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## **Standard contractual clauses for the transfer of personal data to third countries - Frequently asked questions**

Directive 95/46/EC, on the protection of individuals with regard to the processing of personal data and on the free movement of such data, requires Member States to permit transfers of personal data to countries outside the European Union only where there is adequate protection for such data, unless one of a limited number of specific exemptions applies. Where this is not the case, the transfer must not be allowed.

Without such rules, the high standards of data protection established by the Directive would quickly be undermined, given the ease with which data can be moved around on international networks.

Article 26 (4) of the Directive allows the Commission, with the support of a Management Committee composed of Member State representatives, to issue standard contractual clauses which those transferring data to non-EU countries can use to fulfil the requirements set down by the Directive.

These FAQs summarise the main aspects of the Decisions the Commission has taken on standard contractual clauses (see [IP/01/851](#) and [IP/05/12](#)) and provide information to individuals and companies on how to best make use of the standard contractual clauses, both Set I, adopted by the Commission in 2001 and Set II, which the Commission adopted at the end of December 2004.

### **What are the principles behind the standard contractual clauses?**

They reflect the provisions in the 1995 Data Protection Directive that:

- Personal data should be collected only for specified, explicit and legitimate purposes;
- The persons concerned should be informed about such purposes and the identity of the data controller;
- Any person concerned should have a right of access to his/her data and the opportunity to change or delete data which is incorrect; and
- If something goes wrong, appropriate remedies must be available to put things right, including compensation or damages through the competent courts.

The principle aim of the clauses is to ensure that these principles are applied when data is transferred outside the European Union.

The free flow of personal information is essential for the efficient conduct of almost any economic activity on an international basis.

### **Does the new set of clauses just adopted supersede the sets of clauses adopted by the Commission in 2001?**

No. Both sets of standard contractual clauses remain fully applicable and it is up to the operators to choose the one which fits best their needs. For example, the new set does not cover data transfers to data processors in third countries. Lawyers and companies with positive experiences with the 2001 standard contractual clauses may very well decide to continue using them.

### **Why are there now two sets of standard contractual clauses and what are the main differences between them?**

The first set of clauses has been applied successfully in many cases but there was demand from businesses for a wider choice of such clauses. The Commission announced in May 2003<sup>1</sup>, in its first report on the implementation of the 1995 Directive, that it was open to providing businesses with such a wider choice, based on proposals by business representatives themselves, provided this did not diminish the level of protection for data subjects. The coalition of business associations which negotiated the new clauses with the Commission believes that this new set of clauses fits better with business needs, as some clauses, such as those related to litigation, allocation of responsibilities or auditing requirements are more business-friendly. From the perspective of data protection and data subjects, however, the clauses adopted provide for a similar level of data protection as those of 2001. In addition, in order to prevent abuses with the system, the data protection authorities are given more powers to intervene and impose sanctions where necessary. The implementation of this new set of clauses will be reviewed in 2008.

### **Does the new set of clauses provide for a lower level of data protection than the sets adopted in 2001?**

No. Both sets of clauses provide for a similar level of data protection, in other words, individuals are similarly protected by both sets on the basis of the same (adequate) data protection standards and principles. Differences between both sets are mainly of a technical nature (for example, the conditions under which a data protection authority may carry out an audit in the data importer's premises) or related to the differences in the system of liability already explained above.

### **Are the standard contractual clauses compulsory for companies interested in transferring data outside the EU?**

No. The standard contractual clauses are neither compulsory for businesses nor are they the only lawful way of transferring data to countries outside the EU.

First, organisations do not need contractual clauses if they want to transfer personal data to recipients in countries which have been recognised by the Commission as providing adequate protection of data. This is the case for transfers to Switzerland, Canada, Argentina and the UK territories of Guernsey and the Isle of Man. Neither are contractual clauses necessary to transfer data to US-based organisations adhering to the Safe Harbor Privacy Principles issued by the US Department of Commerce (see [IP/00/865](#)).

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<sup>1</sup> COM(2003) 265 final

Second, even if the country of destination does not offer an adequate level of protection, data may be transferred in specific circumstances. These are listed in Article 26 (1) and include cases where:

- the data subject has given his or her consent unambiguously to the proposed transfer; or
- the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of pre-contractual measures taken in response to the data subject's request; or
- the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and a third party; or
- the transfer is necessary or legally required on important public interest grounds, or for the establishment, exercise or defence of legal claims; or
- the transfer is necessary in order to protect the vital interests of the data subject; or
- the transfer is made from a register which according to laws or regulations is intended to provide information to the public and which is open to consultation either by the public in general or by any person who can demonstrate legitimate interest, to the extent that the conditions laid down in law for consultation are fulfilled in the particular case.

Finally, under Article 26 (2), national authorities may authorise on a case by case basis specific transfers to a country not classified as offering adequate protection where the exporter in the EU cites adequate data protection safeguards. This could be done, for example, by specific contractual arrangements between the exporter and the importer of data, subject to the prior approval of national authorities.

### **Can companies still rely on different contracts approved at national level?**

Yes. The standard contractual clauses do not prejudice past or future contractual arrangements authorised by national data protection authorities pursuant to national legislation.

### **Can Member States block or suspend data transfers using the standard contractual clauses?**

Yes, but only in the exceptional circumstances referred to in Article 4 of the Commission Decision. These circumstances are slightly different for transfers concluded under the set of clauses adopted in 2001 and the set of clauses adopted at the end of 2004. For the first set, these exceptional circumstances include cases where:

- it is established that the law to which the data importer is subject obliges it to derogate from the relevant data protection rules beyond the restrictions necessary in a democratic society (as provided for in Article 13 of Directive 95/46/EC) where those derogations are likely to have a substantial adverse effect on the guarantees provided by the standard contractual clauses; or
- a competent authority has established that the data importer has not respected the contractual clauses; or
- there is a substantial likelihood that the standard contractual clauses in the annex are not being, or will not be, complied with and the continuing transfer would create an imminent risk of grave harm to the data subjects.

For the new set of clauses, data transfers can also be blocked or suspended if:

- the data importer refuses to co-operate with the competent data protection authority (for example, to co-operate with an audit) or to abide by the advice of the EU data protection authority; or
- the data exporter refuses to enforce the contract against the data importer after having being informed of the need to do so by the competent data protection authority.

It is expected that these safeguard clauses will be very rarely used as they cater for exceptional cases only. As provided for in Article 4 (4) of the Decision, the European Commission will be informed of any use made by the Member States of this safeguard clause and will forward the information received to other Member States. If any Member State objects to use of the clause by another Member State, the Commission may take appropriate measures to guarantee a level playing field, in accordance with the committee procedure laid down in Article 31 (2) of the Data Protection Directive.

### **Can companies implement the standard contractual clauses in a wider contract and add specific clauses?**

Yes. Parties are free to agree to add other clauses as long as they do not contradict, directly or indirectly, the standard contractual clauses approved by the Commission or prejudice fundamental rights or freedoms of the data subjects. It is possible, for example, to include additional guarantees or procedural safeguards for individuals (e.g. on-line procedures or relevant provisions contained in a privacy policy, etc). Any such additional clauses that parties may decide to add are not covered by the third party beneficiary rights – in other words they cannot be enforced by data subjects, if they are not direct parties to the contract – and may benefit from confidentiality rights where appropriate.

Member States may also add additional elements to the appendix annexed to the set of clauses adopted in 2001. In this appendix, parties to the contract are expected to provide certain information about the categories of data being transferred and the purposes of the transfer.

In all cases, the standard clauses have to be fully respected if they are to have the legal effect of providing for an adequate safeguard for the transfer of personal data as required by the EU Directive.

### **Can data importers be exempted from the application of the principles in the Directive and from the standard clauses, in order to fulfil obligations mandatory for them under national law?**

Yes, they may be exempted from those principles, as long as they are not confronted with legal requirements that go beyond what is necessary in a democratic society:

- to safeguard national security, defence, or public security;
- to allow the prevention, investigation, detection and prosecution of criminal offences or of breaches of ethics for the regulated professions;
- to protect an important economic or financial interest of the State;
- to ensure the protection of data subjects or the rights and freedoms of others.

As regards the new set of clauses, compliance with such “necessary” mandatory requirements, when appropriate, would not amount to a refusal to enforce the contract or to cooperation in bad faith.

**What do “joint and several liability” and “due diligence” mean and how are these applied in the two sets of clauses?**

“Joint and several liability” means that, when data subjects have suffered damage as a consequence of the violation of the rights conferred on them by the contract, they are entitled to obtain compensation from either the data exporter or the data importer or both. This is the liability regime applicable to the set of clauses adopted by the Commission in 2001.

The new set relies instead on the concept of “due diligence by the data exporter”. Due diligence by the data exporter means that it has used reasonable efforts to determine that the data importer is able to satisfy its legal obligations under the clauses. These reasonable efforts may include the carrying out of audits in data importers’ premises or requesting appropriate insurance coverage of any damages caused. In case of damage to the data subject by data importers’ wrongdoing, the data exporter who failed to act with due diligence would be deemed also liable of the damages caused.

**But will this not produce unfair burdens on exporters and/or importers who have done nothing wrong?**

No. Several steps have been taken to ensure that this avoided. In particular the scope and applicability of joint and several liability is strictly limited. It only applies to violations of those clauses which produce rights for data subjects (see the “third party beneficiary clause”, Clause 3) and only in cases where it is necessary to compensate individuals for damage resulting from the violation. Under the new set of clauses, the criterion of “due diligence”, although still very broad, allows the separation of responsibilities between the data exporter in the EU and the data importer in a third country.

Companies within the EU, on the other hand, are concerned that they may be required to compensate data subjects for damage resulting from a violation committed by the data importer. This effect is offset by the mutual indemnification clause which, in such a case, would give the exporter the right to recover from the importer any compensation it has had to pay to the data subject. The general rule is that every party to the contract is responsible for his/her acts *vis-à-vis* the data subject.

**Can US-based organisations that have joined the ‘Safe Harbor’ use the standard contractual clauses to receive data from the EU?**

As a general rule, standard contractual clauses are not necessary if the data recipient is covered by a system providing adequate data protection such as the ‘Safe Harbor’. However, if the transfer concerns data that is not covered by their ‘Safe Harbor’ commitments, use of the standard contract clauses is one way of providing the necessary safeguards.

**Can US-based companies that have not joined the ‘Safe Harbor’ use the relevant ‘Safe Harbor’ rules under the contract?**

Yes, provided that they also apply the mandatory data protection principles in the appendix of Set I (applicable to all countries of destination) or similar restrictions which are reflected throughout Set II: the purpose limitation, restrictions on onward transfers and the right of access, rectification, deletion and objection.

**Who was involved in the business coalition with which the Commission and EU data protection authorities negotiated over the new clauses?**

The Commission and the committee of EU data protection authorities, known as the Article 29 Working Party, negotiated over three years primarily with a wide coalition of business associations led by the International Chamber of Commerce. Among others involved were the EU Committee of the American Chamber of Commerce in Belgium, the Federation of European Direct Marketing, the Japan Business Council in Europe, The International Communication Round Table, The European Industry Association of Information systems, Communication technologies and Consumer electronics, and the Confederation of British Industry.

**When will companies be allowed to use the new set of clauses and data protection authorities be obliged to accept them?**

As from 1 April 2005 no Member State may object to the use of the new set by companies (although it data protection authorities may well accept the new set before this date). Technically speaking and from the perspective of EU law, the decision is addressed to the Member States and does not require implementing measures in order to become operational. However, some Member States have in fact adopted in the past national measures aimed at implementing these decisions into national law.

**Will the Commission consider in the future other standard contractual clauses submitted by interested parties?**

Yes, subject to the availability of appropriate resources, the Commission may consider in the future other sets submitted by interested parties as long as they provide for a similar level of data protection and they can substantially contribute to a further simplification of the conditions for international data transfers. Standard contractual clauses for particular sectors or activities may be helpful in this context. The Commission will also continue closely monitoring developments in work on “Binding Corporate Rules” by the Article 29 Working Party, as a complementary means of ensuring adequate safeguards . Binding Corporate Rules involve using codes of conduct instead of model contracts for the transfer of personal data to third countries.

**How does this exercise fit within the Commission’s wider efforts to ensure effective implementation of the Data Protection Directive?**

Standard contractual clauses are a contribution towards improving the flow of data across borders without compromising privacy or making things unnecessarily difficult for organisations who need to transfer data.

The new set of clauses are therefore an important part of the Commission's work programme for a better implementation of the Data Protection Directive, a programme which began with the Commission's first implementation report (see [IP/03/697](#)) in May 2003 and whose results will be assessed by the Commission in 2005. That report concluded that the Directive had broadly achieved its aim of ensuring strong protection for privacy while making it easier for personal data to be moved around the EU. However, late implementation by Member States and differences in the ways the Directive is applied at national level have prevented Europe's economy from getting the full benefit of the Directive.

Information is a key issue. There is evidence that companies which hold and make use of personal data, while fully recognising the need for privacy laws, are sometimes not fully aware of what that law is or of what their obligations are under it and are not in every case applying it as they should.

The Commission has published a comprehensive Guide to citizens' basic data protection rights under EU law, available in all official languages at: [http://europa.eu.int/comm/internal\\_market/privacy/guide\\_en.htm](http://europa.eu.int/comm/internal_market/privacy/guide_en.htm). However, responsibility for informing citizens and businesses of how EU law is implemented at national level rests with Member States.