META INFORMATION – TO BE DELETED

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| **Name** | EU-US Privacy Shield to SCC Amendment for Controller to Processor Transfer |
| **Version** | 0.6 |
| **Status** | Public Discussion |
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| **Description** | On 16 June 2020 the Court of Justice of the European Union in Case C‑311/18 invalidated Decision 2016/1250 on the adequacy of the protection provided by the EU-US Data Protection Shield.  This instrument seeks to replace the references to EU-US Privacy Shield in all agreements between the parties with SCC provisions. The instruments amends any agreements that the parties mention in Annex 1 to it. The parties may also clarify certain aspects of the processing that are relevant to a particular contract by providing overriding descriptions in the same Annex 1 (e.g. provide security measures overriding those under the previous arrangements).  The instrument also contains a mechanism to adapt to the risk of suspension of data flows that became more prominent to the judgement, namely under paragraphs 106-121.  The agreement also contains a placeholder for the parties’ due diligence of data importer’s legislation and ability to provide equivalent protection in Annex 2. |
| **Fields** | «AmendmentDate» - date of the amendment agreement  «ControllerName» - name of controller and data exporter  «ControllerIncorpJurisdiction» - place of incorporation of the controller  «ControllerRegNo» - controller’s company registration number  «ControllerRegAddress» - controller’s address  «ControllerSigName» - name of signatory on controller’s behalf  «ControllerSigPosition» - position of signatory on controller’s behalf  «ProcessorName» - name of processor and data importer  «ProcessorIncorpJurisdiction» - place of incorporation of the processor  «ProcessorRegNo» - processor’s company registration number  «ProcessorRegAddress» - processor’s address  «ProcessorSigName» - name of signatory on processor’s behalf  «ProcessorSigPosition» - position of signatory on processor’s behalf |
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EU-US Privacy Shield to SCC Amendment for  
Controller to Processor Transfer

This EU-US Privacy Shield to SCC Amendment for Controller to Processor Transfer (the **Amendment**) is concluded on «AmendmentDate» between:

1. **«ControllerName»**, a company incorporated under the laws of «ControllerIncorpJurisdiction», with registration number «ControllerRegNo», whose legal address is «ControllerRegAddress» (hereinafter **Controller**); and
2. **«ProcessorName»**, a company incorporated under the laws of «ProcessorIncorpJurisdiction», with registration number «ProcessorRegNo», whose legal address is «ProcessorRegAddress» (hereinafter **Processor**)

hereinafter referred to jointly as the **Parties** and separately as the **Party**.

# Recitals

## WHEREAS Controller and Processor are engaged in contractual relationship(s) which provide for certain transfer of personal data subject to the provisions of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR).

## WHEREAS Controller and Processor previously concluded several agreements listed in Annex 1 to this Amendment covering the transfer of personal data mentioned in Section 1.1 above (the hereinafter referred to jointly as the Underlying Agreements and separately as the Underlying Agreement).

## WHEREAS on 16 July 2020 (the Effective Date) the Court of Justice of the European Union in Case C‑311/18 invalidated Decision 2016/1250 on the adequacy of the protection provided by the EU-US Data Protection Shield.

## WHEREAS Controller and Processor wish to enter into an agreement compliant with obligations under Articles 44-50 GDPR in order to continue their relationship(s) referred to in Section 1.1 above and to ensure that data subjects whose personal data are transferred to pursuant to standard data protection clauses are afforded a level of protection essentially equivalent to that guaranteed within the European Union.

## NOW THEREFORE the Parties hereto agree as follows.

# Amendments

## The Parties agree to amend the Underlying Agreements, including any data processing agreements or other instruments concluded in accordance with Article 28 GDPR or relevant provisions of earlier acts (as if) incorporated into Underlying Agreements, as follows:

### Any references to “Decision 2016/1250”, “EU-U.S. Privacy Shield” and similar references to adequacy of protection afforded by the United States as a basis for international transfer outside of EEA are deemed excluded and the Underlying Agreements amended mutatis mutandis.

### The Parties agree to add the following wording to each of the Underlying Agreements:

*\*Start of wording\**

This agreement (contract or other form of contractual instrument) hereby incorporates by reference and gives effect to the contractual clauses annexed to the Commission Decision 2010/87/EU on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46/EC of the European Parliament and of the Council (the **SCC**). The signing block of the SCC is omitted due to incorporation into this agreement.

For purposes of the SCC the Controller and Processor, as such terms are defined under EU-US Privacy Shield to SCC Amendment for Controller to Processor Transfer dated «AmendmentDate» (hereinafter – **SCC Amendment**), shall be deemed data exporter and data importer, respectively. Their identification details for purposes of SCC shall be incorporated from the party identification section of the SCC Amendment.

For purposes of Clause 9 and Clause 11(3) of the SCC, the applicable law is the law of «ControllerIncorpJurisdiction».

*\*End of wording\**

### The descriptions of the Data exporter, Data importer, Data subjects, Categories of data, Special categories of data, Processing operations for purposes of Appendix 1 of the SCC (as defined in Section 2.1.2 above) are filled in as described in the Underlying Agreement that is being amended. Should the corresponding Underlying Agreement in Annex 1 to this Amendment contain an alternative description of any or all of the above fields, the corresponding description from Annex 1 shall be deemed effective.

### Unless provided otherwise with respect to the corresponding Underlying Agreement in Annex 1 to this Amendment, Appendix 2 of the SCC shall be as follows:

*\*Start of wording\**

Description of the technical and organisational security measures implemented by the data importer in accordance with Clauses 4(d) and 5(c) (or document/legislation attached):

Taking into account the state of the art, the costs of implementation and the nature, scope, context and purposes of processing as well as the risk of varying likelihood and severity for the rights and freedoms of natural persons, the data importer shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risk.

*\*End of wording\**

## The amendments provided under Section 2.1 above (including its subsections) become effective as of the Effective Date.

# Equivalent Protection Assessment and Commitment

## The Parties undertake and commit to implement appropriate safeguards, enforceable rights and effective legal remedies that ensure that data subjects whose personal data are transferred pursuant to SCC are afforded a level of protection essentially equivalent to that guaranteed within the European Union (Equivalent Protection).

## The Parties hereby confirm that each Party has separately assessed Equivalent Protection afforded by this Amendment and each Party confirms its sufficiency. Such confirmation does not constitute a waiver of each Party’s right to reassess Equivalent Protection in case of material change of circumstances related to the corresponding Underlying Agreement, change of nature of the legal relationship between the Parties, or change of legislation and/or enforcement practice with respect to Controller’s or Processor’s applicable law as well as GDPR and, in particular, appropriate safeguards for transfers outside of the EEA. The Parties may optionally conclude Annex 2 to this Amendment to provide additional details on their assessments and/or commitments to Equivalent Protection.

## The Parties recognize the risk of validity of the Equivalent Protection afforded by this Amendment due to reasons provided in paragraphs 106-121 of the Judgement of the Court of Justice of the European Union in Case C‑311/18 that may result in suspension or prohibition of transfer of personal data to the Processor and agree to bona fide cooperate to ensure both Equivalent Protection and timely and efficient remedial actions in case of suspension or prohibition of transfer (or risk thereof).

# Suspension of Data Flows

## Both Parties acknowledge the risk that transfers of data pursuant to Underlying Agreements subjects to SCC under Section 2 (and its subsections) may be suspended in accordance with the provisions of the GDPR, applicable privacy law, SCC and/or this Amendment. Such suspension may lead to inability to fully or partially perform mutual obligations under the main transaction(s), i.e. the contract or other transaction(s) between the Parties, for the performance of which the processing of personal data was assigned by Controller to Processor (hereinafter Main Transaction).

## In the event either of the Parties in good faith believes that there is a risk that this Amendment does not ensure Equivalent Protection due to material change of circumstances related to the corresponding Underlying Agreement, change of nature of the legal relationship between the Parties, or change of legislation and/or enforcement practice with respect to Controller’s or Processor’s applicable law as well as GDPR and, in particular, appropriate safeguards for transfers outside of the EEA:

### That Party shall contact the other Party with a reasoned proposal to amend this Amendment so that Equivalent Protection is restored;

### If no agreement to amend is reached within 30 calendar days from the receipt of the proposal referred to in Section 4.2.1 above, the Party that initiated such proposal may suspend the personal data transfer until an agreement is reached. The suspending Party shall notify the other Party at least 5 business days before the planned suspension;

### Upon suspension under Section 4.2.2 Processor shall return or delete (at the Controller’s discretion) any and all copies of personal data related to processing assigned to Processor by Controller;

### Upon suspension under Section 4.2.2 the performance of the Underlying Agreement and the corresponding Main Transaction are suspended for the duration of the suspension of the personal data transfer pursuant to the corresponding Underlying Agreement; and

### If no agreement to amend is reached within 60 calendar days from beginning of the suspension provided in Section 4.2.2 above, the corresponding Underlying Agreement, corresponding Main Transaction and the transfer of personal data under it shall be deemed terminated.

## The procedure provided under Section 4.2 above is without prejudice to Controller’s and Processor’s rights and obligations under Clause 4(g) and 5(b) of the SCC, namely, the Controller’s right to suspend the relevant Underlying Agreement upon receipt of Processor’s notification on the change in applicable legislation that is likely to have a substantial adverse effect on the warranties and obligations provided by the SCC or to continue the transfer subject to notification of its supervisory authority. For the avoidance of doubt, any communication with Controller’s supervisory authority regarding the relevant processing of personal data shall be performed solely by the Controller.

## In the event that the competent supervisory authority decides to suspend or prohibit a transfer of data to the Processor:

### the Controller shall suspend or terminate (for purposes of subsections of Section 4.4 referred to jointly as suspension) the relevant transfer of data to the Processor as provided in the decision of the competent supervisory authority;

### Controller shall without delay contact Processor with a notification of suspension and a reasoned proposal to amend this Amendment so that Equivalent Protection is restored, if possible;

### Upon suspension under Section 4.4.1 Processor shall return or delete (at the Controller’s discretion) any and all copies of personal data related to processing assigned to Processor by Controller;

### Upon suspension under Section 4.4.1 the performance of the Underlying Agreement and the corresponding Main Transaction are suspended for the duration of the suspension of the personal data transfer pursuant to the corresponding Underlying Agreement; and

### If no agreement to amend is reached within 60 calendar days from beginning of the suspension provided in Section 4.4.1 above, the corresponding Underlying Agreement, corresponding Main Transaction and the transfer of personal data under it shall be deemed terminated.

# Governing Law and Jurisdiction

## In case Annex 1 contains only one Underlying Agreement:

### this Amendment and any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with it or its subject matter or formation shall be governed by and construed in accordance with the law governing that one Underlying Agreement; and

### with respect to any dispute or claim (including non-contractual disputes or claims) that arises out of or in connection with this Amendment or its subject matter or formation the Parties irrevocably agree to the jurisdiction of the court, arbitral tribunal and/or other dispute resolution mechanism provided in that one Underlying Agreement.

## In case the condition provided under Section 5.1 above is not satisfied:

### this Amendment and any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with it or its subject matter or formation shall be governed by and construed in accordance with the law of the country of incorporation of the Controller; and

### with respect to the any dispute or claim (including non-contractual disputes or claims) that arises out of or in connection with this Amendment or its subject matter or formation the Parties irrevocably agree to the jurisdiction of the courts of the country of incorporation of the Controller.

# Miscellaneous

## The sole purpose of this Amendment is to ensure the level of protection of data subject rights equivalent to that guaranteed within the EU by the GDPR. Accordingly, it should not be construed as in any way affecting the commercial relationship between Controller and Processor, including, inter alia, as an indication of wish to prolong the corresponding Underlying Agreement (or a promise to do so). It should also not be regarded as a waiver of right to claim deficiency with respect to the processing of personal data that occurred before the conclusion of this Amendment.

## This Amendment shall come into force upon placement of the last signature of the Parties.

## This Amendment may be concluded, inter alia, by exchange of scanned copies via email.

## No amendment of this Amendment shall be effective unless it is in writing and signed by, or on behalf of, each Party to it.

## This Amendment may be amended or terminated both in its entirety as well as separately for each Underlying Agreement.

## Neither Party may assign any of that Party's rights or transfer any of that Party's rights and obligations under this Amendment without the written consent of the other Party.

## This Amendment comprises the entire agreement between the Parties regarding the subject matter hereof and supersedes all prior proposals, understandings, and all other agreements, oral, and written between the Parties relating to the Amendment.

## If any part of this Amendment is held to be illegal or unenforceable, then such provision will be modified to reflect the Parties’ intention. The validity or enforceability of the remainder of this Amendment shall not be affected.

## The following Annexes represent an integral part of this Amendment:

### Annex 1. Underlying Agreements

### Annex 2. Equivalent Protection Assessment and Commitment (Optional)

This Agreement has been entered into on the date stated at the beginning of it.

# Signatures

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| --- | --- | --- |
| **Controller**  Signed by  **«ControllerSigName»** for and on behalf of **«ControllerName»** |  | .................... (sig) / .................... (date)  «ControllerSigPosition» |
| **Processor**  Signed by  **«ProcessorSigName»** for and on behalf of **«ProcessorName»** |  | .................... (sig) / .................... (date)  «ProcessorSigPosition» |

Annex 1. Underlying Agreements

This Annex 1 to the Amendment lists the following agreements as Underlying Agreements for purposes of Section 1.2 of the Amendment:

*\*Start of example; does not create legally binding obligations\**

1. DPA A
2. DPA B
   1. Data subjects: Web users
   2. Categories of data: First name, last name, address
   3. Security: Encryption, role management
3. DPA C
   1. Data subjects: Employees

*\*End of example \**

Annex 2. Equivalent Protection Assessment and Commitment (Optional)

This Annex 2 to the Amendment contains an optional Equivalent Protection assessment and commitment referred to in Section 3.2 of the Amendment.

*\*Intentionally left blank\**