NIEDERER KRAFT FREY

NKF Client News

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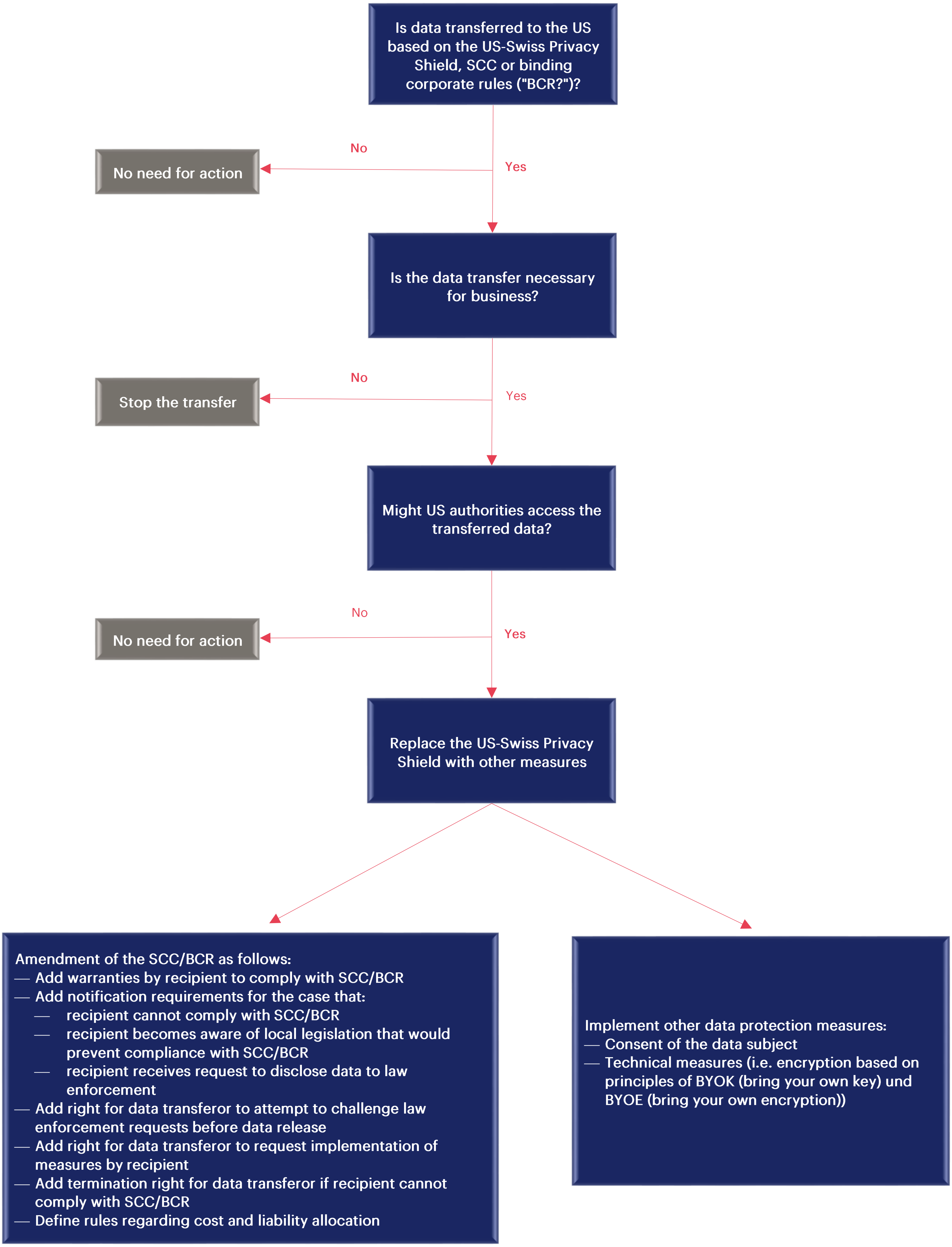
Cross-Border Data Transfer and Schrems II Decision

1. Schrems II Decision and Policy Paper by the Federal Data Protection and Information Commissioner ("FDPIC")

On 16 July 2020, the European Court of Justice ("**ECJ**") ruled in its decision "Schrems II" that the US-EU Privacy Shield is no longer a valid legal basis for data transfers to the US. Moreover, it raised serious doubt on whether standard contractual clauses ("**SCC**") can provide sufficient legal grounds for transferring personal data to the US. Both mechanisms cannot prevent access by US authorities.
In its policy paper dated 8 September 2020, the FDPIC came to the same conclusions regarding the US-Swiss Privacy Shield. The FDPIC has amended his list of countries with adequate data protection laws by removing the indication "adequate level of protection under certain circumstances" for the US. However, as the FDPIC does not have the authority to actually overrule the US-Swiss Privacy Shield, it is still valid and binding for the companies registered under it. The FDPIC's policy paper must be considered an assumption in legal proceedings and would have to be refuted by the natural or legal person accused of violating the Swiss Federal Act on Data Protection. Swiss courts have yet to decide on a case regarding this new development.

2. Practical Steps for Affected Companies

Even though the FDPIC's policy paper did not legally invalidate the US-Swiss Privacy Shield, Swiss companies might be affected by the FDPIC's policy paper as well as the Schrems II decision. Therefore, they must consider implementing additional measures/safeguards to ensure they are acting in accordance with Swiss and EU data protection laws. In the following, we have gathered practical steps Swiss companies can take in this regard. We advise to update the proposed data transfer assessment periodically and to critically evaluate it.



Is data transferred to the US based on the US-Swiss Privacy Shield, SCC or binding corporate rules ("BCR?")?

No need for action

Is the data transfer necessary for business?

Stop the transfer

Might US authorities access the transferred data?

No need for action

Replace the US-Swiss Privacy Shield with other measures

Amendment of the SCC/BCR as follows:

- Add warranties by recipient to comply with SCC/BCR
- Add notification requirements for the case that:
  - recipient cannot comply with SCC/BCR
  - recipient becomes aware of local legislation that would prevent compliance with SCC/BCR
  - recipient receives request to disclose data to law enforcement
- Add right for data transferor to attempt to challenge law enforcement requests before data release
- Add right for data transferor to request implementation of measures by recipient
- Add termination right for data transferor if recipient cannot comply with SCC/BCR
- Define rules regarding cost and liability allocation

Implement other data protection measures:

- Consent of the data subject
- Technical measures (i.e. encryption based on principles of BYOK (bring your own key) und BYOE (bring your own encryption))

If you have further questions or comments on this topic, please reach out to your regular NKF contact.

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