Joint working group on international data transfers

31 August 2021

Issues Suggested for Inclusion in Commission FAQs re: Modernised SCCs

The following issues are suggested for inclusion in the European Commission FAQs on its Implementing Decision (EU) 2021/914 of 4 June 2021 on standard contractual clauses (SCCs) for the transfer of data to third countries pursuant to Regulation (EU) 2016/679 ("Implementing Decision"). They are being submitted jointly by EuroCommerce, headquartered in Brussels, and the National Retail Federation (NRF), headquartered in Washington, D.C., as the product of the associations' newly formed Joint Working Group on international data transfers.

***Clause 14:* Impact of Assessing Local Laws and Practices**

A) In connection with the consideration of technical and organisational measures that may be needed as they relate to the assessment of local laws and practices affecting compliance with the Clauses, our view is that it would be appropriate to holistically consider all potential risks to personal data (e.g., risks in the productive uses of personal data by a company, risks from external threat actors, and risks that may arise from public authorities mandating access to personal data) and to apply appropriate technical and organisational measures relative to the likelihood that a particular risk may actually materialize. What does the Commission consider to be an appropriate approach?

B) In connection with the assessment of local laws and practices affecting compliance with these Clauses and the data importer's obligation to provide the data exporter with relevant information about those laws and practices, our interpretation is that the data importer -- and not the data exporter -- is responsible for assessing the laws of the countries from which the data importer will access or otherwise process personal data. Which party does the Commission view as responsible for making this assessment?

C) While Clause 14 does not allocate the obligation to assess the local laws and practices affecting compliance with these Clauses to either the data importer or the data exporter with respect to the processors or sub-processors of the data importer, our interpretation is that this obligation should be the obligation of the data importer (who imports data into or permits access from the jurisdiction where the local laws apply) and not the obligation of the data exporter. Which party does the Commission view as responsible for allocating the obligation with respect to the processors or sub-processors of the data importer?

***Clause 12:* Relation to Contractual Liability Provisions**

A) In practice, market-dominant service providers will use the Clauses but will significantly alter the liability provisions on a "take-it-or-leave-it" basis for data exporters; often, this will be in another contract (e.g., subscription agreement, license agreement) that is part of a larger set of transaction documents. In such

circumstances, are there practices that a data exporter can take to demonstrate compliance with the Implementing Decision and Clauses, even where liability provisions of transaction documents are inconsistent with Clause 12?

B) Our interpretation is that "damages (caused)... by any breach of these Clauses" refer specifically to damages arising from violations of data protection requirements stipulated in the SCCs, and for all other damages (e.g., loss of profit), the liability can be regulated by the parties in the main contract without undermining Clause 2(a) of the SCCs. How does the Commission interpret the scope of damages in Clause 12?

C) In addition, does the European Commission intend to provide further clarity on whether a 'limitation of liability' clause (in which the parties still accept liability up to a pre-agreed level) in another contract would be considered inconsistent with Clause 12 of the Clauses?

Article 1 & Recital 7: **SCCs in Relation to Data Importers Already Subject to the GDPR under Article 3(2)**

Article 1 and Recital 7 of the Implementing Decision has caused some confusion, as it could be construed that to mean that the Clauses will not be required for data importers who are already subject to the GDPR under Article 3(2). In connection with the applicability of the Clauses, we ask the European Commission to provide clarity on this point and provide sufficient guidance on the consequences of the correct interpretation to stakeholders (e.g., if the Clauses do not apply in this situation, specify the mechanisms under GDPR Chapter V that are appropriate).

Clause 17: **Clauses with More than One Data Exporter**

If a processor is a party to Clauses with more than one data exporter (e.g., where a group of affiliated data exporters enter into a contract with a single service provider), our view is that it should be permissible to clarify in Clause 17 that the law of the member state of each individual data exporter will apply under the Clauses to the extent that such data exporter's data is processed by the single service provider (i.e., processor). It would be impractical in this scenario if the law of only one member state is allowed to be identified in Clause 17; rather, data exporters and importers are seeking the Commission's clarification that they have the flexibility to use one contract to cover data from multiple member states by referencing those states' laws with respect to the processing of such data.

Clause 8.6(c): **Minimum Time Limits to Notify of Breaches**

Our view is that it should be permissible (i.e., it would not be considered a violation of Clause 2(a) of the Implementing Decision) to specify a minimum time limit within which the data importer is expected to notify personal data breaches to the data exporter. If permissible, what would be the advised mechanism to document such clarification (e.g., the main contract, the data processing agreement, additional clauses or sub-clauses), and must that minimum time limit be under 72 hours from the time a data importer is aware of a personal data breach?

Guidance on Laws and Practices of Third Countries:

Will the European Commission alone, or in collaboration with other relevant stakeholders (e.g., EDPB or individual DPAs), provide further guidance on particular laws or practices in effect in third countries?

Additional questions to address in FAQs to aid implementation of SCCs:

- As a follow-up to our joint comments submitted in the stakeholder consultation on 10 December 2020, we ask the European Commission to provide in the FAQs some factual examples of processing relationships that fall within each module's scope. Such examples would provide businesses with certainty on which document/clauses apply in particular situations. This certainty, in turn, will result in a more efficient and agile process of implementation, as this is also part of the negotiation by the parties (e.g., to what extent does the specific relationship fall within the module C-to-P, C-to-C, etc.).

- Provide a list of the threshold circumstances that require a data importer to promptly signal non-compliance with EU data protection.

- *Clause 7 & Recital 10:* Clarify how a *processor* could accede to the clauses agreed to between two *controllers* if one of the parties incorporates Clause 7 to allow additional controllers and processors to accede to the clauses (as contemplated by Recital 10 of the Implementing Decision).

- *Clause 7 (all modules):* Clarify the acceptable mechanism for obtaining "agreement" to the accession of a new party to the clauses (all modules) from multiple parties to the contract in cases where no single physical copy of the clauses is available but counterpart clauses are signed instead.

- *Clause 14 (all modules):* Clarify whether there is a material difference in meaning between the concepts of "third country of destination" used in the clauses and "third country of data importer" used in the *EDPB Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data*, or if these concepts are the same and these terms may be used interchangeably.

- *Clause 8.1(a) (module 3):* In relation to the instructions, clarify what specifically (at what content level) should be disclosed to the data importer by the data exporter, acting as a processor.

- *Clause 8.2(c) (module 1) and Clause 8(3) (modules 2 and 3):* Clarify if it is permissible to provide a data subject with a copy of the clauses in the language originally concluded by the parties. If not, are the parties obligated to translate the copy of the clauses into the language requested by the data subject (subject to the right that parties have to redact information) even in cases where the data subject does not understand the meaning of the contractual clauses agreed to by the parties as a result of such redaction?

- *Clause 8.9(b) (module 2)*: Specify the minimum requirements, in terms of the contents of the documentation and granularity of the processing activities, that the data importer must comply with to ensure "appropriate documentation on the processing activities carried out on behalf of the data exporter."

- *Module IV:* Clarify whether Module IV needs to be signed by every processor transferring data to a controller located outside of the EU except for the clauses of section III.

As you consider the above issues and questions for inclusion in the FAQs, please do not hesitate to contact us if we can provide further context for these suggested clarifications.

About EuroCommerce

EuroCommerce is the principal European organisation representing the retail and wholesale sector. It embraces national associations in 31 countries and 5.4 million companies, both leading global players such as Carrefour, Ikea, Metro and Tesco, and many small businesses. Retail and wholesale provide a link between producers and 500 million European consumers over a billion times a day. It generates 1 in 7 jobs, providing a varied career for 29 million Europeans, many of them young people. It also supports millions of further jobs throughout the supply chain, from small local suppliers to international businesses. EuroCommerce is the recognised European social partner for the retail and wholesale sector.

About NRF

The National Retail Federation, the world's largest retail trade association, passionately advocates for the people, brands, policies and ideas that help retail thrive. From its headquarters in Washington, D.C., NRF empowers the industry that powers the economy. Retail is the nation's largest private-sector employer, contributing $3.9 trillion to annual GDP and supporting one in four U.S. jobs — 52 million working Americans. For over a century, NRF has been a voice for every retailer and every retail job, educating, inspiring and communicating the powerful impact retail has on local communities and global economies.

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