



**5006/02/EN
WP 38 final**

Opinion 1/2001 on

**the Draft Commission Decision on Standard Contractual Clauses
for the transfer of Personal Data to third countries
under Article 26(4) of Directive 95/46**

(draft distributed to the Working Party on 17 January, 2001)

Adopted on 26th January 2001

The Working Party has been established by Article 29 of Directive 95/46/EC. It is the independent EU Advisory Body on Data Protection and Privacy. Its tasks are laid down in Article 30 of Directive 95/46/EC and in Article 14 of Directive 97/66/EC. The Secretariat is provided by:

The European Commission, Internal Market DG, Unit Free flow of information and data protection.
B-1049 Brussels - Belgium - Office: C100-6/136
Internet address: www.europa.eu.int/comm/internal_market/en/dataprot/index/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 following OPINION:

1. Introduction

The Working Party would like to acknowledge the work carried out by the Working Party Subgroup on Contractual Clauses² during the last two years at their meetings with the Commission services, as well as other industry representatives. The Working Party also would like to thank the International Chamber of Commerce and the Confederation of British Industries for their contribution and encourage them to continue to contribute to future work on this important issue.

The Working Party welcomes the Commission proposal on Standard Contractual Clauses and wishes to highlight the importance of this instrument for the protection of the personal data of European citizens outside the boundaries of our Union. It recalls its recommendations to make rapid progress with contractual solutions³. The Working Party would like to stress the fact that the Commission decision is called to play not only the role established by Article 26 (4) of the Directive but at the same time it will become a reference document for future developments on data protection in the international field.

It is for these reasons that the Working Party approved and issued provisional comments for the attention of the Article 31 Committee in December 2000, which have been mostly taken on board in this new draft, and it is for these reasons that the Working Party, while supporting the Commission's proposal, would like to reaffirm their previous opinions on this issue⁴ and make the following comments.

¹ Official Journal no. L 281 of 23/11/1995, p. 31, available at:

http://europa.eu.int/comm/internal_market/en/dataprot/index.htm

² Participant national authorities: Austria: "Österreichische Datenschutzkommission", Germany: "Der Bundesbeauftragte für den Datenschutz", France: "Commission Nationale de l'Informatique et des Libertés", United Kingdom: "Data Protection Commissioner", Netherlands: "Registratiekamer", Italy: "Garante per la protezione dei dati personali", and Spain: "Agencia de Protección de Datos".

³ Opinion 4/2000 of 16 May 2000, WP 32 (doc. CA07/434/00/EN). Available at http://europa.eu.int/comm/internal_market/en/dataprot/wpdocs/index.htm

⁴ See **WP 4 (5020/97)** " First orientations on Transfers of Personal Data to Third Countries - Possible Ways Forward in Assessing Adequacy", a discussion document adopted by the Working Party on 26 June 1997;

WP 9 (5005/98) Working Document: "Preliminary views on the use of contractual provisions in the context of transfers of personal data to third countries", adopted by the Working Party on 22 April 1998.

WP 12 (5025/98) Working document: Transfers of Personal data to third countries: Applying Articles 25 and 26 of the EU Data Protection Directive, adopted by the Working Party on 24 July 1998.

All documents referred to are available at the address indicated in footnote 3.

2. The lawfulness of the transfer under national law.

The Working Party would like to underline the fact that, as provided for in Article 2 and explained in Recital 7 of the Draft Commission Decision, any transfer from the Community to third countries by means of the standard contractual clauses which the Commission has found as offering sufficient safeguards is in itself a processing operation covered by the national legislation implementing the Directive in the Member States. The lawfulness of such processing operation remains entirely subject to the conditions of the national legislation implementing the provisions of the Directive 95/46/EC. Should a transfer by means of the standard contractual clauses approved by the Commission not fulfil the conditions set up in the national law as regards these aspects, the intended transfer to third countries could not take place. In particular, if a disclosure of data to a third party recipient inside a Member State of the controller would not be lawful, the mere circumstance that the recipient may be situated in a third country does not change this legal evaluation.

The Working Party also takes the view that further harmonisation of the information to be provided by the parties in the Appendix to the contract, in particular when dealing with the most common categories of transfers (e.g. employment, marketing, etc) would be very desirable in the light of the experience obtained with the use of the standard contractual clauses at national or European level .

The Working Party wishes to draw the attention to the fact that the scope of the Decision is limited to transfers where both parties act as a controller. The Working Party supports this approach, but invites the Commission to address urgently in a future decision contractual clauses for those transfers not covered by the present Decision, that is, where the recipient of the data outside the Community is a processor acting on behalf of a data controller established in the Community.

3. The safeguard clause of Article 3 of the Decision.

By definition, the recipient of the personal data transferred by means of the standard contractual clauses approved by the Commission is established in a country where there is no adequate protection for the privacy of individuals. The standard contractual clauses would allow to fill this gap provided that the Data Importer effectively complies with them.

If that was not the case, the standard contractual clauses would no longer fulfil their role of providing sufficient safeguards and, therefore, a suspension or prohibition of the transfer could take place. The Working Party would like to stress the fact that letters b) and c) of Article 3 would also cover those cases where the enforcement of the rights conferred to data subjects by the contract was not possible for any reasons.

The situation described in Article 3.1.a) of the Draft Commission Decision is different. Mandatory legislation applicable to the Data Importer prevails over his contractual obligations and there could be situations where the Data Importer may be compelled not to respect all the data protection rules included in the contract.

Under clause 5 a) of the Annex, it is recognised that the Data Importer may do so (and therefore it would not incur responsibility vis a vis the data subjects) where these mandatory requirements imposed upon him are necessary measures to safeguard one of

the democratic grounds listed in Article 13 of the Directive (such as national and public security, defence, prosecution of criminal offences, etc.).

This problem could arise, however, in those particular cases where these mandatory requirements imposed upon the Data Importer go beyond the democratic grounds listed in Article 13 of the Directive. In such case, the resulting violation of the privacy of individuals could not be considered as justified under the Directive's provisions and, therefore, the transfer should be avoided in the first place or, if it took place by accident, it should at least result in the joint and several liability of the Data Exporter and the Data Importer vis a vis the data subjects for any damages resulting from the violation of the contractual obligations

Having said that, the Working Party supports the flexibility shown by the Commission in its draft and takes the view that this reference to Article 13 of the Directive, both in the Decision and clause 5 of the Annex, comes to establish a proper balance between the necessity of preventing an unacceptable use of the standard contractual clauses and the constraints to which the Data Importer could be exposed in exceptional circumstances.

4. The contractual obligations of the Data Importer.

By virtue of clause 5 of the Annex, the Data Importer agrees and warrants to process the personal data received from the Community in accordance with certain processing conditions that allow him to adduce enough safeguards within the meaning of Article 26 (2) of the Directive 95/46/EC. The Working Party would like to stress the fundamental and indispensable character of three of these conditions in order to guarantee a minimum level of protection: the purpose limitation principle, restrictions on onward transfers and the Data Importer's undertake of providing the data subjects with the rights of access, rectification, deletion and objection arising from the Directive 95/46/EC.

The Working Party takes the view that the obligations of the Data Importer should include a general warranty relating to the security of the transfer of all data and not only sensitive data.

4.1. The purpose limitation principle

It is absolutely necessary that the Data Importer undertakes to process the data for the same purpose specified in the Appendix to the clauses, given that any control of the lawfulness of the transfer under national law has been limited to such purpose.

4.2. Restrictions on onward transfers

The Working Party recognises that in the commercial world onward transfer of data will or may have to take place. However, the problem of onward transfers is a very difficult issue which could require complicated mechanisms to enforce adequate guarantees.. In these circumstances, The Working Party takes the view that it is preferable that the standard contractual clauses do not include the possibility of onward transfers

Therefore, the Working Party recommends a simpler formulation of the "restrictions on onward transfers principle" contained in the Mandatory Principles annexed to the contract as the following: "No further transfers of personal data to another controller would be permitted under the standard contractual clauses".

Having said that, the Working Party wishes to underline the fact that new transfers will still be possible by the Data Exporter entering into a new contract with the new data importer or with the consent of the data subjects given to the Data Exporter according to Article 26 (1) of the Directive 95/46/EC.

4.3. The rights of access, rectification, deletion and objection arising from the Directive 95/46/EC

The Working Party would like to highlight the fact that, as it has been reiterated in previous opinions dealing with the issue of what should be an adequate level of protection in third countries, these are the core rights on the basis of which it is possible to build any adequate protection for the privacy of individuals.

In the cases of the Article 26 (4) of the Directive, where personal data of individuals is flowing, by definition, to third countries where there is not adequate protection or any data protection at all, the standard contractual clauses need to provide adequate protection and therefore it is necessary to allow the Data Subjects to exercise the same rights of access, rectification, deletion and objection as recognised in the Directive 95/46/EC.

5. The Mandatory Data Protection Principles and other options of Clause 5.

The Working Party supports the Mandatory Data Protection Principles annexed to the standard contractual clauses as long as they are principles arising from the Directive 95/46/EC and interpreted in this way. The Working Party strongly recommends the inclusion of a principle on automated individual decision as provided for in Article 15 of the Directive. The Working Party is of the view that this principle will have a direct effect on the activities of credit reporting agencies established in third countries, which are likely to receive personal data of European citizens by means of the standard contractual clauses approved by the Commission.

As regards the second option contained in Clause 5, letter c) in the Annex, the Working Party is of the view that where a Commission decision finds that a data protection system of a given country provides adequate protection, such decision is due to be taken with regard to all the specific circumstances of the case, as required by Article 25(2). The requirements of Article 25(2), to which Article 26 refers, imply a thorough consideration of the specific framework in which the data protection rules operate in a given country, since such legal and constitutional framework can not be “exported” without additional safeguards need to be provided by way of contractual clauses.

The Draft Commission Decision allowing the parties to agree on substantive data protection rules of a third country would meet the concerns of the Working Party as long as the following conditions are fulfilled:

- a) This option must be available only to data importers based in the third country which rules are referred to.
- b) This option must be applicable to those situations where adequacy findings provide for adequate protection not in all sectors of activity.

c) The processing conditions mentioned in chapter 4 above (purpose limitation, restrictions on onward transfers and right of access, rectification, deletion and objection of the Directive 95/46/EC) must apply in any case to any Data Importer receiving data by means of the standard contractual clauses.

6. The enforcement safeguards provided for in the clauses

The Working Party notes that the substantive content of the standard contractual clauses proposed by the Commission has been progressively reduced since June 2000. This has been certainly to provide for a certain degree of simplification but also to overcome some negative reactions from Industry and Member States with regards to certain data protection safeguards originally proposed by the Commission. The Working Party takes the view that the clauses contained in the Annex to the Draft Decision should be considered as the minimum safeguards necessary to guarantee the protection of the privacy and the fundamental rights of individuals

The Working Party is convinced that joint and several liability of the data exporter and the data importer vis a vis the data subject of any damages resulting from the violation of the standard contractual clauses, is the only way to address, in a efficient and realistic manner, the serious difficulties that the contractual solution poses for the enforcement of individuals' rights and proper compensation for damages. Accordingly, the Working Party takes the view that any reduction on these provisions, in particular on joint and several liability, would not offer adequate safeguards.

The Working Paper wishes to invite the Commission and the Article 31 Committee to reflect if the possible exception of the responsibility of the Data Importer at the end of the third paragraph of Clause 6 is justified as it may create some confusion in the exercise of this important safeguard for the data subjects.

7. The jurisdiction clause and the role of the Data Protection Authorities as dispute resolution mechanisms.

Although this possibility is already covered by the Draft Decision, the Working Party would recommend to make more explicit that data subjects may take action before Courts not only in the jurisdiction of the country where the Data Exporter is established but also in the jurisdiction of the data subject's residence.

The Working Party would also like to underline the fact that the choices contained in this clause should be regarded as minimum options for the data subject who may use any other jurisdiction available to him under national or international private law.

Finally, the Working Party takes the view that, where possible under national law and feasible in terms of human resources, national Data Protection Authorities may play an increasing role as qualified and really independent dispute resolution mechanisms. This innovative role would be consistent with the trans-border nature of the transfer and the existing trends and proposals on providing non-jurisdictional mechanisms for dispute resolution, particularly in the field of electronic commerce.

8. Conclusion

The Working Party issues a favourable opinion on the Draft Commission Decision under Article 26 (4) distributed on 17 January 2001 as offering sufficient safeguards for the transfer of personal data to third countries with the comments already contained in this opinion.

The Working Party invites the business community to use these clauses once they are approved by the European Commission, recommends the Article 31 Committee to make all reasonable efforts to give a favourable opinion on this clauses as soon as possible, and invites the Commission to monitor their implementation and report on any pertinent finding as well as any necessary amendments in the light of the experience obtained at national or European level, in particular, as regards the Appendix annexed to the contract.

ANNEX

Annex to the Draft Opinion

The Working Party would like to recommend the Commission and the Article 31 Committee to consider the following drafting amendments:

a) to the Draft Decision

- Recital 8: the following words may be deleted: “and all the relevant provisions of the Directive would remain applicable under the responsibility of the controller”;
- Recital 11: the word “exceptional” may be deleted from this recital.
- Article 1: after “Directive 95/46/EC” it may be included. “subject to the provisions of Articles 2 and 3 of this Decision”
- Article 3: At the beginning of the Article the word "without" may be substituted by the expression "This decision does not"

b) to the standard contractual clauses

- clause 5 c): after “if explicitly agreed by the data exporter” it may be included “at the moment of the signature of the contract”
- clause 5 c) first indent may be added at the end: “insofar these provisions are of a character which make them applicable in the sector of the transfer”
- clause 5 f) after “Supervisory Authority” may be added “of the Member State where the Data Exporter is established”
- clause 7 c) may be modified to read: “to refer the dispute to the Supervisory Authority of the country where the Data Exporter is established if so offered by her or to a body created by this Authority”
- clause 8: “The parties agree to deposit a copy of these Clauses with the Supervisory Authority if it so requests or where required under national law.”
- clause 10: it may be added at the end: “recognising the third party beneficiary clause”

Done at Brussels, 26th January 2001

For the Working Party

The Chairman

Stefano RODOTA