



## News on international data transfers

On June 4, 2021, the EU Commission published the long-awaited revised EU Standard Contractual Clauses (**SCCs**) to secure international data transfers (the press release can be found [here](#), the SCCs [here](#)). The revision became necessary after the European Court of Justice had partially criticized data transfers outside of the EU / EEA based on SCCs in the Schrems II ruling (our update in German can be found [here](#)). In addition, the EU Commission also published a template contract for data processing agreements according to Art. 28 of the EU General Data Protection Regulation (GDPR).

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### Newsletter

### IT Law and Data Protection Law

June  
2021

#### Validity

In the decision regarding the new SCCs (available [here](#)), the EU Commission specified when they will apply. As of September 2021 (three months after the announcement of the new SCCs), the decisions regarding the previous SCCs will be declared invalid. This means that companies will only be able to conclude new contracts based on the old SCCs until this date. Companies will then have a period of another 15 months (until December 2022) after this date to re-negotiate existing data transfer agreements based on the new SCCs.

#### Structure of the new SCCs

Instead of providing a separate draft for each type of data transfer, the EU Commission structured the new SCCs in different modules. This means that the contract must contain different modules, depending on the specific planned data transfer. In this context, the EU Commission provides for four scenarios of data transfers in the new SCCs:

- » Controller to controller (module 1)
- » Controller to processor (module 2)
- » **New:** Processor to other (sub)processors (module 3)
- » **New:** Processor to controller (module 4)

#### Schrems II

In the new SCCs, the EU Commission has included a number of additional safeguards that largely correspond to the recommendations of the European Data Protection Board. Nevertheless, the new SCCs also require the parties to independently review the extent to which each planned data transfer can be secured through the use of the SCCs. Therefore, there is still no legal certainty as to whether a data transfer will be deemed lawful by a supervisory authority or a court despite the conclusion of the new SCCs.

#### Changes from old SCCs

Even though many obligations have been reworded, the obligations from the new SCCs largely correspond to established requirements. Among other things, the data recipient has to

- » commit to the principles of data processing according to the GDPR,
- » implement and comply with certain technical and organizational security measures,
- » protect data subjects' rights and accept third-party protection of data subjects under the SCCs and

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- » comply with specific requirements in the event of a further transfer of data to third parties.

New requirements include the following:

- » **Transfer Impact Assessment:** According to Clause 14, the parties must carefully examine, prior to the transfer of data, to what extent the data protection laws in the receiving country, together with the SCCs, can ensure an adequate level of data protection. They must now also document this assessment and be able to provide it to the competent supervisory authority upon request. Therefore, the problems companies have faced with data transfers to the U.S. since the Schrems II ruling remain. In the ruling, the ECJ had determined that the access options of security authorities in the USA were unreasonably high. These cannot be limited even with the new SCCs.
- » **Access by authorities:** The EU Commission addresses the problem of access by authorities in clause 15 by imposing various obligations on the recipient in the event of access by authorities. In addition to information obligations, these relate to the obligation to carry out a legal review of the access and to ensure compliance with the principle of data minimization (i.e., that the authorities only have access to the data that they are authorized to inspect).

#### Template Data Processing Agreement

In addition to the new SCCs, the EU Commission has also published a new template for data processing agreements according to Art. 28(7) GDPR (available [here](#)). Companies are not obliged to use the template when concluding data processing agreements. However, when using the new template, they have the assurance that the agreement complies with the requirements of Art. 28(3) and 28(4) GDPR.

The template is largely based on the wording of Art. 28 GDPR. Some rules that are now standard in the market to protect processors are therefore not included, e.g., regarding the limitation of audits and the obligation to bear costs in the event of support by the processor on data protection obligations. It is questionable and remains to be seen to what extent



large IT providers will adopt the template in the future. For routine and low-risk data transfers, however, the template can make things much easier in practice in the future and help avoiding unnecessary negotiations.

#### Conclusion and Recommendations

Unsurprisingly, the new SSCs do not provide companies with the hoped-for legal certainty for international data transfers. Companies must continue to examine in each individual case whether and how a data transfer can be secured by SCCs. Especially in the case of transfers of sensitive data to insecure third countries, additional technical security measures may have to be implemented. This may mean that companies will have to store sensitive data in the cloud in encrypted form only.

In any case, the principle still applies that companies must examine the necessity of every data transfer to third countries in a documented manner and, if necessary, switch to other solutions. As the latest investigations by German supervisory authorities show (our [report](#) in German), these authorities are taking the requirements of the Schrems II ruling seriously and will increasingly monitor companies in the future.

Companies should now examine which of their international data transfers are currently based on the old SCCs. Particularly in the case of a large number of international data transfers (e.g., in multinational corporations), the 18-month period is short in view of the required case-by-case reviews and requires companies to act quickly.

If you have any further questions or need support, please do not hesitate to contact our experts from the Practice Group Intellectual Property, Media and Information Technology!



### Imprint

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