

Commission Adopts Model Clauses for International Transfers and Processor Agreements

On 4 June 2021, the European Commission published two Implementing Decisions with model clauses that demonstrate compliance with the General Data Protection Regulation (EU) 2016/679 (the **GDPR**). The first decision adopts new standard contractual clauses for the transfer of personal data to third countries (the **Transfer SCCs**) (Commission Implementing Decision (EU) 2021/914). The second decision contains a set of model clauses that can be used between controllers and processors (the **Processor Clauses**) (Commission Implementing Decision (EU) 2021/915).

Standard contractual clauses for international transfers

More situations covered, more flexibility and more legal certainty

The Transfer SCCs allow EU controllers and processors to transfer personal data to third countries outside the EEA which have not been recognised as providing an adequate level of protection for personal data (Article 46 GDPR). Compared to previous versions of the SCCs, the new Transfer SCCs provide for increased flexibility and additional legal security in accordance with the recent case law of the Court of Justice of the EU (**CJEU**).

Through a modular approach, the Transfer SCCs cover additional situations that were not covered by previous versions. For instance, the new Transfer SCCs can be used when the exporting party falls within the scope of the GDPR, even if the controller that is responsible for the data being exported is not established in the EU. In particular, the Transfer SCCs set out the following modules, which can be combined in a single agreement:

- From a controller (in the EU) to another controller (outside the EU);
- From a controller (in the EU) to a processor (outside the EU);
- From a processor (in the EU) to another processor (outside the EU); and
- From a processor (in the EU) to its appointing controller (outside the EU).

The parties to the transfer must select the modules that are applicable to the situation at hand and identify which parties are exporting or importing the personal data. The Transfer SCCs can be used by multiple parties and include arrangements for new parties acceding to the Transfer SCCs. This can be useful for intra-group transfers if a new subsidiary is established, and that subsidiary needs to comply with intra-group data transfer arrangements with its overseas parent company.

In addition, the Commission emphasized that the SCCs reflect the requirements under the GDPR and consider the CJEU's judgment in *Data Protection Commissioner v. Facebook Ireland Limited, Maximillian Schrems* (Case C-311/18) (**Schrems II**). While the CJEU stopped short of invalidating the current SCCs, individual contracts that used these clauses could be invalidated if the parties

failed to use the SCCs in compliance with the CJEU case law. Because the new Transfer SCCs explicitly take account of the CJEU case law, and provide additional guidance on how to comply with the CJEU case law, these new Transfer SCCs significantly increase legal certainty for international transfers of personal data.

... but also more work to implement and monitor

The modular approach provides more options for parties to cover complex international transfers with SCCs. However, in order for organisations to pick the correct modules and complete the information required to adapt the SCCs to the situation at hand, organisations must have a good overview of their international transfers, be able to determine the parties involved, identify their role as either controller or processor in the transfer, outline the categories of data concerned and the motivation for the transfer, the sub-processors and the applicable security measures etc.

Next, the parties to the Transfer SCCs should use “*reasonable efforts*” to ensure that each data importer is able to satisfy the obligations under the Transfer SCCs. It means that parties must be able to assess whether the contractual obligations under the Transfer SCCs are compatible with the local law in the importing countries. Where necessary, the parties to the Transfer SCCs may need to adopt supplementary safeguards in order to ensure the protection of the personal data that is transferred.

Additionally, the data importer may be required to challenge a request by a public authority if the data importer considers that such a request is unlawful pursuant to the law of the importing country or under international law obligations and the principles of international comity.

What to do with your existing SCCs?

The new Transfer SCCs will be effective as of 27 June 2021 and will apply to data processors and controllers subject to the GDPR. After 27 September 2021, no new contracts can be concluded using the previous versions of the SCCs. Previous versions of the SCCs in contracts that were signed before that date will need to be replaced by the new Transfer SCCs (or another transfer mechanism authorized under the GDPR) by 27 December 2022.

The Transfer SCCs are available [here](#).

Standard contractual clauses between controllers and data processors

While most attention has (rightfully) gone to the Transfer SCCs, organisations may also wish to note that on the same date, the Commission published SCCs between controllers and data processors under Article 28 of the GDPR (as mentioned above the **Processor Clauses**).

The Commission’s Processor Clauses are not mandatory. Parties can still use their own clauses in processor agreements provided these contain all the mandatory requirements under Article 28 of the GDPR. Nevertheless, the Processor Clauses can be useful, for instance in situations where controllers and processors cannot agree on whose contracts to use.

The Processor Clauses are available [here](#).