

# LEGAL NEWS

Update international data protection | June 2021

## Development in data protection - New standard contractual clauses for international data transfers -

### Background

Almost a year ago, the ECJ declared the EU-US Privacy Shield to be invalid (Schrems II ruling) and also raised some questions with regard to the EU Standard Contractual Clauses (SCC), the most important instrument for international data transfers. The EU Commission has now adopted new SCCs, with which it has adapted the previous regulations to the General Data Protection Regulation (GDPR) and also taken the ECJ's requirements into account. Nevertheless, it quickly becomes clear that the EU Commission has not created a carte blanche for data exchange with the new set of rules. Companies that transfer personal data to third countries such as the USA on the basis of SCC now have some work to do.

### The EU Commission's Standard Contractual Clause - What's new?

- **Scope:** The SCCs from 2001 and 2010 that are still in force will be replaced by the newly adopted SCCs. Companies have a transition period of 18 months (until 27 December 2022) to replace the previous SCC with the new versions.
- **Structure:** The EU Commission has structured the SCC in a modular way and divided it into "Transfers between Responsible Parties" (Controller-to-Controller, Module 1), "Transfer between Controller and Processor" (Controller-to-Processor, Module 2), "Transfer between Processor" (Processor-to-Processor, Module 3)

and "Transfer between Processor to Controller" (Processor-to-Controller, Module 4). In addition, comprehensive liability rules are included, as well as a choice of jurisdiction and applicable law, which allows for more flexibility.

- **Transparency:** Companies in third countries (i.e. outside the EU and the EEA) that receive personal data from the EU ("data importers") have strict notification obligations if they receive a binding request from an authority (e.g. US security authority) to hand over data. In addition, there is an active duty to defend against official requests if there are doubts about their legitimacy.
- **Risk assessment:** The parties shall examine and, if necessary, communicate whether there is reason to believe that national legislation or practices of the recipient country are not in conformity with the requirements of the SCC.
- **Technical and organisational measures:** The concrete technical and organisational measures (TOM) with which the data are protected shall be included as an annex to the SCC (TOM) with which the data are protected are to be included as an annex to the SCC. For this purpose, 17 categories of TOM are named as examples, which will represent the standard for data security in the future.

### What should companies do now?

Internationally active companies should review their

FOR QUESTIONS PLEASE CONTACT:



Dr. Florian Wäble, LL.M.  
[florian.waessle@actlegal-act.com](mailto:florian.waessle@actlegal-act.com)



Monique Gunawardene  
[monique.gunawardene@actlegal-act.com](mailto:monique.gunawardene@actlegal-act.com)

# LEGAL NEWS

Update international data protection | June 2021

data flows to countries outside the EU/EEA and determine which of them are based on SCC. This also includes, if applicable, internal company data transfers. All SCCs used so far must be replaced by the new SCCs within the transition period until 27 December 2022.

In addition, a risk assessment ("transfer impact assessment") must be carried out and documented in each process. This means that companies are still obliged to check whether the transfer of personal data to third countries complies with the EU data protection standard in each individual case.

This last aspect is particularly complex with regard to the US because, according to the ECJ, some US laws (e.g. the Foreign Intelligence Surveillance Act (FISA) or the Cloud Act) enable comprehensive surveillance by security authorities and thus contradict the requirements of the GDPR.

In this respect, we recommend implementing additional protective measures in this constellation to secure the data streams. This should be done as soon as possible, as several supervisory authorities in Germany have initiated a transnational coordinated audit of companies with regard to their international data transfers on 1 June 2021.

FOR QUESTIONS PLEASE CONTACT:



Dr. Florian Wäble, LL.M.  
[florian.waessle@actlegal-act.com](mailto:florian.waessle@actlegal-act.com)



Monique Gunawardene  
[monique.gunawardene@actlegal-act.com](mailto:monique.gunawardene@actlegal-act.com)