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[...] (2020) **XXX** draft

COMMISSION IMPLEMENTING DECISION (EU) .../...

of **XXX**

**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**

(Text with EEA relevance)

This draft has not been adopted or endorsed by the European Commission. Any views expressed are the preliminary views of the Commission services and may not in any circumstances be regarded as stating an official position of the Commission.

COMMISSION IMPLEMENTING DECISION (EU) .../...

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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

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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)¹, and in particular Article 28(7) and Article 46(2)(c) thereof,

Whereas:

- (1) Technological developments are facilitating cross-border data flows necessary for the expansion of international cooperation and international trade. At the same time, where personal data is transferred to third countries, it has to be ensured that the level of protection of natural persons guaranteed by Regulation (EU) 2016/679 is not undermined, including in cases of onward transfers.² In this respect, the provisions on data transfers in Chapter V of Regulation (EU) 2016/679 are intended to ensure the continuity of that high level of protection where personal data is transferred to a third country.³
- (2) Pursuant to Article 46(1) of Regulation (EU) 2016/679, in the absence of an adequacy decision of the Commission pursuant to Article 45(3) of that Regulation, a controller or processor may transfer personal data to a third country only if it has provided appropriate safeguards, and on the condition that enforceable rights and effective legal remedies for data subjects are available. Such safeguards may be provided for by standard data protection clauses adopted by the Commission pursuant to Article 46(2)(c) of Regulation (EU) 2016/679.
- (3) The role of standard contractual clauses is limited to ensuring appropriate data protection safeguards for international data transfers. Therefore, the controller or processor transferring the personal data to a third country or ('data exporter') and the controller or processor receiving the personal data ('data importer') are free to include those standard contractual clauses in a wider contract, and to add other clauses or additional safeguards provided that they do not contradict, directly or indirectly, the standard contractual clauses or prejudice the fundamental rights or freedoms of data subjects. Controllers and processors are encouraged to provide additional safeguards

¹ OJ L [...], [...], p. [...].

² Article 44 of Regulation (EU) 2016/679.³ See also judgment of the Court of Justice of 16 June 2020, *Data Protection Commissioner v. Facebook Ireland Ltd and Maximilian Schrems* ("Schrems II"), Case C-311/18, ECLI:EU:C:2020:559, paragraph 93.

³ See also judgment of the Court of Justice of 16 June 2020, *Data Protection Commissioner v. Facebook Ireland Ltd and Maximilian Schrems* ("Schrems II"), Case C-311/18, ECLI:EU:C:2020:559, paragraph 93.

via contractual commitments that supplement the standard contractual clauses.⁴ Reliance on the standard contractual clauses is notwithstanding any contractual obligations of the data exporter and/or importer to ensure respect for applicable privileges and immunities.

- (4) Beyond relying on standard contractual clauses to provide appropriate safeguards for transfers pursuant to Article 46(1) of Regulation (EU) 2016/679, the data exporter has to fulfil its general responsibilities as controller or processor in accordance with Regulation (EU) 2016/679. Those responsibilities include among other responsibilities, the obligation of the controller to provide data subjects with information about the fact that it intends to transfer personal data to a third country or in accordance with Article 13(1)(f) and Article 14(1)(f) of Regulation (EU) 2016/679. In the case of transfers referred to in Article 46 of Regulation (EU) 2016/679, it includes a reference to the appropriate safeguards as well as the means by which to obtain a copy of them or information where they have been made available.
- (5) Commission Decision 2001/497/EC⁵, as well as Commission Decision 2010/87/EU⁶, adopted standard contractual clauses in order to facilitate the transfer of personal data from a data controller established in the Union to other controllers or processors established in a third country which does not offer an adequate level of protection. Those decisions were based on Directive 95/46/EC of the European Parliament and of the Council.⁷
- (6) Pursuant to Article 46(5) of Regulation (EU) 2016/679, Decision 2001/497/EC and Implementing Decision 2010/87/EU, as amended, remain in force until amended, replaced or repealed, if necessary, by a Commission decision adopted pursuant to Article 46(2) of that Regulation. At the same time, the standard contractual clauses needed to be updated in light of new requirements in Regulation (EU) 2016/679. Moreover, since the adoption of these decisions, important developments have taken place in the digital economy, with the widespread use of new and more complex processing operations often involving multiple data importers and exporters, long and complex processing chains as well as evolving business relationships. This calls for a modernisation of the standard contractual clauses to better reflect those realities, by covering additional processing and transfer situations and to use a more flexible approach, for example with respect to the number of parties able to join the contract.
- (7) The standard contractual clauses set out in the Annex to this Decision may be used by a controller or a processor in order to provide appropriate safeguards within the meaning of Article 46(1) of Regulation (EU) 2016/679 for the transfer of personal data to a processor or a controller established in a third country. This also includes the transfer of personal data by a controller or processor not established in the Union, to the extent that the processing is subject to Regulation (EU) 2016/679 pursuant to

⁴ Recital 109 of Regulation (EU) 2016/679.

⁵ Commission Decision 2001/497/EC 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, 4.7.2001, p. 19), as amended by Commission Decision 2004/915/EC 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).

⁶ Commission Decision 2010/87/EU 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).

⁷ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31).

Article 3(2) thereof, because it relates to the offering of goods or services to data subjects in the Union or the monitoring of their behaviour as far as their behaviour takes place within the Union.

- (8) 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 Council⁸. 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 [...].
- (9) Where the processing involves data transfers from controllers subject to Regulation (EU) 2016/679 to processors outside the territorial scope of application of that Regulation or from processors subject to Regulation (EU) 2016/679 to sub-processors outside the territorial scope of that Regulation, the standard contractual clauses set out in the Annex to this Decision should also allow to fulfil the requirements of Article 28(3) and (4) of Regulation (EU) 2016/679.
- (10) The standard contractual clauses set out in the Annex to this Decision combine general clauses with a modular approach to cater for various transfer scenarios and the complexity of modern processing chains. In addition to the general clauses, controllers and processors should select the module applicable to their situation, which makes it possible to tailor their obligations under the standard contractual clauses to their corresponding role and responsibilities in relation to the data processing at issue. It should be possible for more than two parties to adhere to the standard contractual clauses. Moreover, additional controllers and processors should be allowed to accede to the standard contractual clauses as data exporters or importers throughout the life cycle of the contract of which those clauses form a part.
- (11) In order to provide appropriate safeguards, the standard contractual clauses should ensure that the personal data transferred on that basis are afforded a level of protection essentially equivalent to that which is guaranteed within the Union.⁹ With a view to ensuring transparency of processing, data subjects should be provided with a copy of the standard contractual clauses and should be informed, in particular, of any change of purpose and of the identity of any third party to which the personal data is disclosed. Onward transfers by the data importer to a recipient in another third country should be allowed only if such recipient accedes to the standard contractual clauses, if the continuity of protection is ensured otherwise or on the basis of the explicit, informed consent of the data subject.
- (12) With certain exceptions, in particular as regards certain obligations that exclusively concern the relationship between the data exporter and data importer, data subjects should be able to invoke, and where necessary enforce, the standard contractual clauses as third-party beneficiaries. Therefore, while the parties should be allowed to

⁸ Regulation (EU) 2018/1725 of the European Parliament and of the Council⁸ 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).

⁹ *Schrems II*, paragraphs 96 and 103. See also recitals 108, and 114 of the preamble to Regulation (EU) 2016/679.

choose the law of one of the Member States as governing the standard contractual clauses, such law must allow for third party beneficiary rights. In order to facilitate individual redress, the standard contractual clauses should require the data importer to inform data subjects of a contact point and to promptly deal with any complaints or requests. In the event of a dispute between the data importer and a data subject who invokes his or her rights as a third-party beneficiary, which is not amicably resolved, the data subject should be able to lodge a complaint with the competent supervisory authority or refer the dispute to the competent courts in the EU.

- (13) In order to ensure effective enforcement, the data importer should be required to submit to the jurisdiction of such authority and courts and to commit to abide by any binding decision under the applicable Member State law. In particular, the data importer should agree to respond to inquiries, submit to audits and comply with the measures adopted by the supervisory authority, including remedial and compensatory measures. In addition, the data importer should have the option to offer data subjects the possibility to seek redress before an independent dispute resolution body, at no cost. 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.
- (14) The standard contractual clauses should provide for rules on liability between the parties and with respect to data subjects, as well as rules on indemnification between the parties. Where the data subject suffers material or non-material damage as a consequence of any breach of the third party beneficiary rights under the standard contractual clauses, he or she should be entitled to compensation. This should be without prejudice to any liability under Regulation (EU) 2016/679.
- (15) In the case of a transfer to a data importer acting as a processor or sub-processor, specific requirements should apply in accordance with Article 28(3) of Regulation (EU) 2016/679. The standard contractual clauses should require the data importer to make available all information necessary to demonstrate compliance with the obligations set out in the clauses and to allow for and contribute to audits of its processing activities by the data exporter. With respect to the engagement of any sub-processor by the data importer, in line with Article 28(2) and (4) of Regulation (EU) 2016/679, the standard contractual clauses should in particular set out the procedure for general or specific authorisation from the data exporter as well as the requirement for a written contract with the sub-processor ensuring the same level of protection as under those clauses.
- (16) It is appropriate to provide different safeguards in the standard contractual clauses for the specific situation of a transfer of personal data by a processor in the Union to its controller in a third country, which reflect the limited self-standing obligations for processors under Regulation (EU) 2016/679. In particular, the standard contractual clauses should stipulate the obligation of the Union processor to inform the controller in the third country if it is unable to follow instructions that would infringe Union data protection law, and of the controller to refrain from any actions that would prevent the processor from fulfilling its obligations under Regulation (EU) 2016/679. They should also require the parties to assist each other in responding to inquiries and requests made by data subjects under the local law applicable to the data importer or, for data processing in the Union, under Regulation (EU) 2016/679. Additional requirements to address any effects of the laws of the third country of destination on the controller's compliance with the standard contractual clauses, and in particular how to deal with binding requests from public authorities in the third country for disclosure of the

personal data transferred should apply where the Union processor combines the personal data received from the controller in the third country with personal data collected by the processor in the Union. Conversely, no such requirements are justified where the outsourcing merely involves the processing and transfer back of personal data received from the controller and which in any event has been and will remain subject to the jurisdiction of the third country at issue.

- (17) The parties should be able to demonstrate compliance with the standard contractual clauses. In particular, the data importer should be required to keep appropriate documentation for the processing activities under its responsibility, and to promptly inform the data exporter if it is unable to comply with the clauses, for whatever reason. In turn, the data exporter should suspend the transfer and, in particularly serious cases, have the right to terminate the contract where the data importer is in breach of, or unable to comply with, the standard contractual clauses. Specific rules should apply in case of local laws affecting compliance with the clauses. Personal data that had already been transferred prior to the termination of the contract and any copies thereof, should at the choice of the data exporter be returned to the data exporter or destroyed in their entirety.
- (18) The standard contractual clauses should provide for specific safeguards, in particular in light of the case law of the Court of Justice,¹⁰ to address any effects 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.
- (19) The transfer and processing of personal data under standard contractual clauses should only take place if the laws of the third country of destination do not prevent the data importer from complying with those clauses. In this respect, 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) of Regulation (EU) 2016/679 should not be considered as being in contradiction with the standard contractual clauses. The parties should warrant that, at the time of agreeing to the standard contractual clauses, they have no reason to believe that the laws applicable to the data importer are not in line with these requirements.
- (20) To that end, they should in particular take into account the specific circumstances of the transfer (such as 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), the laws of the third country of destination relevant in light of the circumstances of the transfer and any additional safeguards (including technical and organisational measures applied during transmission and to the processing of the personal data in the country of destination).¹¹
- (21) The data importer should notify the data exporter if, after having agreed to the clauses, it has reason to believe that it is not able to comply with the standard contractual clauses. If the data exporter receives such a notification or otherwise becomes aware that the data importer is no longer able to comply with the standard contractual clauses, it should identify appropriate measures to address the situation, if necessary in consultation with the competent supervisory authority. Such measures may include

¹⁰ *Schrems II*. [PLACEHOLDER: See also the guidance provided by the European Data Protection Board...]

¹¹ [PLACEHOLDER: See also the guidance provided by the European Data Protection Board ...]

supplementary measures adopted by the data exporter and/or data importer, such as technical or organisational measures to ensure security and confidentiality. The standard contractual clauses should require the data exporter to notify the competent supervisory authority if, based on its assessment that these additional measures will allow the data importer to fulfil its obligations under the Clauses, it intends to continue the transfer, including of the reasons for continuing the transfer and the supplementary measures taken. The data exporter should be required to suspend the transfer if it considers that no appropriate safeguards can be ensured, or if instructed by the competent supervisory authority to do so.

- (22) The data importer should, to the extent possible, notify the data exporter and the data subject if it receives a legally binding request by a public authority under the law of the country of destination for disclosure of personal data or becomes aware of any direct access by public authorities to personal data transferred pursuant to the standard contractual clauses in accordance with the law of the third country of destination. If, despite having made its best efforts, the data importer is not in a position to notify the data exporter and/or the data subject of specific disclosure requests, it should provide the data exporter with the greatest possible amount of relevant information on the requests received. In addition, the data importer should provide the data exporter with aggregate information in regular intervals. The data importer should also be required to document any request for disclosure received and the response provided, and make that information available to the data exporter or the competent supervisory authority, or both, upon request. Moreover, if, following a review of the legality of such request under the law of the country of destination, the data importer concludes that there are grounds to challenge the request, it should pursue such a challenge. In any event, if the data importer is no longer able to comply with the standard contractual clauses, it should inform the data exporter of such inability, including where it is the consequence of a request for disclosure.
- (23) As stakeholder needs, technology and processing operations may change, the Commission should evaluate the operation of the standard contractual clauses in the light of experience, as part of the periodic evaluation of Regulation (EU) 2016/679 referred to in Article 97 of that Regulation.
- (24) Decision 2001/497/EC, as amended, and Decision 2010/87/EU should be repealed. During a transitional period of one year from the date of entry into force of this Decision, controllers or processors may, for the purpose of Article 46(1) of Regulation (EU) 2016/679, continue to rely on standard contractual clauses set out in Decisions 2001/497/EC and 2010/87/EU for the performance of a contract concluded between them before that date, provided the contract remains unchanged, with the exception of necessary supplementary measures in order to ensure that the transfer of personal data is subject to appropriate safeguards within the meaning of Article 46(1) of Regulation (EU) 2016/679. In the case of relevant changes to the contract, the data exporter should be required to rely on a new ground for data transfers under the contract, in particular by replacing the existing standard contractual clause with the standard contractual clauses set out in the Annex of this Decision. The same should apply to any sub-contracting of processing operations covered by the contract to a (sub-) processor.
- (25) [PLACEHOLDER: The European Data Protection Supervisor and the European Data Protection Board were consulted in accordance with Article 42(1) and (2) of

Regulation (EU) 2018/1725 and delivered a [joint opinion] on [...] ¹², which has been taken into consideration in the preparation of this Decision.]

- (26) [PLACEHOLDER: The measures provided for in this Decision are in accordance with the opinion of the Committee established under Article 93 of Regulation (EU) 2016/679.]

HAS ADOPTED THIS DECISION:

Article 1

1. 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).
2. The standard contractual clauses also set out the rights and obligations of controllers and processors with respect to the matters referred to in Article 28(3) and (4) of Regulation (EU) 2016/679 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.

Article 2

This Decision does not affect the obligations of the data exporter or the rights of data subjects under Regulation (EU) 2016/679.

Article 3

Whenever the competent authorities in the Member States exercise their corrective powers pursuant to Article 58 of Regulation (EU) 2016/679 where the data importer is or has become subject to laws in the third country of destination that prevent it from complying with the standard contractual clauses set out in the Annex, leading to the suspension or ban of data transfers to third countries based on the standard contractual clauses set out in the Annex, the Member State concerned shall, without delay, inform the Commission, which will forward the information to the other Member States.

Article 4

The Commission shall evaluate the practical application of the standard contractual clauses set out in the Annex on the basis of all available information as part of the periodic evaluation required by Article 97 of Regulation (EU) 2016/679.

Article 5

This Decision shall enter into force on the [...] day following that of its publication in the *Official Journal of the European Union*.

Article 6

1. Decision 2001/497/EC is repealed.
2. Decision 2010/87/EU is repealed.

¹² [...]

3. For a period of one year from the date of entry into force of this Decision, data exporters and data importers may, for the purpose of Article 46(1) of Regulation (EU) 2016/679, continue to rely on standard contractual clauses set out in Decisions 2001/497/EC and 2010/87/EU for the performance of a contract concluded between them before that date, provided the contract remains unchanged, with the exception of necessary supplementary measures in order to ensure that the transfer of personal data is subject to appropriate safeguards within the meaning of Article 46(1) of Regulation (EU) 2016/679.

Done at Brussels,

For the Commission
Ursula VON DER LEYEN
The President