
Intellectual Property, Media and IT

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- > **Commission Implementing Decision (EU) 2021/914 – standard contractual clauses applicable to data transfer to foreign countries**



I. Commission Implementing Decision (EU) 2021/914 – standard contractual clauses applicable to data transfer to foreign countries

On June 4, 2021, Commission Implementing Decision (EU) 2021/914 of June 4 on standard contractual clauses for the transfer of personal data to third countries under Regulation (EU) 2016/679 of the European Parliament and of the Council was published.

Standard contractual clauses are one of the most commonly used mechanisms to legitimize international transfers of personal data to countries outside the European Economic Area under Article 46 of Regulation (EU) 2016/679 (the “GDPR”) when a country does not benefit from an adequacy decision issued by the European Commission under the GDPR.

This decision follows the decision of the Court of Justice of the European Union (“CJEU”) in the so-called *Schrems II* case, in which pertinent questions were raised regarding the level of protection guaranteed by the standard contractual clauses for countries such as the United States, which were nevertheless considered valid. However, by invalidating the EU-US Privacy Shield, the CJEU also ended up obliging companies based in the United States to use the standard contractual clauses, increasing the pressure that had already been felt for an update of this mechanism.

Taking into account Article 46(1) of the GDPR, in conjunction with Article 45(3), controllers and processors may transfer personal data to a third country only if they provide appropriate safeguards and if data subjects have enforceable rights and effective legal remedies.

In this context, the adoption of the standard contractual clauses complies with the adoption of adequate safeguards for the processing of personal data in international transfers. However, as the CJEU has noted, additional or supplementary clauses may still be necessary, provided they neither contradict the standard contractual clauses nor prejudice the fundamental rights of the data subjects.

Also, the new standard contractual clauses are sufficient to comply with Article 28 of the GDPR (i.e., they concurrently permit an international transfer of data and comply with the obligation to conclude a subcontracting agreement with a subcontractor established outside the European Economic Area).

Structure

The new standard contractual clauses have a modular structure, with the parties’ rights and obligations varying according to the needs to be covered, particularly whether there are subcontracting relationships in addition to the international transfer of data:

- > Controller to controller
- > Controller to processor



- Processor to controller
- Processor to processor

Standard contractual clauses

We highlight the main aspects, obligations, duties, and responsibilities included in the standard contractual clauses:

- Docking clause: a third party may adhere to the standard contractual clauses, either as an exporter or importer of data, at any time by completing the Appendix and signing Annex I.A., without requiring the signature of all parties.
- Ongoing transfer restrictions: the new clauses only allow onward transfer of personal data by the data importer in specific circumstances, and the requirements differ depending on the data transfer scenario.
- Extensive third-party beneficiary rights: data subjects are third-party beneficiaries with enforceable rights against the parties, including demanding compliance with the clauses entered into between the exporter and importer.
- Ulterior international data transfers: communication of data subject to the standard contractual clauses remains prohibited, except where (i) it takes place in a country for which the Commission has issued an adequacy decision, (ii) an adequate level of data protection is ensured through other mechanisms, (iii) it is necessary for the formulation, exercise or defense of claims, or (iv) it is necessary to protect the vital interests of the data subjects.
- Transparency: in the modular scenarios of international transfer from controller to controller, data importers must make available information on (i) their identity and contact details, (ii) the categories of personal data processed, (iii) the right to obtain a copy of the clauses, and (iv) if they intend to further transfer the data to a third party, the recipient or the categories of recipients. Because of these obligations, exporters' privacy policies are expected to become more detailed, as this information is usually provided in them.
- Identification of the competent supervisory authority: the parties will have to list the competent supervisory authorities in an annex to the new clauses. When the data exporter is not established in the EU, but is subject to the GDPR for offering goods or products to, or monitoring the behavior of, individuals in the EU, the competent supervisory authority will be the authority of the Member State where the data exporter has appointed a representative or, in its absence, the Member State where the targeted individuals are located.
- "Schrems II Provisions": exporters and importers are obliged to assess and ensure that the clauses provide for an adequate level of data protection in light of the legal regime of the country of destination.



- Data transfer impact assessments: the parties should ensure that there is no reason to consider that the laws applicable to the data importer will prevent it from complying with its obligations under the standard contractual clauses. To this end, the parties may follow a risk-based approach and, for example, take into account “*documented practical experience with prior instances of requests for disclosure from public authorities, or the absence of such request [...]*.”
- Obligations in case of access requests by governments or state entities: importers must notify their data exporters of any government access request or when they become aware of a direct government access. If legally prohibited, the importer must make its best efforts to obtain a waiver of the prohibition.
- Joint and several liability: interested parties can claim against any party involved in an international data transfer for any damage or loss caused by any of them.

Entry into force

The implementing decision, and therefore the new standard contractual clauses, will enter into force 20 days after it is published in the Official Journal of the European Union; i.e., on June 27 2021.

However, data controllers are granted a transitional period of 18 months, starting from the date the standard contractual clauses enter into force; i.e., there will be a transitional period until December 27, 2022.

Companies should carefully review the new standard contractual clauses and assess their impact on their organization. Specifically, they should start planning an update of existing data processing agreements with suppliers, customers and intragroup arrangements.

Also, to meet the new requirements, data importers that are not directly subject to the GDPR may need to set up a compliance program.

Although the transition period is long, organizations with many suppliers, customers and partners should consider starting to implement the new standard contractual clauses promptly.



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