

Cyber-Security, Data Protection and Privacy

New Standard Contractual Clauses for Data Transfers Subject to the GDPR

Background

On June 4th, 2021, the European Commission published an implementing decision adopting new Standard Contractual Clauses for the transfer of personal data to third countries (“**New SCCs**”). The New SCCs are meant to replace the Standard Contractual Clauses adopted by the European Commission in its decisions from 2001 and 2010 (the “**Previous SCCs**”), which are standard agreements to be executed between entities based in the EU (data exporters) and entities based outside of the EU (data importers). The Previous SCCs served as one of the most common legal bases for the transfer of personal data outside of the EU.

Key Changes

In the time that has passed since the Previous SCCs were adopted, several major changes have affected transfers of personal data outside of the EU, including the implementation of the General Data Protection Regulation (GDPR), and the recent publication of the European Court of Justice’s ruling in the Schrems II case. The New SCCs address these changes, mainly in the following aspects:

- **Modular approach:** As opposed to the Previous SCCs, which contained only two versions – one for transfers from controllers to processors, and another for transfers from controllers to other controllers, the New SCCs offer four modules for data transfers (controller to controller, controller to processor, processor to processor, and processor to controller). This modular approach allows the parties to tailor the New SCCs to the nature of their contractual relationship, however adds a layer of complexity to the drafting process.
- **Non-EU entities:** Taking into account that the GDPR may apply to entities not established in the EU, the new SCCs can be used whenever the exporting party is subject to the GDPR – even if the data exporter is not established in the EU.
- **Schrems II adjustment:** The New SCCs contain provisions designed to address the European Court of Justice’s Schrems II judgment, including, among others, an obligation of the parties to conduct and document a “Transfer Impact Assessment” (TIA) designed to ensure that the laws and practices in the country of destination do not prevent the data importer from fulfilling its data protection obligations under the New SCCs. The data importer is also required to notify the data exporter of any legally binding requests from public authorities to access the data (unless legally prohibited to do so).
- **Article 28 of the GDPR:** The new SCCs address the requirements of Article 28(3) of the GDPR regarding contractual provisions that must be included in engagements between controllers and processors. Accordingly, controllers and processors would not need to enter into a separate data processing agreement (DPA) in addition to entering into the New SCCs.

What you need to do to comply

- **Use the New SCCs in new contracts:** The New SCCs must be used in any new contract (which entails applicable data transfers) that is entered into as of **September 27, 2021**.
- **Revise existing contracts:** Companies will have until **December 27, 2022**, to update existing contracts governing applicable data transfers (contracts with service providers, intra-company agreements, etc.) to include the New SCCs.
- **Transfer Impact Assessments:** Companies should review and document, with respect to their engagements that involve the transfer of personal data outside of the EU, the specific circumstances of each transfer, relevant laws and practices of the country of destination, and relevant contractual, technical and organizational safeguards for increasing protection of the transferred data.

Please feel free to contact us with any questions that you have on this matter.

Assaf Harel, Partner
assafh@gornitzky.com

Rebecca Genis, Associate
rebeccage@gornitzky.com

