**International Transfer of Personal Data**

**Standard Contractual Clauses**

The purpose of this note is to provide an update on the new European Commission Standard Contractual Clauses (“new SCCs[[1]](#footnote-1)”) and what it means for practitioners and their clients.

**What are Standard Contractual Clauses (SCCs)?**

The SCCs were initiated by the European Commission (“Commission”) as a mechanism to allow personal data be transferred globally under a single set of data protection rules or standards that fall in line with the General Data Protection Regulation (“GDPR”) and previously the EU Data Protection Directive 95/46. In essence they are a contractual agreement between the parties agreed on by the Commission.

While the ‘old/outgoing’ SCCs were developed under the now repealed EU Data Protection Directive, SCCs have become more prevalent with the introduction of the GDPR, as they are listed as an appropriate safeguard for the transfer of personal data outside of the EEA. Unfortunately, however, the old SCCs could only be used for very specific purposes (due to the way they are drafted). The old SSCs only provide for transfers between a Data Controller in the EEA and a Data Processor or a Data Controller in a third country (non EEA country).

**Why are we talking about SCCs and international transfers of personal data?**

In July 2020, the [EU Court of Justice (CJEU)](https://curia.europa.eu/jcms/jcms/j_6/en/) delivered a ruling in the case known as Schrems II (C-3111/18) *(Data Protection Commissioner v Facebook Ireland Ltd and Maximillian Schrems)*, in which the mechanisms for personal data transfers between the EEA and the United States (US) were challenged. The challenge was based on the argument that US law cannot adequately ensure protection of EU personal data.

In a momentous decision the CJEU invalidated Privacy Shield as a valid transfer mechanism, thereby disallowing companies to transfer and store EU personal data in the US unless they comply with another appropriate mechanism. In the same decision, the CJEU upheld SCCs as a valid mechanism for transatlantic data transfers, noting that this does make it possible in practice to ensure compliance with the level of protection required by EU law.

**What was the impact of the CJEU decision/Schrems II decision?**

New appropriate safeguards needed to be created to meet the demand for companies acting as processors in the EU to transfer to controllers and other processors in third countries. The Commission, following a detailed consultant period, issued the new SCCs on 4 June 2021, which provide appropriate safeguards when transferring personal data from the EEA to a third country.

The new SCCs increase obligations on the data exporter to conduct due diligence, including considering whether the importing company and third country can provide adequate safeguards.

**What do the new SCCs impact your client’s relationship with its suppliers and clients?**

Clients will need to consider if they transfer personal data outside the EEA to any client and supplier and ensure that they have in place an appropriate mechanism permitting the transfer, for example entering into the new SCCs.

Practitioners will also need to consider any transfers they are making, for example, personal data stored in the cloud by a US vendor

**What do the new SCCs look like?**

The **new SCCs** (issued 4 June 2021 (effective from 27 June 2021) are provided as an “a la carte” document. Controllers and processors should select the appropriate modules, of which there are four (4):

* + Module 1: Controller to Controller
  + Module 2: Controller to Processor
  + Module 3: Processor to Processor
  + Module 4: Processor to Controller

The new SCCs cannot be amended, unless to increase protection of personal data and data subjects and to complete the annexes, which include details of exporter, importer, details of processing and technical and organisation measures.

**How long will companies be given to implement the new SCCs (grace period)?**

The new SCCs can be used from 27 June 2021. The ‘old’ SCCs can continue to be entered into until 27 September 2021, but cannot be entered into after that date. From 27 September 2021 only the new SCCs can be entered into. However if old SCCs are in place, companies have until 27 December 2022 to replace any old SCCs with the new SCCs.

**UK, BREXIT and the transfer of personal data**

On 31 January 2020, the Brexit transition period ended and the UK formally became a third country for the purposes of EU data protection law.

On 28 June 2021, the Commission adopted two adequacy decisions for the United Kingdom - one under the [General Data Protection Regulation (GDPR)](https://ec.europa.eu/info/files/draft-decision-adequate-protection-personal-data-united-kingdom-general-data-protection-regulation_en) and the other for the [Law Enforcement Directive](https://ec.europa.eu/info/files/draft-decision-adequate-protection-personal-data-united-kingdom-law-enforcement-directive_en). This means that personal data can now flow freely from the European Union to the United Kingdom where it benefits from an essentially equivalent level of protection to that guaranteed under EU law (without the need for additional data transfer safeguards under Article 46 of the GDPR)

For the first time, the adequacy decisions include a ‘sunset clause', which strictly limits their duration. This means that the decisions will automatically expire four years after their entry into force, June 2025, unless it is renewed. The adequacy decision will only be renewed if the UK continues to ensure an adequate level of data protection. During these four years, the Commission will continue to monitor the legal situation in the UK and could intervene at any point, if the UK deviates from the level of protection currently in place.

If the adequacy decision is not renewed the next best alternative is for EU entities to enter into Standard Contractual Clauses with UK entities.

There are no additional requirements for the transfer of personal data from the UK to the EU.

The UK is currently considering its positon on the transfer of personal data from the UK to third countries, including adopting its own form SCCs and its one adequacy decision system, for example the UK granting an adequacy decision to the US.

In short for UK/ EU transfers:

1. Entities can rely on the adequacy decision to transfer EU personal data to the UK.
2. There are no additional requirements to transfer UK personal data to the EU.
3. The UK is currently considering its position in relation to international transfers including its own form SCCs and its own adequacy decision system.

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1. https://eur-lex.europa.eu/eli/dec\_impl/2021/914/oj [↑](#footnote-ref-1)