

September 17 2021

FDPIC recognises new EU SCCs subject to certain modifications and amendments

Walder Wyss Ltd | Tech, Data, Telecoms & Media - Switzerland



JÜRGEN
SCHNEIDER



LENA
GÖTZINGER

› Effect of FDPIC's opinion for data transfers from Switzerland abroad

› Modifications and additions to be made to SCCs

As expected, the Federal Data Protection and Information Commissioner (FDPIC) has recognised, as of 27 August 2021, that the standard contractual clauses (SCCs) adopted by the European Commission on 4 June 2021 provide for an adequate level of data protection under Swiss data protection law in case of data transfers – provided, however, that certain modifications and additions are made to these clauses to be compliant with Swiss data protection law.

Effect of FDPIC's opinion for data transfers from Switzerland abroad

Under Swiss data protection law (and comparable to the situation under the EU General Data Protection Regulation (GDPR)), personal data may in principle not be disclosed to recipients abroad that are based in countries not providing for an adequate level of data protection, unless an exception (eg, the consent of the data subject or sufficient safeguards) applies. So far, the FDPIC has held the following contractual means to provide for a sufficient level of data protection:

- the SCCs pursuant to the European Commission decision of 5 February 2010 under Directive 95/46/EC (supplemented by additional contractual and technical measures, if needed);
- the Swiss Transborder Data Flow Agreement (for outsourcing of data processing); and
- the Council of Europe Model Contract for ensuring adequate data protection in the context of transborder data flows.

From 27 September 2021 onwards, the above contractual means are no longer recognised by the FDPIC. However, a transition period applies that slightly deviates (to the benefit of the parties to any of these clauses) from the transition period stated in the European Commission's decision as of 4 June 2021. Parties that have agreed on the aforementioned standard agreements for providing an adequate level of data protection before 27 September 2021 may continue to rely on these safeguards until 1 January 2023 provided that the data processing subject to these safeguards is not substantially changed. From 1 January 2023, the aforementioned safeguards need to be replaced by the new SCCs or a contract sui generis providing for an adequate level of data protection. The FDPIC has already announced that it will publish an updated version of the Swiss Transborder Data Flow Agreement at a later stage. Experience shows, however, that it is advisable to rely on the SCCs as they are an internationally recognised standard for data transfers.

Modifications and additions to be made to SCCs

As Switzerland is not part of the European Union, any references to member states under the SCCs do not apply to Switzerland. For example, data importers would, by signing the SCCs with regard to Swiss cross-border data flows, not subject themselves to the jurisdiction of the FDPIC as the Swiss data protection authority on federal level. Moreover, unchanged SCCs would exclude data subjects in Switzerland from their possibility to sue the data importer and/or exporter in Switzerland as the place of their habitual residence. Further, until the revised Swiss Data Protection Act (revFDPA) enters into force, personal data also relates to data pertaining to legal entities and not only to individuals.

In consequence, where the SCCs are to cover Swiss cross-border transfers:

- the data importer must subject itself (also) to the competence of the FDPIC in clause 13 of the SCCs;
- the SCCs must be supplemented with an annex specifying that the term "member state" must not be interpreted in such a way as to exclude data subjects in Switzerland from the possibility of suing for their rights in Switzerland in clause 18(c) of the SCCs; and
- it is to be clarified that until the entry into force of the revFDPA (expected on 1 January 2023), the SCCs also apply to the personal data of legal entities.

Where data transfers covered by the SCCs are subject not only to Swiss law, but also to the EU GDPR due to its extraterritorial scope of application, it must be taken into account that any amendments and modifications may not contradict – directly or indirectly – the SCCs, or prejudice the fundamental rights or freedoms of data subjects under EU law (clause 2(a) of the SCCs). For example, with regard to the supervisory authority, this approach will lead to the result that the FDPIC is given supervisory authority as far as the data transfer is subject only to Swiss law and an EU authority as far as the data transfer is subject to the EU GDPR. With regard to the governing law and jurisdiction, parties may decide whether to opt for a mirrored approach (ie, to the extent that only Swiss law applies to the transfer, Swiss governing law and jurisdiction) or to generally choose the governing law and jurisdiction of an EU member state.

More detailed information on the approaches as to the implementation of a "Swiss finish" to the SCCs as well as an instructive table can be found in the FDPIC's paper on the transfer of personal data to a country with an inadequate level of data protection based on recognised SCCs and model contracts.(1)

Companies should review the safeguards in place for cross-border transfers and transition any of the revoked contractual means to the new SCCs, subject to a Swiss finish, where applicable. Where companies opt for a "one-size-fits-all" solution by subjecting Swiss cross-border transfers to the EU GDPR standard, they must pay attention to the fact that the transition period will end on 27 September 2022.

For further information on this topic please contact Jürg Schneider or Lena Götzinger at Walder Wyss by telephone (+41 58 658 58 58) or email (juerg.schneider@walderwyss.com or lena.goetzinger@walderwyss.com). The Walder Wyss website can be accessed at

Endnotes

(1) To access the paper, click [here](#) (only available in German, last visited on 9 September 2021).