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To: European Commission

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Submission in respect of consultation feedback on the Commission's draft implementing decision 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 (the "Draft Decision")

Dear Commissioners

We welcome the proposal for new standard contractual clauses as set out in the Draft Decision (the "**DRAFT SCCs**"). We recognise that they are a response to the change in the regulatory framework around data protection compliance (principally the introduction of the EU General Data Protection Regulation ("**GDPR**")), notable recent case law of the Court of Justice of the EU, as well as to the practical needs of businesses in a globally integrated digital economy requiring smooth flows of personal data while respecting EU data protection.

However, we do wish to comment on two aspects of Draft SCCs that concern us (and many of our clients and intermediaries with whom we work); namely: (i) certain language used in the Draft SCCs in the context of laws relating to third party beneficiaries and (ii) the obligations imposed on data importers directly to controllers even where no previous contractual relationship exists.

Third Party Beneficiary Rights

1. *The Standard Contractual Clauses and economic context*

The Draft SCCs require, at Clause 2 of Section I (and some other clauses), that data subjects may enforce the Draft SCCs as third party beneficiaries directly against the data exporter and data importer where the rights are applicable to them. As you will know, similar provisions for the benefit of data subjects exist in the current versions of the Standard Contract Clauses.

Clause 2 of Section III of the Draft SCCs provides two options for the parties to the Draft SCCs as to the governing law but, in either case, the Draft SCCs provide that the governing law must allow for third party beneficiary rights. We recognise of course that having a direct means of redress for data subjects such as this is a key mechanism by which transfers of personal data from the EEA can be done in a manner that complies with the fundamental principles of data protection under the Charter of Fundamental Rights of the EU as expressed in detail in the GDPR.

After the United Kingdom left the EU at the start of 2020, and in particular after the end of the Brexit transition period on 31 December 2020, Ireland, apart from Malta, will be the only Member State of the European Union whose legal system is based on the common law which, as you may know, is also the legal system of most of the United Kingdom (England, Wales, and Northern Ireland), the United States (excluding Louisiana), Canada (excluding Quebec), Australia, New Zealand, South Africa, most of India, Pakistan, Hong Kong and several other jurisdictions. In the context of Brexit but also more generally, very many international entities engaged in business in the European Union wish to benefit from the similarities between Irish law and English law (or their own common law legal system) in their contractual arrangements in order to both remain fully compliant with the obligations of EU data protection law while

smoothing, to the extent possible, the economic disruptions arising from Brexit or in many cases their first entry into the EU market.

2. Third party beneficiary rights in Ireland

As noted above, Ireland is a common law jurisdiction, meaning that the majority of the rules governing the formation and enforcement of contracts are set out in case law. One doctrine arising from such case law is the doctrine of "privity of contract". In short, the doctrine of privity of contract provides that individuals or entities not party to a contract are not able to be legally bound by – or enforce – the provisions of a contract.

The current position under the laws of Ireland in this respect is detailed in the *Report on Privity of Contract and Third Party Rights* published by the Irish Law Reform Commission in February 2008 (the "**LRC Report**"). As the LRC Report points out, there has not as yet been any legislative intervention in this area in Ireland and so the rule on privity of contract remains unamended in this jurisdiction.

However, the LRC Report also details certain legal means under the laws of Ireland in which the rule on privity may be circumvented, principally by means of the long-established common law principle of *agency*. Today, for example, in the context of existing Standard Contractual Clauses, when acting for the data exporter/controller in Ireland we typically provide that the laws of Ireland will apply and that the data exporter/controller enters into the clauses on its own behalf and also as *agent* on behalf of the data subjects for the purposes (only) of permitting the data subjects to enforce their rights as detailed in the relevant clauses.

3. Need to avoid unnecessary Governing law arguments

In view of (i) the doctrine of privity of contract as explained above and (ii) the requirement that the governing law of the Draft SCCs should provide for third party beneficiary rights under Clause 2 of Section III, one interpretation (arguably) of the Draft SCCs is that the laws of Ireland may not be an appropriate governing law for the SCCs.

As noted above, and in particular in the context of Brexit and as Ireland is one of only two remaining Member State of the European Union whose legal system is based on common law, in the event that any person may argue[1] that the laws of Ireland are not appropriate as a governing law of the Draft SCCs, this is likely (based on our experience) to result in negative consequences such as unnecessary (and avoidable) delays to transactions, additional legal review, complexity and expense and analysis of conflict of laws issues.

In our view, such a narrow interpretation of Clause 2 of Section III of the Draft SCCs would ignore the perfectly lawful and effective long established *agency* mechanism specified above which permits the rights of the data subject to be preserved while permitting the laws of Ireland to be used as a governing law. This is how we do things today and it operates perfectly well from a legal perspective.

[1] Note: For example, where an underlying services/outsourcing or data sharing agreement (and perhaps clauses supplementing the Draft SCCs) is subject to the laws of Ireland.

4. Proposed Solution

Accordingly, for clarity and to avoid the negative consequences mentioned above we respectfully propose that the language in Clause 2 of Section III of the Draft SCCs (and elsewhere in the Draft SCCs, where applicable) is amended to specify that third party beneficiary rights may also be provided for by an *agency* mechanism, if appropriate. We believe that this will remove any perceived ambiguity in this respect with regard to the sufficiency of the laws of Ireland as a governing law for the SCCs and maintain data subjects' rights under the SCCs. We believe this is important for the reasons given above and is consistent with the spirit of EU membership including equal treatment, respect for differences and mutual respect.

Data importers' direct obligations to controllers

1. Issue arising

The addition of a processor to processor transfer mechanism to the Draft SCCs is welcome as it will assist with a common transfer of personal data made in the context of many international business models.

However, several of the clauses dealing with transfers in the processor to processor context appear to create obligations on the data importer (a sub-processor) to the controller of the personal data[2]. In these circumstances, there is no pre-existing contractual relationship between the controller and the data importer. This lack of a pre-existing direct contract is reflective of the commercial realities in the appointment by a controller of a processor to process personal data on its behalf. Extensive complexities arise in the context of this relationship (such as the appointment by the processor of a large number of sub-processors who, in turn, appoint a large number of sub-sub-processors and so on). Accordingly, requiring such direct obligations to be in place between a controller and each of the sub-processors in the chain of processors would not, in our view, be a realistic means to ensure that the data protection standards under the SCCs are protected.

We note also that Article 28 of the GDPR permits for the interpretation that there would be no direct obligations on a sub-processor to the controller of the personal data (and, in practice, in our experience this is how it is commonly interpreted by business). Sub-processors are typically obliged to (by way of example only) report data breaches to the processor who is then obliged, under its contractual relationship with the controller, to report that breach on to the controller without undue delay.

Accordingly, the effect of the creation of obligations on a sub-processor directly to a data controller under the SCCs would be to make compliance with the SCCs in many cases practically impossible but also undermine the contractual relationships clarified by controllers in the context of implementing data processing agreements in the run up to and after the implementation of the GDPR.

2. Proposed solution

We recognise that controllers must receive notifications from their processors within a meaningful timeline to allow them to act in a timely manner. We respectfully propose, therefore, that instead of requiring data importers who are sub-processors to make notifications directly to controllers that a more general

[2] Including the provisions set out at Section II, Module 3, Clauses 1.1(b), 1.1(c), 1.4, 1.6(c), 1.9(a), 1.9(c), 1.9(d), 2(f), 4(a), 4(c), 5(a), 5(b). By way of example, 1.6(c) of Module 3, Section II requires the data importer to notify the controller of a personal data breach (where appropriate).

undertaking obligation could be placed on data importers to ensure that they make notifications to the data exporter without undue delay. This undertaking would be regardless of the length of the sub-processor chain below the data importer, even if the acts or omissions of a member of that chain triggers the notification. The effect of this approach would be to avoid the impracticalities noted above while helping to ensure that controllers receive notifications from their processors within a meaningful timeline.

Yours faithfully

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