



# Legal Alert

9 June 2021

Weinhold Legal

## GDPR – transferring outside the EU/EEA

### New standard contractual clauses effective from 27 June 2021!

#### Publication of new SCC

On 4 June 2021, the European Commission published on its [website](#) an implementing decision (2021/914) on standard contractual clauses within the meaning of Article 46 (1) and (2) (a), (c) GDPR (“**SCC**”). The new SCC are annexed to this decision. They were published on 7 June 2021 in the [Official Journal of the European Union](#) and will enter into force on 27 June 2021. SCC are one of the tools on the basis of which personal data can be transferred outside the EU / EEA.

The adoption of new SCC is absolutely crucial, as these are the first SCC that have been adopted under the GDPR and thus reflect current developments in the field of personal data protection. The original standard contract clauses were adopted with effect from the now obsolete Directive 95/46/EC of the European Parliament and of the Council, which was repealed by the GDPR.

#### Character of the new SCC

##### Modular system

The new SCC are based on a modular system, where instead of several different clauses that were used in the past depending on the position of the entities involved in the transfer of personal data, uniform SCC are now used for all situations of transferring personal data to third countries, which will, however, be modified by the use and omission of individual modules that are contained in SCC, depending on the needs and nature of specific transferring processes.

For example, the new SCC fill the gap that has caused difficulties in previous clauses, as they also include new arrangements for transfers between processors of personal data and **transfers**

**from an EU/EEA processor to a controller outside the EU/EEA.**

Although this system is presented as modern, flexible and may give the impression that the SCC system is simplified by unification, only future practice will show whether the modular system will lead to confusion and difficulty in its practical use.

##### Reaction on Schrems II

The new SCC respond, inter alia, to the complex situation surrounding the transfer of personal data to third countries (notably the US) following the judgment of the Court of Justice of the European Union (“**CJEU**”) in Case C-311/18 known as “Schrems II”.

In this respect, the guarantee provided by the parties under clause 14 of the SCC is essential, namely **that they have no reason to believe that the legislation and procedures in the third country of destination** that apply to the processing of personal data by the data importer, including any disclosure requirements of personal data or measures granting access to public authorities **would prevent the data importer from fulfilling its obligations under these clauses.**

This guarantee responds to one of the requirements of the CJEU in the Schrems II case, which called for **the need to review the legal order of the importer** of personal data and to ensure that personal data are in fact (and not only formally) sufficiently protected in SCC-based transfers.

The new SCC then sets out an illustrative list of what the parties must take into account when providing the above guarantee. These are, for example, the specific circumstances of the transfer, the type of recipient, the purposes of processing, the category and format of the transferred personal data, the law of the third country (especially with regard to disclosure to public authorities), any additional guarantees, etc. This assessment must be made **in writing form and make it available to the supervisory authority upon request.**



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In addition, the new SCC introduce a **mechanism to deal with the situation where an importer of personal data receives a request from a public authority for access to personal data.**

In such a case, the importer shall immediately **inform the exporter** of the personal data and, where possible, **the data subject**. Should such a procedure be prohibited by the law of a third country, the importer must make every effort to waive the prohibition and must document this effort and submit it to the exporter upon request.

It should be noted that the new SCC are still only of a contractual nature and are therefore binding only on the contracting parties - importers and exporters of personal data. Therefore, they are not in themselves capable of overcoming a possible breach of the appropriate level of protection of personal data by the law of a third country.

### Transitional period

The European Commission Decision stipulates that SCC enter into force on the twentieth day following that of their publication in the Official Journal of the European Union. As already mentioned, the announcement took place on 7 June 2021, so the SCC will enter into force on 27 June 2021 and can be used from then on.

On the contrary, the original clauses are repealed on 27 September 2021. After this date, it will therefore no longer be possible to use the original clauses for further transfer processes to third countries, and it will be necessary to use the SCC for this transfer. However, this does not mean that transfers based on the original clauses will become illegal after 27 September 2021. The decision of the European Commission provides for a further period of 15 months, after which the transfer based on the original clauses may continue to be relied on for the performance of contracts concluded before the date of repeal of the original clauses, provided that the processing operations remain unchanged.

Thus, by 27 December 2022 at the latest, all the original clauses must be replaced by the SCC. This is one of the reasons why it

is recommended that new SCC are used after 27 June 2021.

### What now?

If you are in a situation where you are dealing with the transfer of personal data to third countries, i.e. outside the EU/EEA, and you plan to base the lawfulness of the transfer on an SCC then we recommend using a new SCC after it enters into force.

If you are already transferring personal data to third countries on the basis of the original clauses, then you need to keep in mind that it is necessary to replace these clauses by the SCC by the end of 2022. We recommend that you do not leave this process to the last minute and start negotiations with personal data importers as soon as possible.

If necessary, do not hesitate to contact us. Our specialized team will be happy to provide you with the necessary support in the complicated area of transferring personal data to third countries.

The information contained in this bulletin is presented to the best of our knowledge and belief at the time of going to press. However, specific information related to the topics covered in this bulletin should be consulted before any decision is made. The information contained in this bulletin should not be construed as an exhaustive description of the relevant issues and any possible consequences, and should not be fully relied on in any decision-making processes or treated as a substitute for specific legal advice, which would be relevant to particular circumstances. Neither Weinhold Legal, v.o.s. advokátní kancelář nor any individual lawyer listed as an author of the information accepts any responsibility for any detriment which may arise from reliance on information published here. Furthermore, it should be noted that there may be various legal opinions on some of the issues raised in this bulletin due to the ambiguity of the relevant provisions and an interpretation other than the one we give us may prevail in the future.

For further information, please contact the partner / manager you are usually connected to.



Martin Lukáš  
Partner  
[Martin.Lukas@weinholdlegal.com](mailto:Martin.Lukas@weinholdlegal.com)



Jiří Kvaček  
Junior Associate  
[Jiri.Kvacek@weinholdlegal.com](mailto:Jiri.Kvacek@weinholdlegal.com)