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Eidgenössischer Datenschutz- und Öffentlichkeitsbeauftragter
EDÖB
Federal Data Protection and Information Commissioner
FDPIC

The transfer of personal data to a country with an inadequate level of data protection based on recognised standard contractual clauses and model contracts.

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1. Standard contractual clauses as an instrument for safeguarding personal data transferred to a country with an inadequate level of data protection

Under Article 6 paragraph 1 of the Federal Act on Data Protection of 19 June 1992 (SR 235.1; FADP) and Article 16 paragraph 1 of its totally revised version of 25 September 2020 (revised FADP), which is scheduled to come into force on 1 January 2023, personal data may not be transferred to countries where there is an inadequate level of data protection.¹ However, a transfer of data to such a country may be possible under certain circumstances, such as when adequate protection in the country of destination can be contractually guaranteed. This document deals with standard contractual clauses (SCCs) and thus with one of the instruments that a data exporter can use under Swiss law to contractually secure a data transfer to a country that does not have an adequate level of data protection. Whether contractual agreements are actually capable of ensuring the adequate protection of the personal data to be transferred must be examined in each specific case. In this regard, we refer to our [guide for checking the admissibility of data transfers with reference to foreign countries](#) (pursuant to Art. 6(2)(a) FADP) of June 2021.

2. Use of recognised SCCs and obligation to notify the FDPIC

Under the current law, data transfers based on contractual guarantees must be notified to the Federal Data Protection and Information Commissioner (FDPIC).² A deliberate breach of this notification obligation may lead to prosecution.³ In order to comply with this obligation, exporters must inform the FDPIC in advance of the contractual guarantees used and submit them to the FDPIC for examination. However, if model contracts or standard contractual clauses drawn up or recognised by the FDPIC are used, the notification obligation under Article 6 paragraph 3 of the Ordinance to the Federal Act on Data Protection (FADP) is regarded as fulfilled if the FDPIC is informed of their use in general terms. Under the revised FADP, the obligation to notify will no longer apply provided recognised standard contractual clauses are used.⁴

3. SCCs and model contracts currently recognised by the FDPIC and their further use

To date, the FDPIC has recognised the following model contracts and standard contractual clauses pursuant to Article 6 paragraph 2 letter a FADP:

- EU standard contractual clauses pursuant to the European Commission Decision of 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46/EC of the European Parliament and of the Council (2010/87/EU);
- Swiss Transborder Data Flow Agreement (for outsourcing of data processing) of November 2013;
- Council of Europe model contract to ensure equivalent protection in the context of cross-border data flows.

¹ Information on whether a country has an adequate level of data protection can be found in the FDPIC's list at https://www.edoeb.admin.ch/dam/edoeb/de/dokumente/2020/staatenliste.pdf.download.pdf/20200908_Staatenliste_d.pdf.

² Art. 6 para. 3 FADP.

³ Art. 34 para. 2 let. a FADP.

⁴ Art. 16 para. 2 let. d revFADP.

The following will apply to all such model clauses and contracts:

Recognition status	New registrations	Transitional period for existing contracts	After expiry of the transitional period
No longer recognised from 27.09.2021	No longer possible from 27.09.2021	Continued use of existing contracts until 01.01.2023, provided that the data processing or the contract is not significantly changed in the meantime.	Replaced by - new SCC ⁵ - sui generis contract - currently no other model clauses or contracts ⁶

4. New SCC according to the Annex to Implementing Decision 2021/914/EU

The standard contractual clauses pursuant to the European Commission Decision of 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46/EC of the European Parliament and of the Council (2010/87/EU) were repealed by the European Commission with effect from 27 September 2021 by Implementing Decision (EU) 2021/914 of 4 June 2021 and replaced by the standard contractual clauses which can be found in the Annex to the same Implementing Decision 2021/914/EU.⁷

The FDPIC recognises these new SCCs, which refer to the General Data Protection Regulation of the European Union (GDPR), including all modules, with the reservation that they will be adapted and/or supplemented as necessary in specific cases. To select the appropriate modules and determine the necessary adjustments and additions, proceed as follows:

4.1 Selection of the relevant scenario

The EU's new standard contractual clauses are modular, allowing parties to tailor the clauses to their specific data transfer procedure.⁸ As a result, in addition to the general clauses to be used in each case, the parties must select the module appropriate to the specific situation and combine it with the general clauses. The four modules represent the following data transmission scenarios:

- Module 1 Controller in a secure country -> Controller in an unsecure country
- Module 2 Controller in a secure country -> Processor in an unsecure country
- Module 3: Processor in a secure country -> Processor in an unsecure country
- Module 4 Processor in a secure country -> Controller in an unsecure country

4.2 Determining the law governing the data transfer

The transfer of personal data from Switzerland to other countries is subject to the rules in Article 6 FADP. However, due to the extraterritorial reach of the GDPR, such data transfers may additionally be subject to the GDPR, in particular if data pertaining to EU residents are (also) transferred.⁹ The application of the GDPR provisions is mandatory, irrespective of any contractual choice of law made by the parties. Accordingly **two cases** should be distinguished. In the first case, there is no link to the GDPR,¹⁰ so that the data transfer is subject solely to the FADP. In the second case, the GDPR applies to certain data transfers based on its extraterritorial reach pursuant to Article 3 paragraph 2 GDPR, but

⁵ Standard contractual clauses for the transfer of personal data to third countries in accordance with Regulation (EU) 2016/679 of the European Parliament and of the Council (pursuant to Implementing Decision 2021/914/EU), adapted for Switzerland in accordance with point 4 below.

⁶ A revised version of the Swiss Transborder Data Flow Agreement (for outsourcing of data processing) will be published at a later date. It is not yet known whether the Council of Europe will also offer a revised version of its model contract.

⁷ New SCCs. For contracts entered into prior to that date, the old SCCs may continue to be used for a further 18 months (until 27 December 2022), provided the processing policy or contract is not changed in the interim. After that, however, they will no longer be considered sufficient safeguards for the EU according to Article 46 paragraph 1 GDPR. Implementing Decision (EU) 2021/914 of 4 June 2021 is available at: http://data.europa.eu/eli/dec_impl/2021/914/oj.

⁸ In accordance with recital 10 of Implementing Decision (EU) 2021/914 of 4 June 2021.

⁹ On the extraterritorial reach of the GDPR, see our [Tips on the GDPR \(admin.ch\)](#) with further notes.

¹⁰ Art. 3 GDPR.

the data exporter is a controller or a processor that falls within the scope of the FADP, e.g. because it is located in Switzerland.

The distinction between these cases is of fundamental importance to the question of how the SCCs or their modules must or may be adapted. Thus, data transfers to which the FADP applies must be adapted to FADP's specifics, in particular to ensure that the data subjects do not suffer any disadvantage as a result of using the SCCs. On the other hand, SCCs for data transfers subject to the GDPR may not be amended.¹¹ Therefore, the parties must determine whether only the FADP or both the FADP and the GDPR apply to their specific circumstances.

If data transfers are to be regulated that are subject to both the FADP and the GDPR, the parties have **two options** for adapting the SCCs. The first is to provide for two separate regimes, one covering data transfers under the FADP and the other covering data transfers under the GDPR. The second is for all data processing to be subject to the GDPR standard. This is possible because the GDPR provides adequate protection¹² and data subjects are consequently not disadvantaged as a result. However, Option 2 also requires certain adjustments, as shown below.

¹¹ Clause 2 of the new SCCs: Unalterability of clauses.

¹² Art. 6 para. 2 let. a FADP.

4.3 Adapting the SCCs to the specific circumstances

4.3.1 Overview

The following overview lists those adaptations that are necessary in order for the SCCs to comply with Swiss legislation and thus be suitable for ensuring an adequate level of protection for data transfers from Switzerland to a third country in accordance with Article 6 paragraph 2 letter a FADP.

	Case 1: Data transmission is exclusively subject to the FADP ¹³	Case 2: The data transfer is subject to both the FADP and the GDPR. ¹⁴	
		Option 1: The parties provide for two 'separate' arrangements for data transfers under the FADP and under the GDPR	Option 2: The parties adopt the GDPR standard for all data transfers
Competent supervisory authority in Annex I.C under Clause 13	Mandatory FDPIC	Parallel supervision: FDPIC, insofar as the data transfer is governed by the FADP; EU authority insofar as the data transfer is governed by the GDPR (the criteria of Clause 13a for the selection of the competent authority must be observed)	
Applicable law for contractual claims under Clause 17	Swiss law or the law of a country that allows and grants rights as a third party beneficiary	Swiss law or the law of a country that allows and grants rights as a third party beneficiary for contractual claims regarding data transfers pursuant to the FADP; law of an EU member state for those according to the GDPR (free choice for Module 4)	Law of an EU member state (free choice for Module 4)
Place of jurisdiction for actions between the parties pursuant to Clause 18 b¹⁵	Free choice	Free choice for actions concerning data transfers pursuant to the FADP; court of an EU member state for actions concerning data transfers pursuant to the GDPR (free choice for Module 4)	Courts of an EU member state (free choice for Module 4)
Adjustments or additions concerning the place of jurisdiction for actions brought by data subjects	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 their place of habitual residence (Switzerland) in accordance with Clause 18 c.		
Adjustments or additions regarding references to the GDPR	The SCCs must be supplemented with an annex specifying that references to the GDPR are to be understood as references to the FADP	The SCC must be supplemented with an annex specifying that the references to the GDPR should be understood as references to the FADP insofar as the data transfers are subject to the FADP.	
Supplement until the entry into force of the revFADP¹⁶	The SCCs are to be supplemented with an annex in which it is specified that the clauses also protect the data of legal entities until the entry into force of the revised FADP.		

¹³ Conditions: GDPR does not apply (no connecting factor pursuant to Art. 3 GDPR); the data exporter is in Switzerland and the data is transferred to an unsecure third country.

¹⁴ Conditions: GDPR applies to certain data transfers due to extraterritorial application in terms of Art. 3 GDPR; the data exporter is a controller or a processor who falls within the scope of the FADP, e.g. because they are in Switzerland, and the data is transferred to an unsecure third country.

¹⁵ This is to be distinguished from the assertion of rights by data subjects at their place of habitual residence, cf. the following row of the table and the explanations under point 4.3.4.

¹⁶ Expected date of entry into force: 1 January 2023.

4.3.2 Supervisory authority

The supervisory competence of the FDPIC is derived from the FADP and continues to apply even if the parties make a different choice. Therefore, in Annex I.C, the FDPIC must be designated as the supervisory authority.

In the case of contracts for data transfers that are exclusively subject to the FADP, the FDPIC is the sole supervisory authority to be named in the Annex. The explicit reference to an EU supervisory authority in the SCCs does not prevent this. However, for data transfers that are subject to both the FADP and the GDPR, two parallel supervisory authorities arise. Insofar as the data transfers are subject to the FADP, the FDPIC is the competent supervisory body. However, for transfers within the scope of the GDPR, the competence lies with the supervisory authorities in the EU. Since contractual agreements do not affect statutory supervisory powers, this applies both to contracts under Option 1 and those under Option 2.

Accordingly, for both options, Annex I.C should designate the FDPIC as the supervisory authority for data transfers covered by the FADP and an EU data protection authority for data transfers covered by the GDPR. The requirements of Clause 13 must be observed. The exclusive designation of an EU authority would not correspond to the actual circumstances and could therefore lead to errors and misunderstandings in the interpretation and application of the contract.

The FDPIC's supervisory powers relate exclusively to compliance with Swiss data protection legislation. The FDPIC may only include in his interpretations and overall assessments contractual claims or provisions of the GDPR that go beyond Swiss legislation.

4.3.3 Applicable law for contractual claims under Clause 17

Insofar as the data transfers are subject to the FADP, it may be agreed that Swiss law applies to contractual claims despite an explicit reference to the law of an EU member state in the SCCs. It is even recommended that Swiss law be chosen in these cases. However, the parties are free to choose a different law, provided that this does not compromise the rights of the data subjects. Swiss law allows a free choice of law. However, particular account must be taken of the fact that the contract allows the data subjects, as third-party beneficiaries, to assert certain rights directly against the parties and, if necessary, to have them enforced.¹⁷ The chosen law must allow and grant for third parties to benefit in this way and thus allow them to enforce these rights in practice.

Where the GDPR applies, on the other hand, the law of a member state must be chosen and this must also allow for third parties to benefit.¹⁸ The parties are only free to choose different law in the case of Module 4.

Accordingly, in the case of contracts under Option 1, the law of a member state must be chosen for claims relating to data transfers under the GDPR, while the choice of law for those subject to the FADP is free in the sense described above. For contracts under Option 2, the law of a member state must be chosen for all claims.

¹⁷ Clause 3 of the new SCCs.

¹⁸ Clause 2 of the new SCCs.

4.3.4 Place of jurisdiction for actions between the parties under Clause 18 b and for actions brought by data subjects

The parties may agree on any place of jurisdiction for disputes arising from the contract, insofar as the relationships are subject to the FADP.

In circumstances where both the FADP and the GDPR apply, the parties may agree on any place of jurisdiction for disputes arising from the contract concerning data transfers subject to the FADP. For disputes concerning data transfers subject to the GDPR, it is mandatory to agree on a court of a member state.¹⁹ In the case of contracts under Option 1, the parties must therefore designate the court of a member state for cases in which the GDPR applies, whereas they are free to choose the court that has jurisdiction for cases in which the FADP applies. For contracts under Option 2, the court of a member state must be chosen for all disputes.

However, in all of the above-mentioned cases, the agreed place of jurisdiction is not exclusive. Although the parties to the contract are bound by their jurisdiction clause, data subjects always have the option of bringing their claims before a court in the State where they are habitually resident.²⁰ Since Clause 18 c explicitly refers to the court in a member state, but the data subjects are usually from Switzerland, it must be specified in an annex that the Swiss courts are an alternative place of jurisdiction for data subjects habitually resident in Switzerland.

4.3.5 Adjustments or additions relating to references to the GDPR

The new SCCs refer to the GDPR in various places. However, in the case of data transfers abroad that are subject to the FADP, the relevant rights and obligations must be assessed in accordance with the FADP, and so the FDPIC must also apply the FADP in his supervisory assessment. Therefore, references to the GDPR in this context must be understood as references to the FADP. In order to avoid misunderstandings in the interpretation and application of contracts, this should be specified in an annex.

In the case to which both the FADP and the GDPR apply, the parties have to consider the following: if the parties choose Option 1 and consequently make two separate arrangements for data transfers under the FADP and the GDPR, the contractual provisions must be interpreted and applied according to the legal basis governing the data transfer in question. This must be stated in the contract. Accordingly, an annex must be added to contracts pursuant to Option 1 in which it is specified that the references to the GDPR are to be understood as references to the FADP, insofar as the data transfers are subject to the FADP. If, on the other hand, the parties choose Option 2, all data processing operations will be subject to the GDPR standard, so such clarifications are not necessary.

4.3.6 Additional clause required before the revFADP enters into force

Under European law, the new SCCs only protect natural persons. The current version of the FADP, however, also protects data pertaining to legal entities. In order to achieve the adequate protection of personal data abroad required under Article 6 FADP, the SCCs must be supplemented with an annex stating that data pertaining to legal entities are also protected by the contract. With the entry into force of the revised FADP, legal entities will no longer be protected, as the revised law will only apply to data pertaining to natural persons. From that date, therefore, the addition in this respect is no longer necessary.

¹⁹ Clause 2 of the new SCCs.

²⁰ Clause 18c of the new SCCs.