Introduction to the European Commission's New Standard Contractual Clauses for International Data Transfers

Background

The General Data Protection Regulation ("**GDPR**") regulates transfer of personal data from the European Union ("**EU**")/European Economic Area ("**EEA**") to non-EU regions or international organisations[1]. Such transfer is permissible if the European Commission determines that the receiving regions or international organisations offer an adequate level of data protection (commonly known as the "**EU adequacy decisions**")[2] or if the transfer is subject to appropriate safeguards (with enforceable data subjects' rights and effective legal remedies available for data subjects)[3]. In the absence of an EU adequacy decision[4], one of the most common mechanisms or safeguards that entities may rely upon for cross-border data transfers is the Standard Contractual Clauses ("**SCCs**"). The SCCs are standardised model contract clauses that have been "pre-approved" by the European Commission.

The New SCCs and Their Implications for Hong Kong Entities

On 4 June 2021, the European Commission adopted a new set of SCCs for the transfer of personal data from the EU/EEA to non-EU regions ("**New SCCs**")[5]. The New SCCs will replace and repeal the SCCs adopted by the European Commission in 2001 (and

[1] Chapter V of the GDPR.
[2] Article 45 of the GDPR.
[3] Article 46 of the GDPR.
[4] The European Commission has so far recognised Andorra, Argentina, Canada (commercial organisations), Faroe Islands, Guernsey, Israel, Isle of Man, Japan, Jersey, New Zealand, Switzerland, and Uruguay as providing adequate protection. On 16 June 2021, the European Commission launched the procedure for the adoption of an adequacy decision for transfers of personal data to South Korea under the GDPR. On 28 June 2021, the European Commission adopted two adequacy decisions for transfers of personal data to the United Kingdom under the GDPR and the Law Enforcement Directive respectively.
[5] On the same day, the European Commission also published its final Implementation Decision adopting a new set of SCCs for the use between controllers and processors in the EU/EEA under Article 28 of the GDPR.

subsequently amended in 2004)[6] and 2010[7] respectively under the then Data Protection Directive 95/46/EC ("**Old SCCs**").

The New SCCs will be relevant to a local entity in Hong Kong if the obligations under the GDPR apply to it as an exporting party on an extra-territorial basis. For instance, the requirements of the GDPR apply even though a Hong Kong entity does not have an establishment in the EU/EEA so long as its data processing activities are related to the offering of goods or services to, or the monitoring of the behaviour of individuals in the EU/EEA. For Hong Kong entities which are not subject to the GDPR but import EU/EEA personal data, it is worth noting that by entering into a data transfer agreement consisting of the New SCCs, the data importer may be required to submit itself to the jurisdiction of and cooperate with the competent supervisory authority in any procedures aimed at ensuring compliance with the New SCCs (Clause 13(b)).

Local entities are encouraged to consider the Guideline 3/2018 on the territorial scope of the GDPR (Article 3) adopted by the European Data Protection Board[8]. For any relevant issue as to the applicability of the GDPR, local entities should also consult their own legal advisers or the data protection authority(ies) concerned where appropriate.

Whilst the New SCCs have come into force on 27 June 2021, entities may still continue to execute contracts using the Old SCCs for a further 3 months (i.e. until 27 September 2021). A transitional period of 18 months (i.e. until 27 December 2022) is also provided for entities to replace all contracts with the New SCCs.

While the Old SCCs only cater for the cross-border data transfers involving situations of Controller-to-Controller (C2C) and Controller-to-Processor (C2P) transfers, the New

[6] On 27 December 2004, the European Commission amended the SCCs previously adopted in 2001 for the transfer of personal data to controllers in non-EU regions.

[7] The European Commission adopted the SCCs for the transfer of personal data to processors established in non-EU regions on 5 February 2010.

[8] The Guideline 3/2018 on the territorial scope of the GDPR (Article 3) adopted by the European Data Protection Board is available at https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_3_2018_territorial_scope_after_public_consultation_en_1.pdf.

SCCs cover further types of data transfers, including data transfers from (i) Controller-to-Controller (C2C), (ii) Controller-to-Processor (C2P), (iii) Processor-to-(Sub-) Processor (P2P), and (iv) Processor-to-Controller (P2C). The New SCCs can be said as having incorporated the applicable clauses for each type of transfer with the corresponding requirements under the GDPR into a single set of ready-made template document, allowing entities to adopt the appropriate clauses under different modules. In particular, the relevant requirements under the GDPR in terms of data protection safeguards to be adopted by the data exporters and data importers are stated in Clause 8 of all the four modules. Please refer to Question 13 of our set of Frequently Asked Questions & Answers on "*Understanding the European Commission's New Standard Contractual Clauses for Transfer of Personal Data from EU to Non-EU Regions*" for details in this regard.

Parties may include the New SCCs in a wider contract and/or add other clauses or additional safeguards therein, provided that the New SCCs are not contradicted, or the fundamental rights or freedoms of data subjects (being the requirements under the GDPR) are not prejudiced. The New SCCs are also without prejudice to the obligations of the data exporters and rights of the data subjects under the GDPR.

One of the notable improvements in the New SCCs is that, unlike the Old SCCs which could only be used by controllers established within EU/EEA, the New SCCs may also be relied upon by the data exporters which are not established in the EU/EEA, so long as their data processing activities fall under Article 3(2) of the GDPR[9]. Besides, the New SCCs contemplated the possibility under which new parties have to be engaged in the processing activities from time to time. New parties may be added into a data

[9] Article 3(2) of the GDPR sets out the conditions under which the GDPR applies to the processing activities of a data controller/processor not established in the EU. It stipulates that:
"*This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to:*

(a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or

(b) the monitoring of their behaviour as far as their behaviour takes place within the Union."

transfer agreement over time through an optional "docking clause"[10] of the New SCCs. This will be useful, for example, in cases of intra-group data transfers where new group companies may be incorporated or acquired over time.

The Schrems II Judgment

The New SCCs were formulated to replace the Old SCCs, taking into account the adoption of the GDPR and the ruling of the Court of Justice of the European Union ("**CJEU**") in *Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems*, Case C-311/18 (commonly known as the "***Schrems II* Judgment**"). On 16 July 2020, the CJEU upheld the validity of SCCs for the transfer of personal data outside the EU/EEA while invalidating the adequacy decision for the EU-US Privacy Shield (Decision 2016/1250) (which previously served as a key mechanism for data transfers from the EU to the United States). The CJEU considered that whilst the Old SCCs (formulated in the pre-GDPR era under the then Data Protection Directive 95/46/EC) remained in principle a valid transfer mechanism under Article 46 of the GDPR, the underlying transfer must be assessed on a "case-by-case" basis in ensuring that the level of protection guaranteed by GDPR would not be undermined.

The New SCCs incorporated the essence of the *Schrems II* Judgment and provide clarity and flexibility for entities in drawing up cross-border data transfer agreements and proceeding with data transfers outside the EU/EEA.

Transfer Impact Assessment and Access by Public Authorities

In the *Schrems II* Judgment, the CJEU considered that the Old SCCs, when viewed from the perspective of the GDPR concerning appropriate safeguards, enforceable rights, effective legal remedies and the EU Charter of Fundamental Rights in particular, still

[10] See Question 4 of our set of Frequently Asked Questions & Answers on "*Understanding the European Commission's New Standard Contractual Clauses for Transfer of Personal Data from EU to Non-EU Regions*".

offered an adequate level of protection to the individuals as required under the GDPR. The CJEU stressed that an assessment of the appropriate level of protection required looking into (i) the contractual clauses agreed between the data exporter and the recipient of the personal data in the non-EU region; and (ii) the possibility of an access by the public authorities of the non-EU region to the data transferred on grounds of national security, etc. (including the relevant aspects of the legal system of that non-EU region).

To this end, clauses formulated in response to the *Schrems II* Judgment, including, *inter alia*, Clause 14 - "*Local laws and practices affecting compliance with the Clauses*" and Clause 15 - "*Obligations of the data importer in case of access by public authorities*" were incorporated in the New SCCs. They set out the obligations of parties in conducting transfer impact assessments and encountering (intended) access to the subject personal data by public authorities in the non-EU regions respectively.

For instance, the New SCCs require both the data exporter and importer to warrant that they have no reason to believe that the relevant laws and practices in the destination region prevent the importer from fulfilling its obligations under the New SCCs (Clause 14(a)).

The New SCCs set out factors that the parties must consider in a transfer impact assessment ("**TIA**"), including the laws and practices of the non-EU region of destination; the special circumstances of the transfer, such as the length of processing chain, the number of actors involved and transmission channels used, intended onward transfers, the type of recipient, purpose of processing, the categories and format of the data transferred, the relevant economic sector in which the transfer occurs, and the storage location of the data transferred, etc. (Clause 14(b)). The New SCCs also require the parties to document the TIA and make it available to the competent supervisory authority on request (Clause 14(d)).

Further, the New SCCs provide that a data importer agrees to review the legality of a request for disclosure made by the public authority concerned in the destination of transfer, and challenge it if there are reasonable grounds to consider that such request is unlawful upon a careful assessment of the relevant factors (Clause 15(a)).

Further Details of the New SCCs

While data exporters and importers may continue to rely on the Old SCCs until 27 December 2022, companies and organisations in Hong Kong which engage in cross-border data transfers involving individuals in the EU/EEA, either as data importers receiving EU/EEA personal data or data exporters (even though without any establishments in the EU/EEA), are encouraged to pay heed to the New SCCs and plan ahead for the proper arrangements of data transfer. For more details of the New SCCs, please refer to our set of Frequently Asked Questions & Answers on "*Understanding the European Commission's New Standard Contractual Clauses for Transfer of Personal Data from EU to Non-EU Regions*".

It is of importance for the aforesaid Hong Kong companies and organisations to be aware of the structure of the New SCCs, in particular the parties' obligations thereunder.

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