Changes in international data transfers

WALLESS explains the essence of the European Commission's new standard contractual clauses and why they are important for data transfers to USA, UK and rest of the world

What are SCCs?

The GDPR stipulates that data transfers to countries outside the EU / EEA (third countries) or international organizations are only possible under special conditions. One of the possible measures is standard data protection clauses adopted by the European Commission. Standard Contractual Clauses (SCCs) are a standardized agreement between two parties – data importer and data exporter – designed to ensure adequate protection of personal data in a third country or international organization. **On 4 June 2021, the European Commission adopted new SCCs**.

Why are they so important?

United States of America

In 2020, CJEU's ruling in *Schrems II* case invalidated the *EU-US Privacy Shield*. This means that data transfers to the USA require additional measures pursuant to the GDPR, e.g. SCCs.

United Kingdom

As part of the new trade deal, data transfers to the UK were permitted until 30 June 2021 (known as the bridge period). While it seems that the adequacy decision could be adopted in time, if any issues occur, SCCs could be the solution.

(Almost) the rest of the world

The European Commission has so far recognized Andorra, Argentina, Canada (commercial organizations), Faroe Islands, Guernsey, Israel, Isle of Man, Japan, Jersey, New Zealand, Switzerland and Uruguay as providing adequate protection. Transfers to other countries require additional protection, such as SCCs.
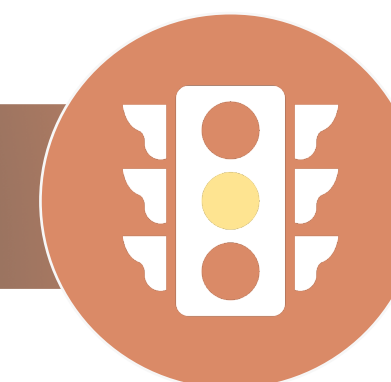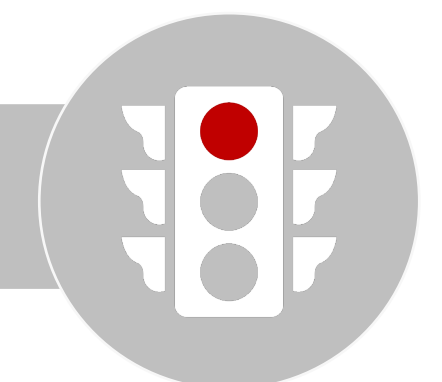
What now?

Timeline

27 June 2021
New SCCs enter into force; you may still conclude agreements on the basis of old SCCs

27 September 2021
Old SCCs shall be not used for new agreements as old SCCs are repealed, but old agreements remain valid

27 December 2022
All contracts shall be amended in accordance with new SCCs

Why did they need to be changed?

They were not in line with the GDPR
Previous *controller-controller* SCCs were adopted in 2001 and amended in 2004 (Commission Decisions 2001/497/EC and 2004/915/EC), and previous *controller-processor* SCCs were adopted in 2010 (Commission Decision 2010/87/EU), i.e. prior to the entry into force of the GDPR.

They were outdated
Provided that old SCCs were adopted more than a decade ago, technology has particularly advanced during this period. In parallel with new technologies - new services, structures, e.g. cloud - both volume and complexity of data flows have increased significantly.

***Schrems II* also created the room for improvements**
CJEU's ruling in *Schrems II* case generally established that SCCs do not automatically present lawful grounds for data transfer, i.e. the existence of SCCs does not automatically prove the compliance of a particular data transfer and they shall be considered on a case-by-case basis.

What was changed?

Modular system
New SCCs contain general clauses applicable to all relations, and four alternative modules based on particular relation between data importer and exporter.

New relations
While previous SCCs encompassed only *controller-controller* and *controller-processor* relations, new SCCs also contain *processor-processor* and *processor-controller* modules.

Exporters outside the EEA
Pursuant to old SCCs the data exporter had to be established in the EEA or SCCs could not be used. This is resolved by new SCCs as both exporter and importer may be established outside the EEA.

No DPA
New SCCs are fully in line with the Article 28 of the GDPR meaning that no separate DPA is required if SCCs are concluded with that particular processor.

Docking clause
New SCCs establish that an entity that is not a party to SCCs may join it at any time, either as a data exporter or as a data importer.

Schrems II safeguards
Clauses 14 and 15 of Section III establish various safeguards concerning issues raised in *Schrems II* ruling, for instance, local laws in the third country – transfer impact assessment shall be performed.

Key changes
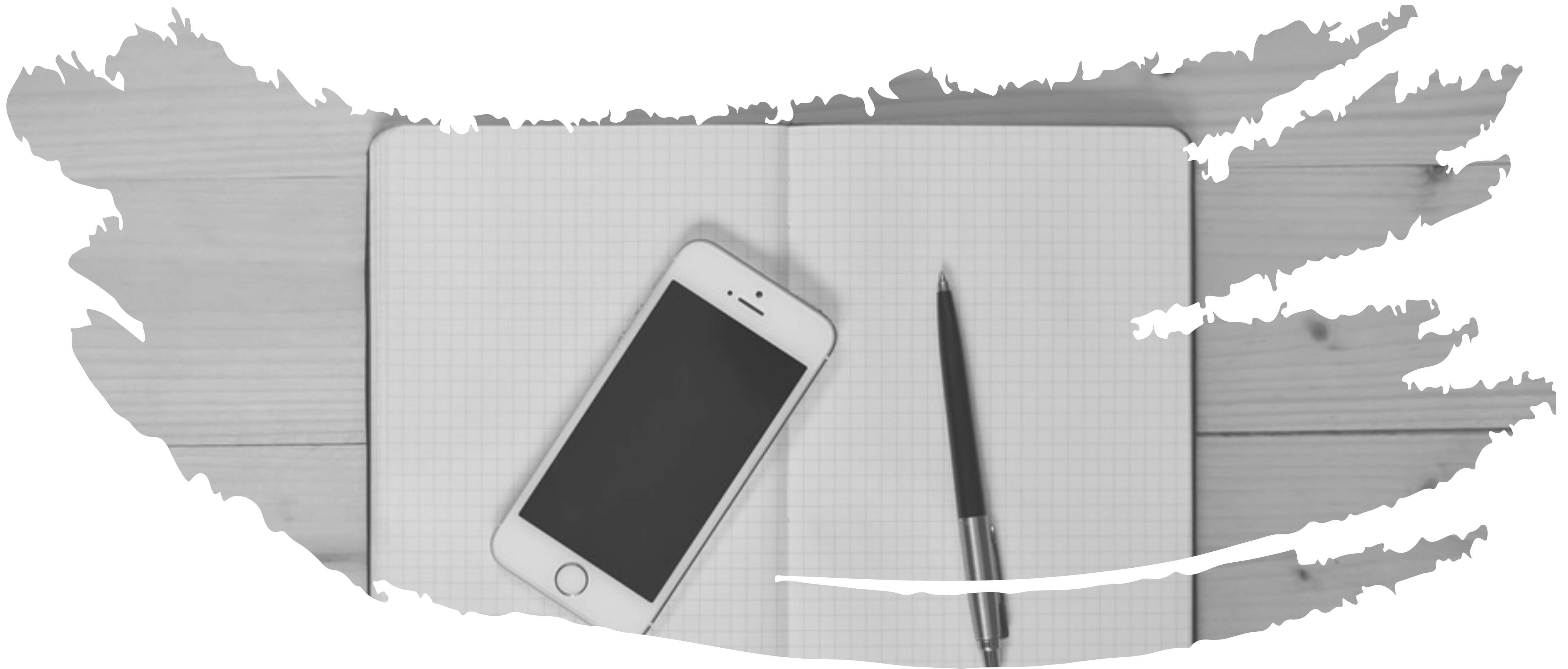
What else?

Alongside with new SCCs for transfers to third countries and international organizations, the Commission adopted **SCCs for transfers between controllers and processors established in the EEA**. Generally, these SCCs are the top-notch standard for data processing agreements (DPAs) to follow.