

European Commission's draft Standard Contractual Clauses Jointly Commented on by EDPB and EDPS

On 18 January 2021, the European Data Protection Board (**EDPB**) and the European Data Protection Supervisor (**EDPS**) published their joint opinions on the draft implementing decisions of the European Commission on standard contractual clauses (**SCCs**) released in November 2020 (See [VBB on Belgian Business Law Newsletter, Volume 2020, No. 11, at p. 15](#)). The joint opinions relate to two sets of SCCs: (i) the Commission's draft implementing decision on SCCs for the transfer of data to third countries under Article 46 of Regulation 679/2016 (the **General Data Protection Regulation** or **GDPR**) (the **Transfer SCCs**) and (ii) the Commission's draft implementing decision on SCCs for contracts between controllers and processors under Article 28 of the GDPR (the **Processor SCCs**). Each of the bodies' joint opinions include an annex containing annotated versions of the relevant draft SCCs with suggested changes and specific comments. The opinion on the Processor SCCs also contains an annex with suggested changes to the draft Commission decision.

Joint Opinion on Transfer SCCs

The SCCs adopted by the Commission are one of the appropriate safeguards foreseen by Article 46 of the GDPR under which a data controller or data Processor may transfer personal data to a third country that has not been recognised as providing an adequate level of protection for personal data.

The EDPB and EDPS welcome the new Transfer SCCs considering the important developments that have taken place in the digital economy since the current Transfer SCCs were adopted by the Commission. Moreover, the Commission's draft Transfer SCCs address concerns that were raised in the *Schrems II* ruling of the Court of Justice of the European Union (**CJEU**) (Our note on the implications of the *Schrems II* ruling can be read [here](#)).

Overall, the EDPB and EDPS state that the Commission's draft Transfer SCCs present a reinforced level of protection for data subjects. Among other things, they welcome the fact that this update of the current Transfer SCCs intends to: (i) better reflect the widespread use of new and more complex processing operations often involving multiple data importers and data exporters in a changed digital economy and (ii) provide for specific safeguards to address the effect of the laws of the third country of destination on the data importer's compliance with the clauses. The latter relates in particular to the question of how to deal with binding requests from public authorities in the third country to disclose personal data transferred.

However, the EDPB and EDPS call on the Commission to clarify that there may still be situations where, despite the use of the new Transfer SCCs, ad-hoc supplementary measures will remain necessary to ensure data subjects receive a level of protection essentially equivalent to that guaranteed within the EU. For this reason, the EDPB and EDPS stress that the new Transfer SCCs will have to be used along with the EDPB Recommendations on supplementary measures (See our article on the EDPB's Recommendations in the [VBB on Belgian Business Law Newsletter, Volume 2020, No. 11, at p. 14](#)). In these Recommendations on supplementary measures, the EDPB sets out a six-step process for data exporters to comply with the provisions on international transfers under the GDPR.

In particular, the EDPB and EDPS request the Commission to clarify that, in the absence of laws in the third country relating to public authorities' access to personal data, the parties should nevertheless look into the available information and assess whether applicable practices relating to the personal data transferred could prevent the data importer from fulfilling its contractual obligations under the SCCs.

Furthermore, the Joint Opinion calls on the Commission to provide further clarification in relation to the rights of data subjects under the Transfer SCCs, as well as the liability regime and possible interactions with Supervisory Authorities.

Joint Opinion on Processor SCCs

Under Article 28 of the GDPR any processing for which a controller relies on a processor (irrespective of whether the processor is in- or outside the EU/EEA) “*shall be governed by a contract or other legal act [...] that sets out the subject-matter and duration of the processing, the nature and purpose of the processing, the type of personal data and categories of data subjects and the obligations and rights of the controller*”. In addition, the contract must address the elements listed in Articles 28.3 and 28.4 of the GDPR. Article 28.7 of the GDPR allows the Commission to adopt SCCs to comply with these requirements.

The EDPB and EDPS welcome in general the adoption of Processor SCCs under Article 28.7 as a strong accountability tool that facilitates compliance by controllers and processors with their obligations under the GDPR and Regulation 2018/1725 *on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data (EUDPR)*. Overall, the aim is to ensure full harmonisation and legal certainty across the EU for contracts between controllers and their processors.

Nonetheless, the EDPB and EDPS consider that the Commission's draft Processor SCCs do not provide sufficient clarity for the parties. For instance, the Processor SCCs appear to cover only situations where the controller and the processor are located in the EU/EEA. The EDPB and the EDPS question why the Processor SCCs could not be used in other situations, for instance if personal data are transferred to third countries that have been recognised as providing an adequate level of protection. Also, the Commission is requested to clarify the interplay between the Processor SCCs and the Transfer SCCs (discussed above).

In addition, the EDPB and EDPS suggest that where multiple entities are parties to the Processor SCCs, the SCCs should require parties to detail and delimit the allocation of responsibilities and indicate clearly which processing is carried out by which processor(s) on behalf of which controller(s) and for which purposes. Also, the EDPB and EDPS would welcome clarification on how new parties can accede to the Processor SCCs (i.e., whether consent by the contracting parties should be in writing, the deadline to provide such consent and the information needed before consent can be given).

The Joint Opinion on Transfer SCCs can be found [here](#) (and the Annex with the amended draft SCCs can be consulted [here](#)).

The Joint Opinion on Processor SCCs can be found [here](#) (and the Annexes with amended draft Commission decision can be consulted [here](#) and the amended draft SCCs can be consulted [here](#)).