

# Regulatory Alert 24/2021

## Recognition of the EU SCC by the FDPIC

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Geneva, 17.09.2020

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### 1. References

#### 1.1 Decision

Decision dated 27 August 2021 of the Federal Data Protection and Information Commissioner concerning the transfer of personal data to a country with an inadequate level of data protection based on recognised standard contractual clauses and model contracts, available at: <https://www.edoeb.admin.ch/dam/edoeb/en/dokumente/2021/Paper%20SCC%20def.en%2024082021.pdf.download.pdf/Paper%20SCC%20def.en%2024082021.pdf>

#### 1.2 Key words

- > Data protection
- > Transfer of personal data
- > Transfer tools
- > Standard contractual clauses
- > Swiss Transborder Data Flow Agreement

#### 1.3 Reference texts

- > Swiss Federal Act on Data Protection (FADP)
- > Swiss revised Federal Act on Data Protection (revFADP)
- > Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation or GDPR)
- > Commission Implementing Decision (EU) 2021/914 of 4 June 2021 on standard contractual clauses for the transfer of personal data to third countries pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council
- > BRP SA Alert EU 6/2021 Standard Contractual Clauses and EDPB Recommendations on supplementary transfer tools

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### 2. Context

On 27 August 2021, the Swiss Federal Data Protection and Information Commissioner (FDPIC) recognised the new EU Standard Contractual Clauses (SCC), including its modules,<sup>i</sup> as a possible transfer tool providing sufficient safeguards to ensuring an adequate level of data protection within the meaning of Art. 6 (2)(a) FADP, to the extent they are adapted and/or supplemented as necessary in specific cases.

Under the current FADP, contractual guarantees for data transfers to countries not providing an adequate level of data protection must be notified to the FDPIC. Data exporters may either submit contractual guarantees to be used for examination by the FDPIC or use model contracts

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or SCC drawn up or recognised by the FDPIC. In the latter case, the notification obligation is deemed to be fulfilled as long as the FDPIC is informed of their use in general terms.

Under the revised FADP (expected to come into force on 1 January 2023), the obligation to notify the FDPIC will no longer apply if recognised SCC are used.

The new SCC must be used for any new contract as of 27 September 2021 onwards. Note that the "Swiss Transborder Data Flow Agreement" and the "Council of Europe model contract to ensure equivalent protection in the context of cross-border data flows" will no longer be recognized as of 27 September 2021.<sup>ii</sup>

The FDPIC's decision includes concrete guidance on how to adapt the EU SCC to the specific circumstances in order to comply with Swiss legislation. In addition, adaptations may also be necessary if a Swiss data exporter is subject to both the Swiss FADP and the GDPR (under its extraterritorial scope of application). Swiss data exporters thus have to assess whether their processing of EU data subjects' personal data (or certain parts of it) is subject to the GDPR, in addition to the FADP.

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### 3. Comments

The recognition of the new EU SCC by the FDPIC was to be expected and the guidance on how to adapt the SCC will be welcomed by Swiss firms transferring personal data to countries not providing an adequate level of data protection.

In general, this latest decision by the FDPIC confirms once more the important influence of EU data protection law and decisions on Swiss data protection law and the fact that Swiss firms operating and transferring personal data on a cross-border basis should develop a parallel knowledge of EU data protection law in order to be on the safe side and be compliant with both Swiss and EU data protection law where necessary. Data protection compliance is here to stay.

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### 4. Practical implication

Compliance functions (or Data Protection Officers) of Swiss banks and financial institutions that transfer personal data to third countries not subject to an adequacy decision of the Swiss FDPIC should be aware of the recognition of the new EU SCC and the impending phasing-out of the Swiss Transborder Data Flow Agreement and the Council of Europe model contract and inform their legal and management functions accordingly. Existing data transfer agreements should be transitioned to the new SCC (or another recognized transfer tool) until latest 31 December 2022.

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We are at your disposal for any questions you may have.

Best regards,

BRP Bizzozero & Partners SA

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<sup>i</sup> For a detailed description of the new EU SCC, please see our BRP SA Alert EU 6/2021, Standard Contractual Clauses and EDPB Recommendations on supplementary transfer tools.

<sup>ii</sup> A revision of the Swiss Transborder Data Flow Agreement (for outsourcing of data processing) is currently underway.