



Schrems II Fallout Continued: Reaction and Analysis to NEW Standard Contractual Clauses and EDPB Schrems II Recommendations

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Publication of New SCCs



Draft decision on revised Standard Contractual Clauses ("SCCs") published on 12 November



Open for public consultation until 10 December 2020



Then 'EU examination procedure' is triggered:

- EU MS representatives, in the form of a 'Committee', must deliver positive opinion
- EDPS and EDPB to be consulted - according to the EDPB they are currently reviewing the SCCs
- After that EC's College of Commissioners may adopt final decision



A transitional period of one year applies following entry into force of Commission decision



Once adopted, new SCCs will replace existing SCCs under Decision 2001/497/EC and Decision 2010/87/EU



The consultation rounds for the EDPB Draft Recommendations on Supplementary Measures run in parallel (until 30 November 2020)

New SCCs provide for 4 Transfer Scenarios or Modules

New Draft SCCs combine general provisions with modular approach to cater for 4 different transfers scenarios and distinguish responsibilities under SCCs on this basis

 1	Module 1. Controller-to-Controller	 3	Module 3. Processor-to-Sub-Processor (new)
 2	Module 2. Controller-to-Processor	 4	Module 4. Processor-to-Controller (new)
	Clauses can differ depending on the Module with respect to, e.g.,: data protection safeguards, use of sub-processors, data subject rights, redress and liability		General overarching responsibilities (applicable to all Modules) with respect to, e.g.,: assessment of local laws, importer obligations in the context of government access, and non-compliance with SCCs
	Some Clauses only appear in certain Modules, e.g., provisions on instructions in Module 2, 3, and 4		The parties to the SCCs are responsible for 'selecting' the applicable Module(s)

Key Elements in the New SCCs

New SCCs are composed of three Sections and two Annexes

	Section I – General Provision	
	Section II – Obligation of the Parties has nine clauses:	
	Clause 1 – Data Protection Safeguards	Clause 6 – Redress
	Clause 2 – Local laws affecting compliance with SCCs	Clause 7 – Liability
	Clause 3 – Obligations of data importer in case of government access	Clause 8 – Indemnification
	Clause 4 – Use of sub-processors	Clause 9 – Supervision
	Clause 5 – Data Subject Rights	
	Section III – Final Provisions	
	Annex IA – List of Parties Annex IB – Description of Transfer	
	Annex II – Technical and Organizational Measures	
	Annex III – List of Sub-Processors	

New SCCs and Data Protection Safeguards

Data Protection Safeguards

 Exporter warrants it has used “reasonable efforts” to determine importer can satisfy obligations in the SCCs

 Clause 1 of Section II sets out the key Data Protection Safeguards – Provisions can vary based on which of the 4 Modules apply

Purpose	•Importer not to use data for incompatible purpose
Transparency	•Importer to inform data subjects of identity and recipients
Accuracy	•Parties to ensure data is accurate, relevant, and limited to what is necessary
Storage	•Importer will retain data for no longer than necessary
Security	•Importer (and exporter during transmission) to implement appropriate technical and organizational measures
Special Data	•Importer to apply specific restrictions and safeguards
Onward Transfers	•Can only transfer to third party if they agree to be bound by SCCs
Processing under authority of Importer	•Importer to ensure any person acting under its authority only acts on its instructions
Documentation	•Parties must be able to demonstrate compliance with the SCCs and keep documentation

EDPB Recommendations



First set of Recommendations covers assessment of Essential Equivalence and Supplementary Measures (“Supplementary Measures Recommendations”)



Second set of Recommendations lays down elements to be used to examine surveillance measures by public authorities in a third country (“European Essential Guarantees Recommendations”)

EDPB Recommendations

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6 Steps in Supplementary Measures' Recommendations

Step 1 – Data Mapping Exercise – exporters must identify their data transfers from the EU

Step 2 – Verify Transfer Mechanism – for each transfer, identify Article 46 Safeguards (e.g., SCCs or BCRs) or Article 49 derogation (e.g., consent, performance of a contract, etc.)

Step 3 – Assessment of Third Country Legal Order – if exporter relies on Article 46 Safeguard, must assess legal order in third country to determine if impinges on effectiveness of SCCs/BCRs

Step 4 – Identify and Implement Supplementary Measures – if assessment in Step 3 reveals third country legislation impinges on Article 46 Safeguard (SCCs/BCRs) then need to consider Supplementary Measures. EDPB Recommendations provide a non-exhaustive list of examples of Supplementary Measures related to:

- **Technical Measures** – including state of the art encryption and pseudonymization
- **Contractual Measures** – for example, exporter reinforcing power to conduct audits
- **Organizational Measures** – such as internal policies, appointing an internal team, applying data minimalization techniques

Step 5 – Implement Appropriate Safeguards, e.g., execute SCCs and additional contractual safeguards in contract

Step 6 – Re-evaluate assessment at appropriate intervals

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