2 December 2020

EACB response to the

EC Consultation on standard contractual clauses (SCCs) for transferring personal data to non-EU countries (implementing act)

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General Comments

From a data protection point of view, we welcome the proposal, especially because it provides now suitable clauses for situations involving sub-processors. We support the provision that the data importer must be in a position to implement data subject rights. Furthermore, the submission to supervision of a European supervisory authority is a very valid point, as is the designation of contact persons in the third country and the extended information to interested parties about these contacts, legal protection mechanisms and compensation possibilities.

However, the draft SCCs do not properly provide a solution to the major problem that companies face in international transfer of data, irrespective of whether the SCCs with a third country are sufficient or supplementary measures need to be taken.

Overall, from a data protection perspective, the Draft SCCs represent a very self-confident EU document with high demands on companies in third countries. However, looking at it from a more practical perspective, it remains to be seen whether it will be well received by third countries and proves useful in its practical implementation. We are somewhat afraid that in many third countries the stipulated requirements cannot be implemented and are therefore concerned that the SCCs might be an unsuitable means because of the very high standards being proposed.

Moreover, there are multiple parts of the documents under consultation that pose significant problems in their practical implementation. In the next section, we elaborate on this by providing comments on specific parts of the documents. Major concerns relate to the burden imposed on data exporters to assess the adequacy of the legal system of data importers in protecting the rights of data subjects, as well as to doubts about how the obligation to suspend the transfer of data in certain cases would reconcile with banks' necessity to ensure operational continuity.

Comments on specific sections and documents

I. Comments on the draft Commission implementing decision (recitals and articles)

EACB members would like to provide below a list of comments outlining their concerns on specific recitals and articles of the draft implementing decision.
The points are listed following the order of the document.

- **Recital 3 (pp. 1-2)**
  Referring to "controllers and processors are encouraged to provide additional safeguards via contractual commitments that supplement SCCs":

  We have concerns about the assessment that controllers and processors are encouraged to carry out to provide additional safeguards to the SCCs, because this assessment would represent a burdensome exercise that is disproportionate to its underlying rationale.

Controllers and processors are encouraged to provide additional safeguards, in addition to the SCCs, when appropriate. This entails that controllers and processors are encouraged to carry out an assessment (whose documents will most likely have to be recorded) about whether additional safeguards are warranted. This assessment would have to be very contextual, taking into account the circumstances of the data transfer, such as the content and duration of the contract, the nature of the data to be transferred, the type of recipient, the purpose of the processing and any relevant practical experience indicating the existence or absence of prior instances of requests for disclosure from public authorities received by the data importer for the type of data transferred, etc…;

- **Recital 11 (Page 3)**
  Referring to: "the data subjects should be provided with a copy of the SCCs and informed in case of changes":

  This is not in line with the SCCs template itself where only the possibility for data subjects to get a copy is stated multiple times. Furthermore, providing all data subjects with all SCCs and informing them of any changes would lead to massive, disproportionate and unjustified efforts for controllers acting in an economic parameter and is therefore not acceptable.

- **Recital 12 (page 3)**
  Referring to 3rd party beneficiary rights and obligation for importer to facilitate individual re-dress and name a contact point for dealing with requests and complaints:

  From a practical point of view, it is hardly imaginable that data importers would agree to sign such a clause. Moreover, the role of the data exporter in such a construct is not sufficiently clear or clarified by the text of the implementing decision.

- **Recitals 17 and 21 (pp. 5-6)**
  Referring to the obligation upon data exporters to suspend the transfer of data in a series of cases (e.g. when it considers that no appropriate safeguards can be ensured):

  It should be highlighted that this obligation raises serious concerns for banks, that due to the nature of their activities must ensure operational continuity. Situations that warrant the suspension of the transfer can be impossible to predict beforehand for banks, increasing the difficulty to ensure operational continuity.
  The final draft should duly take into account the necessity for banks to ensure operational continuity, and whether this would be compatible with the obligation to suspend the transfer of data.

- **Recital 19 (p. 5)**
  Referring to "The transfer and processing of personal data under standard contractual clauses should only take place if the laws of the third country of destination do not prevent the data importer from complying with those clauses":

  This obligation imposes a significant burden on data exporters, who should complete an assessment of the adequacy of the third-country legal system in protecting the rights of data subjects, for which the European Commission was responsible in the past. Moreover, the assessment must be duly documented and made available to the national competent authority.

The assessment is a burdensome and not always feasible exercise for data exporters, that raises concerns in relation to both its costs and the associated liability of data exporters:

- With regard to the costs, it entails a legal analysis of foreign laws, for which data exporters will most probably have to rely on multiple eternal experts, that make a first assessment and continue monitoring legislative developments in a given country. This would generate disproportionate compliance costs for data exporters;
- With regard to the liability regime, the data exporter would be responsible for the assessment of foreign legislation, with poor legal certainty as to whether their assessment is correct.

Finally, we would like to mention a concern pertaining to clause 2 of section 2 of the annex to the implementing decision, that is nonetheless related to this comment. Clause 2.f. requires the data exporter to implement appropriate safeguards whenever it is clear that the data importer can no longer comply with the SCCs. In order to do so, the exporter would need to monitor changes in the legislation applicable to the data importer, that could affect its ability to comply with the SCCs. Guidance is needed to understand how, and with which frequency, data exporters have to carry out this monitoring exercise.

- **Article 6.3 (p.8)**
*Referring to "For a period of one year from the date of entry into force of this Decision, data exporters and data importers may, for the purpose of Article 46(1) of Regulation (EU) 2016)679, continue to rely on standard contractual clauses set out in Decisions 2001/497/EC and 2010/87/EU for the performance of a contract concluded between them **before that date**, provided the contract remains unchanged, with the exception of necessary supplementary measures…":*

The one-year transition period for "old" SCCs is appreciated. Nevertheless, the meaning of *"before that date"* is not clear and does not provide for legal certainty respectively. It has to be consequently clarified, that data exporters and importers can rely on "old" SCCs during the transition period, when the contract is concluded before the "new" SCCs will come into force. **Therefore, it must be clarified that the date mentioned therein is the date of entry into force of the "new'' SCCs.**
Additionally, on the subject of the transition period, and on the conclusion of new SCCs within one year (if we have understood the Draft correctly), the following questions arise:

- What can/shall a company do if a contractor refuses to sign the new SCCs and the contract continues? Will this lead to a forced termination of the contract? Will this constitute a loss of the basis for business? Generally, the changes to the previous SCCs are very extensive, so we do not expect that the SCCs will be replaced by the contracting parties without any discussions. This situation or the way in which the situation is handled should be considered.

II. Comments on the annex to draft Commission implementing decision

- **The three "transparency" paragraphs throughout the annex, in different clauses (pp. 3, 7 and 10)**

We have identified issues in relation to these three paragraphs, and we believe that the following text in each of the paragraphs should be deleted in the final draft:
'….but shall provide a meaningful summary where otherwise the data subject would not be able to understand the content of the Annexes."

Our request derives from the fact that providing the data subject with a copy of the SCCs, where information regarding trade secrecy etc… is redacted, is already a high burden for the controller as such action requires a detailed analysis. Adding here to additional requirements such as a "meaningful summary" poses additional disproportionate burden to the controller which would be nearly impossible to fulfill in the daily business life.

- **Module 4, clause 2, section 2, letters (a) – (f), (pp.13-14)**
  Referring to *"the parties warrant that they have no reason to believe that the laws in the third country of destination applicable to the processing…"*:

  We would like to point out that providing such a warranty is not feasible for the data exporter. It would require each and every single data exporter (i.e. companies operating in an economic perimeter) to completely assess every legislation in third countries in order to be able to warrant "no reason to believe".
  This is not only a massive and utterly disproportionate burden for a single data exporter, **but it would also lead to severe economic disadvantages for all countries within the EEA perimeter. Indeed, personal data transfers by exporters operating in these countries would be severely affected, and restricted, by the burden to establish internal systems that allow exporters to be able to comply with the need to assess all 3rd country legislations by themselves.**
  Such assessments must be done at the EU-level, thereby speeding-up the process of taking adequacy decisions on the one hand, and addressing all legal issues of any third country that prevent data exporters from transferring personal data on the other hand.
  Appropriate safeguards for such cases must be provided at the EU-level as well, reducing the burden on data exporters, that would only have to implement them in their internal processes.

- **Paragraph 3.2, module 4, clause 3, section 2 (pp. 14 – 15)**
  Referring to the obligation of the data importer to re-examine whether the legally binding request by a public authority under the laws of the country of destination for disclosure of personal data transferred is lawful, and to exhaust all available remedies to challenge the request if, after a careful assessment, it concludes that there are grounds under the laws of the country of destination to do so.

  Paragraph 3.2 imposes a very burdensome obligation on the data importer, as it would require costly legal activities. The increased costs for data importers might ultimately be transferred to data exporters, and overall increase the costs for data transferring.