

# Long-awaited clarity on required safeguards for international data transfers

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**J**une has been an exciting month for privacy experts. Various recent publications have shed more light on the rules to protect personal data when transferred outside the European Economic Area (the 'EEA').

On 4 June 2021, the European Commission published the final version of its standard contractual clauses for the transfer of personal data to third countries (the 'new SCCs'). SCCs are a tool used for international data transfers that has gained in importance following the invalidation by the Court of Justice of the European Union (the 'CJEU') in *Schrems II*<sup>1</sup> of the Privacy Shield for data transfers to the US. On that same date, the European Commission also adopted SCCs for data processing agreements between controllers and processors. Two weeks later, the European Data Protection Board (the 'EDPB') adopted the final version of its recommendations on supplementary measures (the 'EDPB Recommendations') which provide crucial guidance in the wake of *Schrems II*. Finally, on 28 June 2021, the European Commission adopted long-awaited adequacy decisions for 'international' data transfers from the EU to the United Kingdom.

This contribution provides a brief overview of these publications, their relevance and the key take-aways.

## SCCs

Standard contractual clauses are probably the most commonly used tool for international data transfers to non-EEA countries, such as the US, Russia, China, India and many other countries that do not benefit from a European Commission adequacy decision. A data transfer tool is a mechanism used to transfer personal data internationally in compliance with Chapter V of the GDPR, by which the lack of adequate data protection in the relevant non-EEA country is compensated via contractual guarantees. The new SCCs were made available for consultation in mid-November 2020 and have now been adopted in final form.

### Modular approach

The new SCCs provide organisations with an easy-to-use template since they are pre-approved by the European Commission. Unlike previous SCCs, the new SCCs<sup>2</sup> cover four categories of data transfers: controller to controller, controller to processor, processor to processor and processor to controller. The new SCCs can be used for all of these transfer situations thanks to their "modular approach", whereby certain clauses apply to all types of transfers while others must be adapted depending on the category of transfer.

### No further need for power-of-attorney constructions

The lack of SCCs for international data transfers between two or more processors often led to the use of power-of-attorney constructions. This would be the case, for example, when an EU-based IT service provider sub-contracted personal data hosting or analysis services to a service provider located in a third country. The EU-based data controller would authorise the EU-based data processor to enter into SCCs on its behalf. In this context, the parties would use controller-to-processor SCCs whereby the data controller acted as data exporter and the sub-processor as data importer. As the new SCCs cover processor-to-processor transfers, they make such constructions unnecessary. The EU-based data processor can now act directly as the data exporter.

### Not applicable to data importers subject to the GDPR

The new SCCs cannot be used for transfers of personal data to an importer located in a third country whose processing activity is subject to the GDPR due to its extraterritorial scope, e.g., when the processing activity relates to the offering of goods or services to data subjects in the EU. This point will most likely be addressed by the EDPB at a later stage.

### Transition period

The previous SCCs, put in place by Decision 2001/497/EC and Decision 2010/87/EU, will be repealed effective 27 September 2021. As from that date, organisations will no longer be able to rely on them. A transition period is foreseen for contracts based on the old SCCs concluded before 27 September 2021. Such contracts can validly be used for data transfers until 27 December 2022, provided the processing operations remain unchanged. By that date, however, the previous SCCs should be replaced with the new SCCs.

### No blank cheque

The CJEU made clear in *Schrems II* that the use of SCCs is not a blank cheque for international data transfers. Organisations can rely on SCCs only insofar as they contain specific safeguards to address any effects of the laws of the destination country on the data importer's compliance with the SCCs. It must thus be ensured that the law of the third country does not, in practice, impinge on the level of protection the SCCs aim to guarantee, i.e. a level of protection that is essentially equivalent to that prevailing within the EEA.

The new SCCs integrate elements from *Schrems II*, such as the factors to be taken into account when carrying out a so-called data transfer impact assessment, i.e. an analysis of the concrete impact of non-EEA legislation on the processing activities. The data transfer impact assessment may show the need for 'supplementary measures' in addition to the SCCs in order to guarantee an essentially equivalent level of protection. To that end, Annex II of the new SCCs provides examples of supplementary measures organisations may take, e.g. state-of-the-art data encryption.

## EDPB Recommendations

More guidance with regard to the need for supplementary measures accompanying an international data transfer tool can be found in the EDPB Recommendations 01/2020.<sup>3</sup> After having received feedback on the draft recommendations, published in November 2020, the EDPB released the final version on 18 June 2021.

### Practical guidance

The EDPB Recommendations provide practical guidance, in the form of a roadmap of the steps EU-based data exporters must take to assess whether supplementary measures are required for the intended data transfer(s) as well as specific examples of such measures and the conditions to be effective. By means of specific cases, the EDPB provides useful assistance to determine the best course of action for data transfers. *Specific assessment still required*

In practice, however, much is still left to the data exporter, e.g., an assessment of the destination country's legislation. The EU-based data exporter is expected to examine the transferred data and the importer and determine whether they could fall under the scope of 'problematic' legislation, i.e. legislation that undermines the contractual guarantee of an essentially equivalent level of protection and that does not meet EU standards on fundamental rights and the principles of necessity and proportionality.<sup>4</sup>

For example, the CJEU has particularly targeted US legislation allowing for massive or «bulk» data collection, e.g., EO 12333 (together with PPD-28) and Section 702 FISA. The data exporter should also examine the practices of the third country's public authorities. That being said, it should be noted that the assessment is limited to legislation and practices relevant to protection of the *specific* data being transferred and a *specific* data importer in the context of a specific data transfer.

### European Essential Guarantees

When assessing and determining whether a third country's legal framework on access to personal data by public authorities can be regarded as a justifiable interference in keeping with European human rights standards, an organisation may find further guidance and clarification in the EDPB's European Essential Guarantees Recommendations.<sup>5</sup> The European Essential Guarantees Guide may also be of help. It contains answers by more than 20 countries to the *Schrems II* questions, with new countries being added frequently.

### Possibility of transfers without supplementary measures

As opposed to the draft version, the final EDPB Recommendations appear to allow a data exporter, upon certain conditions, to proceed with a transfer without implementing supplementary measures in the event of uncertainty surrounding the potential application of problematic legislation to the specific data transfer. In this case, the data exporter must be able to demonstrate and document that it has no reason to believe that problematic legislation will be interpreted and/or applied in practice so as to adversely affect the transferred data and the importer.<sup>6</sup>

## Brexit: adequacy decision for the United Kingdom

As a result of Brexit, the United Kingdom is now a non-EEA country. The Trade and Cooperation Agreement between the EU and the UK allowed

nevertheless for the free flow of personal data during a transition period, until an adequacy decision was adopted or 1 July 2021. On 28 June 2021, two adequacy decisions were adopted allowing for the free flow of personal data from the EU to the United Kingdom: one relates to personal data transfers under the GDPR<sup>7</sup> and the other to personal data transfers under the Law Enforcement Directive.<sup>8</sup> The United Kingdom is deemed to provide an essentially equivalent level of protection for personal data to that guaranteed in the EU.

Unlike other adequacy decisions, the UK adequacy decisions include a so-called sunset clause. This means that the decisions will automatically expire after four years and a new assessment will be conducted.

Many organisations are not aware that, despite these adequacy decisions, they must nevertheless appoint a representative in the EU if they fall within the territorial scope of the GDPR, and controllers transferring data to the UK must indicate this in their data protection notice.

## SCCs for data processing agreements

Last but not least, the European Commission also published standard contractual clauses pursuant to Article 28(7) GDPR. These are standard clauses for the data processing agreement that needs to be implemented between a data controller and a data processor as required by Article 28(3) and (4) GDPR. These SCCs are also referred to as covering data transfers 'within the EU', because the SCCs on international transfers now make clear that they also serve as a data processing agreement in the sense of Article 28 GDPR (until now it was a practice to conclude a DPA in addition to the SCCs on international data transfers).

While the use of SCCs for a data processing agreement is not mandatory (they are quite prescriptive in terms of defining the applicable security measures (to be implemented by the processor),<sup>9</sup> if an organisation decides to use them, its data processing agreement will be deemed compliant with the GDPR. Furthermore, organisations remain free to negotiate additional terms (not covered by the SCCs), such as provisions on allocation of the costs related to the data processor's assistance, e.g. in the event of a data breach. Specific contractual terms can also be introduced to address the liability of the parties.

## Conclusion

The new SCCs will be very welcomed by many organisations, in particular data processors that sub-outsource data processing activities to service providers located in third countries. The new SCCs should not be considered a blank cheque, however, as organisations will still have to carry out a data transfer impact assessment of the legal framework and practices in the destination country and put in place supplementary measures where needed. To help organisations in this respect, the EDPB Recommendations provide a road map, practical guidance and examples of supplementary measures. One new thing is that the final version of the EDPB Recommendations seems to allow international transfers without supplementary measures in the event of uncertainty surrounding the potential application of problematic legislation to the specific data transfer. In principle, neither SCCs nor supplementary measures will be required for the next four years for personal data transfers from the EU to the United Kingdom as such transfers can be based on the adequacy decision(s) adopted on 28 June 2021. Finally, the European Commission has adopted standard contractual clauses governing processing agreements between a data controller and a data processor. However, organisations may wish to consider negotiating specific terms relating to cost allocation, deadlines and liability.

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- 1) CJEU, 16 July 2020, *Schrems II*, C-311/18.
- 2) Published by Commission Implementing Decision (EU) 2021/914 of 4 June 2021 on standard contractual clauses for the transfer of personal data to third countries pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council.
- 3) EDPB Recommendations 01/2020 of 18 June 2021 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data.
- 4) EDPB Recommendations 01/2020, p.4.
- 5) EDPB Recommendations 02/2020 on the European Essential Guarantees for surveillance measures.
- 6) EDPB Recommendations 01/2020, p.22.
- 7) Decision on the adequate protection of personal data by the United Kingdom - General Data Protection Regulation.
- 8) Decision on the adequate protection of personal data by the United Kingdom: Law Enforcement Directive.
- 9) Article 28(6) GDPR.



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