Minutes of the 6th meeting of the Multi-stakeholder expert group to support the application of the Regulation (EU) 2016/679 7 December 2020

1) Introduction

The Commission welcomed the Members and informed them that the purpose of this special ad-hoc meeting was to discuss exclusively the draft Standard Contractual Clauses (SCCs) between controllers and processors located in the EU[1] and the draft SCCs for transferring personal data to non-EU countries[2]. The Commission proposed to go through each section of the draft SCCs and requested from the Members concrete feedback on the substance of the texts, which would complete the on-going public consultation on them[3].

The Commission highlighted that the purpose of the two draft SCCs was to equip stakeholders with a consistent package of modern tools than can facilitate compliance with the General Data Protection Regulation (GDPR)[4], in line with the announcement in the GDPR evaluation report of 24 June 2020[5]. The Commission indicated that the two draft SCCs are complementary to each other and could be used either separately or jointly.

2) Draft SCCs between controllers and processors located in the EU

SECTION I

The Commission presented the first section of these draft SCCs, containing clause 1 '*Purpose and scope*', clause 2 '*Invariability of the Clauses*', clause 3 '*Interpretation*', clause 4 '*Hierarchy*' and clause 5 '*[Docking Clause]*', which is optional for new entities acceding the SCCs.

The Commission underlined that the SCCs are based on Article 28(7) GDPR and Article 29(7) of Regulation (EU) 2018/1725[6], and cover transmissions of personal data between controllers and processors that are located in the EU and subject to the GDPR. The Commission added that the SCCs took in consideration the opinions of the European Data Protection Board (EDPB) on the SCCs prepared

[1] Annex to the Commission Implementing Decision on standard contractual clauses between controllers and processors under Article 28 (7) GDPR and Article 29(7) of Regulation (EU) 2018/1725, ref. Ares(2020)6654429 - 12/11/2020.
[2] 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, ref. Ares(2020)6654686 - 12/11/2020.
[3] The public consultation on the draft SCCs was opened between 12 November 2020 and 10 December 2020.
[4] 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, 4.5.2016, p. 1–88.
[5] COM(2020) 264 final.
[6] 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.

by the Danish[7] and Slovenian[8] Data Protection Authorities (DPAs). The Commission clarified that the main difference is that the Commission draft SCCs have an EU-wide scope compared to the national SCCs of the Danish and Slovenian DPAs.

One Member commented on the title of the SCCs, in particular the necessity to include the wording 'data protection'. This Member mentioned also that the terminology 'entity' used in clause 5 seems to be too restrictive and should be broaden to include the possibility for persons to accede the SCCs.

Another Member pointed out that it would be useful if clause 2 provides for the possibility to add other clauses or additional safeguards beyond the SCCs if they can strengthen the protection of personal data, and consequently benefit the data subjects. The Commission replied that it would make it clear that changes to the SCCs could be accepted only if they are in favour of the data subjects. The Commission clarified also that changes in the annexes of the SCCs do not undermine the SCCs.

The same Member questioned the efficiency of the mechanism for accession of new entities to the SCCs as provided for in clause 5. The Member suggested that, in case of several controllers, it might be relevant to grant a power of attorney to an entity in order to authorise accession of new entities to the SCCs.

One Member representing the business sector stressed that, in relation to clause 5, there might be a wrong designation of the acceding entity in Annex I '*List of Parties*'. This Member questioned whether there should be first a designation in Annex I, or first a factual designation. The Member indicated that the Parties themselves designate whether they are a controller or a processor, but in some cases, their interpretation could be wrong, as it is not always easy for companies to make the correct assessment. The Commission replied that the SCCs should help the Parties to conduct an objective self-assessment, which could ultimately be evaluated by national DPAs.

Another Member representing the business sector questioned how the accession of entities to the SCCs would work in case of many entities and some of them joining later (example in the case of an international cloud service provider), would all these entities need to sign (in an electronic format) the Annexes of the SCCs. The Commission replied that it would reflect on this issue related to the fluctuation in the SCC membership.

SECTION II – OBLIGATIONS OF THE PARTIES

The Commission presented the second section of the draft SCCs, containing clause 6 '*Description of processing(s)*', clause 7 '*Obligations of the Parties*', clause 8 '*Data subject rights*' and clause 9 '*Notification of personal data breach*'. The Commission specified that clause 7 focuses on the obligations of the processor, as the ones of the controller are clearly explained in the GDPR. The Commission underlined that clause 7.3(a) '*Security of processing*' introduces a 48h notification deadline for the processor, meaning that in the event of a data breach concerning data processed by the processor, it shall notify the controller without undue delay and at the latest within 48h after having become aware of the breach. The Commission mentioned that clause 8(c) defines to which extent the

7 Opinion 14/2019 on the draft Standard Contractual Clauses submitted by the DK SA (Article 28(8) GDPR), adopted on 9 July 2019.
8 Opinion 17/2020 on the draft Standard Contractual Clauses submitted by the SI SA (Article 28(8) GDPR), adopted on 19 May 2020.

processor should support the controller in the event of a data breach, and covers both data breaches on the side of the processor and on the side of the controller.

According to one Member representing the business sector, clause 8(b) (which lists for the exercise of which data subject rights the data processor shall assist the data controller) is too exhaustive and processors may not assist the controller for the exercise of data subjects' rights that are not therein. Therefore, this Member suggested using a more general reference to data subjects' rights instead of listing which are these rights. The Commission agreed to reflect on that, but it stressed that Parties to the SCCs cannot change the scope of the data subjects' rights.

Afterwards, Members discussed the 48h notification deadline for the processor in the event of a personal data breach. Several Members were not in favour of this provision because the time line is too short, and preferred to align it with the 72h notification deadline, which applies to the controller pursuant to Article 33 GDPR. One Member warned that the 48h notification deadline raises questions if the processor does not have sufficient time within the 48h to provide qualitative information to the controller. According to this Member, the time necessary for the notification depends on a case-by-case (sometimes this might take even weeks), and it would be better, therefore, not to be prescriptive as regards the notification time line.

The Commission reported that this provision had been extensively debated in the context of the preparation of the draft and agreed to reflect on it. The Commission emphasized that the SCCs are not a mere copy-paste of the text of the GDPR, but on the contrary, they bring added value to the stakeholders by helping them comply with the GDPR, something which requires more specific/ "operational" provisions.

SECTION III – FINAL PROVISIONS

The Commission presented clause 10 '*Termination*', which enables the controller to instruct the processor to temporarily suspend the processing of personal data, and to terminate the SCCs under certain circumstances. No specific concerns were raised by the Members for this clause.

As a general remark, some Members indicated that there are some discrepancies between the wording used in the two draft SCCs. The Commission explained that it aimed to ensure consistency between the two draft SCCs, unless differences are justified. The Commission replied that it will do a further review of the consistency between the two texts and invited the Members to send their observations of discrepancies between the two SCCs.

3) Draft SCCs for transferring personal data to non-EU countries

The Commission presented an overview of these draft SCCs, underlining the difference with the existing ones[9], in particular because of their modular approach that offers one set for four different

[9] 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 (for transfers EU controller to non-EU or EEA controller); and
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 (for transfers EU controller to non-EU or EEA processor).

transfer scenarios. The Commission explained that general clauses (that apply to every scenario) need to be combined with specific clauses, depending on the relevant module.

SECTION I

The Commission introduced first section of these draft SCCs, containing clause 1 '*Purpose and scope*', clause 2 '*Third party beneficiaries*', clause 3 '*Interpretation*', clause 4 '*Hierarchy*', clause 5 '*Description of the transfer(s)*' and clause 6 '*[Docking Clause]*', which is optional for new entities acceding the SCCs.

The Commission stated that the SCCs are designed to provide appropriate safeguards within the meaning of Article 46(1) and (2)(c) GDPR for international transfers of personal data from an EU-based controller or processor subject to the GDPR ('data exporter') to a non-EU based controller or (sub-) processor not subject to the GDPR ('data importer'). The Commission added that the SCCs cover also the rights and obligations of controllers and processors with respect to the matters referred to in Article 28(3) and (4) GDPR in so far as the transfer of personal data from a controller to a processor, or from a processor to a sub-processor is concerned. The Commission stated that, in an international transfer context, these SCCs can therefore be used for compliance with Article 46 GDPR, as well as with Article 28 GDPR.

The Commission specified that the draft SCCs do not cover transfers to a non-EU based data importer that is subject to the GDPR pursuant to Article 3(2) GDPR. Finally, the Commission mentioned that joint controllership is not covered by the draft SCCs.

Several Members commented on the scope of the draft SCCs, namely the exclusion of their applicability to transfers to entities that fall within Article 3(2) GDPR. One Member stated that transfers to entities that fall within Article 3(2) GDPR occur often, and the disapplication of the SCCs to this type of transfers would be a burden for the data exporters. In the view of this Member, this could create practical problems and hamper data protection on the ground. This Member recalled that, as affirmed by the Court of Justice of the EU (CJEU)[10] and the EDPB[11], transferring personal data to a third country is an act of data processing that falls within the scope of the GDPR, so that the rules concerning data transfers must also apply when the GDPR applies. Another Member stated that, despite the lack of a clear interpretation of the interplay between Article 3(2) GDPR and Chapter V GDPR, the draft SCCs should provide a solution for transfers of personal data to non-EU based entities subject to the GDPR pursuant to Article 3(2) GDPR.

The Commission replied that this only concerns the scope of application of these SCCs and is not about taking any position as to whether or not there is a transfer when data is shared with a third country controller/processor whose processing is directly subject to the GDPR (pursuant to Article 3 GDPR). The reason for this approach is that the Commission did not want to pre-empt the discussions that were at the time still ongoing within the EDPB on the interplay between Chapter V and Article 3 of the GDPR. Moreover, it was considered that it would not make sense, from both a practical and legal point of view, for a company that is directly subject to the GDPR to apply (through the SCCs) a second set of rules which is different from/does not fully correspond to those it has to anyway apply under the GDPR. This means that it would in any event not be appropriate to use the draft SCCs for this scenario.

[10] Case C-311/18, *Schrems II*.
[11] EDPB Guidelines 3/2018 on the territorial scope of the GDPR.

One Member questioned the legal value of the signatures of the Parties in Annex I '*A. List of Parties*'. Another Member reported that sometimes the SCCs are not signed, but agreed in another way. The Commission replied that the purpose of the signature is to manifest the agreement of the Parties to join the SCCs and to be bound by them.

One Member repeated his comments made for the draft SCCs between controllers and processors located in the EU, namely the need of a mechanism of a power of attorney granted to one entity for the management of new entities acceding the SCCs.

SECTION II – OBLIGATIONS OF THE PARTIES

Clause 1

MODULE ONE: Transfer controller to controller

The Commission presented the specificities for this module, which takes into account that this scenario concerns two entities operating separately from each other.

One Member pointed out to clause 1.1 '*Purpose*', according to which the data importer shall not process the personal data for any purposes that are incompatible with the specific purpose(s) of the transfer, unless it has obtained the data subject's prior consent. The Member stressed that it might be difficult to obtain consent in some cases, and questioned whether other legal grounds for processing could be used instead of consent, such as the legitimate interests pursued by the controller.

One Member inquired about clause 1.2(a) and mentioned that it goes beyond what is required under Article 14 GDPR, by requiring the data importer to disclose the identity and contact details of third party recipients. Several Members also commented on clause 1.2(c) '*Transparency*' of this module, which obliges the Parties to provide the data subject with a copy of the SCCs upon request. One Member representing the business sector noticed that this obligation diverge from what is requested under Article 13 GDPR and that it might be problematic for competition purposes. Another Member representing the civil society suggested that, under clause 1.2(c), the data subjects should be provided with a copy of the SCCs not only upon request, but that such a copy should be made generally available. Similarly, another Member stressed the importance of the transparency principle after the *Schrems II* judgement[12], and the contradiction with Article 13(1)(f) GDPR, which requires the controller to provide the data subject with reference to the appropriate safeguards for transfers referred to in Article 46 GDPR, and the means by which to obtain a copy of them. This Member requested to clarify what are the modalities for obtaining a copy of the SCCs under clause 1.2(c), for example what exactly the Parties have to make available and when they have to reply to the data subject.

The Commission clarified that the purpose of these transparency obligations is to allow the data subject to keep track of his or her data and, if necessary, exercise his/her rights, including when the data is shared with third parties. Regarding clause 1.2(c), the Commission mentioned that it could be possible to redact the copy to be provided to the data subject, if the Parties do not want to disclose the security measures of processing.

[12] Case C-311/18, *Schrems II.*

One Member representing the business sector pointed out the vague meaning of the term 'regular checks' in clause 1.5(a) '*Security of processing*', according to which the data importer shall carry out regular checks to ensure that technical and organisational measures continue to provide an appropriate level of security of the personal data. The Commission explained that this provision should not be overly prescriptive for this first module as it applies where the data importer is a controller (acting independently from the data exporter) and reflects the overall approach under the accountability principle under the GDPR.

One Member representing the civil society referred to clause 1.5(d), which provides that if a data breach is likely to result in significant adverse effects, the data importer shall without undue delay notify both the data exporter and the competent DPA. The Member asked for a clear time line for this notification, instead of the term 'without undue delay'. The Commission stressed that the time line cannot be shorter that the 72h requested under Article 33 GDPR, and that in any case the GDPR does not apply to the data importer, therefore there is no need to impose to it exactly the same obligations stemming from the GDPR. Another Member commented also on this clause and stated that the wording 'significant adverse effects' is different from the wording in the GDPR and he did not see the added value of the difference.

One Member representing the civil society referred to clause 1.6 '*Special categories of personal data*', which establishes that for transfers of special categories of personal data, the data importer shall apply specific restrictions and/or additional safeguards adapted to the specific nature of the data and the risks involved. According to this Member, the risk based approach set forth in this clause should be deleted, and instead the data importer should always be obliged to apply specific restrictions and/or additional safeguards. The Commission clarified that the intention behind the clause is to always require specific restrictions and/or additional safeguards, but make clear that they should address and be adapted to the specific level of the risk of the transfer concerned. The Commission agreed to consider whether this could be further clarified.

One Member representing the business sector questioned how to deal with cases when the data importer agrees with extra measures to regulate the cooperation with the data exporter and whether there would be a need for a new contract on the top of the SCCs. The Commission replied that it would not be a problem to add additional clauses, as long as they do not contradict the provisions of the SCCs.

MODULE TWO: Transfer controller to processor

The Commission presented briefly this module, noting that it incorporates the requirements of Article 28 GDPR in a transfer context.

One Member requested that and explanation could be inserted in clause 1.2 '*Purpose limitation*' that if the data importer processes the personal data for other purposes than the specific purpose(s) of the transfer (as indicated in the annex), this would be a breach of the SCCs. The same Member commented on clause 1.5 '*Storage limitation and erasure or return of data*', according to which if a local law prohibits the data importer to return or destruct the personal data, the data importer [warrants] that it will guarantee, to the extent possible, the level of protection required by the SCCs and will only process it to the extent and for as long as required under that local law. In the view of this Member the wording 'to the extent possible' could be clarified. Another Member representing the business sector also commented on this clause, stating that it is not aligned with Article 28 GDPR.

Furthermore, this Member stated that it would be better to leave to the Parties to agree on provisions about costs for audits, referring to clause 1.9(d) '*Documentation and compliance*', according to which if the data importer mandates an audit, it has to bear the costs of the independent auditor.

Another Member recommended to use the same wording than in the GDPR, referring to the provision in clause 1.1(b) '*Instructions*', which stipulates that the data importer shall immediately inform the data exporter if the data importer is unable to follow the instructions from the data exporter. The Commission recalled that the purpose of this provision would be to allow the data exporter to react in case the data importer would not comply with the instructions and agreed to consider whether the wording could be clarified.

MODULE THREE: Transfer processor to processor

One Member referred to the obligations of the data importer towards the data exporter and the controller under clause 1.9(c) '*Documentation and compliance*' and questioned whether they are realistic. The Commission replied that it would reflect on this provision.

MODULE FOUR: Transfer processor to controller

The Commission explained that this module is shorter compared to the others, as it reflects the corresponding self-standing obligations that apply to processors under the GDPR. There were no particular comments on this module.

Clause 2 and 3

The Commission presented the remaining clauses in Section II of the draft SCCs, starting with clause 2 '*Local laws affecting compliance with the Clauses*' and clause 3 '*Obligations of the data importer in case of government access requests*'. The Commission specified that clause 2 applies to all modules, with a particularity for module 4 in the sense that clause 2 applies to it 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 Commission informed that it kept the elements from the existing SCCs on which the CJEU based itself to confirm the validity of the SCCs, and added the additional clarifications provided by the Court in the *Schrems II* judgment. The Commission added that, in doing so, it also took in consideration the relevant recommendations of the EDPB[13]. Regarding the interplay between the two clauses, the Commission mentioned that first, the Parties have to conduct the assessment pursuant to clause 2, and only if they come to the conclusion that they can proceed with the transfer clause 3 would be relevant.

One Member underlined the need to have more clarity on the respective roles of the data exporter and importer in carrying out the required assessment.

One Member representing the business sector requested to make it clear, in clause 2(f), when the data exporter is obliged to inform the competent DPA for cases when the data exporter identifies appropriate measures to be adopted by the data exporter and / or the data importer to address impact of the laws of the country of destination. Another Member commented also on clause 2(f) stating that the requirement

[13] Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data.

to notify the competent DPA (if the data exporter decides to continue the transfer, based on its assessment that appropriate additional measures will allow the data importer to fulfil its obligations under the SCCs) is far reaching and goes beyond the GDPR.

The Commission underlined that the notification requirement to the competent DPA is in line with the decision of the CJEU, which highlighted the role of the DPA in this context. The Commission clarified that, concerning the assessment required under clauses 2 and 3, to a large extent this should be a joint exercise between the data exporter, which knows more about the data and has the responsibility to assess the local law of the country of destination, and the data importer, which generally will have more knowledge about its third country's local law or practice.

One Member representing the business sector stressed that it could be challenging for companies, especially SMEs, to assess the local laws. The Commission replied that the assessment requirement follows from the decision of the CJEU. It also explained that such assessment can take into account the specific features and circumstance of the transfer in question.

One Member representing the business sector noticed that it is important to define the definition of 'public authority' (does it include for instance a law enforcement authority) under clause 3.1(a)(i), which provides that the data importer should promptly notify the data exporter and, where possible, the data subject, if the data importer receives a legally binding request by a public authority, under the laws of the country of destination, for disclosure of personal data transferred pursuant to the SCCs.

A Member representing the civil society referred to the requirement of assessment of the laws of the country of destination under clauses 2 and 3, and requested to add that those laws have to be clear and precise and to include a reference to the need to have independent oversight and access to remedies. Another Member suggested that clause 2 should not only refer to the laws in a third country, but also to relevant practices.

One Member representing the business sector reported that some companies may have to share sensitive data with public bodies in third countries in order to operate on the market in that country. As the sharing is in principle voluntary, it does not seem to fit with the local laws clause, nor with the clause on onward transfers. The Commission replied that it would take this comment into consideration.

4) AOB – next steps

The Commission thanked the Members for their useful feedback on the draft SCCs. Finally, the Commission reminded the Members that the public consultation on the draft SCCs was open until 10 December and invited them to submit their written comments.