

MEETING WITH [REDACTED]

[REDACTED] Deutsche Telekom AG

**Scene setter**

- You are meeting with [REDACTED] Deutsche Telekom AG, responsible for operations in 10 European Countries.
- The bilateral meeting will take place remotely and cover the following topics: 1) How to strengthen Europe's competitiveness on digital sphere to ensure sustainable economic growth; 2) Challenges for intra-EU cross-border investments, e.g. intra-EU investment protection and enforcement 3) Rule of Law enforcement 4) Prevention of the misuse of European funds (RRF and MFF) 5) Rule of law issues that affect cross-border investments within the EU and 6) Transatlantic data flows/Schrems II.
- In her meeting request, [REDACTED] stated that “[a]s the national RRF plans have been notified to the EU Commission, it is essential to ensure that European taxpayer's money is spent wisely and in compliance with the rule of law”. Moreover, being responsible for Deutsche Telekom's intra-EU cross-border investments, she “observe[d] with some concern recent developments in a couple of countries where Deutsche Telekom operates telecommunications networks”.
- The discussions should cover “the challenges ahead and how to make Europe a frontrunner for sustainable economic growth and investments”. The meeting would i.a. provide **a good occasion to hear the views and experiences of [REDACTED]** with regard to the **business climate** and the **situation of the rule of law** in the Member States that fall in her area of competence
- As regards transatlantic data flows/Schrems II, you may want to:
  - Inform about the recent adoption of the new standard contractual clauses, which provide a useful tool to assist companies in their compliance efforts;
  - Explain that the Commission worked closely with the EDPB on its recently adopted guidance on the Schrems II judgment;
  - Refer to the ongoing talks with the US on a successor to the Privacy Shield, which would provide a more comprehensive, stable solution for transatlantic data flows, provided it fully complies with the Schrems II judgment.

## 1. Sustainable Corporate Governance

- The Commission is currently **working on the impact assessment** with a view to submitting a **proposal** on Sustainable Corporate Governance to the EU co-legislators **later this year** (announced in the 2021 Commission work programme).
- We are taking into account a **very broad range of evidence that demonstrates also the benefits of switching businesses to a more sustainable modus of operation.**
- The **aim** of the legislative proposal is to **foster sustainability and resilience** in corporate decision-making and in particular to **help companies become environmentally and socially sustainable**. Embedding sustainability into corporate governance would also be an important **catalyst for a sustainable recovery** after the COVID crisis.
- The impact assessment is looking into **three main elements**:
  - Possible EU-wide rules on **corporate due diligence, to mitigate or prevent adverse impacts** in the **company's own operations and its value chains**.
  - How to **clarify that directors have a duty** to pursue **long-term value creation** and a **sustainable strategy** for their company and **manage sustainability** risks.
  - Reflections on aligning **directors' remuneration schemes** to ensure that **incentives support long term sustainability**.
- We are looking into whether the **due diligence duty** would have to apply across **all industry sectors** or not and how it could be **aligned with internationally recognised human rights and labour standards and/or international environmental commitments** and EU goals, such as the 2050 climate neutrality objective and the EU's biodiversity goals. Ideally, all adverse impacts that can occur throughout the **value chain** should be captured.
- We are exploring how **civil liability** can play a role and whether obligations would apply beyond direct suppliers, as important risks to the environment as well as regards human rights (e.g. forced labour) tend to materialise in supply chains beyond tier one suppliers. We are also looking into the potential role of **public authorities** and whether the due diligence rules would **also cover some third-country companies** to level the playing field in the EU market.
- We also aim at ensuring **consistency, in particular, with the recently proposed new Corporate Sustainability Reporting Directive**.

## 2. Investment protection and facilitation initiative

- We share the objective of the importance of creating a favourable environment for investors in the intra-EU context. This will also help the twin transition with digital and green transition targets.
- Facilitating and promoting intra-EU investments is crucial for the development of the EU economy, the creation of business opportunities and new jobs. Mobilising private capital is essential to finance the green and digital transition and the post-Covid economic recovery.
- As announced in the CMU Action Plan, the Commission has been exploring ways to further improve the intra-EU investment environment.
- After analysing the evidence and stakeholder contributions, the impact assessment work is entering its final stage.
- The preparation of the initiative involves the analysis of complex questions, also from a legal viewpoint and it is too early to comment on its content. We are trying to make it as attractive as possible with concrete, new elements that will be genuine add-ons changing the status quo.
- A number of options are being explored, in particular in relation to investors to state disputes resolution mechanisms – which seems to be a focal point for investors.
- We will have more clarity in the autumn.
- Courts remain a key dispute resolution mechanism under the EU legal framework.
- The Commission work on rule of law and the Justice Scoreboard are the main tools to address potential shortcomings in the national judicial systems. The options envisaged in the initiative will be complementary to existing EU judiciary system.

### **3. Rule of Law enforcement**

- Respect for the rule of law is of particular importance for the functioning of our Union and the effective application of EU law.
- Over the past years, we have seen rule of law concerns emerging in certain Member States. These developments have only made the Commission more convinced of the importance of using all the instruments at our disposal to uphold the rule of law.
- Therefore, the Commission has gradually developed and used during the last years a variety of instruments to address these challenges.

#### *The annual Rule of Law Report*

- A new tool has been added to the rule of law toolbox last year with the annual Rule of Law Report.
- It is conceived as a **yearly process**, during which **we aim to prevent problems from emerging or deepening**. It also **allows Member States to learn from each other**, through an exchange of best practices.
- The Commission intends to publish the second annual Rule of Law Report in July this year and preparations are well advanced. It will cover the same four pillars and will in particular follow-up on the challenges identified in the first Report.

#### *Infringement proceedings*

- In critical situations where judicial independence or the independence of regulatory authorities in a Member State is affected, the Commission can, as the guardian of the Treaties, **launch infringement proceedings** against a Member State, as it did for example **in the case of Poland**.
- In particular, in addition to the several infringement proceedings to safeguard judicial independence in Poland, the Commission sent on 8 March 2021 a reasoned opinion to Poland for breaching EU law safeguarding the independence of the national regulatory authority for telecommunications (NRA), a key principle of the EU's telecom law. More specifically, the legal provisions amending the Polish Telecommunications Law that resulted in the early termination of the mandate of the Head of the Polish NRA – the Office for electronic communications, raise concern.
- The Commission will not hesitate to take further action to launch infringement proceedings in order to uphold the rule of law and judicial independence.

#### *Article 7 procedures*

- Another instrument to react to threats to our values is provided by **Article 7** of the Treaty on European Union. It establishes a procedure in case of a “clear risk of a serious breach of the [Union’s] values” or in the case of “the existence of a serious and persistent breach” of such values.
- The deterioration of the situation of the rule of law in Poland led the Commission to initiate the procedure under Article 7 TEU in December 2017. In September 2018, the European Parliament decided to do the same for Hungary. Both Article 7 proceedings are **still ongoing before the Council**.

#### **4. Prevention of the misuse of European funds (RRF and MFF)**

##### General

- The EU has a sound system in place to ensure that the EU budget is implemented in line with sound financial management principles.
- Further to recent initiatives such as the new Financial Regulation, the amendment of the European Anti-Fraud Office (OLAF) Regulation, the Commission Anti-fraud Strategy, the Commission spearheaded the establishment of the European Public Prosecutor's Office (EPPO) and will continue to cooperate with the EPPO to protect the Union budget.
- The Regulation for the new Recovery and Resilience Facility explicitly provides for the funds to be implemented in accordance with the Conditionality Regulation.
- For the multiannual financial framework and the Recovery and Resilience Facility, the quality of the beneficiaries' data to be collected by Member States (including beneficial ownership data) will be enhanced.
- The Commission will provide Member States with a single data-mining tool that they can voluntarily use for control and audit purposes, with a view to a generalised application by Member States.
- In the context of the Recovery and Resilience Facility, Member States must have control and audit systems in place to ensure compliance with EU and national laws, including to prevent, detect and correct serious irregularities, and avoid double funding. These systems are assessed ex ante by the Commission when it looks at the national plans.
- The Commission will also implement its own risk-based control strategy and intervene where needed during the implementation of Recovery and Resilience Facility.

##### European Semester & Recovery and Resilience Facility

- In recent years, the Commission has also deployed other instruments to protect the rule of law in the Union, including measures under the European Semester, the annual cycle for aligning economic and fiscal policies in the Union. In this context, the Commission has made several country-specific recommendations on justice reforms in Member States, which were subsequently adopted by the Council.
- Member States are expected to address these recommendations in their national recovery and resilience plans. These plans set out the reforms and investments they wish to implement when spending funds from the EU's 670 billion euro Recovery and Resilience Facility.

##### Rule of Law Conditionality Regulation

- A new Regulation on a general regime of conditionality has been adopted, and applies as from 1 January 2021. For the first time, the Union will be able to **protect its budget from breaches of the principles of the rule of law which affect the EU's financial interests** in a **sufficiently direct** way.
- The **measures** that can be proposed under the Regulation include, for instance, suspension and termination of payments, as well as prohibition of new legal commitments and financial corrections.

- The Commission is fully committed to enforcing the Regulation and **is already monitoring possible breaches** of the rule of law principles that would be relevant under the Regulation. In parallel, we are also **preparing guidelines** to ensure that this mechanism is applied in fair and objective way.

**5. Rule of law issues that affect cross-border investments within the EU**

- The rule of law is **crucial for the effective functioning of our internal market**. Where judicial systems guarantee the enforcement of rights, creditors are more likely to lend, firms are dissuaded from opportunistic behaviour, transaction costs are reduced and innovative businesses are more likely to invest. In other words, the rule of law is important for a business and investment-friendly environment.
- A study has indicated a **positive correlation between perceived judicial independence and foreign direct investment flows**. Another study has found that a higher percentage of companies perceiving the justice system as independent by 1% tends to be associated with higher turnover and productivity growth.
- I would be **very interested to hear your experiences** with regard to the business climate and the situation of the rule of law in the Member States that fall in your area of competence.

**6. Transatlantic data flows/Schrems II**

- In response to the Schrems II judgment, we have been working on different work streams.
- We recently adopted modernised Standard Contractual Clauses for international data transfers. These have been fully aligned with the GDPR and adapted to modern business realities. They also take into account the requirements of the Schrems II judgment and operationalise the clarifications offered by the Court.
- The new clauses provide companies with a practical toolbox to assist them in their compliance efforts.
- The standard contractual clauses are the most used tool by European companies for their international data transfers and finalising the new clauses was therefore a priority for us.
- We will now work together with stakeholders to develop a user-friendly practical guide, on the basis of questions and answers, to further facilitate the use of these new Clauses.
- Of course, also the new Clauses have to be used in accordance with the Schrems II judgment and the guidance of the EDPB.
- That is why we worked closely with the Board to ensure consistency between our work. This is reflected in the final guidance of the EDPB that was adopted two weeks ago, which is aligned with the approach of the standard contractual clauses.
- When it comes to transatlantic data transfers, the most comprehensive solution remains a new adequacy decision, which is what we are currently discussing with the US.
- As indicated in my recent statement with US Secretary of Commerce Raimondo, developing a successor arrangement to the Privacy Shield is a priority for both sides.
- At the same time, it should be clear that there are no shortcuts and there will be no quick fix. We will only accept a solution that is fully in line with the requirements of Union law, as interpreted by the Court of Justice in the Schrems II judgment.
- Developing an arrangement that complies with the Schrems II judgment is also the only way to provide stakeholders on both sides of the Atlantic with the stability and legal certainty they expect.



## **DEFENSIVES**

### **Transatlantic data flows/Schrems II**

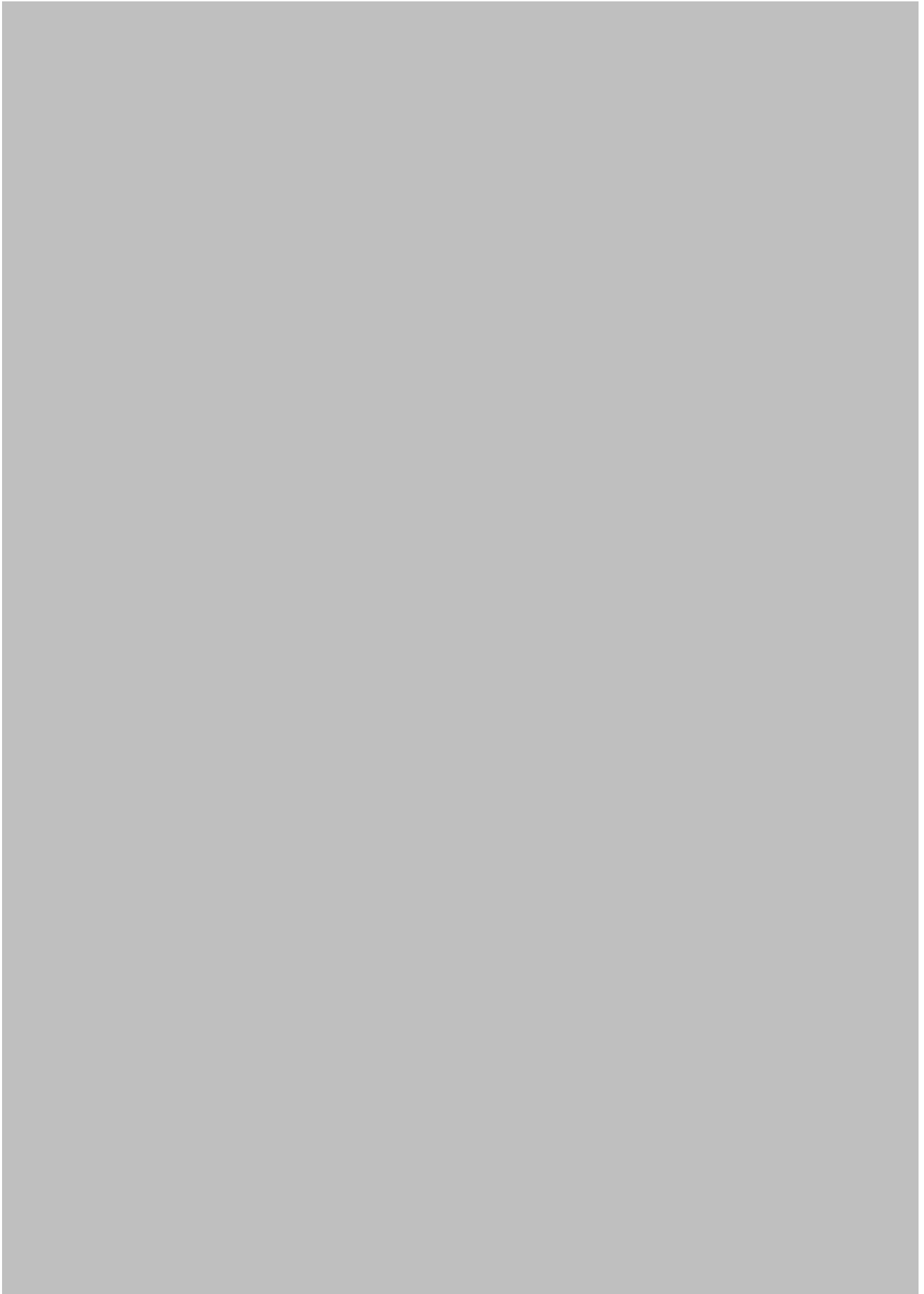
#### **We are concerned about calls for data localisation.**

- We have repeatedly confirmed the Commission's commitment to facilitate data flows.
- This is notably reflected in our approach to digital trade in trade negotiations, consisting in preserving our regulatory autonomy in the area of data protection while prohibiting data localisation measures. In other words, we should not confuse data protection with digital protectionism. This is reflected in the recently concluded EU-UK Trade and Cooperation Agreement, the first trade agreement that contains a straightforward prohibition of data localisation requirements while stressing the importance of data flows.
- That is also what we continue to pursue in our engagement with international partners in different fora, including the WTO e-commerce negotiations, where we promote safe and free data flows. This includes for instance the very promising work at the OECD on developing global principles for government access – which builds on the Japanese “Data Free Flow with Trust” initiative – or the conclusion of our adequacy talks with South Korea.

#### **We are concerned about the uncertainty created by the Schrems II judgment, which is further fuelled by the very strict guidance of the data protection authorities**

- We understand the need for practical guidance and therefore worked closely with the European Data Protection Board, which issued detailed guidance on 18 June.
- In our own work on standard contractual clauses, which are the most used tool for international data transfers, we have operationalised some of the clarifications provided by the Court, which we believe provide a helpful toolbox to assist companies in their compliance efforts.
- While we were finalising the clauses, we also worked closely together with the EDPB to ensure consistency between our approaches.





## **Transatlantic data flows/Schrems II**

### **Negotiations on a successor to the Privacy Shield**

Immediately after the invalidation of the Privacy Shield by the Schrems II judgment, the EU and US expressed strong willingness to work on a new, strengthened framework<sup>1</sup>. In a recent joint press statement, Commissioner Reynders and Secretary of Commerce Raimondo announced that the EU and US are intensifying their negotiations<sup>2</sup>.

While we are seeing a willingness across the Biden administration to engage [REDACTED], the issues that have to be addressed are very complex and concern the delicate balance between privacy and national security. At the same time, the only way to ensure stability of data flows and deliver the legal certainty stakeholders are expecting is to develop a new arrangement that is fully compliant with the Schrems II judgment, which may take some time.

At the moment, it is too early to say whether this engagement on US side will translate into proposals that will allow to comply with the requirements of the Court.

### **Standard Contractual Clauses**

The Standard Contractual Clauses (SCCs) are model data protection clauses that an EU-based exporter of data and a data importer in a third country can decide to incorporate into their contractual arrangements (e.g. a service contract requiring the transfer of personal data) and that set out the requirements related to appropriate safeguards. These SCCs can be used as a tool for transfer of personal data to countries outside the EU that are not subject to a Commission adequacy decision. SCCs represent by far the most widely used data transfer mechanism for EU companies that rely on them to provide a wide range of services to their clients, suppliers, partners and employees. Their broad use indicates that, through their standardisation and pre-approval, SCCs are an easy-to-implement tool for businesses to meet data protection requirements in a transfer context and are of particular benefit to companies, especially the SMEs, that do not have the resources to negotiate individual contracts with each of their commercial partners. The SCCs are of general nature and are not country specific.

The SCCs that had been adopted under the previous data protection regime (the Data Protection Directive) had to be modernised and on 4 June 2021, the Commission adopted new SCCs. Compared to the previous ones, the modernised SCCs:

- Have been updated in line with new GDPR requirements;
- Provide one single entry-point covering a broad range of transfer scenarios, instead of separate sets of clauses;
- Provide more flexibility for complex processing chains, through a 'modular approach' and by offering the possibility for more than two parties to join and use the clauses;
- Contain a practical toolbox to comply with the Schrems II judgment.

For controllers and processors that are currently using previous sets of standard contractual clauses, a transition period of 18 months is provided.

### **EDPB Recommendations on supplementary measures**

<sup>1</sup> [https://ec.europa.eu/info/news/joint-press-statement-european-commissioner-justice-didier-reynders-and-us-secretary-commerce-wilbur-ross-7-august-2020-2020-aug-07\\_en](https://ec.europa.eu/info/news/joint-press-statement-european-commissioner-justice-didier-reynders-and-us-secretary-commerce-wilbur-ross-7-august-2020-2020-aug-07_en).

<sup>2</sup> [https://ec.europa.eu/commission/presscorner/detail/en/statement\\_21\\_1443](https://ec.europa.eu/commission/presscorner/detail/en/statement_21_1443).

On 18 June, the **EDPB adopted the final version** of its ‘Recommendations on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data’, which provide an overview of the steps companies have to take following the Schrems II ruling when using tools such as standard contractual clauses. This is the version **after the public consultation**, which ended in December.

The **main change** in the recommendations (compared to the version that was published in the fall) concerns the approach of the EDPB to the **factors that companies can take into account when assessing whether sufficient protections are in place for their transfers**. According to the first version of the recommendations, this assessment would only have to take into account the scope of relevant laws in the third country of destination, i.e. whether the data importer would be subject to those laws. This would have meant that data importers that fall within the scope of third country legislation but in practice never receive government access requests would still need to put in place supplementary measures, or would no longer be able to receive data from the EU. This was heavily criticised by stakeholders, who expressed a preference for the approach of the draft SCCs (as they were published in November), which included the relevant practical experience of companies with prior requests (or the absence thereof) as one of the factors to be taken into account in this assessment. The **final version of the recommendations contains more nuanced wording, allowing companies to take into account their practical experience** with government access requests. The language is **overall aligned with the approach in the final SCCs**.

The language of the recommendations has **also been nuanced on several other aspects**, e.g. on some of the so-called ‘use cases’, i.e. examples of situations for which the EDPB has identified/has not managed to identify possible supplementary measures. For example, the revised recommendations no longer contain an example that requires companies transferring data to countries benefiting from an adequacy decision to put in place supplementary measures if their data would be ‘routed’ via a another third country where it may be subject to disproportionate government access.

**At the same time, the two ‘negative’ use cases**, i.e. examples of situations where the EDPB was not able to identify any solution that would allow companies to continue transferring personal data to a third country where it would be subject to disproportionate government access, **have been maintained**. These examples were **heavily criticised by stakeholders**, as they concern two scenarios that are very common in the commercial sector. First, the scenario where EU companies use cloud providers (or other service providers) in a third country that need to have access to ‘clear’, unencrypted data. Second, the scenario where an EU company shares clear, unencrypted data with a commercial partner outside the EU for common business purposes (e.g. within a corporate group). **However**, given that the final recommendations allow companies to take into account their practical experience, **companies in those scenarios will now be provided with more flexibility** and could still transfer data if they conclude that the data importer/the transferred data will in practice not be subject to government access requests (whereas under the first version, such data transfers could never take place as long as the non-EU company fell within the scope of disproportionate surveillance laws, regardless of whether or not access requests are received in practice).

