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Federal Data Protection and Information Commissioner (FDPIC)

The transfer of personal data to a country without an adequate level of data protection based on standard data protection clauses in accordance with Article 16 paragraph 2 letter d FADP

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1. Introductory note

The disclosure of personal data abroad is regulated in Articles 16 and 17 of the Federal Act on Data Protection of 25 September 2020 (FADP, SR 235.1).

In principle, personal data may be disclosed abroad if the Federal Council has decided that the legislation of the State concerned or the international body guarantees an adequate level of protection. Annex 1 of the Data Protection Ordinance (DPO, SR 235.11) lists the relevant countries. All the countries in the European Union (EU) and the European Economic Area (EEA) are on the list.

From 15 September 2024, the United States will also be included on this list, but only for personal data processed by companies that are certified in accordance with the principles of the data protection framework between Switzerland and the USA ('Data Privacy Framework'). The list of certified companies can be found on the Data Privacy Framework website (https://www.dataprivacyframework.gov/list).

In the absence of a decision by the Federal Council in accordance with Article 16 paragraph 1, personal data may still be disclosed abroad if appropriate data protection is guaranteed; one method of doing this is by means of standard data protection clauses that the FDPIC has approved, issued or recognised beforehand (Art. 16 para. 2 let. d FADP). This document deals with standard data protection clauses recognised by the FDPIC in accordance with Article 16 paragraph 2 letter d FADP.

When the new Data Protection Act came into force on 1 September 2023, the obligation to report the use of recognised standard data protection clauses ceased to apply. Standard data protection clauses recognised by the FDPIC may be used subject to the requirements of Article 10 GDPR

2. Standard Contractual Clauses (SCC) in accordance with the Annex to Implementing Decision 2021/914/EU

The European Commission replaced its previous standard contractual clauses with new standard contractual clauses with effect from 27 September 2021; the new clauses can be found in the Annex to Commission Implementing Decision 2021/914/EU of 4 June 2021. [1]

The FDPIC recognises these SCCs, which refer to the EU's General Data Protection Regulation (GDPR), including all modules, with the reservation that they will have to 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:

2.1 Selecting the relevant scenario

The EU's standard contractual clauses are modular, allowing parties to tailor the clauses to their specific data transfer procedure.[2] 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

[1] Implementing Decision (EU) 2021/914 of 4 June 2021 is available at: http://data.europa.eu/eli/dec_impl/2021/914/oj.

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

2.2 Determining the law governing the data transfer

The transfer of personal data from Switzerland to other countries is subject to the rules in Article 16 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.[3] 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,[4] so 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 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 the 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.[5] 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 protection[6] and data subjects are consequently not disadvantaged as a result. However, Option 2 also requires certain adjustments, as shown below.

2.3 Adapting the SCCs to the specific circumstances

2.3.1 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 16 paragraph 2 letter a FADP.

[3] See the Guidelines 3/2018 on the territorial scope of the GDPR (Article 3).

[4] Art. 3 GDPR.

[5] Clause 2 of the new SCCs: Unalterability of clauses.

[6] All EU and EEA states and all states that apply the GDPR are considered appropriate (see Annex 1 to the GDPR).

	Case 1: Data transmission is exclusively subject to the FADP[7]	Case 2: The data transfer is subject to both the FADP and the GDPR.[8]	
		Option 1: The parties provide for two 'separate' arrangements for data transfers under the FADP and under the GDPR	Option 2: Parteien übernehmen den Standard der DSGVO für alle Datenübermittlungen
Competent supervisory authority in Annex I.C under Clause 13	Mandatory FDPIC	Parallel supervision: FDPIC, where the data transfer is governed by the FADP; EU authority where 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 claims pursuant to the GDPR (free choice for Module 4)	Applicable law for contractual claims under Clause 17
Place of jurisdiction for actions between the parties pursuant to Clause 18 b[9]	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)	Place of jurisdiction for actions between the parties pursuant to Clause 18 b[10]
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.**	**Adjustments or additions regarding references to the GDPR**

2.3.2 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 express 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, there are two parallel supervisory authorities. Where 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 under Option 2.

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7 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.

8 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.

9 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.

10 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.

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 consider contractual claims or provisions of the GDPR that go beyond Swiss legislation in the context of his interpretations and overall assessments.

2.3.3 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 express 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.[11] The chosen law must allow and grant this third party benefit and thus allow these rights to be enforced in practice.

Where the GDPR applies, however, the law of a member state must be chosen and this must also allow for third parties to benefit.[12] 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.

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

The parties may agree on any place of jurisdiction for disputes arising from the contract where relations 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.[13] 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.[14] Since Clause 18c expressly 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.

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[11] Clause 3 of the SCCs:

[12] Clause 2 of the SCCs:

[13] Clause 2 of the SCCs:

[14] Clause 18c of the SCCs:

2.3.5 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 provisions 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.

3. Model Contractual Clauses for the Transfer of Personal Data (MCC) in accordance with Art. 14 para. 3 let. b of the modernised Council of Europe Convention 108 (CETS 223) (known as C108+)

At its plenary meeting on June 2023, the Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108) adopted module 1 of the Model Contractual Clauses for the transfer of personal data in accordance with Article 14 paragraph 3 letter b of the modernised Council of Europe Convention 108 (CETS 223) (known as C108+). Module 1 relates to data transfers from a controller in a state party to another controller in a non-state party. Module 2 relates to data transfers from a controller in a state party to a processor in a non-state party and was adopted at the plenary meeting on November 2023. The third and final module for data transfers from one processor to another processor was adopted at the plenary meeting on June 2024.

The FDPIC recognises the aforementioned Model Contractual Clauses adopted by the Consultative Committee on C108, which have been compiled in a document.