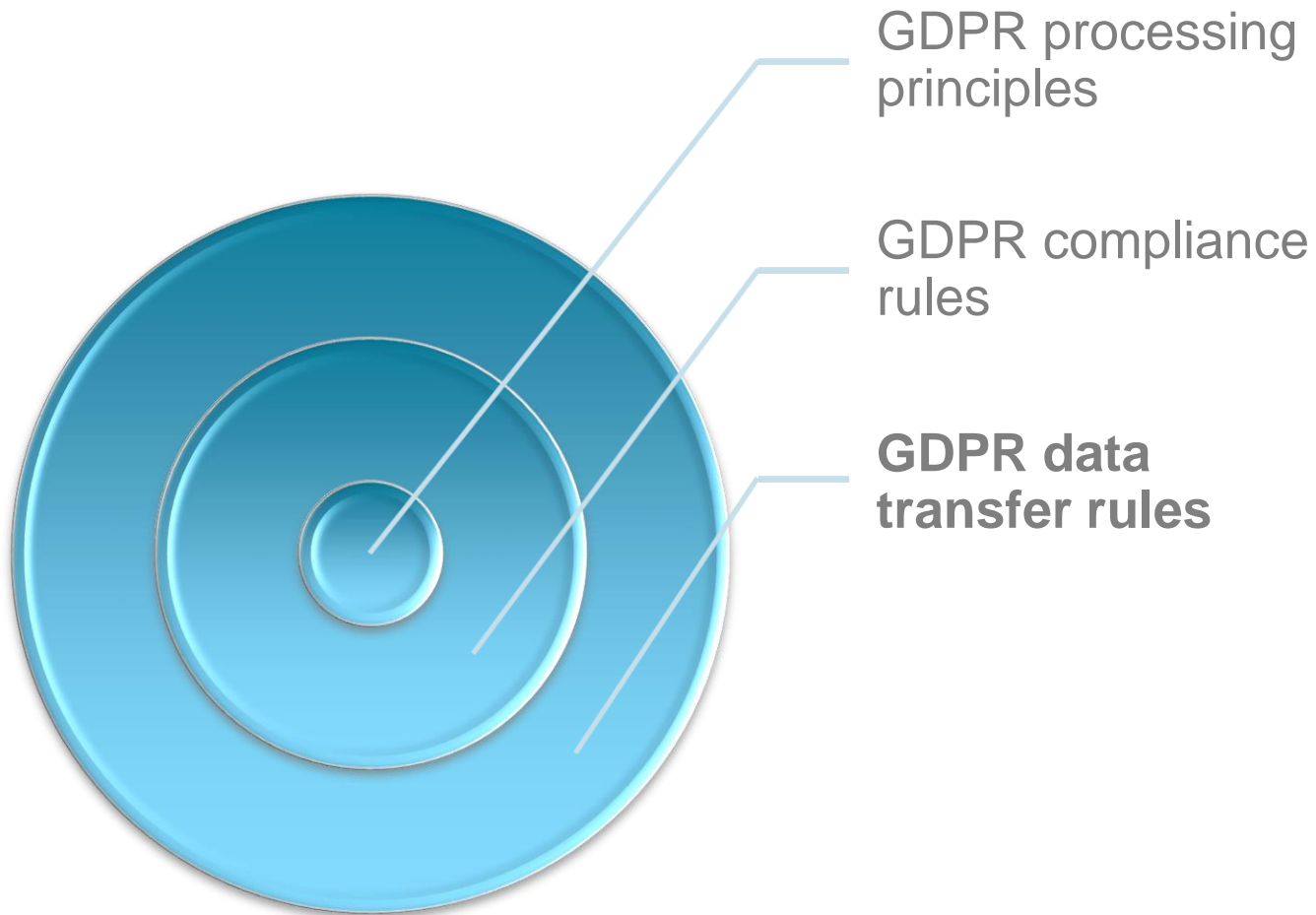


**International transfers in a
context of research:
challenges and
opportunities**

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What are the criteria for a data transfer?

1. A controller or processor **subject to the GDPR for the given processing** *e.g. an EU University conducts a research project*
2. This controller or processor (**exporter**) **discloses** by transmission or otherwise makes personal data available **to another controller**, joint-controller or processor (importer) *e.g. transmission of personal data to conduct the research project*
3. The **importer** is located **in a third country** or is an **international organisation** *e.g. the University is located in Japan or USA*



- Whether the importer is not subject to the GDPR in respect of the given processing does not matter (European Data Protection Board interpretation)

➔ *Some non-EU partners do not understand the scope*

- Disclosure of personal data where **two different parties** are involved *e.g. no transfer in case of a controller's employee business trip outside EU if the employee is located in EU*
- No disclosure where the data is disclosed directly by the data subject to the recipient as data subject is neither controller nor processor

➔ *Are the data subject enough protected?*

Science and research have no borders

Collaboration with partners located outside the EU & EEA

e.g. sharing, generation of data between entities, etc.



Online apps, solutions, services, etc. (providers located outside the EU & EEA)

e.g. outsourcing to a data processor for genetic analysis, for conducting a survey, etc.

**Adequacy
decisions
adopted by the
EU Commission**

List of countries considered as offering an equivalent protection for individuals than EU and adequacy decision concluded *e.g. Japan, Canada (not all applicable to academic activities)*

*Where no
adequacy
decision*

**Appropriate
safeguards**

- BCRs
- Standard Contractual Clauses
- Approved codes of conduct and certification mechanisms

*In situation where no
adequacy decision &
appropriate safeguards*

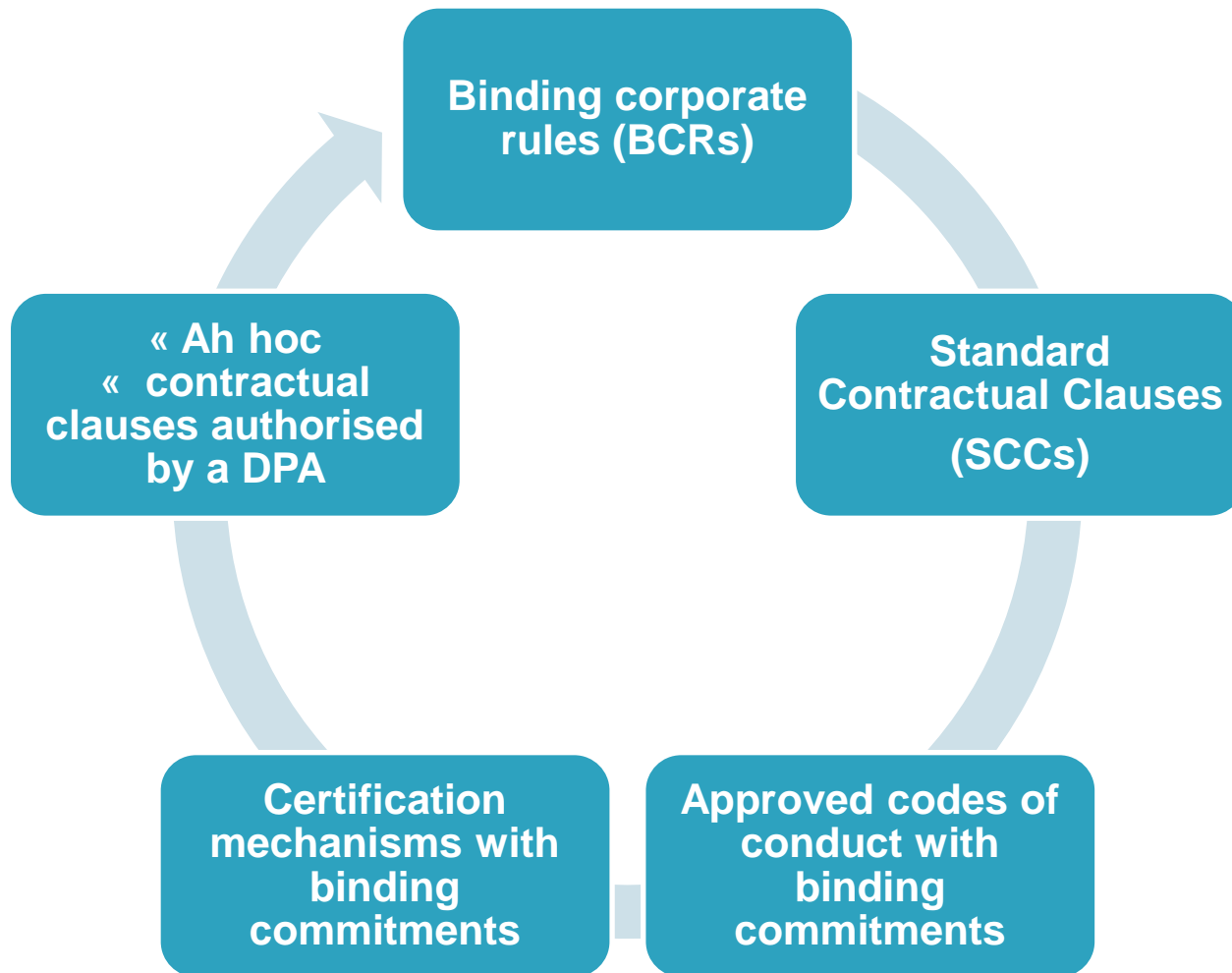
Derogations

- Invalidated U.S adequacy decisions (Safe Harbor, Privacy Shield)
- **13 December 2022**: EC published **draft adequacy decision** for the EU-US Data Privacy Framework
 - Move towards a **robust stakeholder consultation** including from the EDPB, the Council and Parliament of EU
 - The adequacy process may take until six months (**expected July 2023**)
 - It will be **challenged by the privacy associations** (e.g. NOYB, EPIC)
- If the adequacy decision adopted is, **once again, invalidated by the CJUE**, organisations may lose faith in the feasibility of successful EU-US data transfer framework
- **SCC** as a sole and permanent solution to legitimate transfers to the US

Scope of the future adequacy decision?

- Any personal data transferred from the EU to the US based on the certification scheme
- Certification scheme opens to companies **not to research, academic institutions or Universities**
- Other mechanisms must be continued to be used e.g. appropriate safeguards or derogations





- **New Standard Contractual Clauses** issued on 4 June 2021 are most commonly used in a research context as well
- BCRs do not fit to an academic context
 - Business context for transfers within group of entities where they are engaged in a joint economic activity
- **Codes of conduct** for research are missing (GDPR), some for research integrity

- SCCs do not require DPA authorisation
- Text of SCCs **cannot be changed**
- In case of old SCC to be replaced the timeline for implementation is over: 27 December 2022!
- **Supplementary measures** may be needed to ensure a level of protection which is “essentially equivalent” to that of the EU (Schrems II)
 - Up to organisations to check on a case-by-case basis and prior to any transfer whether the SCCs can offer the level of protection required by the GDPR and where necessary to implement supplementary measures
- **Data Transfer Impact Assessment (DTIA)**

- EDPB recommendations 01/2020
 1. Identify and assess the relevant data transfers
 2. Identify the relevant data transfer mechanism
 3. **Assess the data protection laws** and practice in the third country (laws of the data importer)
 4. Identify and adopt appropriate supplementary measures
 5. Procedural steps to implement the supplementary measures
 6. Periodically re-evaluate safeguards



- 1. Technical measures** *e.g. encryption, pseudonymisation, technical measures implemented in a research context especially for sensitive data*
- 2. Contractual requirements** *e.g. commitments to use specific technical measures, importer notifying the data exporter if the data importer cannot comply with its obligations, prohibition of onward transfers*
- 3. Organisational measures** *e.g. internal policies, documenting data access requests*

- No guidance about technical measures where unencrypted processing of personal, partner in control of the keys
- Contractual requirements difficult to implement in practice with major companies where standard agreements are imposed, recommended to negotiate in a research context
- Organisational measures such as documenting data access requests to be developed and required

- **Certification mechanisms** must be studied to determine whether they fit to a research context
 - On **May 2022**, the **CNPD** adopted the first national level GDPR certification mechanism (**GDPR-CARPA**)
 - In **June 2022**, the **EDPB** adopted **guidance on certification as a tool for transfers**
 - On **October 2022**, the EDPB approved **Europrivacy**, the **first European Data Protection Seal**

- To be used where no adequacy decision and no appropriate safeguards
 - Strictly interpreted
 - Not commonly used in research as:
 - Explicit consent is one derogation with restrictions
 - Necessary for the performance of a contract
 - Necessary for important reasons of public interest
- Must be demonstrated
- Other derogations are only applicable in very specific context
e.g. protect vital interests of a person

Challenges

- Complex legal instruments
- New requirements in relation with SCC (DTIA)
- Adequacy decisions not always applicable
- Derogations strictly interpreted

Opportunities

- Legal instruments to explain to partners
- Measures to negotiate with partners (SCC)
- Code of conduct for research not only focus on integrity
- Certification to be considered

THANK YOU FOR YOUR ATTENTION

Questions?



Remarks?