Adequate level of data protection in third countries post-
*Schrems* and under the GDPR
What are adequacy decisions?

• Transfer of personal information to a third country must fall under an exception, standard contractual clause, or binding corporate rules.

• Directive, art 25(6) and GDPR, art 45(3): European Commission can also find a third country ensures an adequate level of protection.

• Consequence: no authorisation by a DPA is required for the transfer.
Why have adequacy findings?

• No need for Member States to constantly assess third countries for adequacy.
• Rationalising decision-making for large numbers of transfers.
• Coherence and consensus on whether a third country has adequate data protection.
• Incentivise third countries to develop or improve their data protection.
The nature of adequacy (i) definition

Under the Directive

• General criteria: Article 25(2).

• Supplemented by more specific core criteria formulated by Article 29 Working Party.

• Article 29 WP: adequacy does not necessarily entail equivalency.

• ECJ in Schrems: while “adequate” does not mean “identical” to EU protections, protections should be “essentially equivalent”.

Under the GDPR

• Standard of “essential equivalence”.
• It includes additional obligations.
• Regulation expressly particularizes the matters to be considered when considering adequacy.
The nature of adequacy
(ii) jurisdiction

• Member States must comply with Commission decision: art 25(4). This provides certainty and uniformity.
• If Commission finds third country does not ensure adequacy, Member States must prevent transfer of data.
• Member states retain power to suspend transfers if protections not adequate (to be confirmed by amendment to existing adequacy decisions).
• Only ECJ has power to deal with the validity of adequacy decision.
• Position remains the same under the GDPR.
The nature of adequacy (iii) temporal dimension

- Adequacy decision process under art 25 a “continuing one” subject to revision.
- Under both Directive and GDPR, third countries can move in and out of adequacy over time.
- Monitoring of third countries formalised under GDPR.
- Periodic review mechanism, as well as Commission monitoring of relevant developments in third country.
- Commission can repeal, amend or suspend adequacy decision.
- Adequacy decisions under Directive remain in force until amended, replaced or repealed by Commission.
Has the bar been raised unreasonably or unfairly high?

• Higher GDPR standards not likely to be achievable for most countries.
• Substantial compliance a more realistic standard than essential equivalency?
• A *tu quoque* objection?
• Eg, some Member States participate in intelligence programmes with the USA.
How important is it to achieve adequacy: does it really matter?

• Difficult to gauge how important it actually is to achieve or maintain adequacy status.
• After nearly 20 years, most countries have not achieved adequacy status.
• The available exceptions and options may be sufficient.