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DANSK ERHVERV
Danish Chamber of Commerce

European Commission

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The Danish Chamber of Commerce contribution to the European Commission's draft Standard Contractual Clauses for transferring personal data to non-EU countries

The Danish Chamber of Commerce welcomes the possibility to comment on the abovementioned clauses. We have the following remarks:

Initially we would like to thank the Commission for taking the initiative to revise the existing SCCs. New standard contracts have long been needed and it is of enormous importance that the Commission focuses on creating tools that in practice enable data transfer to the US until we hopefully very soon will have a new EU-US agreement to replace the Privacy Shield agreement.

We also appreciate the European Commission's approach to provide Standard Data Protection Clauses for four different international data transfers scenarios, and to offer certain optional clauses, but we urge the Commission to submit four separate documents, each addressing one specific data transfer situation. This would be significantly easier to work with in practice.

The one-year transition period is too short.

The Commission has provided organizations with a one-year transition period to implement the New SCCs, after which time the current SCCs can no longer be relied on to legitimize transfers. This proposed transition period is very short, and is likely to pose significant challenges for many businesses, especially multinational companies that may have hundreds or even thousands of contracts that incorporate the current SCCs. This is particularly so given that the New SCCs require companies to document their assessments of the data transfers, taking into account the specific circumstances of the transfer, the laws of the third country of destination, and any safeguards adopted in addition to the SCCs (Section II, Clauses 2(b) and (d)), all of which could take a significant amount of time to document.
Accordingly, the Commission should provide a longer transition period to ensure that organizations have sufficient time to implement the New SCCs and take the steps necessary to comply with its obligations.

Warranty on local laws

Section 2 Clause 2 will off course very difficult to handle in real life. It will not be easy for especially the data importer to live up to this Clause. According to Clause 2 b) (i) the parties have to declare, that they have taken the mentioned elements into account. One of the elements is "the

nature of the personal data". If this means that the data processor has to take into account any special legislation that applies to the personal data that are put into the data processor's system, this becomes an impossible task. An example could be a CRM system provider whose customers may belong to different industries and therefore will be subject to different regulatory controls (e.g. food control)

Accordingly, the Commission should delete "the nature of the personal data" in Clause 2 b) (i) or clarify what is meant by this term.

Liability

Rules on liability between parties are negotiated as part of the commercial transaction and relate to multiple aspects of the commercial relationship – including but not limited to compliance with data protection and non-data protection laws. It is of extremely importance, that the parties still have the possibility to negotiate limitations on liability "inter partes". If this is not the case, it might be very difficult for e.g. the data processor to get his services insured, because most of the insurance companies doesn´t accept unlimited liability clauses. When the GDPR entered into force in Denmark in 2018, the Danish Ministry of Justice wrote in their report, that article 82 in the GDPR did not prevent the parties from entering into liability clauses.

Accordingly we therefore suggest, that the Commission clarifies this in Section 1 Clause 1 litra c) or even makes Section 2 Clause 8 optional.

Require data importers to comply with decisions only if they are final under EU or Member State law.

Section II, Clause 6(d) (in all modules except processor-to-controller) requires the data importer "to abide by a decision binding under applicable EU / Member State law" if a data subject invokes its third-party beneficiary rights. Similarly, Section II, Clause 9(b) requires the data importer to "comply with measures adopted by the [competent] supervisory authority, including remedial and compensatory measures." These commitments could be read to contractually oblige the data importer to comply with the decisions of competent authorities or courts, even if it has not yet exhausted its ability to seek review of these decisions. This could have the effect of organizations having to suspend or terminate transfers to meet its contractual obligations when such a decision is not yet final or binding.

Accordingly, the Commission should amend Clauses 6(d) and 9(b) to clarify that data importers only have an obligation to comply with "a **final** decision binding under applicable EU / Member State law.

Best regards

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