



Beyond GDPR: The Next Major Privacy Mandate in 2021

With new regulatory compliance deadlines in 2021 and 2022, the General Data Protection Regulation (GDPR) continues to provide a regulatory outline for organizations handling personal data in the European Union.

With the ultimate goal of ensuring that citizens retain control and rights over their personal data, GDPR puts pressure on organizations to change policies regarding its creation, retention and destruction of citizen data. While enshrined in EU law, the regulation also applies in situations where organizations do not operate exclusively in the European Union (EU) and the European Economic Area (EEA).

Despite many organizations still grappling with the initial 2018 ramifications of the GDPR, new requirements, stemming from a ruling in 2020, recently enforced yet another look at the cross section of day-to-day operations and personal data collection.

On July 16, 2020 the Court of Justice of the European Union issued its decision on Data Protection Commissioner v. Facebook Ireland, Schrems. Known as “**Schrems II**”, this decision has impacted changes to the European Commission’s GDPR Adequacy Decision for the EU-U.S. Most notably, it invalidates the Privacy Shield Framework which many U.S. organizations relied on to comply with EU data protection rules surrounding cross-border data transfers.

The EJEU decision significantly impacts the Standard Contractual Clauses (SCCs). The SCCs provide safeguards for transfer or access of individual personal data from inside the EEA to outside the EEA to a country that has been deemed not to have adequate data protection laws.



Definitions

GDPR

The General Data Protection Regulation is legislation in EU law that regulates the collection, storage and use of personal data; it also addresses the transfer of personal data to countries outside the EU and EEA.

Processor

Typically a service provider or sub-contractor engaged by the Controller to process data for specific purposes.

GDPR Adequacy

The term used by the EU to describe countries that are deemed to provide an “essentially equivalent” level of data protection to that in the EU; and so a “**GDPR Adequacy Decision**” is a formal decision of the EU Commission recognising this equivalent level of protection. Where there is a GDPR Adequacy Decision, transfers outside the EEA are permitted.

Controller

The party controlling why and how personal data is processed.

SCCs

Standard Contract Clauses, one of the appropriate safeguards set out in GDPR Article 46, used to ensure personal data is protected when it is transferred outside of the EU/EEA.



Modernised, or the “New SCCs” as labelled, are necessary to address the impact of data flows resulting from technological advances. Standard Contractual Clauses are pre-approved clauses by the European Commission and therefore comply with GDPR. The New SCCs will replace the three sets of SCCs previously adopted.

The New SCCs specifically address the issues brought up in Schrems II. They place responsibility on both the data exporter and importer for the security of data and adhering to the protections of the EU in third countries where data protection laws may not be as stringent. This includes the data importer, with support from the data exporter, completing a risk-based assessment that is made available to the supervisory authority upon request. The SCCs set out factors that the data exporter and importer must consider in these assessments, in addition to consideration of law and practices in the third country.

Data importers are subject to the following requirements in the event of a data request by a public authority in a third country: “notify the data exporter of any request (or access) by a government authority unless prohibited, and, if prohibited, use best efforts to get the prohibition waived. The data importer must review the legality of any such request and challenge unlawful requests, and provide only the minimum information necessary to comply with any legal compulsion it is under. The data importer must also provide regular transparency reporting about the requests it receives and notify the data exporter if it believes it is no longer able to comply with the SCCs — in which case, unless appropriate measures can be taken to remedy this risk, the data exporter may suspend and/or terminate the SCCs.”

Adoption Timeline

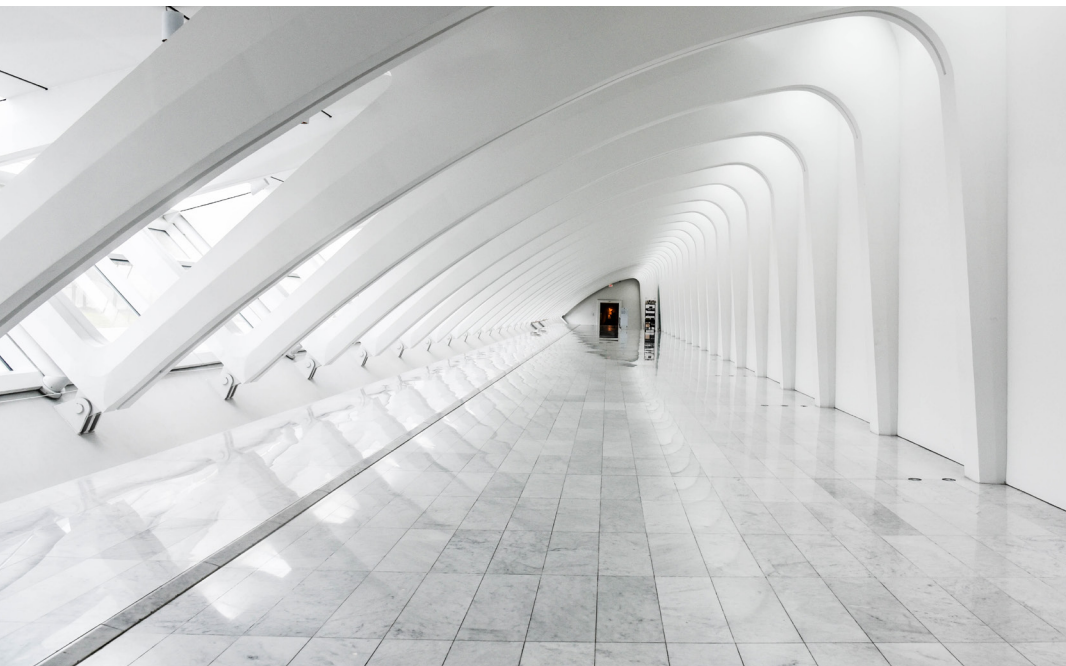
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Entered into force
(can be used starting on)
June 27, 2021

Old SCCs can be used for new agreements until September 27, 2021, at which point use of the old SCCs must be discontinued and expiring contracts must be renewed using the new SCCs

Old SCCs can be used for existing agreements until December 27, 2022

All contracts will need to have updated the SCCs to the new versions by December 27, 2022





Here's an overview of the key changes to the SCCs in light of the Schrems II ruling:

1. The previous SCCs only accounted for Controller-to-Controller and Controller-to-Processor relationships. The new iteration accounts for different kinds of data transfers in a modular format:
 - **Controller-to-Controller transfers (Module 1)**
 - **Controller-to-Processor transfers (Module 2)**
 - **Processor-to-(sub-) Processor transfers (Module 3)**
 - **Processor-to-Controller transfers (Module 4)**
2. The New SCCs recognize and account for data exporters from outside the EEA.
3. The previous SCCs were bipartite, but the New SCCs allow multiple data exporting parties to contract and have a “docking clause” that enables new signatories to be added throughout the lifecycle of the contract.
4. All Controllers/exporters must be contracted with their Processors/importers and all sub-Processors must be contracted with the Controller/exporter.
 - **The replacement SCCs are compliant with both GDPR Article 28 governing data processing agreements and Article 46 governing cross-border transfers, so there is no need for two separate agreements.**
5. New guidelines address data importer's potential inability to adhere to SCC requirements due to sub-standard (or conflicting) data privacy laws in the importer's country. This includes both parties conducting and documenting a risk assessment prior to transferring data.
6. The SCCs are non-negotiable. Specifics of the processing of personal data are required in the three annexes to the SCCs. In summary, the SCCs state that the path of the data must be fully documented, i.e. all parties handling data from the Controller exporter to Processor importer and all subsequent sub-Processors must be identified and each must ensure adequate security measures taken are mapped out and detail of what they intend to use the data for is documented.

Countries That Meet GDPR Adequacy Standards

- **Andorra**
- **Argentina**
- **Canada (commercial organizations)**
- **Faroe Islands**
- **Guernsey**
- **Israel**
- **Isle of Man**
- **Japan**
- **Jersey**
- **New Zealand**
- **Switzerland**
- **Uruguay**
- **United Kingdom**

Countries in the Process of Obtaining Adequacy Status

- **South Korea**



FACTOR

Factor's Approach and How We Can Help

We help clients meet regulatory change deadlines by designing and deploying tech-enabled solutions, overseen by expert project managers to handle:

Working under tight deadlines and regulatory scrutiny leaves no room for error. Having completed 100+ complex contract review and remediation projects over the last decade, Factor has narrowly focused its investments (in technology, tools, methodologies) with the aim of being the best in the world in regulatory response and remediation.



GDPR Compliance for Global Insurance Company

- Amended 20,000 client contracts to ensure compliance with new GDPR requirements
- Handled all counterparty outreach and negotiations for 11,000+ client counterparties and supported negotiations for 8,000+ client-driven outreaches
- Factor team consisted of 50+ senior commercial lawyers based in Chicago and London and supported 48 business units.



LIBOR Solution in collaboration with Allen & Overy for Global Bank

- Collaboration with Magic Circle law firm, Allen & Overy, integrating world-class legal advice and Factor's industry-leading contract remediation and execution
- Reviewing 50,000+ contracts and handling 130,000+ bilateral client outreaches and negotiations
- Team of 90 supporting 10 business lines and 100+ stakeholders across the bank
- 40% cost savings vs. conventional approach for LIBOR transition.



Initial Margin 5&6 Solution for Global Bank

- Support client in repapering master agreements for approximately 551 unique pairings for 61 counterparties to ensure compliance with global Initial Margin requirements known as Initial Margin Wave 5 ("IM5")
- Such documentation includes creating new and/or amending existing CSAs, CSDs, CTAs, and ACAs as required
- A global team of 6 at Factor draft and negotiate agreements, following agreed processes for internal escalations to legal, credit, and other business stakeholders to ensure a timely resolution to each negotiation.

While any privacy regulation change can appear daunting at first review, Factor offers a variety of services and solutions that can help you achieve compliance and to plan for the future. Schrems II is the latest ruling to impact your data management obligations; having a plan and a team that is ready to support you, ensures you are prepared.

..... To learn more about how Factor can support you, get in touch with your Client Engagement Partner.