

 Brussels, XXX [...](2020) XXX draft COMMISSION IMPLEMENTING DECISION of XXX on standard contractual clauses between controllers and processors for the matters referred to in Article 28 (3) and (4) of Regulation (EU) 2016/679 of the European Parliament and of the Council and Article 29 (7) of Regulation (EU) 2018/1725 of the European Parliament and of the Council (Text with EEA relevance)

Commented [A1]: The title is referring to 28 (3) - (4) GDPR on one side and 29 (7) EUDPR on the other side. We should align and either refer to 28(3) and (4) GDPR / 29 (3) and (4) EUDPR or to 28 (7) GDPR / 29 (7) EUDPR.

Also the title is not aligned with the one mentioned in the Annex

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COMMISSION IMPLEMENTING DECISION

of **XXX**

on standard contractual clauses between controllers and processors for the matters referred to in Article 28 (3) and (4) of Regulation (EU) 2016/679 of the European Parliament and of the Council and Article 29 (7) of Regulation (EU) 2018/1725 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 (GDPR)¹, and in particular Article 28(7) thereof,

Having regard to 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 (EUDPR)², and in particular Article 29(7) thereof,

Whereas:

- (1) The concepts of controller and processor play a crucial role in the application of Regulation (EU) 2016/679 and of Regulation (EU) 2018/1725. The controller is the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data. For the purpose of Regulation (EU) 2018/1725, a controller means the Union institution or body or the directorate-general or any other organisational entity which, alone or jointly with others, determines the purposes and means of the processing of personal data. Where the purposes and means of such processing are determined by a specific Union act, the controller or the specific criteria for its nomination can be provided for by the Union. A processor is the natural or legal person, public authority, agency or other body, which processes personal data on behalf of the controller.
- (2) The same set of standard contractual clauses should apply in respect of the relationship between data controllers and data processors subject to Regulation (EU) 2016/679 and Regulation (EU) 2018/1725, respectively. This is justified by the fact that, in the interest of a coherent approach to personal data protection throughout the Union and the free movement of personal data within the Union the data protection rules applicable to the public sector in the Member States and the data protection rules for Union institutions, bodies, offices and agencies were aligned as far as possible between Regulation (EU) 2016/679 and Regulation (EU) 2018/1725.

Commented [A2]: We suggest adding "by Union law" as per the definition of controller under Article 3(8) EUDPR

Commented [A3]: These definitions do not exist in the law. We would rather suggest to refer to the notions of "controller" and "processor".

¹ OJ L 119, 4.5.2016, p. 1.

² OJ L 295, 21.11.2018, p. 39.

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- (3) To ensure compliance with the requirements of Regulations (EU) 2016/679 and (EU) 2018/1725, when entrusting a processor with processing activities, the controller should use only processors providing sufficient guarantees, in particular in terms of expert knowledge, reliability and resources, to implement technical and organizational measures which meet the requirements of Regulation (EU) 2016/679 and Regulation (EU) 2018/1725, including for the security of processing.
- (4) The processing by a processor is to be governed by a contract or other legal act under Union or Member State law, that is binding on the processor with regard to the controller and that sets out the elements listed in Article 28(3) and (4) of Regulation (EU) 2016/679 or Article 29(3) and (4) of Regulation (EU) 2018/1725. That contract or act is in writing, including in electronic form.
- (5) In accordance with Article 28(6) of Regulation (EU) 2016/679 and Article 29(6) of Regulation (EU) 2018/1725, the controller and the processor may choose either to negotiate an individual contract containing the compulsory elements laid down in Article 28(3) and (4) of Regulation (EU) 2016/679 or Article 29(3) and (4) of Regulation (EU) 2018/1725, respectively, or to rely, in whole or in part, on standard contractual clauses adopted by the Commission pursuant to Article 28(7) of Regulation (EU) 2016/679 and Article 29(7) of Regulation (EU) 2018/1725.
- (6) The controller and processor should be free to include the standard contractual clauses laid down in this Decision 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. Reliance on the standard contractual clauses is notwithstanding any contractual obligations of the controller and or processor to ensure respect for applicable privileges and immunities.
- (7) The standard contractual clauses should provide for both substantive and procedural rules. Moreover, in line with Article 28(3) of Regulation (EU) 2016/679 and Article 29(3) of Regulation (EU) 2018/1725, the standard contractual clauses should require the controller and processor to set out the subject matter and duration of the processing, its nature and purpose, the type of personal data concerned, as well as the categories of data subjects and the obligations and rights of the controller.
- (8) Pursuant to Article 28(3) of Regulation (EU) 2016/679 and pursuant to Article 29(3) Regulation (EU) 2018/1725, the processor has to inform the controller immediately, if, in its opinion, an instruction of the controller infringes Regulation (EU) 2016/679 or Regulation (EU) 2018/1725, respectively or other Union or Member State data protection provisions.
- (9) Where a processor engages another processor for carrying out specific activities, the specific requirements referred to in Article 28(2) and (4) of Regulation (EU) 2016/679 or Article 29(2) and (4) of Regulation (EU) 2018/1725 should apply. In particular, a prior written authorisation is required. Such authorisation could be specific or general. In both cases, the first processor should keep a list of other processors updated.
- (10) To fulfil the requirements of Article 46(1) Regulation (EU) 2016/679, the Commission adopted standard contractual clauses pursuant to Article 46(2)(c) Regulation (EU) 2016/679. Those clauses also fulfil the requirements of Article 28(3) and (4) of Regulation (EU) 2016/679 for data transfers from controllers subject to Regulation (EU) 2016/679 to processors outside the territorial scope of application of that Regulation or

Commented [A4]: We would suggest to explain further to which extent parties can rely only in part on SCCs and to clarify that in case SCCs are relied upon only in part, the requirements of Article 28 (3) and (4) GDPR should still be fulfilled.

Commented [A5]: We suggest to clarify that this sentence and this reference to applicable privileges and immunities is relevant in the framework of SCCs under Regulation 2018/1725.

Commented [A6]: We suggest including "prior written authorisation of the controller" to make it explicit that in line with the GDPR and EUDPR this is always the prior authorisation of the controller.

Commented [A7]: We would suggest to use the wording "initial processor" in line with the terminology in GDPR and EUDPR. Moreover, where a reference is made to the "list of other processors", it should be clear that it refers also to sub-processor.

Commented [A8]: See comment in the Joint Opinion on the scope and interaction with the transfer SCCS.

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from processors subject to Regulation (EU) 2016/679 to sub-processors outside the territorial scope of that Regulation.

- (11) Third parties should be able to become a party to the standard contractual clauses throughout the life cycle of the contract.
- (12) The operation of the standard contractual clauses should be evaluated in the light of experience, as sub-part of the periodic evaluation of Regulation (EU) 2016/679 referred to in Article 97 of that Regulation.
- (13) [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 [...]³, which has been taken into consideration in the preparation of this Decision.]
- (14) [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 and Article 96(2) of Regulation (EU) 2018/1725.

HAS ADOPTED THIS DECISION:

Article 1

The standard contractual clauses as set out in the Annex fulfil the requirements for contracts between the controller and the processor in Article 28(3) and (4) of Regulation (EU) 2016/679 and of Article 29(3) and (4) of Regulation (EU) 2018/1725.

Article 2

The standard contractual clauses as set out in the Annex may be used in contracts between a controller and a processor who processes personal data on its behalf, where the controller and the processor are subject to Regulation (EU) 2016/679 or Regulation (EU) 2018/1725.

Article 3

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 provided for in Article 97 of Regulation (EU) 2016/679.

Article 4

This Decision shall apply from ...
Done at Brussels,

For the Commission
Ursula VON DER LEYEN
The President

Commented [A9]: In terms of wording, we would prefer referring to the "implementation of the use of SCCs" or "practical application" as mentioned in Art. 3 below.

Commented [A10]: We would also recommend to add a reference to the review process of Art. 97 EUDPR.

Commented [A11]: See comment in the text of the Joint Opinion.