

# Lawyer Insights

## European Commission's new standard contractual clauses: what they mean for UK businesses

By Bridget Treacy

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The European Commission's long-awaited standard contractual clauses (SCCs) for international transfers of personal data made under the EU GDPR have now been finalised (see [Legal update, European Commission adopts final versions of standard contractual clauses under EU GDPR](#)).

SCCs are the most frequently used mechanism for transferring personal data from the EU (practically speaking, the EEA) and from the UK to third countries. They have become the default alternative for UK or EU transfers to the US, following the ECJ's decision in July 2020 to uphold SCCs (subject to case-by-case assessment of the transfer) and to strike down the EU-US Privacy Shield in *Data Protection Commissioner v. Facebook Ireland Limited, Maximilian Schrems (C-311/18)* (the Schrems II case)) (see [Legal update, Schrems II: controller to processor standard contractual clauses valid but EU-US Privacy Shield invalid \(ECJ\)](#)).

### Key features of the new SCCs

Aside from including additional contractual provisions to address the Schrems II case, a key feature of the long awaited new SCCs is that they have been updated to reflect the requirements of the EU GDPR (the existing SCCs reflect the Data Protection Directive 95/46/EC). There are also other modifications, retained in the final version, that overall will make the new SCCs more flexible to use. These include the modular structure, recognition of processor-to-processor and processor-to-controller transfers, and a "docking" provision to enable companies to join (and leave) group arrangements for data transfers.

As before, the content of the clauses cannot be amended, but the modular structure enables the clauses to be customised, for example, provisions addressing controller to controller transfers can be omitted when the transfer at hand is a processor to processor transfer. Otherwise, the clauses convey the clear message that companies are expected to understand their data transfers in more detail than was previously the case (including onward transfers), and to document them in greater detail.

### Transition and implementation

The new SCCs will take effect on 27 June 2021, and existing SCCs template will be repealed three months later, on 27 September 2021. There is therefore a three month window in which to finalise any transfer arrangements that have already been started and which will rely on the existing SCCs. If the deadline is missed, the new SCCs will need to be used.

Existing transfer arrangements that rely on SCCs will continue to be valid until 27 December 2022, provided the data processing activities are unchanged. Accordingly, there is no need to rush to implement

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the new SCCs. In most cases, the date by which new SCCs must be implemented is 27 December 2022, when the existing SCCs will cease to be valid.

### What about personal data transfers from the UK?

Crucially, the new SCCs have not been adopted for use in the UK and the transition periods above do not apply to personal data exports from the UK, because the new SCCs were adopted under the EU GDPR. Also, this is an issue of timing: as the new SCCs have been adopted after the UK left the EU, they do not form part of retained EU law. Accordingly, UK companies cannot use the new SCCs for UK data exports, but must instead continue to use the existing SCCs. Where existing SCCs are used, the ICO has indicated that changes may be made 'so they make sense in a UK context', provided the substantive provisions of the SCCs are not changed. So, for example, changing EU Member States to the UK, and changing supervisory authorities to the ICO is permitted. The ICO has published a modified version of the existing SCCs for UK data transfers (see [ICO: Guide to the UK GDPR: Standard Contractual Clauses \(SCCs\) after the transition period ends](#)).

The ICO is preparing its own set of UK SCCs under the UK GDPR for data transfers from the UK and is expected to consult on these shortly with a view to finalising them by the end of the summer. Interestingly, ICO Deputy Commissioner, Steve Wood, said in May that the ICO is "considering the value to the UK for us to recognise transfer tools from other countries, so standard data transfer agreements, so that would include the EU's standard contractual clauses as well". It is possible that we may yet see a modified version of the new EU SCCs for use in the UK.

### Schrems II requirements

When companies use SCCs as the data transfer mechanism, they must address the requirements of the Schrems II case. This is the position irrespective of whether the existing SCCs or the new SCCs are used. In practical terms, where UK companies rely on the existing SCCs they must undertake a data transfer risk assessment (step 3 of the EDPB's six steps, summarised in the [The EDPB's six steps](#) below), and supplement the existing SCCs with additional contractual provisions and other safeguards, as envisaged by the case itself and by the EDPB's Recommendations 01/2020 (adopted on 18 June 2021).

Where an EU exporter uses the new SCCs, they must still undertake a data transfer risk assessment, but the new SCCs contain contractual provisions that address the Schrems II case. They must still consider whether any additional contractual measures or technical or organisational safeguards are required (see Annex 2 of the EDPB Recommendations). UK companies may find it helpful to refer to the Schrems II provisions of the new SCCs as a template for any additional clauses required to supplement the existing SCCs (see [What about personal data transfers from the UK?](#)).

### EDPB final Recommendations 01/2020 on supplementary measures

The EDPB's Recommendations clarify that controllers or processors, acting as data exporters, are responsible for verifying, on a case-by-case basis whether the law or practice of the third country importer impinges on the effectiveness of the appropriate safeguards contained in the Article 46 EU GDPR transfer tools, and if appropriate, this can be done in collaboration with the data importer. Where the data exporter assesses that the law or practice of the third country is not "essentially equivalent" to that of the EU, they can implement supplementary measures to bring it up to the standard required.

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The EDPB's Recommendations provide data exporters with six steps to follow, potential sources of information and examples of supplementary measures, to help them to comply with the requirements of the Schrems II case. The [The EDPB's six steps](#) are summarised in the box below (see the [Recommendations](#) for the full text).

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