

The New GDPR SCC Framework: What In-house Lawyers Must Do Today to Be Prepared

By Zoltan Horvath

When the European Commission published its final guidance on new standard contractual clauses, it pinpointed several dates for compliance. The guidance took effect on June 27, 2021, and the final day for updating all new contracts was September 27, 2021. In that time, businesses across the European Union have come into compliance with the new SCCs, which in turn have brought them into compliance with the General Data Protection Regulation.

The clauses are contractual addendums that apply to both current and future agreements which pertain to how businesses manage, interact with and transfer user personal information. Europe's status as a leader in data privacy means these clauses and the overall data privacy efforts are widely seen as best practices in the global race to protect data transfers.

On December 27, 2022, the EC's final deadline is hitting businesses, which is to transfer – also known as “repaper” – all old contracts to the new language and clauses laid out by the EC in their June 2021 decision. The December date marks the end of the 18-month grace period set forth by the EC to allow businesses to transition to the new clauses, after which older contracts may face penalties.



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EU General Data Protection Regulation

With the deadline fast approaching, corporate legal departments overseeing contracts for their organizations must act now to be prepared to be compliant with the EU's GDPR for the December 27 deadline.

This article explores the clauses that have been updated for the GDPR and what legal departments should be doing right now as this critical deadline nears.

Supplementary data protection

Through the transfer impact assessments that legal teams will process under repapering, many will find that certain types of data transfers require

additional security measures under EU provisions or private agreements beyond what the new SCCs have laid out. While it is tempting to implement standardized SCC language across the board, it is imperative that attorneys dive deeper to understand what will truly meet the needs of client transfers.

The new clauses allow for measures that go beyond what qualifies under the new provisions, and if preferred by either party to the repapering agreement, this means that legal teams can go beyond the measures set forth in the GDPR and could include additional protections such as encryption in new agreements.

Any supplemental transfer guidance must be done under the purview of the new SCCs, however. The guidance included in contracts must also not be at odds with the GDPR, and in the case of legal or regulatory conflict, the new guidance will always take precedence over supplemental guidance added by legal teams.

In June 2021, the European Data Protection Board put forth guidance for legal teams seeking to supplement the new data protection measures while maintaining compliance with the GDPR.

The docking clause

Clause 7 of the SCC amendments to the GDPR includes the so-called “docking clause,” of note to legal teams because it allows new parties to be added to standing agreements during and after the repapering process. This is advantageous to companies seeking to write in new partners to an agreement or that frequently acquire entities or other businesses as part of their business model.

The guidance deems that:

An entity that is not a Party to these Clauses may, with the agreement of the Parties, accede to these

Clauses at any time, either as a data exporter or as a data importer, by completing the Appendix and signing Annex I.A.

Once it has completed the Appendix and signed Annex I.A, the acceding entity shall become a Party to these Clauses and have the rights and obligations of a data exporter or data importer in accordance with its designation in Annex I.A.

The guidance should be welcome news to legal teams that, before the SCC revisions, lacked a standardized process for integrating new parties into standing agreements. However, given the simplicity of the clause, legal teams should consider adding supplementary guidance to the new SCC that details specifically how and when new entities can join and that leaves little ambiguity for the process – something valuable, especially for large organizations that routinely add new entities.

Understand and apply the different structures laid out in the SCC

It is imperative that legal teams understand the different structures of contract laid out by the SCC to comply with the GDPR. The EC differentiated each based on the relationships between the parties as either a controller, the party that owns the data and how it is transferred, or a processor, the entity that provides the service of transferring the data. The result is four different modular approaches to transfers:

- Controller to controller
- Controller to processor
- Processor to processor
- Processor to controller

In-house legal teams should be particularly mindful of this dynamic within the regulations

because there was no previous standardization of processor-originating transfers and also no stipulation for what happens when data is imported from outside of the EU.

Begin repapering now and get ahead of the December 27 deadline

Of course, repapering is a race for anyone involved, but legal teams working on behalf of data importers should specifically be ahead of the game. The new regulations mandate that importers review each entity with which they share data to ensure compliance with the SCCs and that they have signed onto them. Additionally, per the new regulations, legal teams need to ensure that their company is only transferring data to entities that have agreed to be bound by the new SCCs or to which a derogation applies.

Review your options

Though the GDPR requires a transition to new SCCs, legal teams need to know that a work-around alternative exists in simply amending current contracts instead of transitioning them completely. By including the new clauses in compliance with the GDPR and doing so while identifying whether parties are processors, controllers or otherwise, a GDPR-compliant contract could simply note that all parties to the agreement consent to abiding by the new SCCs in their entirety, instead of repapering completely and adding each clause individually to every contract. In doing so, however, legal teams must be careful and deliberate in remembering to include jurisdiction and docking clauses, as required by the changes.

The alternative is one that may expedite the repapering process for legal teams working hard against the December 27 deadline and looking for another option to simplify the repapering process.

Pre-December Checklist

Keeping in mind all of the above, before December 27 in-house legal teams should already be in the process of sweeping for all corporate contracts that need to be repapered and revised. They should also discern the relationships in each contract (i.e., processor to controller, controller to controller, etc.) to determine the applicable clauses. Finally, they must act as quickly as possible to engage each entity in the contractual ecosystem, including processors, subprocessors or any entity that touches the data, to ensure that they too consent to compliance under the new SCCs and GDPR.

Zoltan Horvath is a Client Services Advisor with QuisLex. An accomplished leader with more than 30 years of experience in the global legal services industry, Mr. Horvath specializes in technology consulting for corporate legal departments and AmLaw 200 law firms.



Mark Wilcox
Mark.Wilcox@quislex.com