BEUC The European Consumer Organisation

The Consumer Voice in Europe

BEUC Comments on the proposed Standard Contractual Clauses for data transfers to third countries pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council

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1. General comments

BEUC thanks the Commission for the opportunity to comment on the draft implementing decision regarding the Standard Contractual Clauses ("SCCs") for data transfers to third countries pursuant to the General Data Protection Regulation (GDPR). BEUC welcomes that the Commission modernised the SCCs, particularly in light of the recent judgements of the CJEU. BEUC also welcomes the new modular approach, accommodating the diversity of the transfers scenarios and the alignment to the CJEU jurisprudence when it comes to the obligation to document the data transfers, as well as the effort to enhance the level of transparency towards data subjects.

In general terms, we would first of all like to underline the need to ensure full alignment of the modernised SCCs with the European Data Protection Board recommendations on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data' as well as with the principles and obligations as formulated in the GDPR.

We also underline that, while SCCs remain a valid legal mechanism for transferring data to third countries, they cannot per se solve the problems that led the CJEU to declare the EU-US Privacy Shield and Safe Harbour decisions invalid. Neither can they ensure the respect of the GDPR and the EU Charter of Fundamental Rights in all situations.

2. Comments on specific issues

2.1. Transfer risk assessments

The draft implementing decision requires organisations to take into account the specific circumstances of a transfer, including **subjective factors** such as such the content and duration of the contract, the nature of the data transferred, the type of recipient, the purpose of the processing and any relevant practical experience indicating the existence or absence of prior instances of requests for disclosure from public authorities received by the data importer for the type of data transferred. However, according to the EDPB and the CJEU, organisations have to rely on **objective factors** when assessing the impact of the law and practices in the data importer's jurisdiction on the effectiveness of the safeguards provided in the SCCs. Therefore, we invite the Commission to revise the relevant clauses, in particular clause 2(b) and any related clauses, and clarify that such assessment should rely only on objective factors.

2.2. Representation of data subjects

It is essential that there is no difference or divergences between the rights that the SCCs give to data subjects and the rights that they have under other transfers mechanisms and the GDPR. The possibility for data subjects to mandate an NGO to represent them is particularly important in the context of international transfers to companies in third countries.

Paragraph 13 of the draft implementing decision states that *In line with Article 80(1) of Regulation (EU) 2016/679, data subjects should be allowed to be represented by associations or other bodies in disputes against the data importer if they so wish and if authorised by national law.* The last part of the sentence ('if authorised by national law') should be deleted. The reference to the authorisation by a national law is confusing (whose national law?) and unsuitable as the article 80(1) of the GDPR is per se applicable regardless of any national laws.

Additionally, in paragraph 13 of the implementing decision, as well as in Clause 6 (Annex – Section II) on 'Redress', the Commission should add a reference to Art 80(2) of the GDPR. We do not understand why this Article is not mentioned at all in the Clauses.

2.3. Third party beneficiaries

We welcome the possibility for data subjects to invoke and enforce SCCs, as third-party beneficiaries, against the data exporter and /or data importer (Annex - Clause 2 - Section I). However, the Commission accompanied such possibility with a very long list of exceptions. The approach taken here by the Commission is excessively restrictive in our opinion. Data subjects should still be able to invoke most of these provisions in case the SCCs are not respected and they suffered damage as a result. The list of exceptions should be narrowed down to ensure the rights of data subjects are not unjustifiably limited.

In particular, the following exceptions should be deleted:

- Section II, Module I, Clause 1.9(b) (*documentation*);
- Section II, Module II, Clause 1.9 (*documentation and compliance*);
- Section II, Module III, Clause 1.9 (*documentation and compliance*);
- Section II, Module IV, Clauses 1.2 *(security*) and 1.3 (*documentation and compliance*);
- Section II, Clauses 3.1(d) (*retention of information)*, 4 (*use of subprocessors)*, and 8 (*Indemnification*).

Furthermore, for ease of understanding, the Commission should also consider to explicitly mention what aspects fall under the exceptions, rather than just provide the list of clauses affected.

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