Scope of the new SCC - discussions about recital 7

Is it possible to transfer data to third countries without concluding SCC as long as the GDPR applies to processing by the recipient? A closer look at recital 7 of the new SCC decision

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Sentence 2 and 3 of recital 7 of the European Commissions' newly released SCC (Decision (EU) 2021/914) for the GDPR have raised one heavily debated and not so easy to answer question stipulating from the scope of applicability of the SCC referred to in recital 7. This question is the following: is it possible to transfer data to third countries without concluding SCC as long as the GDPR applies?

Introduction

Let's recall the exact wording of recital 7:
Sentence 1: "*A controller or processor may use the standard contractual clauses set out in the Annex to this Decision to provide appropriate safeguards within the meaning of Article 46(1) of Regulation (EU) 2016/679* ***for the transfer of personal data to a processor or controller established in a third country****, without prejudice to the interpretation of the notion of international transfer in Regulation (EU) 2016/679*." (Emphasis by us)

Sentence 2: *"The standard contractual clauses may be used for such transfers* ***only*** *to the extent that the processing by the* ***importer*** *does* ***not fall within the scope*** *of Regulation (EU) 2016/679."* (Emphasis by us)

Sentence 3: *"This* ***also includes the transfer*** *of personal data by a controller or processor* ***not established in the Union, to the extent*** *that the* ***processing is subject to Regulation (EU) 2016/679 (pursuant to Article 3(2) thereof)****, because it relates to the offering of goods or services to data subjects in the Union or the monitoring of their behaviour as far as it takes place within the Union."* (Emphasis by us)

It seems as if companies would often have to find solutions other than the SCC because the processing by the recipient in the third country falls in scope of the GDPR and recital 7 sentence 2 of the decision does not allow companies to use the SCC in such a situation.

We want to give insides on our thoughts to this question.

Historical context

Interestingly, sentence 2 of recital 7 was newly inserted in the final version of the Commission's decision and not part of the previous version. The draft version only consisted of sentence 1 and (now) 3, which made sense. Sentence 1 describes in general terms when SCCs should be used. For transfers to entities in third countries. Sentence 3 supplements this application scenario with transfers by entities established in the third country that are subject to the GDPR according to Art. 3 (2) GDPR. In other words, onward transfers to which the GDPR applies (extraterritorially).

The new sentence 2 included in the final version seems to be based on the proposal of the EDPB and the EDPS in Joint Opinion 2/2021. There, in a comment to Art. 1 (1) of the

Decision, the DPAs recommend that the Commission clarifies that these provisions are only intended to address the issue of the scope of the Draft Decision and the draft SCCs themselves, and not the scope of the notion of transfers. This recommendation is based on the understanding about the new SCCs that the "*Draft Decision does not cover: Transfers to a data importer not in the EEA but subject to the GDPR for a given processing under Article 3 (2) GDPR*" (p. 9). This finding of the DPAs is reflected in the new sentence 2 of recital 7.

If one proceeds with the EDPB/EDPS understanding, and that this is exactly what the Commission intended to reflect in the second sentence, this would likely mean the following: As long as a data transfer takes place that is subject to the GDPR and where subsequently the recipient of the data is also subject to the GDPR, the regulations under Art. 46 (2)(c) GDPR do not apply. Regardless of whether the data in this chain is also processed in a third country. Or, to speak figuratively: As long as personal data is used under the umbrella of the applicable GDPR, there is no need (!) to use SCC. Only upon the first transfer out of this umbrella of the GDPR. This first relevant transfer out of the GDPR protective umbrella can also be carried out by a processor to a sub-processor in a third country, for example.

However, based on this interpretation (which is of course not conclusive), many practically relevant questions arise: if the use of the SCC is excluded, does this mean that another instrument under Art. 46 (2) GDPR or e.g. Art 49 GDPR must or can be used? Or is there no relevant transfer to a third country in the sense of Chapter V GDPR at all?

The exclusion of only the SCC (Art. 46 (2)(c) GDPR) as an instrument to transfer personal data is probably supported by the last part of sentence 1 of recital 7. Because there it is stated that the regulations in the decision are without prejudice to the interpretation of the notion of international transfer in the GDPR.

First problem: the GDPR applicability according to Art. 3 (2) as a standard situation?
If the Commission really wants to exclude the applicability of the SCC in the case that the recipient of the data is subject to the GDPR according to Art. 3 (2) GDPR, one would probably have to acknowledge that this would rather be the regular case in practice. If, for example, a cloud service provider offers its services in the EU and in this context processes personal data for EU controllers who offer their services to EU data subjects, the GDPR is applicable.

The EDPB considers (Guidelines 3/2018, p. 21) that, where processing activities by a controller relates to the offering of goods or services or to the monitoring of individuals' behaviour in the Union ('targeting'), *any **processor instructed** to carry out that processing activity on behalf of the controller **will fall within the scope of the GDPR** by virtue of Art 3 (2) in respect of that processing*.

In addition, it would have to be asked what applies in situations where the importer is already subject to the GDPR under Art. 3 (1) GDPR. This is also often the case, for example if the service provider from the third country maintains an establishment in the EU for marketing and sales purposes. Often in this case, it can be assumed that processing by the service provider is done "*in the context of the activities of an establishment of a controller or a processor in the Union*".

Second problem: against the wording of Art. 44 GDPR?

Art. 44 sentence 1 GDPR's wording is the following "*Any transfer of personal data (…) shall take place **only** if, subject to the **other provisions of this Regulation**, the conditions laid down in this Chapter are complied with by the Controller and processor (…)*". Since Art. 44 sentence 1 GDPR also mentions "*other provisions of this Regulation*" it would not make sense if Chapter V GDPR would not apply as soon as the GDPR directly applies to the data processing of the recipient in the third country. Why would the legislator then use the word "other" provisions?

Additionally Art. 44 sentence 1 GDPR clearly says "*any transfer (…) to a third country*" and by that implies that the applicability of the GDPR to a processor or controller in the third country has no influence at all on the applicability of Chapter V GDPR. Therefore it is not convincing to assume that there is no transfer to a third country in the sense of Art. 44 sentence 1 GDPR when the GDPR applies to the data processing of the recipient.

Third problem: same level of protection?

One could also argue that Art. 44 sentence 2 GDPR could imply that as long as the GDPR applies directly to the data processing of the recipient in the third country, the conditions of Art. 44 sentence 2 GDPR (same level of protection as under the GDPR) would already be fulfilled. However, this argument leaves aside that for the Member States, where controllers/processors are based in the EU / EEA, Art. 23 GDPR applies and thereby it is legally guaranteed that restrictions to rights under Art. 12-22 GDPR and the principles under Art. 5 GDPR respect the essence of rights and freedoms and do not go beyond what is necessary and proportionate in a democratic society to safeguard interests named in Art. 23 (1) (a)-(j) GDPR. If there are conflicts between the laws of the country of the recipient and the recipient's obligations under the GDPR, it is no longer ensured that Art. 44 sentence 2 GDPR (same level of protection) is complied with.

As explained before, it does not seem consistent to assume that Art. 44 GDPR as part of Chapter V GDPR would not apply at all. In our humble opinion, it is therefore, if at all, only possible to transfer data to third countries without concluding SCC when the GDPR applies if there are no conflicts in the laws of the country of the recipient (that the recipient is subject to) with obligations of controller/processors of the GDPR and with Art. 23 GDPR. As Chapter V GDPR would still apply in those cases, the problem is that the transfer would then have to be based on Art. 44 sentence 2 GDPR if the derogations of Art. 49 GDPR don't apply and it is highly doubtable if relying on the fulfillment of the goal mentioned in Art. 46 sentence 2 GDPR only would be a possible solution. Additionally, there may often be conflicts between provisions of third country laws and obligations under the GDPR and Art. 23 GDPR.

One could think that supplementary measures intended to solve problems connected to such conflicts could be concluded without the SCC being signed. The problem with this argument is that Art. 46 (2) (a)-(f) GDPR name exhaustively (!) the appropriate safeguards referred to in Art. 46 (1) GDPR that do not require specific authorization of the supervisory authority. In other words, if concluding supplementary measures alone would be enough to ensure compliance with Chapter V GDPR, Art. 46 (2) GDPR would not be the place of the law that could offer grounds for such a way of legitimizing the transfer. It would only be possible to use supplementary measures, concluded independently from SCC, as a way to legitimize the transfer by going for the way more complex Art. 46 (3) GDPR as a solution. From our point of view, it would not be sufficient to only conclude supplementary measures as "technical and organizational measures" in the sense of Art. 32 GDPR, because Chapter V GDPR would still

apply and there would still have to be a transfer mechanism applicable as long as Chapter V GDPR applies.

Concluding remarks

Recital 7 has caused headaches for many data protection and privacy professionals all over the world. In this context, it will be interesting to see if and when the Commission will publish FAQ on the SCC as Christopher Schmidt indicated in a tweet. Right now it is rather hard to make sense of recital 7 and what the Commission's intention might have been. Currently, however, one should probably assume that the SCC cannot be used if the importer itself is already subject to the GDPR. Whether this understanding is correct is, in our opinion, at least debatable.