



INDUSTRY CONSULTATIONS ON ASEAN CROSS BORDER DATA FLOWS MECHANISM MODEL CONTRACTUAL CLAUSES

06 October 2020

BSA | The Software Alliance (**BSA**) welcomes this opportunity to provide our comments to the Personal Data Protection Commission (**PDPC**) on the ASEAN Model Contractual Clauses (**MCCs**), one of the mechanisms being developed by the ASEAN Working Group on Digital Data Governance to facilitate cross border data flows in ASEAN.

BSA is the leading advocate for the global software industry before governments and in the international marketplace. BSA's members¹ are enterprise software companies that create the technology products and services that other businesses use. For example, BSA members provide business-to-business tools including cloud storage services, customer relationship management software, human resource management programs, identity management services, and collaboration software. Businesses entrust some of their most sensitive information — including personal data — with BSA members. Our companies work hard to keep that trust. As a result, privacy and security protections are fundamental parts of BSA members' operations, and their business models do not depend on monetizing users' data.

As economies around the world undergo digital transformation, companies of all sizes and industry sectors increasingly rely on the ability to transfer data responsibly around the world to design, create, and export new products and services; to enhance business processes and increase productivity; to ensure seamless global customer experience and reach new customers; to access global supply chains; and to engage in research, development, and innovation.

In this regard, BSA applauds ASEAN's efforts and commitment to facilitate data transfers across ASEAN more seamlessly. While the MCCs are meant for voluntary adoption by businesses, based on industry's experience with the EU Standard Contractual Clauses, the ASEAN MCCs could become a widely used mechanism to support transfers in the ASEAN. Given the ASEAN MCCs' potential impact on business operations in the region, BSA would welcome the opportunity for further consultations on the MCCs. We share the initial views below to contribute to this process and look forward to continuing working with you as this process continues.

¹ BSA's members include: Adobe, Amazon Web Services, Atlassian, Autodesk, AVEVA, Bentley Systems, Box, Cadence, Cisco, CNC/Mastercam, IBM, Informatica, Intel, MathWorks, Microsoft, Okta, Oracle, PTC, Salesforce, ServiceNow, Siemens Industry Software Inc., Sitecore, Slack, Splunk, Synopsys, Trend Micro, Trimble Solutions Corporation, Twilio, and Workday.

BSA's Observations and Recommendations

1) **BSA supports the baseline and voluntary nature of the ASEAN MCCs and recommends the MCCs be recognized as a mechanism to facilitate cross-border data transfers by ASEAN Member States (AMS).**

BSA welcomes the development of the ASEAN MCCs as a basic guidance tool which ASEAN businesses can voluntarily adopt to enable secure and trusted data transfers. It is important that the MCCs be recognized as an additional acceptable mechanism to transfer data across ASEAN borders and are not intended to replace other legitimate data transfer mechanisms already permitted by the laws in each ASEAN country's respective domestic regime or other international and regional frameworks such as the APEC Cross Border Privacy Rules (**CBPR**).

BSA notes that the MCCs are intended as a voluntary mechanism with baseline clauses and is encouraged that the MCCs make a distinction between "Core Obligations" and "Supplementary Obligations". Given the intent for the MCCs to function as baseline clauses, they should represent the minimum required to facilitate data transfers without additional controller or processor liabilities that go beyond requirements found in AMS' domestic legislation. For example, the MCC's "Core Obligation" requires data recipients to demonstrate that they have the legal status and ability to comply with the obligations in the agreement. However, if a data recipient is unable to comply with the obligations in the agreement, it would already be in breach of those obligations — an additional warranty of compliance does not provide further safeguards to the data. Additionally, as the MCC's "Core Obligations" would already set out clear baseline data protection obligations for businesses, we recommend the clauses under the "Supplementary Obligations" be more expressly identified as for businesses' reference only. This will make clear that businesses can propose variations that may be better aligned with domestic laws or are better suited for the particular services they offer and the particular types of data that they transfer.

Given the voluntary and baseline nature of the MCCs, BSA further recommends that clauses in the MCCs be limited to data protection obligations. The MCCs currently contain a "Commercial Component", marked as optional. The inclusion of such commercial components in the MCCs may raise the risk of confusion and increase complexity for businesses. These other components may also broaden the scope of the MCCs from the ASEAN Data Protection Framework to include wider commercial legal considerations which could have unintended effects on existing commercial arrangements and negotiations.

2) **BSA urges further consultations with affected stakeholders to refine the proposed model clauses.**

As stated above, given the ASEAN MCCs' potential impact on business operations in the region, BSA recommends further consultation on the various clauses in the three different modules included in the draft document. We include below a non-exhaustive set of examples of clauses that require further development.

BSA acknowledges the efforts to outline the different business relationships between the contracting parties in the MCCs and the need for different contractual provisions based on these relationships. However, as the goal of the MCCs is to provide a set of clear and simple baseline contractual clauses on data protection provisions relating to transfers, which will be particularly beneficial for ASEAN SMEs, BSA recommends deleting Module 3 — Joint Controllers, which could potentially be confusing for ASEAN SMEs. For example, it may be unclear when businesses are making a data transfer based on a joint controller business relationship or a controller-controller relationship, and thus preferable for the MCCs to rely instead on the provisions under Model 2 — Controller-Controller.

BSA recommends the PDPC engage in further consultations with stakeholders on the language of Modules 1 and 2, which are intended to facilitate transfers between controllers and processors and controllers and controllers, respectively. In particular, in Module 1, several of the proposed obligations on data recipients/processors are quite prescriptive and may create tension with the unique role of processors, which generally do not interact directly with the individual customers and data subjects of the controller/data sender and may be contractually prohibited from reviewing personal data stored on or processed via their services on behalf of controllers. As a result, obligations such as providing information to data subjects about the relevant data protection policies and practices are most appropriately placed on the controller, rather than the processor that handles data on the controller's behalf. Moreover, the current language of Module 1 includes potentially burdensome provisions for processors in relation to audits, including possibly providing a controller access to the processing facility. Requiring on-site access can undermine the many privacy and security measures implemented by processors that often are processing personal data on behalf of many controllers at any given time. A more practical approach that is consistent with global best practices would be to allow the processor to have the option of selecting a recognized third party/independent auditor in discussion with the controller and have the auditor present its report to the controller to demonstrate the processor's compliance with its obligations, rather than requiring processors to allow each data sender/controller (or their appointed inspection agents) to audit their facilities and processes.

Similarly, Module 1 contains prescriptive requirements for engaging sub-processors, which are frequently needed to carry out the processing requested by a controller. Instead, data senders/controllers should be allowed to provide general authorization for the engagement of sub-processors by the data recipients/processors, and to include a clause providing such authorization in the MCCs.

In addition, as the MCCs are meant to help businesses comply with the legal and regulatory requirements of each AMS while protecting and promoting trust in the ASEAN digital ecosystem, BSA recommends they include a provision allowing businesses to rely on existing certifications such as to the ISO 27001 series of internationally recognized standards, the APEC CPBR, and similar internationally recognized standards and frameworks as an indication of a data sender's/controller's and data recipient's/processor's ability to comply with data protection requirements. This approach would increase the interoperability of the ASEAN MCCs with existing compliance mechanisms, allowing companies to adopt them more readily.

3) BSA recommends the ASEAN MCCs be interoperable with existing data transfer mechanisms

BSA is encouraged by the progress by ASEAN to develop data transfer mechanisms that are consistent with approaches adopted by internationally recognized frameworks. This means that the MCCs could potentially be applicable to both intra-ASEAN transfers and transfers out of ASEAN. To realize the full potential of the ASEAN MCCs, BSA welcomes efforts to make the MCCs interoperable with other international transfer mechanisms based on global best practices.

Conclusion

BSA appreciates the opportunity to submit our comments on the ASEAN MCCs. We hope this will be useful to ASEAN as it continues its good work on developing and further refining the MCCs.

BSA looks forward to continued collaboration with the Singapore Government and other ASEAN Member States as they continue to advance cross border data flows in the region. If you require any

clarification or further information in respect of this submission, please contact the undersigned at eunicel@bsa.org.

Yours faithfully,

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