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Opinion 3/2009 on the Draft Commission Decision on standard contractual clauses for the transfer of personal data to processors established in third countries, under Directive 95/46/EC
(data controller to data processor)

Adopted on 5 March 2009

This Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC.

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Website: http://ec.europa.eu/justice_home/fsj/privacy/index_en.htm

THE WORKING PARTY ON THE PROTECTION OF INDIVIDUALS WITH REGARD TO THE PROCESSING OF PERSONAL DATA

set up by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995¹,

having regard to Articles 29 and 30 paragraphs 1 (a) and 3 of that Directive,

having regard to its Rules of Procedure and in particular to articles 12 and 14 thereof,

has adopted the present Opinion

I. Introduction

For several years companies and Data Protection Authorities (DPAs) have been working with the standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46 (data controller to data processor 2002/16/EC) approved by the European Commission on 27 December 2001².

Although the standard contractual clauses 2002/16/EC provide a solid base for the transfer of personal data, the call for an “update” of this contract has grown louder every year.

The main reason to consider an “update” of the standard contractual clauses 2002/16/EC is simply put the advent of “global outsourcing”. As more and more companies not only transfer their data to a processor but to "sub processors" and sometimes transfers data to subsequent "sub-sub processors", the standard contractual clauses 2002/16/EC do not provide a means to deal with these complex onward transfers. Therefore the European Commission considers it necessary to modify the standard contractual clauses 2002/16/EC to make a contract better equipped for current business arrangements by adopting a new Decision based on Article 26(4) of Directive 95/46/EC.

II. Comments on the Draft Commission Decision

1. Main issues

1.1. Subcontracting by processors established in the Community versus subcontracting by processors outside the Community

The Working Party would like to make some remarks concerning the international sub processing outside the EEA by a processor established in the European Union/EEA, a situation not foreseen in the Draft Commission Decision and that becomes more common in practice day by day.

¹ OJ L 281 of 23/11/1995, p. 31, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:EN:HTML>

² OJ L 6, 10.12002, p.52. See Opinion of the Working Party n° 7/2001, WP 47) available at: http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2001/wp47en.pdf

The Working Party is aware that the adoption of this Draft Commission Decision would introduce a remarkable flexibility in processing services, as far as the authorization system provided for in Article 26.2 of the Directive is concerned. However, this flexibility would not apply equally to the different players in an increasingly global market. Indeed the Draft Commission Decision would allow a processor established in a third country to carry out onward transfers for the purposes of sub processing only with an authorization granted by the controller, while those processors established in the EU/EEA and which would like to subcontract part of their processing activities to a sub processor in a third country should continue to use the current legal system. This situation could cause a competitive disadvantage for European companies that would be required to bear an administrative burden greater than that of their equivalents in third countries, in order to perform equivalent processing as service providers.

The Working Party can not forget, however, the different legal nature of intra community and international transfers. This is reflected in the Directive, which regulates these issues in two different Sections.

Therefore, the Working Party considers it necessary to find a legal solution that would allow international sub processing by processors established in the EU/EEA without generating unnecessary inequalities in the market. In this regard, the Working Party urges the Commission to develop promptly a new separate and specific legal instrument that allows international sub processing by processors established in the Union to sub processors in a third country. Such an instrument could for instance take the form of a new set of Standard Contractual Clauses, through which the controller and the processor established in the EU/EEA could provide for trans border sub processing, in accordance with the necessary and adequate guarantees for such transfers.

Aware that the drafting of an instrument as proposed may need time, the Working Party understands that, in the absence of a specific Community legal instrument, the trans border sub processing of data processing services by processors established in the EU/EEA deserves a response from the national supervisory authorities. Thus, without prejudice to the rights and obligations of national supervisory authorities under their domestic law to adopt the authorizations provided for in Article 26.2 of the Directive, the Working Party encourages national supervisory authorities to consider as an adequate guarantee for the international sub processing contracts entered into by the controller and a processor in the EU/EEA that they apply by analogy the same principles and guarantees of these Standard Contractual Clauses. That is to say, contracts made between an EU/EEA data controller and an EU/EEA data processor under which the controller authorises the transfer of data to a sub-processor outside the EU/EEA should be viewed by a national data protection authority as providing adequate protection for the rights of the data subjects whose data is being transferred if they apply by analogy the same principles and guarantees of these Standard Contractual Clauses 2002/16/EC. This would amount to a similar regime to that provided by the Draft Decision to processors outside the EU.

In this regard the Working Party invites the Commission to consider whether the Commission Decision adopting the standard contractual clauses could contain a statement explaining this question, for instance by including specific recitals in the Commission Decision which would expressly provide the possibility for Member States to authorize international transfers based on the Standard Contractual Clauses annexed to the Commission Decision to sub processors established outside the EU/EEA in the specific situation in which both the controller and the processor are established in the EU/EEA.

These references should include the advisability of allowing this type of outsourcing through an authorization system identical to that provided for processors established outside the EU/EEA.

1.2. Multi-Layered Sub-Contracting

The Working Party is aware of the need to adjust Standard Contractual Clauses to the new trans-national dimension of the processing of personal data – in particular taking account of the widespread practice of “sub processing” certain processing operations.

Given the above premise, the Working Party takes note of the inclusion of a sub contracting clause in the Standard Contractual Clauses (SCCs) "controller to processor", where such clause is designed in accordance with the scheme that is contained in the document mentioned in Clause no. 11 (i.e. as a written agreement between data importer and subcontractor based on the data exporter's prior written consent and modelled after the controller-to-processor Standard Contractual Clauses).

Sub processing of the processing operations mostly consists in appointing entities established in third countries as data processors; the third countries in question often do not ensure adequate safeguards and the processed data are also exposed to the application of local laws

At the same time, the Working Party would like to call upon the Commission to carefully evaluate the advisability of also allowing a sub processor to stipulate subsequent sub processing agreements with further third parties; in particular when sensitive data are processed or in case of processing operations carrying specific risks to data subjects (i.e. biometric data, genetic data, judicial data, financial data, data on children, profiling).

This would actually give rise to major chains of sub processors that might act independently of the data controller's instructions; additionally, it would be difficult to “keep track” of the various sub processors especially in order to establish tasks and responsibilities vested in the individual entities.

In its Working Document on Preliminary views on the use of contractual provisions in the context of transfers of personal data to third countries the Working Party indicated that onward transfers to bodies or organisations not bound by the contract should be specifically excluded by the contract, *unless it is possible to bind such third parties contractually to respect the same data protection principles*. This is the purpose of the Draft Commission Decision.³

The Working Party is fully aware of the current organisational pattern of worldwide markets, whereby long chains of sub-processors are an integral part of the international business structure.

Given this context, a system of SCCs envisaging a single sub processing layer (from the data importer to one sub processor) is unsuitable for coping with the existing business scenarios.

The Working Party has accordingly decided to accept the introduction of a “multi-layered” sub processing clause, on condition that appropriate safeguards are laid down to protect data subjects in the light of the aforementioned risks.

³ Document WP 9, 22 April 1998: http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/1998/wp9_en.pdf

Applying contractual clauses to all different layers of sub processing operations will introduce greater uniformity in business as all subcontracts of processing operations covered by the standard contractual clauses shall be subject to the same clauses and stipulations. In addition this will simplify current situation by increasing legal certainty whereby it is not evident that where data importers subcontract their processing activities to other sub processors they require prior written consent of the data controller and impose contractual obligations that will ensure the same level of protection as provided by the contractual clauses.

Following this line of thought, it would appear appropriate to consider that a “multi-layered” sub processing clause can be lawful if the decision to commit the processing to further sub processors goes hand in hand with the careful assessment of the specific requirements and features of the processing operations that justify such decision. The assessment in question will have to be especially accurate if the number of sub processing layers is especially high and should also pay particular attention to the purpose limitation principle so as to ensure that the initial purpose for which the controller transferred the data to the data importer for processing services is not altered by the different sub processing contracts that could be entered into.

Given the above premise, providing for a sub processing system in which multiple sub processors may be sequentially entrusted with part of the processing is an interesting option the Working Party might also endorse, if the precondition related to the existence of specific technical and organisational requirements to be met by the data controller is fulfilled under the terms described above. In this regard the data exporter should also introduce organisational solutions to facilitate exercise of data subjects’ rights (access, rectification, objection, erasure, etc.). This might entail, for instance, specifying a single corporate contact point for data subjects to exercise their access rights (at the data controller’s headquarters), or else developing clear-cut procedures – to be made known to all processors and sub-processors – in order to provide data subjects with the personal data to which they may request access.

The Article 29 Working Party considers that Clause 11 –Subcontracting- of the Commission's Draft Decision includes the elements necessary to adequately ensure that the whole chain of possible sub processing operations will continue to ensure the level of protection set out by the standard contractual clauses. In addition the obligations imposed in Clause 4 (obligations of data exporter) and Clause 5 (obligations of data importer) will ensure that the controller and the processor are obliged to ensure this level of protection through all the layers of subcontracts. In this regard the Working Party suggests that in parallel with the obligation imposed on the data importer (processor) of sending a copy of any subcontract he concludes to the data exporter, the data exporter should keep an updated list of the individual processors and sub-processors making up the “contractual chain”.

In the same vein, the competence of data protection authorities to conduct audits of the data importer as well as sub processors of the data importer will be essential to ensure compliance with contractual clauses and the level of protection required by all different sub processors involved in the processing activities of the personal data being transferred subject to the standard contractual clauses.

2. Other issues

2.1 Audits:

The proposed standard contractual clauses would foresee the possibility for data protection authorities to have powers allowing them to inspect the full chain of sub processing: the data controller, the data processor(s), and the sub processor(s) and, where appropriate, to take binding decisions on them. Therefore the Working Party recommends adapting Clause 8 (Cooperation with supervisory authorities).

2.2 Governing Law

Clause 9 of existing contractual clauses provides that the Clauses shall be governed by the law of the Member States in which the data exporter is established. In order to ensure legal certainty and consistency, it would be stated that the law governing contracts entered into for sub processing services should also be the law of the Member State in which the data exporter is established.

2.3 Consequences for the old set of clauses

The Draft Commission Decision proposes the repeal of Decision 2002/16/EC. The question arises whether those transfers contract entered into EU/EEA controllers and third country processors by applying the standard contractual clauses of Decision 2002/16/EC would be also repealed and accordingly would have to be converted into the new set of contractual clauses "controller to processor". Requiring the adaptation of all existing contracts concluded under the contractual clauses of the Commission Decision 2002/16/EC would create a significant and disproportionate burden both for stakeholders and data protection authorities.

However maintaining in force Contractual Clauses approved by Decision 2002/16/EC may be not the better solution than having to re-authorize the current international transfer agreements. This could cause legal uncertainty.

As a solution the Working Party recommends that the Commission includes transitional provisions in the Decision itself (perhaps in Article 6) providing that the international transfers authorized pursuant to the repealed Decision 2002/16/EC shall remain in force as long as the transfers and data processing described in the initial signed contractual clauses have not changed. However, if the companies that have used the 'old' clauses wish to amend the 'old' clauses or wish to introduce sub processing arrangements, they will be required to amend the 'old' clauses to bring them into line to the new Standard Contractual Clauses and apply for a new authorization in accordance with national legislation.

Conclusions

Subject to the above recommendations, the Working Party issues a favourable opinion on the draft Commission decision on standard contractual clauses for the transfer of personal data to data processors established in third countries and invites the Article 31 Committee to continue its work with a view of adopting this Draft Commission Decision.

Done at Brussels, on 5 March 2009

*For the Working Party
The Chairman
Alex TÜRK*