EDPB - EDPS Joint Opinion 2/2021 on the European Commission's Implementing Decision on standard contractual clauses for the transfer of personal data to third countries

for the matters referred to in Article 46(2)(c) of Regulation (EU) 2016/679

TABLE OF CONTENTS

The European Data Protection Board and the European Data Protection Supervisor

Having regard to Article 42(2) of the Regulation 2018/1725 of 23 October 2018 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, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC,

Having regard to the EEA Agreement and in particular to Annex XI and Protocol 37 thereof, as amended by the Decision of the EEA joint Committee No 154/2018 of 6 July 2018[1],

HAVE ADOPTED THE FOLLOWING JOINT OPINION

1   BACKGROUND

1. In compliance with Article 44 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data[2] ("**GDPR**"), any transfer of personal data which are undergoing processing or are intended for processing after transfer to a third country or to an international organisation shall take place only if the conditions laid down in Chapter V GDPR are complied with by the controller and processor, including for onward transfers of personal data from the third country or an international organisation to another third country or to another international organisation. In particular, in the absence of an adequacy decision, any transfer should be based on appropriate safeguards listed in Article 46 GDPR.

2. Standard data protection clauses adopted by the European Commission (or the "**Commission**") in accordance with the examination procedure referred to in Article 93(2) GDPR ("**SCCs**") are one of the appropriate safeguards listed by Article 46 GDPR.

3. In order to be valid, SCCs must incorporate effective mechanisms that make it possible, in practice, to ensure compliance with the level of protection required by EU law and that transfers of personal data pursuant to these clauses are suspended or prohibited in the event of the breach of such clauses or if it is impossible to honour them[3].

---

[1] References to "Member States" made throughout this opinion should be understood as references to "EEA Member States".

[2] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation); OJ L 119, 04.05.2016, p. 1–88.

[3] Judgment of the Court (Grand Chamber) of 16 July 2020; Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems; Case C-311/18; para 137.

4. On 15 June 2001, the Commission adopted Decision 2001/497/EC on standard contractual clauses for the transfer of personal data to third countries, under Directive 95/46/EC [4], as amended by Commission Implementing Decision (EU) 2016/2297 of 16 December 2016 [5] ("**the 2001 SCCs**"), complemented by Commission Decision of 27 December 2004 [6] ("**the 2004 SCCs**").

5. On 5 February 2010, the Commission adopted Decision 2010/87/EU on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46/EC[7], later amended by Commission Implementing Decision (EU) 2016/2297 of 16 December 2016[8] ("**the 2010 SCCs**").

6. On 16 July 2020, the Court of Justice of the EU ("**CJEU**" or "**the Court**") ruled that the examination of the 2010 SCCs in the light of Articles 7, 8 and 47 of the Charter of Fundamental Rights disclosed nothing to affect the validity of that decision ("**the Schrems II ruling**")[9].

7. In the same case, the CJEU also provided for additional clarifications on the use of SCCs. In particular, the CJEU ruled that data subjects whose personal data are transferred to a third country pursuant to standard data protection clauses should be afforded, as in the context of a transfer based on an adequacy decision, a level of protection essentially equivalent to that which is guaranteed within the European Union[10].

8. The CJEU added that *"[s]ince by their inherently contractual nature standard data protection clauses cannot bind the public authorities of third countries [...] it may prove necessary to supplement the guarantees contained in those standard data protection clauses."*[11].

---

[4] 2001/497/EC: Commission Decision of 15 June 2001 on standard contractual clauses for the transfer of personal data to third countries, under Directive 95/46/EC; OJ L 181, 04.07.2001, p. 19-31.

[5] Commission Implementing Decision (EU) 2016/2297 of 16 December 2016 amending Decisions 2001/497/EC and 2010/87/EU on standard contractual clauses for the transfer of personal data to third countries and to processors established in such countries, under Directive 95/46/EC of the European Parliament and of the Council; OJ L 344, 17.12.2016, p. 100–101.

[6] 2004/915/EC: Commission Decision of 27 December 2004 amending Decision 2001/497/EC as regards the introduction of an alternative set of standard contractual clauses for the transfer of personal data to third countries; OJ L 385, 29.12.2004, p. 74–84.

[7] 2010/87/: Commission Decision of 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46/EC of the European Parliament and of the Council; OJ L 39, 12.2.2010, p. 5–18.

[8] Commission Implementing Decision (EU) 2016/2297 of 16 December 2016 amending Decisions 2001/497/EC and 2010/87/EU on standard contractual clauses for the transfer of personal data to third countries and to processors established in such countries, under Directive 95/46/EC of the European Parliament and of the Council; OJ L 344, 17.12.2016, p. 100–101.

[9] Judgment of the Court (Grand Chamber) of 16 July 2020; Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems; Case C-311/18; para 149.

[10] Ibid, para 96

[11] Ibid, para 132

9. Consequently, on 10 November 2020, the EDPB adopted its Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data ("**the EDPB Recommendations on supplementary measures**")[12].

10. On 12 November 2020, the Commission published:

    ➢ A draft Commission Implementing Decision on standard contractual clauses for the transfer of personal data to third countries pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council ("**the Draft Decision**"); and

    ➢ A draft Annex to the Commission Implementing Decision on standard contractual clauses for the transfer of personal data to third countries pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council ("**the Draft SCCs**").

11. The Draft Decision plans to repeal the 2001, 2004 and 2010 SCCs.

12. The Draft SCCs combine general clauses with a modular approach to cater for various transfer scenarios. In addition to the general clauses, controllers and processors should select the module applicable to their situation among the four following modules:

    ➢ Module One: transfer controller to controller;

    ➢ Module Two: transfer controller to processor;

    ➢ Module Three: transfer processor to processor;

    ➢ Module Four: transfer processor to controller.

13. In this context, on 12 November 2020, the Commission requested the EDPB and the EDPS to issue a Joint Opinion on the Draft Decision and the Draft SCCs ("**the Joint Opinion**"), in compliance with Article 42(2) of Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 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**")[13].

2 GENERAL REASONING REGARDING THE DRAFT DECISION AND THE DRAFT SCCs

2.1 General structure and methodology of the Joint Opinion

14. **First,** for the sake of clarity, the Joint Opinion comprises (i) a core part detailing general comments the EDPB and the EDPS wish to make and (ii) an annex where additional comments of a more technical nature are made directly to the Draft SCCs, notably in order to provide some examples of possible amendments. There is no hierarchy between the general comments and the technical ones.

---

[12] https://edpb.europa.eu/sites/edpb/files/consultation/edpb_recommendations_202001_supplementarymea surestransferstools_en.pdf.

[13] Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 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, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC; OJ L 295, 21.11.2018, p. 39–98.

15. **Second,** the general comments on the Draft Decision and the Draft SCCs are presented in two separate sections. Where needed, cross-references are made to ensure consistency.

16. **Third,** for the sake of consistency, where needed, cross-references are also made to the Joint Opinion of the EDPB and the EDPS on standard contractual clauses between controllers and processors under Article 28(7) GDPR and Article 29(7) EUDPR.

2.2 General presentation of the Draft Decision and Draft SCCs and interplay with the EDPB Recommendations on supplementary measures

17. Overall, the EDPB and the EDPS note with satisfaction that the Draft Decision and the Draft SCCs present a reinforced level of protection for data subjects.

18. Following up on the EDPB contribution for the evaluation of the GDPR under Article 97 GDPR[14], the EDPB and the EDPS welcome the fact that this update of existing SCCs intends to:

    ➢ Bring the SCCs in line with new GDPR requirements[15].

    ➢ Better reflect the widespread use of new and more complex processing operations often involving multiple data importers and data exporters, long and complex processing chains, as well as evolving business relationships. This means covering additional processing and transfer situations and using a more flexible approach, for example with respect to the number of parties able to join the contract[16].

    ➢ 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, and in particular how to deal with binding requests from public authorities in the third country for disclosure of the personal data transferred[17].

19. In particular, the EDPB and the EDPS welcome the specific provisions intending to address some of the main issues identified in the Schrems II ruling, and in particular the provisions of the Draft SCCs on:

    ➢ Third country's laws affecting compliance with the Draft SCCs (Section II - Clause 2);

    ➢ Access requests received by the data importer and issued by third country's public authorities (Section II - Clause 3); and

    ➢ Optional ad-hoc redress mechanism to the benefit of data subjects (Section II - Clause 6).

20. In addition, the EDPB and the EDPS note with satisfaction that the Draft SCCs reflect several measures identified in the EDPB Recommendations on supplementary measures, although for some others the EDPB and the EDPS call for more consistency, as notably detailed in Section 4.3.6 below.

21. In this context, the EDPB and the EDPS recall that the EDPB Recommendations on supplementary measures will remain relevant to be applied after the adoption of the Draft SCCs. In particular, the

---

[14] https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_contributiongdprevaluation_20200218.pdf.

[15] Draft Commission Implementing Decision on standard contractual clauses for the transfer of personal data to third countries pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council; Recital 6.

[16] Ibid, Recital 6.

[17] Ibid, Recital 18.

EDPB and the EDPS call on the Commission to clarify that there may still be situations where, despite the use of the new SCCs, ad-hoc supplementary measures will remain necessary to be implemented in order to ensure that data subjects are afforded a level of protection essentially equivalent to that guaranteed within the EU. As such, the new SCCs will have to be used along with the EDPB Recommendations on supplementary measures. The EDPB and the EDPS invite the European Commission to refer to the final version of the EDPB Recommendations on supplementary measures, should the final version of the Recommendations be updated before the Draft Decision and the Draft SCCs[18].

3   ANALYSIS OF THE DRAFT DECISION

3.1   References to the EUDPR (Recital (8))

22.   The EDPB and the EDPS take note that Recital (8) of the Draft Decision reads as follows:

"The standard contractual clauses may also be used for the transfer of personal data to a sub-processor in a third country by a processor that is not a Union institution or body, processing personal data on behalf of such an Union institution or body in accordance with Article 29 of Regulation (EU) 2018/1725 of the European Parliament and of the Council. Doing so will also ensure compliance with Article 29(4) of Regulation (EU) 2018/1725, to the extent these clauses and the data protection obligations as set out in the contract or other legal act between the controller and the processor pursuant to Article 29(3) Regulation (EU) 2018/1725 are aligned. This will in particular be the case where the controller and processor rely on the standard contractual clauses included in Decision [….]".

23.   The EDPB and the EDPS understand that the intention of the Commission is that the Draft SCCs should cover processing operations between processors and sub-processors for which the controller is an EU institution, body, office or agency ("**EUI**") subject to the EUDPR.

24.   In this respect, the EDPB and the EDPS consider that the relevant requirements of the EUDPR should be reflected throughout the entire chain of contracts when a EUI is the controller. This should be further clarified in the Draft Decision and Draft SCCs.

25.   In any event, the EDPB and the EDPS recall that it remains always possible for the Commission to remove any reference to the EUDPR if it decides not to apply the draft Article 46 SCCs to relations between processors and sub-processors being part of a processing operation for which the controller is a EUI subject to the EUDPR.

3.2   The scope of the Draft Decision and the notion of transfers (Article 1(1))

26.   **First,** Article 1(1) of the Draft Decision provides that:

*"The standard contractual clauses set out in the Annex are considered to provide appropriate safeguards within the meaning of Article 46(1) and (2)(c) of Regulation (EU) 2016/679 for the transfer of personal data from a controller or processor subject to Regulation (EU) 2016/679 (data exporter) **to a controller or (sub-) processor not subject to Regulation (EU) 2016/679 (data importer)."***

18

https://edpb.europa.eu/sites/edpb/files/consultation/edpb_recommendations_202001_supplementarymeasurestransferstools_en.pdf. This document was submitted for public consultation until 21 December 2020 and is still subject to possible further modifications on the basis of the results of the public consultation.

27. In view of the above and of the title the Draft Decision, the EDPB and the EDPS understand 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; and

> ➢ Transfers to international organisations.

28. Keeping this in mind, for the avoidance of doubt, the EDPB and the EDPS recommend the Commission to clarify 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.

29. **Second,** the EDPB already clarified in its Guidelines on the territorial scope of the GDPR [19] that a controller or processor is never subject as such to the GDPR, but only in relation to a given processing activity.

30. Therefore, the EDPB and the EDPS recommend rephrasing Article 1(1) of the Draft Decision accordingly.

4 ANALYSIS OF THE DRAFT SCCs

4.1 General remark on the Draft SCCs

31. The EDPB and the EDPS welcome the introduction of specific modules for each transfer scenarios. However, the EDPB and the EDPS note that it is not clear whether one set of the SCCs can include several modules in practice to address different situations, or whether this should amount to the signing of several sets of the SCCs. In order to achieve maximum readability and easiness in the practical application of the SCCs, the EDPB and the EDPS suggest that the European Commission provides additional guidance (e.g. in the form of flowcharts, publication of Frequently Asked Questions (FAQs), etc.). In particular, it should be made clear that the combination of different modules in a single set of SCCs cannot lead to the blurring of roles and responsibilities among the parties.

4.2 Section I

4.2.1 Clause 1 - Purpose and scope

32. In relation to the reference to standard contractual clauses pursuant to Article 28(7) GDPR included in Clause 1(c), the EDPB and the EDPS consider that it is important to clearly explain in the Draft Decision, the articulation and interplay between this set of SCCs and the SCCs pursuant to Article 28(7) GDPR. It should be made clear to the parties, already in the Draft Decision, that when parties intend to benefit from SCCs both under Article 28(7) and Article 46(2)(c) GDPR, then the parties need to rely on transfer SCCs. According to Clause 1(c) of the Draft SCCs, the parties are allowed to add other clauses or additional safeguards "*provided that they do not contradict, directly or indirectly,*" the Draft SCCs. To provide controllers and processors with legal certainty, the EDPB and the EDPS would welcome clarifications on the type of clauses that the European Commission would consider as contradicting directly or indirectly the Draft SCCs. Such clarification could, for instance, indicate that clauses contradicting the Draft SCCs would be those that undermine / negatively impact the obligations in the Draft SCCs or prevent compliance with the obligations contained in the Draft SCCs. For example,

---

[19] https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_3_2018_territorial_scope_after_public_consultation_en_1.pdf.

clauses allowing processors to use the data for their own purposes would be contrary to the obligation of the processor to process personal data only on behalf of the controller and for the purposes and by the means identified by the latter.

4.2.2 Clause 2 - Third party beneficiaries

33. Pursuant to Section, I Clause 2, "*Data subjects may invoke and enforce these Clauses, as third party beneficiaries".* However, this right solely applies to the provisions that are <u>not</u> listed under this Clause 2. For the sake of providing clear and unambiguous information to data subjects on their rights, as well as to controllers and processors that will use the Clauses on those third party beneficiary rights, the EDPB and the EDPS invite the European Commission to provide, under this Clause 2, a 'positive' list of the rights that are enforceable by data subjects, instead of listing those that are not enforceable[20].

34. In terms of substance, the EDPB and the EDPS note that a number of the provisions included in the list provided in Clause 2 should actually be made enforceable by data subjects, hence should be deleted from that list.

35. The EDPB and the EDPS are of the view that, as this is currently the case in the previous sets of SCCs adopted by the European Commission[21], and as it is required by SAs for binding corporate rules ("**BCRs**"), **Section I Clause 2 (Third party beneficiaries)** itself should be subject to enforceability by data subjects.

36. Concerning **Section I, Clauses 3 (Interpretation) and 4 (Hierarchy)**, it should be noted that if the parties do not respect the rules on interpretation and on the hierarchy of documents, it may have an impact on data subjects and their rights. Therefore, the EDPB and the EDPS believe that this Clause should be made enforceable by data subjects.

37. Under **Section II, Module Two: Clause 1.9(a) and Module Three: Clause 1.9(a)** contain the same requirements. They cover the data importer's obligation to deal with the data exporter's inquiries (as well as the controller's inquiries, for Module Three). If breached, the EDPB and the EDPS are of the view that these two Clauses may have an impact on data subjects and their rights, hence should be deemed enforceable by data subjects, as this is currently the case in the previous sets of SCCs adopted by the European Commission[22].

38. Under Section II, Module Three: Clause 1.1(a) relates to the data exporter's obligation to inform the data importer that it acts under the controller's instructions; Clause 1.1(b) sets out the data importer's obligation to process the personal data under the controller's instructions and those transmitted by the data exporter; and Clause 1.1(c) relates to the data importer's obligation to inform the data exporter when the data importer is unable to follow those instructions and the data exporter's obligation to notify it to the controller. The EDPB and the EDPS note that a breach of **Section II, Module Three: Clause 1.1(a), (b), and (c)** may have an impact on data subjects and their rights, hence should

---

[20] This would be better aligned with the way Chapter III GDPR is drafted, as well as with the previous sets of SCCs adopted by the European Commission (see Clause 3 2001 SCCs; Clause III(b) 2004 SCCs; and Clause 3.1 2010 SCCs).

[21] See Clause 3 in 2001 SCCs; Clause III(b) in 2004 SCCs; Clause 3 in 2010 SCCs.

[22] See Clause 5(e) in 2010 SCCs.

be made enforceable by them, as this is currently the case in the previous sets of SCCs adopted by the European Commission[23].

39. Under **Section II, Module Four: Clause 1.1**, the EDPB and the EDPS note that Clause 1.1(a) and (b) relate to the data exporter's obligation, respectively to process the data under the data importer's instructions and to inform the data importer if the data exporter is unable to comply with the controller's instructions or if they infringe Union or Member State's data protection law; and Clause 1.1(c) covers the data importer's obligation to refrain from taking any action preventing the data exporter from fulfilling its obligations under GDPR. **Section II, Module Four: Clause 1.3** touches upon the parties' ability to demonstrate compliance with their commitments taken under the SCCs.

40. Given that a breach of the commitments set out under **Section II, Module Four: Clause 1.1(a), (b), and (c), and Clause 1.3** may have an impact on data subjects and their rights, they should be made enforceable by data subjects.

41. The EDPB and the EDPS note that non-compliance with sub-processing commitments may have an impact on data subjects and their rights, thus **Section II, Clause 4(a), (b), and (c)** should be made enforceable by data subjects, as this is currently the case in the previous sets of SCCs adopted by the European Commission[24].

42. The EDPB and the EDPS note that **Section II, Clause 9(b)** deals with the data importer's agreement to cooperate with the competent supervision authority. As a breach of this commitment may have an impact on data subjects and their rights, the EDPB and the EDPS consider that it should be made enforceable by data subjects, as this is currently the case in the previous sets of SCCs adopted by the European Commission[25], as well as in BCRs[26].

43. The EDPB and the EDPS note that, **Section III, Clause 1(a)** provides for the obligation on the data importer to inform the data exporter if it cannot comply with the SCCs, from which follows the obligation for the data exporter to suspend the transfer(s) (Clause 1(b)), which may then terminate the contract upon certain conditions (Clause 1(c)) and instruct the data importer on what happens to the data after such termination (Clause 1(d)).

44. Since these provisions touch upon situations where the data importer cannot comply with the SCCs and/or is in breach of the SCCs, the EDPB and the EDPS are of the view that a violation of **Section III, Clause 1(a), (b), (c), and (d)** may have an impact on data subjects and their rights, and should therefore

---

[23] This comment only applies for Section II Module Three: Clause 1.1(b) (see Clause 5(a) in 2010 SCCs) and Clause 1.1(c) (see Clause 5(b) in 2010 SCCs) of the Draft SCCs. There is no equivalent of Section II Module Three: Clause 1.1(a) in the previous SCCs.

[24] See Clause 5(h)(i) and (j) in 2010 SCCs.

[25] See Clause 5(c) in 2001 SCCs; Clause II(e) in 2004 SCCs; Clause 8.2 in 2010 SCCS.

[26] See Article 47(2)(l) GDPR. See also Section 3.1 of the Working Document setting up a table with the elements and principles to be found in BCRs (WP256 rev.01), adopted by the Article 29 Working Party and endorsed by the EDPB, http://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=614109; and Section 3.1 of the Working Document setting up a table with the elements and principles to be found in Processor BCRs (WP257 rev.01), adopted by the Article 29 Working Party and endorsed by the EDPB, http://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=614110.

be able to enforce them, as this is currently the case in the previous sets of SCCs adopted by the European Commission[27], as well as in BCRs[28].

4.2.3 Clause 6 - Docking clause

45. The EDPB and the EDPS welcome the inclusion of a docking clause in Clause 6, which allows, as an option, any entity to accede to the Draft SCCs and therefore to become a new party to the contract as a controller or as a processor. The qualification and the role of the parties to the contract should appear clearly in the Annexes, especially in the case where new parties accede to the contract. Thus, the Annex should 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.

46. Clause 6(a) makes the accession of new parties to the Draft SCCs conditional upon the agreement of all the other parties. In order to avoid any difficulties in practice, the EDPB and the EDPS would welcome a clarification on the way such agreement could be given by the other parties (e.g. whether it has to be provided in writing, the deadline, the information needed before agreeing). Moreover, the EDPB and the EDPS would welcome clarification as to whether and how such agreement has to be given by all the parties, irrespective of their qualification and role in the processing.

4.3 Section II - Obligations of the parties

4.3.1 Clause 1 - Data protection safeguards – Module One (Transfer controller to controller)

4.3.1.1 Scope of Module One (Transfer controller to controller)

47. This module seems to cover transfers between controllers acting as independent or separate controllers. In order to avoid any ambiguity, the EDPB and the EDPS call on the Commission to assess and clarify, in the Draft Decision or in the Draft SCCs, if this module is only relevant for independent or separate controllers, or if it could also be used in joint controllership scenarios with regard to processing of personal data carried out by joint-controllers where one of the joint controller is established outside of the EU and not subject the GDPR.

4.3.1.2 Clause 1.2 - Transparency

48. Clause 1.2(a) of the Draft SCCs lists the elements on which the data importer must provide information to data subjects whose personal data are transferred. To ensure full transparency and put data subjects in a position to exercise their rights as provided by this clause, the EDPB and the EDPS consider that the list of elements should further be completed, so as to be brought in line with Article 14(1) and (2) GDPR relating to indirect collection of data. As such, this clause should be complemented with information on the types of personal data processed by the data importer, and the period for which personal data will be stored by the latter (or criteria used to determine it).

49. In addition, this clause should specify the timing in which the data importer shall provide this information to data subjects so as to meet the conditions set out by Article 14(3) GDPR.

---

[27] See Clause 5(a) in 2001 SCCs; Clause II(c) in 2004 SCCs; Clauses 5(a) and (b), and Clause 12.1 in 2010 SCCs.
[28] See Section 6.3 of the Working Document setting up a table with the elements and principles to be found in BCRs (WP256 rev.01); and Section 6.3 of the Working Document setting up a table with the elements and principles to be found in Processor BCRs (WP257 rev.01).

50. Furthermore, it results from Clause 1.2(b) that the data importer may be exempted from providing information to data subjects in accordance with Clause 1.2(a), notably where providing such information proves impossible or would involve a disproportionate effort in which case the data importer shall, to the extent possible, make the information publicly available. The use of the term "*to the extent possible*" does not appear in line with Article 14(5)(b) GDPR and should be deleted. Indeed, Article 14(5)(b) GDPR does not provide for such condition but rather sets a clear requirement that information is made publicly available to the data subject where providing such information proves impossible or would involve a disproportionate without any possible derogation.

4.3.1.3   Clause 1.5 - Security of processing

51. In connection with the data importer's obligation to implement appropriate measures to ensure the security of transferred data, Clause 1.5(a) specifies that the parties shall consider "*encryption during transmission and anonymisation or pseudonymisation, where this does not prevent fulfilling the purpose of processing".* In relation to the reference to anonymization, the EDPB and the EDPS recall that if personal data are anonymized, the obligations under the GDPR are no longer applicable.

4.3.1.4   Clause 1.7 - Onward transfers

52. The obligations of the data importer under this clause raise several issues:

53. First of all, the EDPB and the EDPS note that this clause does not include a commitment from the data importer to notify the data exporter of the existence of an onward transfer as is the case in the 2004 SCCs for transfers from controllers to controllers. The EDPB and the EDPS do not see the reason for not replicating this obligation in the proposed Draft SCCs. Such information of the data exporter is essential to allow the latter to comply with its obligations under Article 44 GDPR, which specifically refer to onward transfers and ensure accountability, as required by the GDPR, for any processing in this specific case for the processing subject to the onward transfer.

54. Further, Clause 1.7 provides that the data importer may carry out an onward transfer if the third party is or agrees to be bound by the Draft SCCs. It is unclear however, how this provision would work in practice if the third party concerned is a processor, notably how it would be bound by the clauses, which requirements will apply to it, and whether the parties could add another module (i.e. Module Two) that would be relevant for that situation. This point requires clarification in the Draft SCCs to avoid any confusion in practice, and ensure legal certainty for the parties. In addition, it should be made clear that the third party should assess whether it is able to comply with the obligations set out by the Draft SCCs under the third country law applicable to this third party and, where necessary, to implement supplementary measures to ensure a level of protection essentially equivalent to the one required in the EEA.

55. In addition, Clause 1.7(iii) specifies, amongst other conditions, that an onward transfer may be allowed where the data importer and the third party enter into an agreement ensuring "*the same level of data protection*" as under the Draft SCCs. According to the EDPB and the EDPS, the reference to the "*same level of data protection*" does not appear sufficient as the agreement needs to replicate in substance the same guarantees and obligations as those contained in the Draft SCCs to ensure the continuity of the protection in line with Article 44 GDPR. This clause should be amended accordingly, by stating that the agreement must impose the same obligations as those included in the Draft SCCs between the data exporter and the data importer. In addition, a specific obligation shall be added in this case for the parties to assess whether they are able to comply with the obligations set out by such agreement under the third country law applicable to this third party, and, where necessary, to implement supplementary measures to ensure a level of protection essentially equivalent to the one required in the EEA.

56.   Furthermore, an obligation should be added for the data importer to provide data subjects with a copy of the safeguards implemented for the onward transfer, upon request. The provision of a copy of such safeguards to data subjects contributes to the transparency which is required in relation to the transfer of their data.

57.   Finally, Clause 1.7(iv) sets out that an onward transfer could be carried out where the data importer has obtained the explicit consent of the data subject. The possibility of relying on the data subject's consent corresponds to the derogation for specific situations envisaged by Article 49(1)(a) GDPR. The EDPB and the EDPS are of the opinion that the derogatory and exceptional nature of this possibility needs to be stated in the Draft SCCs, in particular compared to other possibilities for framing onward transfers referred in this clause. As such, it must be specified that the consent of the data subject could, as an exception, frame the onward transfers only if other mechanisms listed in Clause 1.7 cannot be relied upon. Also, the EDPB and the EDPS are of the opinion that the Commission should assess the possibility of onward transfers in particular for the establishment, exercise or defence of legal claims, and to protect the vital interests of the data subject or of other persons.

4.3.2   Clause 1 - Data protection safeguards – Module Two (Transfer controller to processor)

4.3.2.1   Clause 1.5 - Storage limitation and erasure or return of the data

58.   Clause 1.5 of the Draft SCCs stipulates that upon termination of the provision of the processing services, the data importer shall delete all personal data processed on behalf of the data exporter (option 1) or return to the data exporter all personal data processed on its behalf, and delete existing copies (option 2). The EDPB and the EDPS are of the opinion that this wording conflicts with Article 28(3)(g) GDPR, which provides for that deletion or returning takes place "*at the choice of the controller*". Accordingly, Clause 1.5 should provide for that deletion or returning of personal data to take place at the choice of the data exporter acting as a controller to avoid any ambiguity that such choice is not up to the data importer acting as a processor.

59.   In addition, this clause provides that in case the data importer does not delete or return the data to the data exporter due to local requirements applicable to the data importer, it will guarantee the level of protection required by the Draft SCCs "*to the extent possible*". The EDPB and the EDPS consider that if data are to be kept by the data importer, the protection provided by the Draft SCCs needs to be fully ensured and without exceptions, to allow for the continuity of the protection. As a consequence, the terms "*to the extent possible*" should be deleted from this clause.

60.   Moreover, Clause 1.5 sets forth that the data importer's obligation to return or delete the personal data is notwithstanding any requirements "*under local law*" which prohibits return or destruction. This wording amounts to contradicting Article 28(3)(g) GDPR. The Commission should clarify in the Draft SCCs that only the requirements of local laws that respect the essence of the fundamental rights and freedoms and do not exceed what is necessary and proportionate in a democratic society to safeguard one of the objectives listed in Article 23(1) GDPR should be taken into account under this clause. The EDPB and the EDPS consider that specific legal requirements in terms of data retention periods under local laws, types of data, and retention periods should be explicitly specified under Annex I.B.

4.3.2.2   Clause 1.6 - Security of processing

61.   Similarly as in Module One, Clause 1.6(a) specifies that in order to ensure the security of data as part of the transfer, the parties shall consider "*encryption during transmission and anonymisation or pseudonymisation, where this does not prevent fulfilling the purpose of processing".* In relation to the reference to anonymization, the EDPB and the EDPS recall that if personal data is anonymized, the obligations under the GDPR are no longer applicable.

62. Furthermore, Clause 1.6(d) provides for the data importer's obligation to cooperate "*in good faith*" and assist the data exporter to comply with its obligations under the GDPR. The terms "*in good faith*" are not used in other parts of the SCCs where an obligation of cooperation is mentioned and the EDPB and the EDPS do not see the need for such specification, which, in any case, would go beyond the provisions of the GDPR on that matter. It should thus be deleted.

4.3.2.3   Clause 1.8 - Onward transfers

63. Clause 1.8(i) should be completed with an obligation for the data importer to provide the data exporter, upon request, with a copy of the safeguards implemented for framing onward transfers to a third party. Such obligation was included in the controller to processor 2010 SCCs. The EDPB and the EDPS do not see the reason for its exclusion from the proposed Draft SCCs, as the provision of these safeguards constitute an important element for the data exporter's obligation under GDPR to ensure accountability with respect to the transfers it carries out, including onward transfers.

64. An obligation should also be added for the data importer to provide data subjects with a copy of these safeguards upon request, as is the case in the controller to processor 2010 SCCs. As above, the EDPB and the EDPS do not see the reason for excluding such obligation from the proposed Draft SCCs. The provision of these safeguards to the data subject contribute to the transparency which is required in relation to the transfer of their data.

4.3.2.4   Clause 1.9 - Documentation and compliance

65. **Clause 1.9(d)** of the Draft SCCs provides for the possibility for the data exporter, in order to conduct audits, to rely on an independent auditor mandated by the data importer. This provision is not foreseen in Article 28(3)(h) GDPR, and needs to be aligned with this article which provides that the processor has to allow for and contribute to audits, including inspections, that are conducted by the controller or another auditor mandated by the controller[29]. As such, the processor might propose an auditor, but the decision about the auditor has to be left to the controller according to Article 28(3)(h) GDPR. The controller's right to choose the auditor should not be limited from the outset. Clause 1.9(d) also states that where the data exporter mandates an independent auditor, it shall bear the costs, and where the data importer mandates an audit, it has to bear the costs of the independent auditor. As the issue of allocation of costs between a controller and a processor is not regulated by the GDPR, consequently, the EDPB and the EDPS are of the opinion that any reference to the costs should be deleted from this clause. The same comment applies to the corresponding provision in Module Three.

---

[29] As this is currently required by the EDPB in the context of BCRs for processors, see WP257 (endorsed by the EDPB), Section 2.3 "*Any processor or sub-processor processing the personal data on behalf of a particular controller will accept, at the request of that controller, to submit their data processing facilities for audit of the processing activities relating to that controller which shall be carried out by the controller or an inspection body composed of independent members and in possession of the required professional qualifications, bound by a duty of confidentiality, selected by the data controller, where applicable, in agreement with the Supervisory Authority.";* https://ec.europa.eu/newsroom/article29/document.cfm?action=display&doc_id=49726 https://ec.europa.eu/newsroom/article29/document.cfm?action=display&doc_id=49726.

4.3.3 Clause 1 - Data protection safeguards – Module Three (Transfer processor to processor)

66. Pursuant to Clause 1.1, the data importer is obliged to process the personal data only based on the controller's instructions. In addition to that, Article 28(4) GDPR requires that, where a processor engages another (sub-)processor for carrying out specific processing activities on behalf of the controller, "*the same data protection obligations as set out in the contract or other legal act between the controller and the processor*" as referred to in Article 28(3) GDPR shall be imposed on that other processor by way of a contract or other legal act under Union or Member State law. The EDPB and the EDPS are of the opinion that the requirement of Article 28(4) GDPR needs to be taken into account by the parties also in this scenario.

4.3.3.1 Clause 1.1 - Instructions

67. Module Three deals with processor to processor transfers. Accordingly, practitioners might initially assume that the contract pursuant to Article 46 GDPR may exclusively be concluded between the processor and its (sub-)processor if only Module Three is relied upon. However, Clause 1.1(a) refers to Annex I.A. and the list of "*parties*" which includes the identity and contact details of the controller and its signature. The EDPB and the EDPS are of the opinion that the Commission needs to clarify whether the controller has to sign these clauses, or whether the processor and sub-processor only need to mention the identity of the controller in the Annex. In the first case, it should be clarified to what effect and which obligations of Module Three would apply to the controller.

68. Furthermore, Clause 1.1 stipulates that the data exporter may give further instructions regarding the data processing "*within the framework of the contract agreed with the data importer throughout the duration of the contract*". It is not clear whether the reference to the framework of the contract limits in any way the controller's right to give further instructions regarding the data processing, all the more since Clause 7 of the draft Article 28 SCCs does not contain such possible limitation. Clause 7 states simply that "*Subsequent instructions may also be given by the data controller throughout the duration of the processing of personal data*".

4.3.3.2 Clause 1.5 - Storage limitation and erasure or return of data

69. Clause 1.5 stipulates that upon termination of the provision of the processing services, the data importer shall delete all personal data processed on behalf of the controller (option 1) or return to the data exporter all personal data processed on its behalf and delete existing copies (option 2). The EDPB and the EDPS are of the opinion that this wording conflicts with Article 28(3)(g) GDPR, which provides for that deletion or returning takes place "*at the choice of the controller*". Accordingly, Clause 1.5 should provide for that deletion or returning of personal data to take place at the choice of the controller. Furthermore, it should be added to option 2 that the data importer should be required to certify to the data exporter that it has deleted existing copies.

70. Apart from that, Clause 1.5 sets forth that the data importer's obligation to return or delete the personal data is notwithstanding any requirements "*under local law*" which prohibits return or destruction. This wording amounts to contradicting Article 28(3)(g) GDPR. Taking into account that the processor is subject to third country laws, and therefore may be subject to a legal obligation to (further) storage of the data (e.g. for accounting purposes), the EDPB and the EDPS consider that the Commission should clarify in the Draft SCCs that only the requirements of local laws that respect the essence of the fundamental rights and freedoms and do not exceed what is necessary and proportionate in a democratic society to safeguard one of the objectives listed in Article 23(1) GDPR should be taken into account under this Clause. As in Module Two, the EDPB and the EDPS consider

that specific legal requirements in terms of data retention periods under local laws, types of data, and retention periods should be explicitly specified under Annex I.B.

Furthermore, the term "*to the extent possible*" should be deleted. To avoid repetition, the EDPB and the EDPS invite the Commission to refer to Section 4.3.2.1.

4.3.3.3   Clause 1.5 - Security of processing and Clause 1.6 - Special categories of personal data

71.   For the avoidance of repetition, the EDPB and the EDPS invite the Commission to refer to their comments made under Section 4.3.2.2.

4.3.4   Clause 1 - Data protection safeguards – Module Four (Transfer processor to controller)

72.   The EDPB and the EDPS recognise that the scope of Module Four includes only transfers from a processor subject to GDPR to its own controller not subject to GDPR, and excludes transfers from such a processor to any other controller, as is clarified in Article 1.1 and Recital 16 of the Draft Decision. Nevertheless, to avoid any misunderstanding about the scope of this module, the EDPB and the EDPS would recommend a short explanation of the limited scope of Module Four in the Draft SCC themselves.

73.   The EDPB and the EDPS would welcome any additional explanation that the European Commission could add in the Draft Decision regarding Module Four, so as to better understand the rationale used to determine which commitments shall be taken by parties using Module Four.

74.   To provide for all the necessary provisions of Article 28 GDPR directly applicable to the processor, Module Four should be completed as follows:

75.   There should be a commitment from the processor that persons authorised to process the personal data have committed themselves to confidentiality or are under an appropriate statutory obligation of confidentiality (Article 28(3)(b) GDPR).

76.   A clause on the personal data breach notifications obligations imposed on the processor by virtue of Article 33(2) GDPR should also be added to this Module of the SCCs.

77.   Furthermore the Module should be completed with a clause on sub-processing by the processor/data exporter as this is a direct obligation for the processor under Article 28(3) and (4) GDPR.

78.   Moreover, the parties must commit themselves to mutual assistance and support. In addition to the obligation already set out in Clause 5 of Module Four, this also concerns the obligation of the processor to inform the controller of personal data breaches (Article 33(2) GDPR), which should be explicitly included in the agreement.

4.3.5   Horizontal remarks - Clause 2 (Local laws affecting compliance with the Clauses) and Clause 3 (Obligations of the data importer in case of government access requests)

4.3.5.1   Partial exemption of application to Module Four

79.   Concerning the fact that Clauses 2 and 3 will apply to Module Four "*only if the EU processor combines the personal data received from the third country-controller with personal data collected by the processor in the EU*", the EDPB and the EDPS stress that Article 3(1) GDPR does not state that personal data processed by the processor in the EU shall (also) be collected in the EU for the processor obligations to be applied to them. Therefore, the EDPB and the EDPS call on the Commission to clarify the reasons why this exemption has been inserted, and to further assess whether this exemption is justified.

80. Moreover, the EDPB and the EDPS call on the Commission to clarify the notion of "*combination*" of the personal data received from the third country controller with personal data collected by the processor in the EU, and the situations where this combination will take place, as such notion of combination of data is not envisaged in the GDPR.

4.3.5.2   Situations covered by Clauses 2 and 3

81. Concerning the situations covered in Clauses 2 and 3, the EDPB and the EDPS note that the scope of these provisions should be clarified. Indeed, it is not entirely clear if these clauses cover situations where, in the absence of legislation in the third country affecting compliance with the commitments of the data importer, practices affecting such compliance would still have to be taken into account and assessed, or even if the clauses will cover practices diverging from what the legal framework of the third country provides. For instance, concerning access to data by public authorities in the third country, even if not envisaged by the applicable legal framework, such access could take place in practice, or the authorities might access to the data without complying with the legal framework. In order to expressly take into account these situations, the titles of these clauses should be amended accordingly (in particular the title of Clause 2, which only refers to the laws, should be completed), and the wording of the clauses should be clarified to include more expressly these situations.

82. In particular, Clause 2(a) does not seem to impose any specific obligation in the case where there is no law relating to public authorities' access to personal data. In this respect, it is recalled that the EDPB Recommendations on supplementary measures provide that, in the absence of publicly available legislation, the data exporter should still look into other relevant and objective factors. The rationale behind this recommendation is that it cannot be reasonably inferred from the absence of law on public authorities' access to personal data that no access takes place in practice.

83. Therefore, the EDPB and the EDPS recommend to complement Clauses 2 and 3 to provide safeguards also in situations where the third country does not have a legislation, but where such practices, which would then be contrary to EU data protection requirements, exist or where the practice will diverge from the provisions of the legal framework. In particular, it should thus be clarified in the Draft SCCs that, in the absence of laws in the third country relating to public authorities' access to personal data, the parties should nevertheless, based on any available information, strive to identify any practice applicable to the data transferred preventing the data importer from fulfilling its obligations.

4.3.5.3   Scope of Clauses 2 And 3

84. Also concerning the scope of the clauses, the EDPB and the EDPS note that some elements such as the reference to the "*absence of requests for disclosure from public authorities received by the data importer*" or to "*relevant practical experience*" in this regard in Clause 2(b), as well as the use of the present tense in Clause 2(e) concerning the moment in which the data importer "*is or has become subject to laws not in line with the requirements under paragraph a)*" of Clause 2, are source of ambiguity. Indeed, these elements may give the impression that even when the prior assessment of the legal framework of the third country of the importer led to the conclusion that the legislation of the third country is not compliant with the EU requirements in terms of level of protection afforded to personal data and that no effective supplementary measure(s) could be put in place, transfers could still take place. The EDPB and the EDPS therefore recommend to clarify that these clauses will apply only to situations where, at the time of the conclusion of the contract, either the relevant law(s) of the third country was (were) assessed to be providing an essentially equivalent level of protection to that guaranteed within the EU, or where effective supplementary measures to remedy the potential deficiencies identified in such legislation and/or practices and to ensure the effective application of the safeguards contained in the Draft SCCs have been put in place so as to allow the data importer to comply with its obligations, or where the third country does not have any law in the field relevant to the transferred data.

85. In other words, the mechanisms foreseen in these clauses will be triggered only in cases where, either:

➢ The third country will have no legislation, but a practice incompliant with the EU requirements will be revealed;

➢ A change of law in the third country will occur, and as a consequence of this change, the legal framework of the third country of the importer will not be providing an essentially equivalent level of data protection anymore, which will thus require a suspension of the transfers taking place on the basis of the SCCs; or

➢ The implementation of the law will diverge in practice and no longer provide an essentially equivalent level of protection to that guaranteed within the EU.

4.3.6 Clause 2 – Local laws affecting compliance with the Clauses

4.3.6.1 Objective assessment of the legislation of the third country

86. The EDPB and the EDPS stress that the assessment of whether there is anything in the law or practice of the third country of destination, which prevents the data importer from fulfilling its obligations under the Draft SCCs in the context of the specific transfer, should be based on objective factors, regardless of the likelihood of access to the personal data. As underlined in the EDPB Recommendations on supplementary measures (in particular paragraphs 33 and 42[30], this assessment depends on the circumstances of the transfer and in particular on the following objective factors:

➢ Purposes for which the data are transferred and processed (e.g. marketing, HR, storage, IT support, clinical trials);

➢ Types of entities involved in the processing (public/private; controller/processor);

➢ Sector in which the transfer occurs (e.g. adtech, telecommunication, financial, etc.);

➢ Categories of personal data transferred (e.g. personal data relating to children may fall within the scope of specific legislation in the third country);

➢ Whether the data will be stored in the third country or whether there is only remote access to data stored within the EU/EEA;

➢ Format of the data to be transferred (i.e. in plain text/ pseudonymised or encrypted);

➢ Possibility that the data may be subject to onward transfers from the third country to another third country.

87. In this respect, the EDPB and the EDPS also recall that in the Schrems II ruling, the CJEU did not refer to any subjective factor such as the likelihood of access, for instance. The mere fact that the data are comprised within the scope of a third country legislation that allows access to data by public authorities without specific essential guarantees (as recalled in the EDPB Recommendations 02/2020 on the European Essential Guarantees for surveillance measures[31]) would amount, *per se,* to considering that such access will possibly take place, without the need to rely on any practical

---

[30] https://edpb.europa.eu/sites/edpb/files/consultation/edpb_recommendations_202001_supplementarymeasurestransferstools_en.pdf.

[31] https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_recommendations_202002_europeanessentialguaranteessurveillance_en.pdf.

experience in this regard or absence of requests for disclosure from public authorities received by the data importer. The current drafting of Clause 2(b)(i) can therefore be misunderstood as it might be read as permitting data to be exported if the data importer has not yet received any order to disclose personal data, even if it is subject to local laws permitting such orders. It could also be understood to allow continuing the transfer where the data importer is simply not permitted to inform the data exporter in this respect due to a gag order. Furthermore, assessing these kinds of subjective factors (likelihood of access) in practice would prove to be very difficult and hardly verifiable.

88.   Therefore, the EDPB and the EDPS recommend:

> Deleting the reference to "*the content and duration of the contract*"; "*the scale and regularity of transfers*"; "*the number of actors involved and the transmission channels used*"; "*any relevant practical experience with prior instances, or the absence of requests for disclosure from public authorities received by the data importer*";

> Ensuring full consistency between Clause 2(b)(i) and of the EDPB Recommendations on supplementary measures;

> Amending Clause 2(b)(ii) accordingly.

4.3.6.2   New annex to be added to the Draft SCCs

89.   In order to avoid that the parties merely agree to document the above-mentioned assessment without doing so in practice, the EDPB and the EDPS recommend to add an annex to the Draft SCCs to require the parties to document, prior to the signature of the contract, this assessment led under Clause 2 (i.e., the assessment of the third country's legislation and practices in the light of the circumstances of the transfer). This would help to achieve that the Draft SCCs will be correctly used, as an explicit annex would point the data importers and data exporters to the necessity of this assessment.

4.3.6.3   Consultation of the SA on supplementary measures

90.   Under Clause 2(f), the Draft SCCs provide for the consultation of the competent supervisory authority ("**SA**"). As underlined in the EDPB Recommendations on supplementary measures, "*when you intend to put in place supplementary measures in addition to SCCs, there is no need for you to request an authorisation from the competent SA to add these kind of clauses or additional safeguards as long as the identified supplementary measures do not contradict, directly or indirectly, the SCCs and are sufficient to ensure that the level of protection guaranteed by the GDPR is not undermined*."[32]

91.   Indeed, it is the responsibility of the data exporter, with the assistance of the data importer, to identify those measures. This is in line with the principle of accountability of Article 5(2) GDPR, which requires controllers to be responsible for, and be able to demonstrate compliance with the GDPR principles relating to processing of personal data. This was emphasized by the CJEU in its Schrems II ruling[33], and recalled in the EDPB Recommendations on supplementary measures[34].

---

[32] https://edpb.europa.eu/sites/edpb/files/consultation/edpb_recommendations_202001_supplementarymea surestransferstools_en.pdf; para 56

[33] Judgment of the Court (Grand Chamber) of 16 July 2020; Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems; Case C-311/18; para 134.

[34] https://edpb.europa.eu/sites/edpb/files/consultation/edpb_recommendations_202001_supplementarymea surestransferstools_en.pdf; para 5.

92. Also, the EDPB and the EDPS underline that there is no express legal basis in the GDPR according to which the SAs would have to provide for such kind of consultation.

4.3.6.4 Notification of SAs where the data exporters intend to continue with the transfers, even though no supplementary measures could be found

93. The EDPB and the EDPS recall that in previous SCCs, the data exporter had to "*forward*" the notification made by the data importer relating to the impossibility to respect the SCCs to the SA, where it "*decides, notwithstanding that notification, to continue the transfer or to lift the suspension*". This commitment, scrutinized by the CJEU in the Schrems II ruling, paragraph 145, should be retained in the Draft SCCs.

94. In line with the provisions contained in the 2010 SCCs[35], as scrutinized by the CJEU, a notification should be foreseen only if the data exporter intends to continue the transfer in the absence of effective supplementary measures. This case is not reflected in the Draft SCCs yet, while it is indeed the situation where a SA could have a role to play, and could intervene with its powers to suspend or prohibit data transfers in those cases where it finds that an essentially equivalent level of protection cannot be ensured in accordance with the Schrems II ruling[36].

95. In addition, the drafting of Clause 2(f) should make clear that such notification will not, in any way, constitute an authorisation to continue the transfer in the absence of suitable supplementary measures on the basis of the Draft SCCs. The EDPB and the EDPS thus call on the Commission to clarify this point.

4.3.7 Clause 3 – Obligations of the data importer in case of government access requests

96. The EDPB and the EDPS recommend clarifying that access requests from courts and other public authorities of the third country fall within the scope of this provision. This could for instance be achieved with a modification of the title of this clause.

4.3.7.1 Clause 3.1 – Notification

97. Under Clause 3.1, the EDPB and the EDPS underline that it should be clarified that the notification foreseen by the data importer would take place before having replied to the access request by third country's public authorities, so as to allow the data exporter to take any appropriate further steps, if needed.

4.3.7.2 Clause 3.2 – Review of legality and data minimisation

98. The EDPB and the EDPS understand that the scope of Clause 3.2 is limited to situations where access requests received by the data importer will not be compliant with the legislation of the third country, including its obligations resulting from international law and its rules governing conflicts of laws situations. The EDPB and the EDPS consequently recommend clarifying this clause in order to ensure that data exporters do not misunderstand it. This clause is only meant to ensure that the legislation of the third country already complying with EU law requirements will be applied correctly in that third

---

[35] 2010/87/: Commission Decision of 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46/EC of the European Parliament and of the Council; OJ L 39, 12.2.2010, p. 5–18; Annex - Clause 4(g).
[36] Judgment of the Court (Grand Chamber) of 16 July 2020; Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems; Case C-311/18; para 113 and 121.

country. Therefore, this clause will not, *per se,* result in challenging the legality of requests of disclosure against EU data protection requirements, unless the legislation of the third country expressly provides for the possibility to invoke the legislation of another country.

4.3.8   Clause 5 - Data subject rights - Module One (Transfer controller to controller)

- **Clause 5(a)**

99.   According to this subparagraph, the data importer is responsible for dealing with data subjects' requests to exercise their rights. Possible difficulties may arise in practice, due to the data importer being outside the EU. For that reason, the EDPB and the EDPS share the view that this clause should be more closely aligned with the current requirements under the 2004 SCCs, i.e., the data exporter is in charge of responding to data subjects' enquiries, unless the parties agreed otherwise[37]. Besides, the parties should commit to assist and cooperate with each other when handling data subjects' requests.

100.   Additionally, the EDPB and the EDPS are of the opinion that the obligation imposed on the data importer to provide information to data subjects upon request should be clearly introduced in the Draft SCCs, and fully aligned with the requirements under Article 12(1) and Article 15 GDPR.

- **Clause 5(b)**

101.   In the opinion of the EDPB and the EDPS, data subjects should have the right to access, upon request, to more information than those currently listed under Clause 5(b)(i), and more precisely to:

➢ More precise information in relation to onward transfers, including for sub-processors, i.e., the full name and contact details of all recipients of the data relating to them[38]. This could be achieved by requiring the parties to provide such information in Annex III of the Draft SCCs, or by requiring to provide them to data subjects upon request;

➢ In accordance with Article 15(1)(d) GDPR, precise information on the envisaged period for which the personal data will be stored, where possible, or if not, the criteria used to determine that period. This could be achieved by requiring the parties to provide such information in Annex I of the Draft SCCs. Providing such information in Annex I might also make it clear to the parties that they need to actually define and implement retention periods; and

➢ In accordance with Article 15(1)(g) GDPR, any available information as to the source of collection, where the personal data are not collected directly from data subjects.

102.   Module One should include the data importer's obligation to inform data subjects on their rights to request rectification or erasure of their personal data, as well as their rights to request restriction of or to object to the processing of their personal data, which would bring this clause in line with Article 15(1)(e) GDPR. Such information would come in addition to information on the right to lodge a complaint with the competent SA, as currently included under Clause 5(b)(i). More generally, the EDPB and the EDPS call on the Commission to insert the obligation for the data importer to allow data subjects to exercise their right to request the restriction of the processing of their data.

---

[37] See clause 1(d) and Clause II(e) in 2004 SCCs.
[38] See Judgment of the Court (Third Chamber) of 7 May 2009; CJEU College van burgemeester en wethouders van Rotterdam v M.E.E. Rijkeboer C-553/07; para 49 and 54.

103. As to Clause 5(b)(iii) concerning erasure of data subjects' personal data, the EDPB and the EDPS are of the opinion that such commitment should completely reflect the requirements set out in Article 17(1) GDPR.

- **Clause 5(c)**

104. The EDPB and the EDPS are of the opinion that it is not justified to limit the right to object to direct marketing cases and that the scope of the right to object should be extended, especially in cases where the right to object is enforceable against the data exporter in the first place.

- **Clause 5(d)**

105. The EDPB and the EDPS are of the opinion that the wording of Clause 5(d) should be revised so as to mirror Article 22 GDPR's prohibition of automated decision-making as a principle, and should set out the conditions allowing derogations to such prohibition. Clause 5(d) should also clarify that the data importer's obligations to implement suitable safeguards and provide information about the envisaged automated decision to data subjects are cumulative.

106. In addition, in accordance with Article 22 and Article 15(1)(h) GDPR, Clause 5(d) should require that information provided to data subjects include the significance and the envisaged consequences for data subjects.

- **Clause 5(f)**

107. Whilst the EDPB and the EDPS acknowledge that there may be circumstances justifying that the data importer may refuse a data subject's request, it should be made clear in the Draft SCCs that only the requirements of local laws that respect the essence of the fundamental rights and freedoms and do not exceed what is necessary and proportionate in a democratic society to safeguard one of the objectives listed in Article 23(1) GDPR should be taken into account under this Clause.

- **Clause 5(g)**

108. In order for data subjects to be fully able to exercise their rights, the EDPB and the EDPS consider that the obligation to inform data subjects that the data importer intends to reject their requests should be aligned with Article 12(4) GDPR, hence be provided without delay and at the latest within one month of receipt of the request.

4.3.9 Clause 5 - Data subject rights - Modules Two (Transfer controller to processor) and Three (Transfer processor to processor)

109. Clause 5 in Module Two and Clause 5 in Module Three contain the same requirements, hence are addressed together in this Joint Opinion.

110. The EDPB and the EDPS share the opinion that Clause 5(a) should:

➢ Further specify that the responses to data subjects shall be made in accordance with the controller's instructions (e.g. on content of the response) as set out in annex to the Draft SCCs.

➢ Further specify that the scope of the data importer's obligation relating to the exercise of data subjects' rights on behalf of the controller should be described and clearly set out in annex to the Draft SCCs.

4.3.10 Clause 5 - Data subject rights - Module Four (Transfer processor to controller)

111. The EDPB and the EDPS would welcome clarification from the European Commission regarding the possible practical consequences entailed by the commitment made by the parties to assist each other in handling data subjects' requests made on the basis of the data importer's applicable law.

112. The EDPB and the EDPS would welcome further clarity on the situations that the commitment made by the parties to assist each other in handling data subjects' aim at covering.

113. Moreover, it is unclear what is meant in Clause 5, where reference is made to the assistance "*for data processing by the data exporter in the EU, under the GDPR*". If the intention is, for instance, to cover assistance in relation to security obligations, it should be clarified by the Commission in the Draft SCCs.

4.3.11 Clause 6 - Redress

114. The EDPB and the EDPS would welcome clarification in the Draft SCCs as to whether the option to offer data subjects the possibility to seek redress before an independent dispute resolution body, at no cost, has to be provided in all sets of clauses. While it would be clear that this option may help ensure effective enforcement in case of controller to controller transfer, the EDPB and the EDPS would welcome further clarification as to how this mechanism will apply in Modules Two, Three, and Four. For instance, it should be clarified to which extent this mechanism would apply in relation to the specific and direct obligations of the processor and of the controller in Module Four.

115. As for the clauses on redress envisaged in Modules One, Two, and Three (Clause 6(b)), the EDPB and the EDPS are of the opinion that it should be made clearer that the data importer shall accept the right of the data subject (who invokes his or her rights as a third party beneficiary) to lodge directly a complaint with an EEA SA and/or bring a claim before an EEA court without the need to seek an amicable resolution of the dispute in advance. In fact, in order to ensure the same level of protection envisaged by Articles 77 and 79 GDPR, such type of mechanisms (e.g. internal complaint-handling mechanisms put in place by the data importer) should be encouraged so as to facilitate the exercise of the third party beneficiary rights, but they should not be considered as a prerequisite for lodging a complaint with the SA or with a court.

116. Furthermore, Article 77(1) GDPR provides that data subjects shall be able to choose to lodge a claim before the SA of their habitual residence, place of work, or place of the alleged infringement. From this perspective, the EDPB and the EDPS consider it to be important to amend Clause 6(b)(i) accordingly – as the Draft SCCs seem to refer only to the SA with responsibility for ensuring compliance by the data exporter with the GDPR as regards the data transfer.

117. The EDPB and the EDPS call for clarifications in relation to the absence of a redress clause in Module Four. Taking into consideration the commitments currently contained in Clause 5 of Module Four in relation to 'data processing by the data exporter in the EU, under the GDPR', the EDPB and the EDPS are wondering how the data subject's right to redress will be recognised in such cases.

4.3.12 Clause 7 - Liability - Modules One (Transfer controller to controller) and Four (Transfer processor to controller)

118. In Clause 7, Modules One and Four, the EDPB and the EDPS note that the joint and several liability towards the data subject would only be triggered in case there is a shared responsibility. In other words, the liability regime envisaged in the Draft SCCs does not provide for a full joint and several liability where each party would be responsible for the damage solely caused by the other party.

119. In this context, the EDPB and the EDPS would like to recall that the Draft SCCs should incorporate effective mechanisms that make it possible, in practice, to ensure compliance with the level of

protection required by EU law[39]. However, bringing an action against a non-EU company may prove to be difficult for the data subject as regards enforcement of the judgment against that non-EU company. The existing sets of SCCs are more protective than what is proposed in the Draft SCCs, and the EDPB and the EDPS are of the opinion that the protection of data subjects should be reinforced in this regard.

120. Against this background, the EDPB and the EDPS call for an amendment of Clause 7 in line with the considerations made above.

4.3.13 Clause 7 - Liability - Modules Two (Transfer controller to processor) and Three (Transfer processor to processor)

121. In Modules Two and Three, Clause 7(c) and 7(d), it is envisaged that the data subject shall be entitled to receive compensation, for any material or non-material damages the data importer caused, against the data importer (c) or against the data exporter (d).

122. For the avoidance of doubt, it should be clarified in the Draft SCCs by the Commission that these possibilities are cumulative and the data subject has a choice to receive compensation, for any material or non-material damages the data importer caused, either against the data importer or the data exporter. In other words, the possibility to seek the liability of the data exporter for any material or non-material damages caused by the data importer should not be conditioned by an action against the data importer.

4.3.14 Clause 9 - Supervision

123. Clause 9 requires to specify the SA which is competent for the data exporter for the purpose of compliance with the Draft SCCs, but does not envisage the case where there may be several competent SAs if there are several data exporters as parties to the Draft SCCs (which is a possibility offered by the Draft SCCs). The EDPB and the EDPS would suggest clarifying this aspect by referring to the possibility that more than one EEA SA could be competent if different data exporters are involved and that, in this specific case, each SA with the responsibility to ensure compliance by the data exporter will be competent for the specific transfer carried out on its territory. For the sake of clarity and readability, the parties should be requested to designate the competent SAs in the annexes.

4.4   Section III - Final provisions

4.4.1   Clause 1 - Non-compliance with the Clauses and termination

124. Clause 1(d) provides for an exception to the obligation to return or destroy the data prior to the termination of the contract when the local law applicable to the data importer prohibits this return or destruction. The EDPB and the EDPS call the Commission to recall that the obligations of the data importer under Clause 5 Section II would also apply in the case referred to in Clause 1(d) Section III. The EDPB and the EDPS consider that the Commission should clarify in the Draft SCCs that only the requirements of local laws that respect the essence of the fundamental rights and freedoms and do not exceed what is necessary and proportionate in a democratic society to safeguard one of the objectives listed in Article 23(1) GDPR should be taken into account under this clause.

---

[39] For instance, Article 47(2)(f) GDPR requires that BCRs shall specify, amongst others, "*the acceptance by the controller or processor established on the territory of a Member State of liability for any breaches of the binding corporate rules by any member concerned not established in the Union*".

125. In addition, the EDPB and the EDPS note that Clause 1(d) provides that the data importer should warrant that it will ensure, "*to the extent possible*" the level of protection required by these clauses.

126. In this respect, the EDPB and the EDPS recall that the level of protection required by the Draft SCCs should always be ensured. Therefore, the EDPB and the EDPS call on the Commission to remove the reference to "*to the extent possible*".

4.5 Annexes

127. The EDPB and the EDPS note that the Draft SCCs are designed to be possibly used – as a Multi Party Agreement - by more than one party as data exporters and/or as data importers. In order to avoid the risk of blurring roles and responsibilities, it is important to provide the parties, in the Draft SCCs, with clear indications as to how the Annex should to be filled out appropriately. This is all the more necessary because of the modular approach that allows the clauses to be incorporated within one Multi Party Agreement covering up to four scenarios (controller-to-controller, controller-to-processor, processor-to-processor, and processor-to-controller transfers), and possibly a large number of transfers, each of them possibly occurring between different data exporters and/or data importers. The EDPB and the EDPS are therefore of the opinion that it is of utmost importance that the contract that will be signed in practice, including its Annexes, will, with absolute clarity, delimit the roles and responsibilities of each of the parties (data exporter-controller, data exporter-processor, data importer-controller, data importer-processor) in each relationship, and with regard to each transfer or set of transfers covered.

128. For these reasons, the Annex to the contract should be precise enough so it is possible at any point in time to determine who takes which role as regards a specific transfer or set of transfers of personal data. The EDPB and the EDPS therefore suggest to clarify that **each transfer or set of transfers**, i. e. each transfer or set of transfers carried out for one or several certain and defined purposes, should be separately described on the basis of its/their purpose(s), the types of personal data transferred, the category or categories of data subjects, the type(s) of processing, and the parties to the transfer (data importer(s) and data exporter(s)), as well as the role of the respective parties (controller(s) or processor(s)). Consequently, as a rule, a distinct Annex – which should include Parts I to VI - per transfer or set of transfers, will always be required. Such distinct Annex required for each transfer or set of transfers should be signed only by those data exporters and data importers which carry out the respective transfer. At the same time, each data exporter and data importer signing the respective Annex should specify, when signing the Annex relating to the respective transfer or the respective set of transfers, its role as regards this transfer or set of transfers (controller or processor), in order to avoid any ambiguities.

129. As a result, in case of a Multi Party Agreement addressing several transfers and/or parties, it should always be clear which Annex (comprising Parts I to VI) applies to which specific transfer or set of transfer, who the data exporters and data importers involved in that transfer or set of transfers are, and which role (controller or processor) the respective data exporter or data importer takes in that transfer or set of transfers. To this aim, the EDPB and the EDPS suggest to include some explanatory wording, in the "Annex" part of the Draft SCCs, aimed at guiding the parties on the appropriate use and signing of the Annex, in particular in the case of the Draft SCCs being used as a Multi Party Agreement. The EDPB and the EDPS have provided some corresponding wording suggestions in the technical annex of this Joint Opinion.

130. Thus, an Annex containing only general information that applies to a variety of transfers should not be considered complete. In order to avoid confusion, the Annex should be signed only by the parties that effectively carry out the specific processing, including those parties acceding to the clauses on the basis of Section I Clause 6.

131. Another problem encountered in practice, is that SCCs Annexes on technical and organisational measures are often filled out in a very generic way because they are meant to be made fit for a whole variety of different transfers and processing operations, while lacking precise indication as to which technical and organisational measures apply to which of the transfers covered by the SCCs. Therefore, the EDPB and the EDPS suggest to expressly highlight in the Draft SCC (Part III of the Annex as suggested by the EDPB and the EDPS) that only those specific technical and organisational measures that will be applied to the respective transfer/set of transfers should be enumerated, while technical and organisational measures that will only apply to other transfers / categories of transfers covered by the same Multi Party Agreement should only be filled out in those Annex that relates to those respective transfers for their part.

132. As regards controller-processor relationships, the EDPB and the EDPS note that, in practice, there is sometimes confusion about the requirements relating to sub-processors. The requirements set out in the Draft SCCs to enlist each and every sub-processor should be specifically recalled and reflected in Part V of the Annex. Moreover, the EDPB and the EDPS would suggest to indicate (as Part V of the Annex as suggested) the list of intended sub-processors (including, per each, their location, the processing operation(s), and type of safeguards they have implemented) in order to enable the controller to authorise the use of the intended sub-processors as required by Article 28(2) GDPR. It would be, moreover, also useful to insert the sentence that the controller has authorised the use of the sub-processors mentioned in that list.

For the European Data Protection Supervisor

The European Data Protection Supervisor

(Wojciech Wiewiorowski)

For the European Data Protection Board

The Chair

(Andrea Jelinek)