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# How to deal with data transfers to third countries?

CIT Workshop: GDPR one year after – What now?  
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# Overview Chapter V GDPR

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- General principles for transfers Art. 44 GDPR
- Transfers based on...
  - adequacy decision Art. 45 GDPR
  - appropriate safeguards Art. 46 GDPR
    - Binding Corporate Rules (BCR) Art. 47 GDPR
- Transfers not authorised by EU law Art. 48 GDPR
- Derogations for specific situations Art. 49 GDPR

# Data transfers to third countries

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Two-step test

Legal basis (Art. 6 et seqq. GDPR)

Adequate data protection level in 3<sup>rd</sup> country  
(compliance with Chapter V, i.e. Art. 44 et seqq. GDPR)

EDPB Guidelines 2/2018

# Layered approach – Overview

1

Adequacy decision (Art. 45 GDPR)

2

Appropriate safeguards (Art. 46 GDPR)

3

Derogations (Art. 49 GDPR)

# Adequacy decision

## EU / Pre-GDPR:

- Andorra
- Argentina
- Canada (limited to commercial organisations)
- Faroe Islands
- Guernsey
- Isle of Man
- Israel
- Jersey
- New Zealand
- Switzerland
- Uruguay
- United States: **for EU-US Privacy Shield**

## Under GDPR:

- Japan
- Future?
  - South Korea
  - UK post Brexit?
  - Others?
  - Periodic review of existing adequacy decisions

## Switzerland:

- **List of FDPIC** (for personal data of individuals only)
- United States: **for CH-US Privacy Shield**

# Adequacy decision

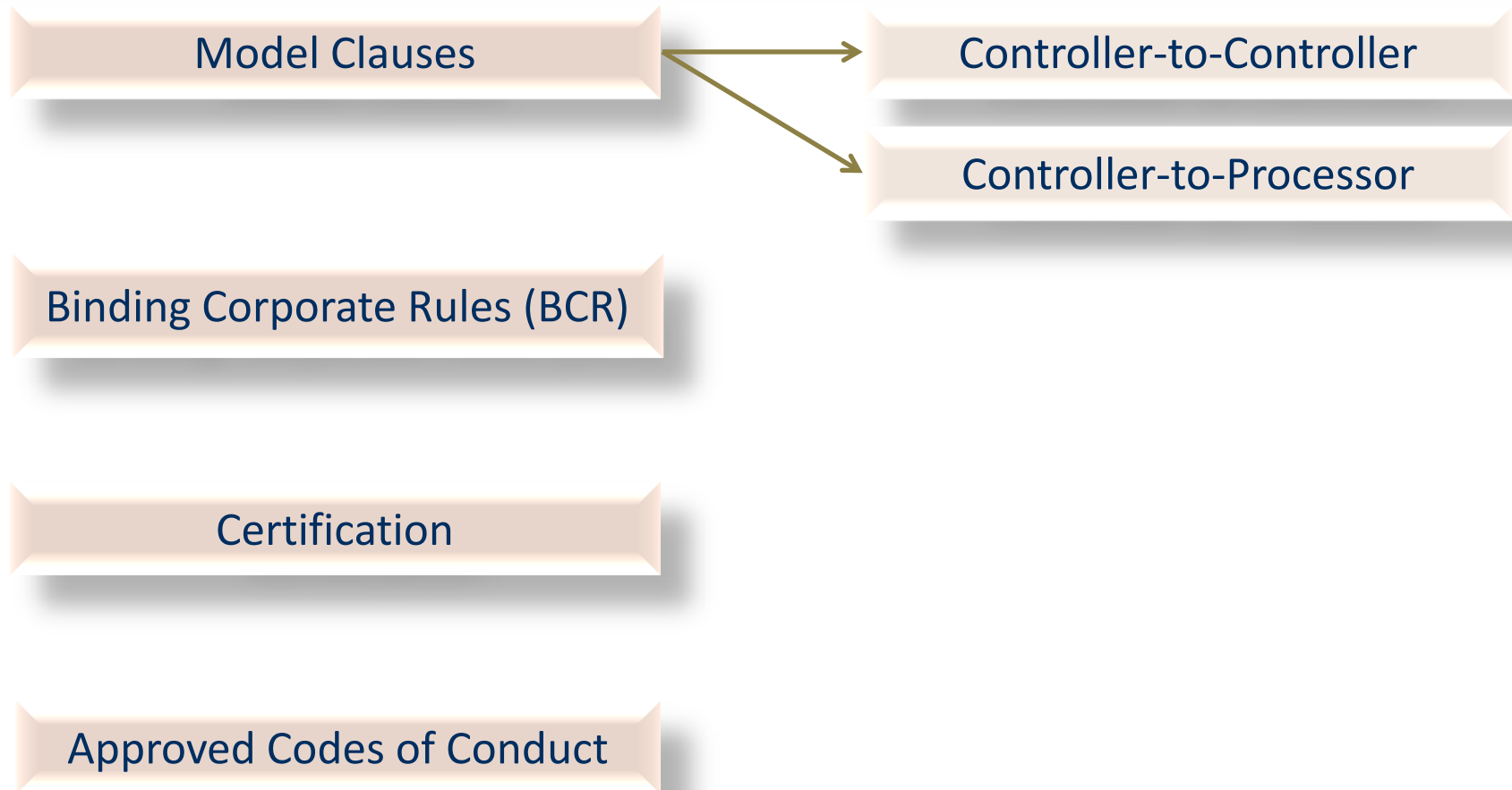
- «Adequate data protection level»: benchmark?
  - «Essentially equivalent», not identical  
(Schrems judgment of the ECJ, GDPR Recitals 104, 105)
  - Art. 45 GDPR
  - Japan adequacy decision
  - WP29 reference framework for adequacy: WP 254 rev.01

# Adequacy decision

- Assessment criteria (Art. 45 para. 2 GDPR; cf. also Fact sheet Japan adequacy decision, Jan. 2019)
  - a) **Rule of law and legal framework**
    - *Inter alia* fundamental rights, data protection rules, data subject rights
  - b) **Independent supervisory authority with enforcement powers**
    - Strengthening the resources and competencies of the FDPIC and cantonal authorities; sanctions
  - c) **International commitments**
    - Positive: in particular joining **Council of Europe's Convention 108+**
    - Negative: e.g. excessive data exchange with third countries

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# Appropriate safeguards (Art. 46 GDPR)





# Derogations (Art. 49 para. 1 GDPR)

Conclusive list of derogations:

Subpara. 1

Explicit consent (let. a)

Contract (let. b and c)

Public interest (let. d)

Legal claims (let. e)

Vital interest (let. f)

Register (let. g)

Overarching condition: necessity test

Subpara. 2

Singular exemptions

“fall-back clause” for singular cases

# Derogations (Art. 49 para. 1 GDPR)

- Derogations are **exemptions** from general principle, i.e. must be **interpreted restrictively, apply for specific situations only**, in particular:
  - **Contract exemption**
  - **Legal claims exemption**
  - “**occasional**” (recital 111),
  - “**not repetitive**” (Art. 49 para. 1 § 2)
  - **Not covered: systematic, repeated access, direct access via interface**
  - **Does not justify disclosure of passenger data to foreign authority on a massive scale**
- **Explicit consent**  
given freely, for specific case, on informed basis, only if few persons concerned and no damage imminent for the persons concerned
- **Public interest**  
strict benchmark, only if also in public interest of EU or EU member state concerned

# Layered approach

- 1 Adequacy decision (Art. 45 GDPR)
- 2 Appropriate safeguards (Art. 46 GDPR)
- 3 Derogations (Art. 49 GDPR)

- Model Clauses
- Binding Corporate Rules (BCR)
- Certification
- Approved Codes of Conduct
- Explicit consent
- Contract
- Public interest
- Legal claims
- Vital interest
- Register
- Singular exemptions (1)2

# Relation to Art. 48 GDPR

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- Recital 115
- **Decisions from third country authorities, courts or tribunals** are not in themselves legitimate grounds for data transfers to third countries.
  - Covers all **sovereign acts / measures of third countries**
  - Transfers to third countries
- Justification of transfer in case of **international agreements which cover data transfers**, e.g.
  - Mutual legal assistance treaties (MLAT)
  - ≠ mere non-binding international agreements and recommendations: not sufficient
- If international agreement is in place: EU companies should ...
  - generally refuse direct requests
  - refer requesting third country authority to existing MLAT or agreement.

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