



New standard contractual clauses for the transfer of personal data to third countries

On 4 June 2021, the European Commission' Implementing Decision (<http://eur-lex.europa.eu/legal-content/PT/TXT/HTML/?uri=OJ:L:2021:199:FULL&from=EN>) on the use of standard contractual clauses applicable to the transfer of personal data to third countries under the rules arising from Regulation (EU) 2016/679 of 27 April 2016 (<http://eur-lex.europa.eu/legal-content/PT/TXT/?uri=celex%3A32016R0679>)(General Data Protection Regulation, "GDPR" was published.

The Commission Decision, which set the new Standard Contractual Clauses ("SCC"), entered into force on 27 June 2021, and established that the previous SCC model could continue to be used for new data transfers during a transitional period, which extended until 27 September 2021. Thus, as of today, September 28, all new transfers of personal data to third countries, which are not regulated by another of the mechanisms provided for in Article 46, no. 2 of the GDPR, should be regulated using the new SCC.

A period of adaptation of existing data flows, regulated by the previous SCC, is also foreseen, under which they remain valid until December 2022, provided that the processing flows under the contract remain unchanged and that the previous SCC ensures adequate protection of the transferred data.

European Commission's Decision aims to address concerns about the transfer of personal data, due to the need to keep up with technological developments that have substantially altered cross-border data flows, which today correspond to an increasingly complex and expanding reality due to global cooperation and international trade. The new SCC model approved by the European Commission also adapts this instrument to the current regulatory framework arising from the GDPR, as the previous SCC were based on the regime contained in Directive 95/46/EC, which has since been revoked by that European Regulation. With this amendment, the European Commission has thus addressed the need to conform SCC to the existing legal regime, which reflects a more demanding perspective on the protection of personal data.

It also contributed to the regulatory setting of the new SCC, the decision of the Court of

Justice of the European Union contained in The Judgment Schrems II of 16 July 2020 (<http://eur-lex.europa.eu/legal-content/PT/TXT/?uri=CELEX%3A62018CJ0311>), which pointed out the need to ensure an adequate level of data protection in data transfers to third countries, and the old SCC sums are not sufficient, and affirming the need to assess concretely the level of protection achieved by the third country, recipient of the data, by offering additional measures when necessary.

Given the context for its creation described above, the main innovations introduced in the new SCC are:

- the extension of its scope, and options are configured by modules, depending on the role played by the Parties in the transfer of data (there are 4 modules: Exporter and Importer as data controllers; Exporter as data controller and Importer as data processor; Exporter and Importer as data processors; Exporter as data processor and Importer as data controller);
- the possibility of adhering at any time by entities that were not Parties initially at the time of the conclusion of the contract, with the authorization of the other Parties, with SCC bidding for the adherent only from the date of the date of the entry; and
- the implementation of an impact assessment procedure before data transfer takes place, by which the level of data protection provided by the country of destination is analyzed.

While the novelties introduced by the Commission Decision in the new SCC contribute to promoting a higher level of protection of personal data and are more appropriate to the complex and dynamic reality of data transfers, the challenges of their practical implementation remain, and it is up to the entities operating in these cross-border data flows to adapt to the new regulatory framework.

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