

European Commission

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## **Feedback on Draft Implementing decision standard contractual clauses for transferring personal data to non-EU countries**

The Confederation of Swedish Enterprise (Svenskt Näringsliv) is the main business organization in Sweden, representing 50 member organisations (industry and employer organizations) and over 60.000 member companies in almost all sectors of business.

The Confederation of Swedish Enterprise welcomes these new Standard Contractual Clauses, SCCs, in particular since the old SCCs approved by the Commission in 2001 and 2010 only addressed two data flow scenarios: an EU-based controller exporting data outside of the EU to other controllers, or to processors. In this new draft, the Commission departs from that approach and addresses a gap which frequently occurred in practice: allowing for EU processors to serve as data exporters to controllers and processors outside of the EU. This brings welcomed flexibility, and recognises the reality that EU-based processors frequently export personal data to non-EU sub-processors and reflects the expanded territorial scope of the GDPR. It creates a pathway for controllers outside of the EU to work with processors located in the EU on projects involving EU data.

Some additional positive aspects of the Commission's proposal for the new SCCs are;

- Obligation on good faith cooperation by data importer in relation to data exporter to fulfil requirements in GDPR (s II module two clause 1.6 (d) of SCC) as well as obligation on data importer to provide appropriate documentation to enable data exporter to demonstrate compliance with SCC (s II module two clause 1.9 (b)-(c) of SCCs).
- Introduction of general written authorization (s II module two clause 4 of SCCs).
- Clarification that liability for damages shall be limited to actual damages suffered and clarification on cases with joint and several liability (s II module one and four clause 7 of SCCs) and clarification on indemnification responsibilities (s II module clause 8 of SCCs).

### **Discrepancy in the interpretation of the Schrems II judgement**

In comparison with the EDPB's draft recommendations, the Commission's proposal for new SCCs are more balanced, with all actors being given responsibilities. Not least, the importer is given responsibility for sharing knowledge, which in the light of the complexity of understanding local relevant legislation is a prerequisite for sharing personal data outside the EU.

The Commission appears to permit a risk-based approach and a right to consider the practical likelihood of government access by allowing evaluation of "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." The EDPB, on the other hand, in the current draft of the Recommendations warn data importers away from "subjective" considerations, including "the likelihood of public authorities' access to your data in a manner not in line with EU standards." However, both documents note that the evaluation must include all laws "applicable" to the data importer. We think that a clarification and alignment here is necessary.

We also take the opportunity to mention some additional points in EDPB's draft that is not aligned with the Commission's proposal of new SCCs rendering the use of the new proposed SCCs very unclear.

- Use of party warranty by all parties at the time of agreeing to SCCs, where no one has reason to believe that applicable laws of data importer are not in line with SCC requirements (s 19 of preamble of decision to implement SCC and s II module one-four clause 2 (a) of SCCs). Warranty for data exporter is limited to reasonable efforts (s II clause 1 in SCCs).
- Use of practical experience from data authorities in country of data importer (s 20 of preamble of decision to implement SCCs)
- Obligation on data importer to notify data exporter in case of reason to believe that compliance to SCCs is not possible. Obligation on data importer to consult with supervisory authority (s 21 of preamble of decision to implement SCCs). Clarification that processing activities of data importer lies under the responsibility of the data importer (s II clause 1.9 (a) of SCCs) accompanied with information duty to data exporter in case of inability to follow SCCs (s II module two clause 1.1 (b) of SCCs).
- Obligations on data importer in SCCs that EDPB view as additional measures in addition to SCCs (s 22 of preamble of decision to implement SCCs).
- Obligation on supervisory authorities to inform the Commission on any data importer that has become subject to laws that prevent compliance to SCCs (art. 3 of decision to implement SCCs).
- Obligation on data importer to notify data exporter and take necessary actions in relation to activities in the country of the data importer (s II module one-four clause 3 (b)-(c) of SCCs).
- Entitlement of data exporter to terminate contract (s III clause 1 (c) of SCCs) is viewed by EDPB as additional measures.

### **Third-country assessments**

A simpler process is indeed needed. It is an unreasonable order for each controller to assess, in the case of each new data transfer, on the basis of the unique situation, whether the data importing country has a legal order that safeguards the privacy interests of EU citizens. Different companies may come to different conclusions when it comes to assessing if a third country is reliable or not. A legal analysis of the third country at every opportunity will be a costly and time-consuming process.

Therefore, we ask the Commission to communicate third country assessments. It would be far more effective if the Commission provided assessments of different countries' data protection legislation and surveillance laws than requiring it from individual companies, often lacking the right competence and ability to do the assessments in a proper way (e.g. GDPR Article 45.2). Also, it would be most welcomed if the Commission could produce use-cases reflecting different type of transfers that can be approved, so that it would be easier to act correctly and at the same time create legal certainty and predictability. We urge the Commission to act in the good of legal certainty and ability to conduct business' in the data economy with a strong focus on competitiveness.

### **Agreement documentation for additional parties**

From a structural point of view, we welcome the fact that the new SCCs also provide a mechanism for additional parties to accede to the clauses as data exporter or data importer – something which is often implemented under the current SCCs by using a wraparound framework data transfer agreement which incorporates the SCCs. However, the actual mechanism by which new parties join is not clear. The SCCs say that the new party may accede by completing a new data transfer Annex, "by agreement of the Parties". Arguably, it is not clear how the existing parties would give agreement – any mechanism which requires multiple existing parties to sign agreement will quickly become unwieldy and undermine the welcome flexibility which this introduces. It would be helpful if the final SCCs noted that it is for

the parties to determine, at the outset, how this agreement may be documented, thus allowing solutions to be used which best fit the circumstances.

**Supplemental terms and optional clauses**

There can be uncertainty as to what extent parties can introduce supplemental terms. We recognise that the Commission has tried to make clear that additional clauses can be used, so long as they do not contradict the SCCs or undermine protections for individuals. However, it would be helpful if the Commission could do more to reduce any uncertainty by including more optional clauses and by making clear that clauses which are concerned with process, rather than substance, do not contradict the clauses.

**Transition period**

Recital 24 and Art. 6(3) of the draft provide for a one-year transition period to switch to the new SCCs. We urge the Commission to consider a transition of two years, instead of a one-year period entry into application.

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