# Bird & Bird & New SCCs and Art 28 GDPR terms: where do we start?

Thursday 10 June 2021

1

# What we'll be covering...

- New EC transfer SCCs – Fabian Niemann, Partner, Germany

- New EC A28 SCCs – James Mullock, Partner, UK

- Introduction to our EU SCC Generator – Gabriel Voisin, Partner, UK

- Questions from the audience

Moderated by - Izabela Kowalczuk-Pakula, Partner, Poland

**Slide 2**
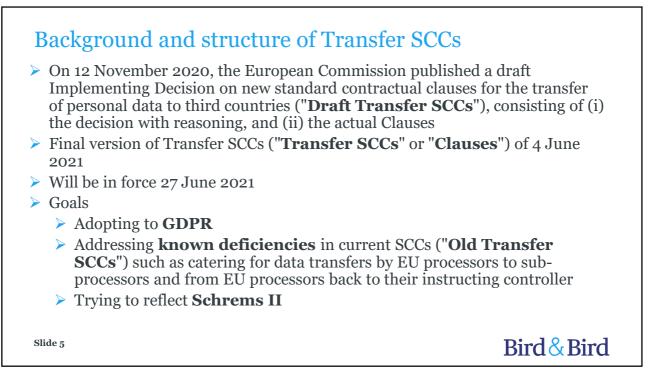© Copyright text 2020

Bird & Bird

2

# Bird & Bird & New SCCs

Final Implementing Decision on new EU standard contractual clauses for the transfer of personal data to third countries ("Transfer SCCs") of June 4, 2021
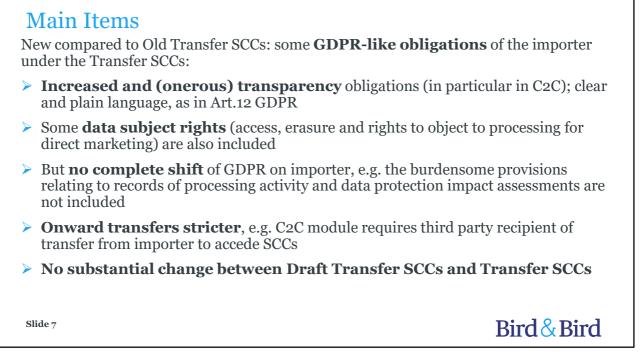
3

## Agenda

1. Background

2. High level summary of the existing Nov. 12, 2020 draft

3. Main changes compared to the draft

4. Impact on complying with Schrems II

5. Summary

**Slide 4**
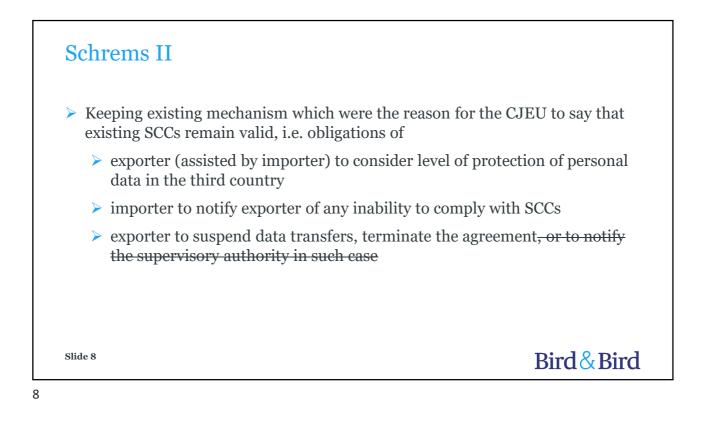© Copyright text 2020

Bird & Bird

4

## Background and structure of Transfer SCCs

➢ On 12 November 2020, the European Commission published a draft Implementing Decision on new standard contractual clauses for the transfer of personal data to third countries ("**Draft Transfer SCCs**"), consisting of (i) the decision with reasoning, and (ii) the actual Clauses

➢ Final version of Transfer SCCs ("**Transfer SCCs**" or "**Clauses**") of 4 June 2021

➢ Will be in force 27 June 2021

➢ Goals

  ➢ Adopting to **GDPR**

  ➢ Addressing **known deficiencies** in current SCCs ("**Old Transfer SCCs**") such as catering for data transfers by EU processors to sub-processors and from EU processors back to their instructing controller

  ➢ Trying to reflect **Schrems II**

**Slide 5**

**Bird & Bird**

5

## Summary of Draft Transfer SCCs

| Good | Bad | Ugly |
|------|-----|------|
| Modular approach: C2C, P2C, P2SP and P2C | Lack of clarity re supplemental rules | Long Arm (onward transfers) |
| Covering multiple scenarios and parties | Lack of clarity re liability | GDPR-like obligations extended |
| Extension of scope to P2SP and P2C | Lack of clarity re US transfers (though this is rather caused by CJEU) | Heavy Schrems II related obligations (caused by CJEU) |
| Trying to address Schrems II somehow pragmatic | Heavy documentation requirements | Short (1 year) grace period |

**Bird & Bird**

6

## Main Items

New compared to Old Transfer SCCs: some **GDPR-like obligations** of the importer under the Transfer SCCs:

➢ **Increased and (onerous) transparency** obligations (in particular in C2C); clear and plain language, as in Art.12 GDPR

➢ Some **data subject rights** (access, erasure and rights to object to processing for direct marketing) are also included

➢ But **no complete shift** of GDPR on importer, e.g. the burdensome provisions relating to records of processing activity and data protection impact assessments are not included

➢ **Onward transfers stricter**, e.g. C2C module requires third party recipient of transfer from importer to accede SCCs

➢ **No substantial change between Draft Transfer SCCs and Transfer SCCs**

**Slide 7**

**Bird & Bird**

7

## Schrems II

➢ Keeping existing mechanism which were the reason for the CJEU to say that existing SCCs remain valid, i.e. obligations of

➢ exporter (assisted by importer) to consider level of protection of personal data in the third country

➢ importer to notify exporter of any inability to comply with SCCs

➢ exporter to suspend data transfers, terminate the agreement, ~~or to notify the supervisory authority in such case~~

**Slide 8**

**Bird & Bird**

8

## Schrems II

➢ Additional safeguards:

  ➢ Obligation to **challenge** government request if there are **reasonable** grounds to do so

  ➢ Exporter to undertake & document a **transfer impact assessment** (to be made available to the competent authority on request); Transfer SCCs set out factors to be considered

  ➢ **In addition to considering the law and practice in the third country**, the draft Transfer SCCs also **helpfully reference** the **specific circumstances** of the transfer, including the length of the processing chain, the number of actors involved and the transmission channels used; intended onward transfers; the type of recipient; the purpose of processing; the categories and format of the transferred personal data; the economic sector in which the transfer occurs; the storage location of the data transferred

  ➢ ~~(does this allow some flexibility?)~~ It allows **some flexibility and discretion in particular by referring to practical experience (Fn 12 to Clause 14),** however based on objective factors, such as importer/sector experience with government requests

  ➢ Way out of the Schrems II dilema? **Maybe …**

  ➢ Updated Guidance of **EDPD expected (mid-June?)**

*Slide 9*

**Bird & Bird**

9

## Supplemental terms

➢ There is often uncertainty as to what extent parties can introduce supplemental terms without violating the prohibition on contradicting provisions in the SCCs.

➢ The Commission has tried to make clear that additional clauses can be used, so long as they do not contradict the Transfer SCCs or undermine protections for individuals. However, **what does this actually say?**

➢ It would have been helpful if the Commission would have done more to **reduce the uncertainty and expressly allow flexibility**
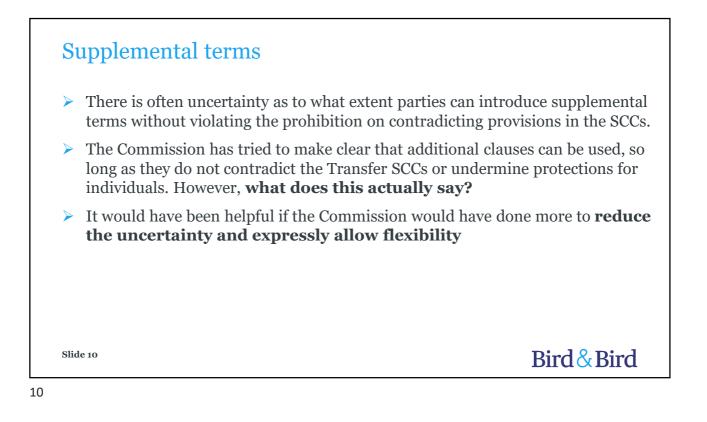
*Slide 10*

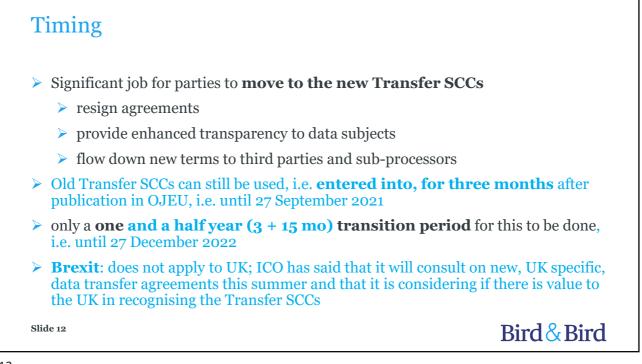**Bird & Bird**

10

## Liability

➤ Other than eg the 2001 C2C and the 2010 C2P (and like the 2004 C2C) SCCs, the Transfer SCCs include express **rules on liability between Exporter and Importer**

   ➤ For ~~material and~~ **non material** breaches of the Transfer SCCs

   ~~➤ Liability (only) limited to **actual damage**; no punitive damages~~

   ➤ Indemnification for damages caused by responsibility of the other (eg data subject claims)

   ➤ No cap, no exclusion of indirect/consequential damages

➤ **Deviations possible?**

   ➤ Decision says "*standard contractual clauses should provide for rules on liability between the parties and with respect to data subjects, as well as rules on indemnification between the parties*". **Any rules or the suggested rules?**

   ➤ Clause 2 (a) says "*This does not prevent the Parties from including the standard contractual clauses laid down in these Clauses in a wider contract and/or to add other clauses or additional safeguards, provided that they do not contradict, directly or indirectly, these Clauses or prejudice the fundamental rights or freedoms of data subjects.*" **What is a contradiction?**
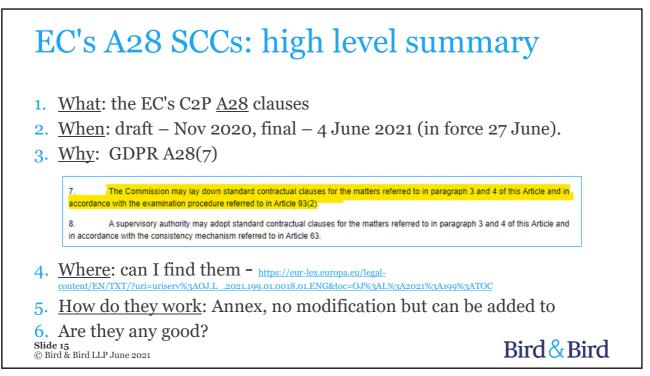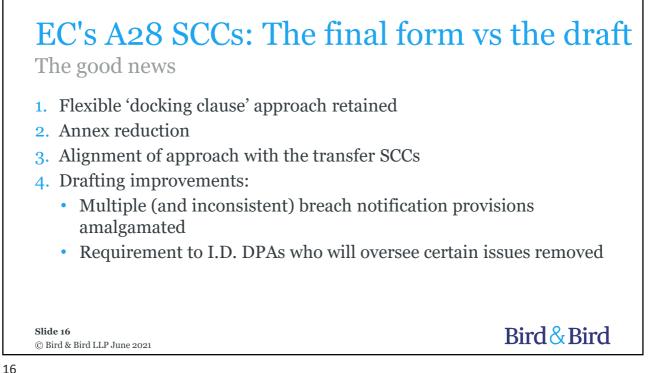
**Slide 11**

Bird & Bird

11

## Timing

➤ Significant job for parties to **move to the new Transfer SCCs**

   ➤ resign agreements

   ➤ provide enhanced transparency to data subjects

   ➤ flow down new terms to third parties and sub-processors

➤ Old Transfer SCCs can still be used, i.e. **entered into, for three months** after publication in OJEU, i.e. until 27 September 2021

➤ only a **one and a half year (3 + 15 mo) transition period** for this to be done, i.e. until 27 December 2022

➤ **Brexit**: does not apply to UK; ICO has said that it will consult on new, UK specific, data transfer agreements this summer and that it is considering if there is value to the UK in recognising the Transfer SCCs

**Slide 12**

Bird & Bird

12

## Summary of Final Transfer SCCs

| Good | Bad | Ugly |
|------|-----|------|
| Modular approach | Lack of clarity re supplemental rules | Long Arm (onward transfers) |
| Covering multiple scenarios and parties | Lack of clarity re liability | GDPR-like obligations extended |
| Extension of scope to P2SP and P2C | Lack of clarity re US transfers (though this is rather caused by CJEU) -> improvement | Heavy Schrems II related obligations (caused by CJEU) |
| Trying to address Schrems II somehow pragmatic -> improved | Heavy documentation requirements | Short (1 year) grace period -> improvement: 3+15 months |

Bird & Bird

13

Bird & Bird & New EC A28 SCCs

James Mullock, Partner

14

# EC's A28 SCCs: high level summary

1. <u>What</u>: the EC's C2P <u>A28</u> clauses
2. <u>When</u>: draft – Nov 2020, final – 4 June 2021 (in force 27 June).
3. <u>Why</u>:  GDPR A28(7)

> 7.      The Commission may lay down standard contractual clauses for the matters referred to in paragraph 3 and 4 of this Article and in accordance with the examination procedure referred to in Article 93(2).
>
> 8.      A supervisory authority may adopt standard contractual clauses for the matters referred to in paragraph 3 and 4 of this Article and in accordance with the consistency mechanism referred to in Article 63.

4. <u>Where</u>: can I find them - https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2021.199.01.0018.01.ENG&toc=OJ%3AL%3A2021%3A199%3ATOC
5. <u>How do they work</u>: Annex, no modification but can be added to
6. Are they any good?

**Slide 15**
© Bird & Bird LLP June 2021

**Bird & Bird**

15

# EC's A28 SCCs: The final form vs the draft

The good news

1. Flexible 'docking clause' approach retained
2. Annex reduction
3. Alignment of approach with the transfer SCCs
4. Drafting improvements:
   • Multiple (and inconsistent) breach notification provisions amalgamated
   • Requirement to I.D. DPAs who will oversee certain issues removed

**Slide 16**
© Bird & Bird LLP June 2021

**Bird & Bird**

16

# EC's A28 SCCs: The final form vs the draft
The bad news

1. Data breach notification - clause 9
   - Delineation between data processed by controller & by processor is potentially confusing
2. Gold plating in some areas. E.g.
   - Contractual obligation to disclose materials (e.g. audits) to DPAs
3. Sub-processor provisions:
   - Lack of clarity if consent to use a sub-processor withheld
   - 3rd party rights clause to benefit controller if processor disappears
4. Annex III – level of TOMs unusually high
   - E.g. measures to protect data in transit

**Slide 17**
© Bird & Bird LLP June 2021

**Bird & Bird**

17

# Controller friendly / Processor unfriendly

| Issue | Clause |
|---|---|
| 1. Who covers the cost – the SCCs are silent re. a number of issues (e.g. return / deletion of data, assisting the controller). Requirement for controller to pay for 3rd party auditors deleted | 10(d) 8 7.6(d) |
| 2. Removal of 48 hr breach notification backstop included in the draft A28 SCCs published in November | 9.2 |
| 3. Processor to inform controller w/o delay if it becomes aware that data is inaccurate or outdated | 8(c)(3) |
| 4. Removal of reasonableness qualification on processor's obligation to promptly assist with controller inquiries re compliance with SCCs | 7.6(b) |

**Slide 18**
© Bird & Bird June 2021

**Bird & Bird**

18

# Processor friendly / Controller unfriendly

| Issue | Clause |
|---|---|
| 1. Addition of ability to rely on certifications in processor audit clause | 7.6(c) |
| 2. Data breach notification clause confusion –<br>Notification obligations differ where controller processes data. Assistance of processor in DPA notifications is conditional on breach being likely to result in a risk of harm to data subjects) | 9.2(a) |
| 3. Sub-processor flow down provisions – processors have been cut some slack (as compared to the November draft A28 SCCs)<br>e.g. obligation to flow down SCC obligations "in substance"<br>ability to redact sub-processor contracts before sharing with processor | 7.7(b)<br>7.7(c) |

**Slide 19**
© Bird & Bird June 2021

**Bird & Bird**

19