

New standard contractual clauses for transfers of personal data to third countries adopted by the European Commission

This article discusses the adoption of new standard contractual clauses under Article 46 of the EU General Data Protection Regulation 2016/679 (**GDPR**) for the legitimisation of transfers to third countries which do not benefit from an adequacy decision – ie “international transfers”.

For the avoidance of any confusion, it does not discuss the recent adoption of intra-EEA controller to processor standard contractual clauses under Article 28(7) of the GDPR.

What happened?

On 4 June 2021, the European Commission (**EC**) published the Commission Implementing Decision (EU) 2021/914 adopting new standard contractual clauses (**New SCCs**) under Article 46 of the GDPR for the legitimisation of transfers to third countries which do not benefit from an adequacy decision (**New SCCs Decision**). The New SCCs came into effect on 27 June 2021, 20 days after their publication in the EU Official Journal.

With the introduction of the New SCCs, the Old SCCs will be repealed on 27 September 2021, ie three months from the date on which the New SCCs came into effect. Importantly, the New SCCs Decision stipulates that contracts concluded before 27 September 2021 on the basis of the Old SCCs will be deemed to provide “appropriate safeguards” within the meaning of the GDPR until 27 December 2022. This means that:

- From 27 September 2021 undertakings will no longer be able to validly insert the Old SCCs into new contracts; however
- Undertakings may continue to rely on the Old SCCs until 27 December 2022 where the relevant contract incorporating the Old SCCs was entered into prior to 27 September 2021.

This effectively creates a transition period of 18 months for undertakings to revisit their historic contracts in order to update them with the New SCCs.

Why is this important?

Standard contractual clauses are the most popular mechanism for legitimising international transfers under the GDPR. Despite the introduction of the GDPR, undertakings have so far relied on historic standard contractual clauses adopted under the now repealed EU Data Protection Directive, the predecessor to the GDPR, as issued under Decision 2001/497/EC and Decision 2010/87/EU (**Old SCCs**). The Old SCCs continued to be valid on the basis of their endorsement under Article 46(5) of the GDPR. The Old SCCs operated as an effective tie-over in this respect, however they did not reflect new requirements, concepts and structures under the GDPR and were always considered a temporary solution pending the New SCCs.

In turn, in July 2020 the European Court of Justice handed down its judgment in the Schrems II case, in which it called into question the inherent validity of standard contractual clauses (and thereby the Old SCCs), unless appropriate transfer impact assessments were conducted and “supplementary measures” were implemented. With this development, the need for revamped standard contractual clauses addressing developments in the field of international transfers became even more necessary.

What has changed?

The New SCCs represent a response to a number of issues previously identified as shortcoming under the Old SCCs, as well as a response to the recent developments in European data protection regulation.

Location of data exporter

A core shortcoming of the Old SCCs was that the exporter could only be a party based in the EU, which did not acknowledge the realities of chains of data transfers. Unlike the Old SCCs, the New SCCs specifically envisage the possibility that the data exporter may be a party located outside of the EEA.

Modules

The New SCCs combine general clauses with a modular approach to cater for various transfer scenarios and the complexity of modern processing chains covering four data transfer scenarios:

- Controller-to-controller transfers (Module 1)
- Controller-to-processor transfers (Module 2)
- Processor-to-processor transfers (Module 3)
- Processor-to-controller transfers (Module 4)

The concept is therefore that the data exporter may select the module applicable to the relevant data transfers and use only those clauses. It is important to note that this represents an upgrade from the Old SCCs, which did not cater for processor-to-processor or for processor-to-controller transfers.

Docking clause

A historical pain point under the Old SCCs was that these were structured as bilateral agreements, meaning that these did not accommodate to additional parties or otherwise to multiple parties. This resulted in high-maintenance administrative arrangements where transfers to multiple parties were involved – eg in relation to intra-group data transfer agreements. In this respect the New SCCs resolve this with:

- Their revised structure accommodating multiple parties to enter into the New SCCs
- The introduction of a “docking” clause, which allows additional parties to be added to the arrangements over time

With indeed a single stroke, this resolves a large part of the administrative burden faced by undertakings when dealing with data transfers to multiple parties.

Article 28 provisions

The GDPR introduced a set of more rigorous requirements for the appointment of processors. The Old SCCs, being issued prior to GDPR, were not aligned with these provisions. The New SCCs now reflect and align with the requirements of the GDPR (namely Article 28) in connection with the appointment of such processors.

Updated Annexes

As with the Old SCCs, the Annexes to the New SCCs are left to be completed by the parties to reflect the circumstances of the particular data transfer. The Annexes to the New SCCs also reflect some useful practical updates from the Old SCCs:

- **Annex I:** requires the parties to set out the details of the transfer occurring. Most interestingly, Annex I includes new provisions where sub-processors are appointed by the data importer, requiring the data importer to include information on the subject matter, nature and duration of those sub-processor transfers. This further emphasises the expectation that data exporters should be aware of the full chain of transfers occurring with the personal data they hold.
- **Annex II:** sets out the list of technical and organisational measures applied to the data transfers. The measures inserted here should be specific and should not consist of generic statements as to the status of the data importer's security measures. Helpfully, a rather extensive list of indicative measures is provided to assist the parties.

- **Annex III:** in the context of transfers to processors (ie Modules 2 and 3), is designed to set out the list of authorised sub-processors. It should be noted that this is relevant to complete where the parties have agreed that the data importer must obtain specific authorisation from the data exporter to appoint sub-processors. It is not necessary to complete Annex III if the parties have instead agreed to general authorisation.

Can you amend the New SCCs?

The position in relation to amending the Old SCCs has been that you may do so provided any changes do not contradict the SCCs – which in practice often been applied as a “do not amend” rule.

The New SCCs apply a similar position, providing under Clause 2(a) that parties may “add other clauses” provided that they do not directly or indirectly contradict the New SCCs or prejudice the fundamental rights or freedoms of data subjects. In many ways, however, there remains a lack of clarity as to what amendments may be viewed as such a contradiction or prejudice – clearly additional provisions limiting the recourse and rights of data subjects would not be permissible, however, the position is less clear when it comes to commercial liability terms between the parties themselves. In particular, the New SCCs provide that each party is liable to the other party for any damages it causes the other party by breaching the New SCCs, however, it is not clear to what extent commercial variation on these terms will be seen as contradicting or prejudicing the New SCCs. As such, it may be the case that the “do not amend” practice will continue, pending further clarifications.

How do the New SCCs respond to Schrems II?

The New SCCs specifically acknowledge and seek to respond to the additional requirements for transfers relying on standard contractual clauses under Schrems II.

In response to this, the New SCCs provide that the parties warrant that at the time of signing the New SCC they have “no reason to believe” that the laws and practices applicable to the data importer, including any requirements to disclose personal data or measures authorising access by public authorities, prevent the data importer from complying with the New SCCs. In giving this warranty the parties must take into account:

- The specific circumstances of the transfer (type of data, purpose for processing)
- The laws and practices of the third country destination, where this may include “documented practical experience with prior instances of requests for disclosure from public authorities, or the absence of such requests”
- Any adopted supplementary measures, whether contractual, technical or organisational

Notably, the New SCCs specify that the above assessments must be documented by the parties and available to provide them to the competent supervisory authority on request. Furthermore, the New SCCs include detailed provisions outlining how a data importer should respond in cases where it receives a request for disclosure from a public authority.

In summary, implementation of the New SCCs will be closely connected and intertwined with the processes adopted by business to respond to the requirements in Schrems II.

A cheeky caveat

There is a distinction under GDPR: on the one hand third country data importers who receive personal data within scope of the GDPR, who are subject to specific provisions in terms of how they must treat such data; and on the other hand third country data importers who are themselves caught within scope of the GDPR’s extra-territorial scope and therefore need to comply with the GDPR in its entirety.

The New SCCs Decision specifies that the New SCCs may be used by data exporters with respect to international transfers to a data importer “whose processing of the data is not subject” to the GDPR. That is to say, the New SCCs may be used for international transfers only to the extent that the relevant processing by the data importer does not in its own right fall within the scope of the GDPR.

As such, the New SCCs are not appropriate for use by data importers who are directly subject to the full scope of the GDPR under its extra-territorial provisions.

Next steps

In terms of next steps, undertakings will need to consider the New SCCs to identify which modules apply to their activities, as well as to create a process to ensure their own as well as their data importers' compliance with the new requirements. It is important to remember that the New SCCs touch upon not only arrangements with vendors, but on any international transfers relying on standard contractual clauses – ie also intra group arrangements and transfers to other controllers/joint controllers. Practically speaking, it would be wise to leave a generous period for implementation and back and forth with counterparties, to ensure that the process can be completed in good time for the December 2022 deadline.

Conclusion

The New SCCs have not yet completed their first month and already they are receiving a range of reactions across the board, in many ways in connection to Schrems II and the privacy concerns it raised and sought to address. The fact of the matter is that there is no easy response to Schrems II in terms of balancing the privacy concerns it seeks to resolve with business efficacy and recognition of the reality that many businesses may not necessarily have the resources or the knowledge to respond to what can reasonably be described as fairly complex demands. Outside of Schrems II, if nothing else the New SCCs have resolved some chronic pain points and streamlined certain administrative pressures. All in all, they are a good development – even if we wish they could be a little more.

The New SCCs Decision along with the New SCCs can be found [here](#).

See also our post on the Schrems II judgment [here](#).



Elina Mantrali
+357 2582 0020
elina.mantrali@harneys.com
Cyprus



For more information and key contacts
please visit [harneys.com](https://www.harneys.com)

© Harneys, July 2021

Harneys is a leading international offshore law firm. From locations around the globe, Harneys advises the world's top law firms, financial institutions and corporations on the laws of British Virgin Islands, Cayman Islands, Cyprus, Luxembourg, Bermuda, and Anguilla. For more information about Harneys please visit [harneys.com](https://www.harneys.com) or contact us at marketing@harneys.com.

The foregoing is for general information only and not intended to be relied upon for legal advice in any specific or individual situation. Bermuda legal services are provided through an association with Zuill & Co which is an independently owned and controlled Bermudian law firm.