NKF Client News

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New Standard Contractual Clauses for International Data Transfers

The EU Commission has adapted the standard contractual clauses used for international data transfers.

The background to this is the Schrems II decision of the European Court of Justice (CJEU) of July 2020. According to this decision, the so-called "Privacy Shield"-agreement was held to be insufficient to regulate the exchange of data between the EU and the USA in a form that is sufficient under the GDPR. The CJEU established additional requirements for cross-border data transfers. In its opinion of September 8, 2020, the Swiss Federal Data Protection and Information Commissioner (FDPIC) also concluded that the "Privacy Shield"-regime USA / Switzerland, despite granting special protection rights to data subjects in Switzerland, did not meet the requirements of adequate data protection under the Federal Data Protection Act (FADP) (see here).

Further information can be found here: European Commission Press Release

1. One set of Standard Contractual Clauses with four Modules

There is now only one set of standard contractual clauses, which can be adapted depending on the characteristics of the respective data transfer by using certain and omitting other text modules. There are the following four modules:

— Module 1: Transfer between controllers
— Module 2: Transfer from controller to processor
— Module 3: Transfer from processor to processor
— Module 4: Transfer from processor to controller.

Further information can be found here.

2. Mandatory prior Assessment of Data Transfers

The new standard contractual clauses require a mandatory assessment of the data transfer to be carried out by the parties involved. Both parties must affirm, with regard to the planned data transfer, that they have no doubts about compliance with European data protection standards in the country of the data importer. The assessment, which is equivalent to a kind of data protection impact assessment, must be documented and submitted to the supervisory authorities upon request.

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3.   Deadlines for Implementation

The current standard contractual clauses may only be concluded for three months from the date of the (pending) official publication of the revised standard contractual clauses. This grace period serves the purpose of ensuring that ongoing or already concluded contract negotiations based on the current standard contractual clauses can go ahead. However, all existing standard contractual clauses must be converted to the new regulations by the end of a further 15 months at the latest.

4.   Concrete Measures for Swiss Companies

Although no opinion has yet been issued by the FDPIC, it is expected that the FDPIC will recognise that the new standard contractual clauses meet the requirements of adequate data protection under the FADP for data disclosures from Switzerland to third countries.

Swiss companies should therefore convert all current data transfers to third countries based on the currently applicable standard contractual clauses to the new clauses within the next 18 months. The following procedure is advisable:

— Conduct data mapping to determine in which cases the new standard contractual clauses are to be concluded;
— Prepare the standard contractual clauses with the applicable modules for the different cases;
— Conduct assessments for the data transfers;
— Document the results of the data transfer assessment and the measures taken.

You can find more information here.

If you have further questions or comments on this topic, please reach out to your regular NKF contact. Your NKF data protection team will be happy to answer your questions.

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