



Revised SCCs, Third-party beneficiary rights and the need to amend Cyprus' Data Protection Law

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GDPR, an acronym we all know so well. Since 25th May 2018 when it came into force, the General Data Protection Regulation (GDPR) has been trying to protect people and the processing of their personal data across the EU. Cyprus follows and complies with the GDPR through the effective implementation of the Law Providing for the Protection of Natural Persons with regard to the Processing of Personal Data and for the Free Movement of such Data of 2018 (Law 125(I)/2018).

So, what happens when there is a transfer of data to a non-EU country? The EU Commission has the power to determine whether a country outside the EU offers an adequate level of data protection through 'adequacy decisions'. On the basis of article 45(2) of the GDPR, the rules for assessing adequacy, include: the need to ensure that the non-EU country offers essentially equivalent levels of protection to that within the EU; and provide data subjects with effective and enforceable rights and means of redress. If the European Commission 'adequacy decision' has not been made, a controller or processor may transfer personal data to a non-EU country or an international organisation provided that, a) they have provided appropriate safeguards and b) enforceable data subject rights and effective legal remedies for data subjects are available.

Time for another acronym – SCC which stands for Standard Contractual Clauses, are considered an appropriate safeguard on which transfers to non-EU countries or global organisations may be justified. SCCs are used by the data controller or data processor for this purpose. A legal document between the contractual parties ensuring the necessary safeguards in order to comply with the GDPR obligations must exist. SCCs are binding on both the sender and the receiver of personal data.

On June 4th 2021, the European Commission issued new SCCs. Clause 17 states that the parties can decide for themselves which EU Member State law will govern their SCCs, provided that the Member State's laws allow for third-party beneficiary rights. Where a Member State's laws do not allow for third-party beneficiary rights, then the SCCs would have to be governed by the law of another Member State that recognises third party beneficiary rights. The modernised SCCs replace the previous SCCs and from September 27th 2021, it is no longer possible to conclude contracts incorporating the previous sets of SCCs.

Most EU member states have a civil legal system that extends these rights. However, some of the EU Member States, such as Cyprus, Malta and Ireland, are common law jurisdictions that rely on case law to determine the scope of various rights and obligations. Common law jurisdictions have the so-called doctrine of privity of contract, which limits rights and liabilities arising from a contract to the contracting parties. Under this doctrine, only the parties to a contract can enforce it.

However, Ireland amended its legislation in order to cater for third party beneficiary rights shortly before the introduction of the new SCCs. Unlike Ireland, Cyprus does not allow for third-party beneficiary rights and has not taken any steps towards addressing this issue, therefore we cannot use Cyprus Law as governing law in the SCCs. Because of this, several



practical issues have arisen since the SCCs will be subject to another governing law, almost certainly conflicting with Cyprus law.

Companies must consider that the use of the SCCs for personal data transfers to non-EU country recipients forms part of a wider picture now. It must be understood that they should be extra cautious when personal data is transferred outside the EU and the safeguards that are used. Moreover, common law jurisdictions across the EU, such as Cyprus and Malta, face important difficulties with the amendment of the SCCs because of the doctrine of privity of contract. The Irish public authorities managed to solve the problem; however, the remaining common law jurisdictions have to move quickly to solve the hidden difficulties that might arise in the near future.

The Data Protection Department at George Z. Georgiou & Associates LLC identified this legally inadequate situation while assessing international transfers. It suggests that this situation is appropriate for legislative intervention similar in scope to the abovementioned Irish amendment. It seems that the issue could be addressed through an amendment of the Cyprus Data Protection Law (Law 125(I)2018) so that Cyprus is placed in the same a position as other EU Member States in recognising third party rights, thus allowing organisations to choose Cyprus law to govern their SCCs. What is more, data subjects will also be able to enforce the benefits they enjoy under the new international transfer SCCs.

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