

December 2020

Magda Cocco | [mpc@vda.pt](mailto:mpc@vda.pt)  
Inês Antas de Barros | [iab@vda.pt](mailto:iab@vda.pt)  
Maria de Lurdes Gonçalves | [mlg@vda.pt](mailto:mlg@vda.pt)

## INFORMATION, COMMUNICATION AND TECHNOLOGY

### NEWS ON INTERNATIONAL DATA TRANSFERS

#### I. THE NEW RECOMMENDATIONS ON INTERNATIONAL TRANSFERS OF PERSONAL DATA

The European Data Protection Board (EDPB) issued its long-awaited [Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data \(Supplementary Measures Recommendations\)](#) and [Recommendations 02/2020 on the European Essential Guarantees for surveillance measures \(EEGs Recommendations\)](#).

The recommendations follow on from the CJEU's judgment in Schrems II which invalidated the Privacy Shield and found that organisations relying on the Standard Contractual Clauses (SCCs) may need to implement additional safeguards beyond the SCCs to legitimize transfers to countries outside the European Economic Area (EEA). Both documents are under consultation until 21 December.

Organisations are now required to re-assess international data transfer tools and, under the accountability principle, identify the supplementary measures that are adequate on a case-by-case basis. These supplementary measures could be of contractual, technical or organizational nature, or a combination of the three.

As such, organizations must carry out a **Data Transfer Assessment**. In order to help organizations, the EDPB provides a 6 step RoadMap:

#### Step 1: Map data transfers

As a first step, organisations (acting as exporters) must map data transfers so as to identify and understand where their data is transferred and what adequacy mechanisms are in place. The following elements must be identified:

- The type of data being exported;
- The type of parties receiving it (acting as importers);
- The data location.

## **Step 2: Identify the data transfer tool under GDPR**

Considering the data transfer tools foreseen in GDPR, exporters must identify the most adequate one.

## **Step 3: Assess the effectiveness of the data transfer tool**

After identifying the possible transfer tools, exporters need to analyse (i) the nature of the transfer; (ii) the laws, regulations and practices in the recipient jurisdiction; and (iii) the characteristics of all entities involved.

When carrying out this assessment, special attention must be paid to the possible risks affecting the effectiveness of the transfer tool, such as third country laws giving public authorities unrestricted access to personal data. In these circumstances, the complementary EEG Recommendations come into play, by helping exporters determine if the third country legislation governing public authorities' access to personal data may be considered a justifiable interference.

## **Step 4: Adopt supplementary measures if necessary**

If, after the assessment, the exporter considers that the transfer tool in place fails to guarantee an EEA equivalent level of protection for the exported data, it must then consider applying contractual, technical or organisational supplementary measures (possibly a combination of the three) which will effectively fill this gap.

The Supplementary Measures Recommendations provide, in Annex 2, a non-exhaustive list of supplementary measures that may be adopted. If exporters cannot find effective supplementary measures, the international transfer may not proceed.

## **Step 5: Take formal procedures to put in place the supplementary measures**

After identifying the adequate supplementary measures, exporters must take the necessary formal procedural steps to ensure its application. The procedural steps will depend on the chosen transfer tool.

## **Step 6: Re-evaluate the level of protection on an ongoing basis**

The Data Transfer Assessment must be an on-going exercise. Hence, exporters must review periodically their conclusions regarding the protection of the transferred data and, if needed, implement additional safeguards.

## II. THE DRAFT DECISION ON STANDARD CONTRACTUAL CLAUSES

Another relevant data transfer topic refers to SCCs. The European Commission published its **Draft Implementing Decision on new Standard Contractual Clauses for the transfer of personal data to third countries**. The draft SCCs are subject to public consultation until 10 December 2020.

The SCCs have been revised so as to comply with GDPR. The new set of clauses have a more comprehensive content than the previous ones and can be used in a multiple situations: international transfers from controller to controller, controller to processor, processor to processor (including sub-processors) and processor to controller situations. Also, they can be used by multiple parties, including those which are not established in the EU. Organisations relying on SCCs will have one year to replace old SCCs with the new ones, and to introduce the adequate supplementary measures.

### **NOW WHAT – THE WHEN, HOW AND WHY TO IMPLEMENTING THE RECOMMENDATIONS**

The EDPB Recommendations touch on an important and sensitive point for organisations with international activity and which rely on international data transfers: mapping data transfers to third countries and implementing the EDPB's 6 step roadmap may be a time-consuming task for both data controllers and processors.

Therefore, this review should start as soon as possible to avoid possible complications in the future, such as fines or having to terminate transfers – with undeniable financial and operational impact for business. In addition, organisations relying on SCCs should prepare the transition from the old SCCs to the new ones, whose final version will probably be approved in the near future.

In any case, time certainly is of the essence: a call to action in the short run is a must for both controllers and processors.