

# Ecommerce Europe’s comments on the European Commission’s draft implementing decision on standard contractual clauses

## Introduction

Ecommerce Europe is the sole voice of the European Digital Commerce sector. It represents, via its national associations, more than 100,000 companies selling goods and services online to consumers in Europe. Ecommerce Europe acts at European level to help legislators create a better framework for online merchants, so that their sales can grow further.

On 12 November 2020, the European Commission published a [draft implementing decision](#) on standard contractual clauses for the transfer of personal data to third countries pursuant to the EU General Data Protection Regulation (GDPR), along with its draft [set of new standard contractual clauses](#) (SCCs).

Ecommerce Europe welcomes the work of the Commission to establish a modernised set of SCCs to enable transfers of personal data to third countries outside the EU that have not yet received an adequacy decision, especially in light of the Court ruling in [Schrems II](#), which held that organisations that rely on SCCs to transfer data outside the EU may need to adopt additional safeguards to protect personal data from access by public authorities in third countries. The Commission’s work on SCCs is closely linked to the ongoing work at EDPB level on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data. Ecommerce Europe therefore stresses that the EDPB Recommendations should be fully aligned with the Commission’s modernised SCCs. Ecommerce Europe’s comments on the Commission’s draft implementing decision can be found in the section below.

## Comments

### 1. Transition period:

The draft Implementing Decision for SCCs would provide only 12 months for new SCCs to be adopted to replace existing SCCs. This 12-month transition period foreseen under the draft SCCs, is insufficient for e-commerce retailers. Businesses may have hundreds of relationships to remediate and 12 months is not sufficient time for cancelling and replacing existing agreements. Moreover, businesses will have a separate, significant burden to assess each relationship for purposes of determining if supplemental measures are required under Schrems II for transfers to third countries. Therefore, Ecommerce Europe calls on the Commission to extend the deadline for parties to adopt new SCCs to 24/36 months, consistent with the timeline and conditions under the GDPR (which became applicable after two years). Furthermore, Ecommerce Europe asks the Commission to ensure that existing SCCs remain valid for the duration of a data transfer agreement and that the modernised SCCs would only be required for new data transfer agreements. As a minimum, Ecommerce Europe urges the Commission to allow existing SCCs to remain valid during the transition period (with necessary supplementary measures adopted where required).

### 2. Risk-based approach:

Ecommerce Europe welcomes the fact that the European Commission has emphasised the importance of the ‘risk-based approach’, through the inclusion of “relevant practical experience” and asks that the Commission explicitly encourages the EDPB to also reflect this risk-based approach in its recommendations on supplementary measures.

The SCCs require the data exporter and data importer (both parties) to declare that they have no reason to believe that the laws in the third country will prevent the data importer from fulfilling the obligations under

the SCCs. Ecommerce Europe asks the Commission to clarify that the warranty required regarding third country legislation should be made separately, not jointly, as each party will have a different perspective on the application of third country law to its own data handling practices. In making this warranty, the parties need to take due account of many elements, including “any relevant practical experience with prior cases, or the absence of requests for disclosure from public authorities received by the data importer for the type of data transferred.” For a data exporter, this warranty should be based on the data exporter’s own knowledge of requests for disclosure from public authorities. Ecommerce Europe therefore asks the Commission to declare the “relevant practical experience” element to be a risk-based consideration applied to obligations throughout the SCCs, in particular to other warranties that a controller/data exporter must make. Generally, Ecommerce Europe stresses that the SCCs’ obligations should not ask parties to take actions which they cannot perform in practice (especially SMEs), in a full risk assessment of third countries in terms of adequacy.

### 3. Completeness:

Ecommerce Europe asks the Commission to confirm that the Implementing Decision will provide certainty with regards to the sufficiency of the SCCs to ensure the validity of data transfers to third countries. It is critical that e-commerce retailers can rely on the SCCs as approved by the European Commission, without the risk that DPAs seek to impose additional requirements beyond the SCCs, creating contradictory or confusing situations. Additionally, we ask the Commission to clarify that service providers cannot seek to decrease the protections of such SCCs (e.g. in provisions in other agreements that sit outside the SCCs, such as “For purposes of clarification, the data importer’s obligation to allow an audit under GDPR will be satisfied by data exporter requesting data importer to provide written information about data importer’s security practices”).

Accordingly, Ecommerce Europe would recommend that the Commission clarifies that:

- to avoid legal uncertainty, businesses can rely on the modernised SCCs, as published by the European Commission, and will not be subject to additional contractual clauses for compliance with privacy law for transfers to third countries;
- that such SCCs may be used for transfers to any data importer in any third country; and
- that any other provisions in any other agreement between a data exporter and data importer are void, to the extent such provisions would conflict with the obligations set forth in the SCCs.

### 4. Controller/processor relationship:

The modernised SCCs lead to some uncertainty on the obligations of controllers and processors in the controller-to-processor (data exporter to data importer) scenario that may be inconsistent with well-established elements of the GDPR.

In Ecommerce Europe’s view, it would be helpful if the Commission could clarify that the SCCs do not impose obligations on the exporter that would make it responsible for the actions taken by the sub-processor. Ecommerce Europe finds that, in line with the GDPR, that if the processor transfers data to a sub-processor, it is the obligation of the processor, not the controller, to ensure an appropriate contract is in place and to otherwise monitor and be responsible for that sub-processor.

### 5. Modular approach:

Ecommerce Europe generally welcomes that the Commission provides a modular approach with a wider range of processing scenarios than before, having the benefit of creating flexibility. However, the approach also raises questions on how it will work in practice.

Ecommerce Europe asks the Commission, when adopting the SCCs in final form, to create final and clean drafts, preferably also in compatible digital format, of the SCCs for each of the four processing scenarios and address (whether by offering a modular set or otherwise) the use of the SCCs in scenarios beyond the four relationships currently identified. This will provide certainty to data exporters and data importers as to the complete set of contractual provisions in SCCs that will enable such parties to satisfy their obligations under GDPR.

## **6. Alignment with the GDPR:**

The modernised SCCs should be aligned with and refer back to the wording and principle-based approach of the GDPR. To ensure it being future proof, Ecommerce Europe prefers an open, principle-based norm, to avoid a too detailed interpretation that limits the scope of the norm and the risk-based, case-to-case approach. For instance, in terms of disclosures to data subjects, the rules need to provide greater discretion to parties to allow them to take into account practical circumstances. The obligations to provide a copy of SCCs to data subjects (recitals 4 and 11) and inform data subjects about any change of purpose and/or identity of any third-party data recipient should be consistent with the GDPR. In fact, it would be more helpful for data subjects and more practical for the Commission to clarify that this obligation only requires the data exporter to provide copies on request, to the extent required by the GDPR. The GDPR has defined the information rights toward data subjects, and the modernised SCCs should refer back to these information rights as set forth in the GDPR.