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Opinion 8/2003 on the draft standard contractual clauses submitted by a group of business associations ("the alternative model contract")

Adopted on 17 December 2003

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:

Directorate E (Services, Intellectual and Industrial Property, Media and Data Protection) of the European Commission, Internal Market Directorate-General, B-1049 Brussels, Belgium, Office No C100-6/136.
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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:

Introduction

The Working Party welcomes the draft standard contractual clauses submitted by the International Chamber of Commerce and other business associations. It shares the views expressed by the European Commission that it should be possible to adopt other standard contractual clauses so that economic operators have a wider choice. This would help companies to transfer personal data to third countries while safeguarding the protection of the fundamental rights and freedoms of those benefiting from the protection of the EU Data Protection Directive and national laws implementing it.

Having said that, as there is already a set of Standard Contractual Clauses which was adopted by the Commission in 2001 after long deliberations and taking into account the concerns expressed by this Working Party, the adoption of a new set of Standard Contractual Clauses must be conditioned to the full satisfaction of two basic parameters:

- a) That the proposed standard contractual clauses deliver a comparable level of protection to those adopted by Commission decision 497/2001/CE
- b) That the proposed clauses offer an added value which goes beyond the mere fact that they are more business-friendly: the clauses should be also more citizens-friendly.

¹ Official Journal no. L 281 of 23/11/1995, p. 31, available at:
http://europa.eu.int/comm/internal_market/privacy/law_en.htm

The Working Party has doubts that the current proposals satisfy these conditions fully. It also has doubts that these clauses are easier to use by economic operators. The same business associations that criticised the Commission's standard contractual clauses in 2001 as "unworkable" do not seem to have found better wording for many clauses and when the proposals deviate from Decision 497/2001/CE, the result is not necessarily clearer but rather more uncertain in legal terms.

Anyway, as the progresses made over the last two years of discussions have been substantial and these final proposals are not too far from what it could be an acceptable level of data protection, the Working Party would like to issue a favourable opinion which sets out three remaining issues of concern that are fundamental reservations to be overcome before the European Commission considers a draft Commission decision for the consideration of the Article 31 Committee. If that was not the case, the Article 29 Working Party recommends the Commission to empower the data protection authorities to request companies to use those clauses of Commission decision 497/2001/EC to which these reservations refer to if they find them more appropriate

The Article 29 Working Party also invites the authors of the clauses to carefully assess the technical suggestions for improvement provided by the Information Commissioner and in particular, those comments related to the termination of the clauses.²

The duty of co-operation with data protection authorities

As this Working Party already stated in 1998 and has repeated in later opinions, "any meaningful analysis of adequate protection must comprise the two basic elements: the content of the rules applicable and the means for ensuring their effective application"³.

² The Working Party is of the view that the termination provisions are somewhat confused. As regards clause VI a), if either party is in breach of its obligations under the Clauses what is required is that no further personal data is transferred in accordance with the clauses and that any personal data which has already been transferred is destroyed or returned to the Data Exporter.

Where there is a breach of the Clauses they should not be terminated as it is the clauses which set out how disputes and breaches are to be handled, in other words, terminating the clauses does not help the situation: what is required is for transfer of personal data under any associated commercial contract made in reliance on the adequate safeguards provided by the Clauses must be stopped.

In clauses VI a), the Group suggests to replace "may" with "shall" in the first sentence, and delete "temporarily" as it is unnecessary. The reference to "a final decision against which no further appeal is possible" is linked with the weaknesses already commented on the duty of co-operation.

³ See page 5 of WP 12: working document: transfers of personal data to third countries: Applying Articles 25 and 26 of the EU Data Protection Directive.

As indicated in working document number 12, the monitoring and complaint investigations functions of the Data Protection Authorities are not the only way to ensuring effective application of the rules and therefore to guarantee adequate protection. It should be possible to guarantee this effective application of the rules by other means. It would not be compatible with adequate protection, nevertheless, not to provide for the monitoring and complaint investigation functions of the EU data protection authorities in a proper way, and at the same time not to foresee alternative procedural/enforcement requirements for the individuals.⁴

In short, this is the way of proceeding by the alternative standard contractual clauses where the co-operation duties of the data importer have been considerably weakened⁵ without putting forward any new proposals which may eventually compensate the lack of this important element, for example, the reinforcement of alternative dispute resolution systems.

From the very beginning of these discussions, the Article 29 Working Party and the Commission have persistently invited the authors of the clauses to submit imaginative proposals at this regard, both to broad the margin of manoeuvre and on the consideration that the business associations sponsoring these alternative clauses were best positioned to do so. Such proposals would be fully consistent with their own requests to the regulators of flexible dispute resolution mechanisms in several international fora⁶.

Other alternative suggested by the Commission and the Article 29 Working Party have been direct or indirect participation of the business associations as qualified arbiters, to explore disciplinary measures against these members failing to honour their data protection obligations, etc.

The authors of the clauses have refused to take any of these suggestions on board (on the argument that creating an alternative dispute resolution system would be extremely complex and was also not foreseen in the Commission's clauses) but have nevertheless differed from the standard contractual clauses adopted by the Commission as regards the duty of co-operation of the data importer with the data protection authorities in the European Union.

⁴ A good example of the application of this principle can be found in the Commission Decision 2000/520/EC on the US Safe Harbor Principles: as the Federal Trade Commission was not able to play any role on the transfer of employee data to harborites, the system compensated this lack with the setting up of a panel of EU data protection authorities.

⁵ Under the alternative standard contractual clauses, data protection authorities could only expect "co-operation in good faith to respond inquiries about the processing of personal data" but data importers would no longer have to submit its data processing facilities for audit at the request of the data exporter but potentially "in agreement with the supervisory authority", nor to abide by the advice of the supervisory authority with regard to the processing of the data transferred.

⁶ See for example, the proposals of the Trans-Atlantic Global Business Dialogue on Alternative Dispute Resolution Systems.

This has a direct and serious consequence on the level of protection provided by the alternative standard contractual clauses and therefore the Article 29 Working Party urges the Commission to make sure that this problem is overcome by the authors of the alternative model before submitting a draft Commission decision to the consideration of the Article 31 Committee.

Limitations to the right of access

As it was the case with the standard contractual clauses adopted by the Commission, under this new set proposed the data importer could also choose to process the personal data in accordance with the relevant provisions of any Commission decision pursuant to Article 25 (6) of the Directive - if the importer complies with the relevant provisions and is based in the country to which the decision pertains but is not covered by the Commission decision- , being the US Safe Harbor Principles the most obvious example.

Appendix 3 of Commission Decision 2001/497/EC "top up" the right of access of the Safe Harbor Principles to guarantee the same level of protection for all international transfers carried on the basis of standard contractual clauses no matter if the data importer is established in the United States or in any other third country. For the same reasons, it is necessary that the alternative standard contractual clauses proposed guarantee similar effects to those achieved by Appendix 3, point 2, of the Commission Decision abovementioned as the right of access would not be currently covered when importers choose the option of Article II h) (ii).

The mandatory principles attached as annex 2 to Commission Decision 497/2001/EC must be "read and interpreted in the light of the provisions of Directive 95/46/EC". The same should apply for Annex A of the alternative standard contractual clauses. When the European Commission, in principle 5 of annex 2 of the Commission decision (right of access) referred back to Article 12 of the Directive, this could only mean that adequate protection by means of standard contractual clauses requires access rights with the same scope set out in Article 12 of the Directive.

In fact, Article 12 of the Data Protection Directive does not authorise a data controller to refuse access on the consideration that granting that right would be likely to seriously harm the interests of the data controller.

It is true that Article 13 of the Directive authorises Member States to adopt legislative measures to restrict the obligations and rights provided for in Article 12, when such a restriction constitutes a necessary measure to safeguard "the protection of the data subject or the rights and freedoms of others". However, such an assessment is not left in the hands of the data controller but on the hands of the legislator in the Member States, which may have foreseen (or not) these limits to the right of access for the protection of the rights and freedoms of others.

The Article 29 Working Party therefore agrees that in those cases where the law of the data exporter foresees legislative measures which restrict the obligations and rights provided for in Article 12 of the Directive, the data importer may eventually also benefit from them. However, the proposal of the alternative clauses at this regard fails to guarantee an adequate level of protection and must be rejected. The same applies

for the obligation to inform about the sources of the data which is not limited in the Directive to any test as regards "reasonable efforts".

The system of liability

The Working Party is aware that "joint and several liability" is deemed as a burdensome regime which may be preventing some data controllers from using the standard contractual clauses otherwise genuinely interested. If by overcoming this problem, the use of standard contractual clauses by operators significantly increases, there should be no problem in exploring other possible approaches.

When considering the liability regime, the means are less important than the results, that is, the important is not whether or not the data exporter and the data importer are jointly and severally liable but whether or not individuals are provided with readily means to exercise third party beneficiary rights and get appropriate compensation in case of damages.

In this line of thought, the system of subsidiary liability proposed by the alternative standard contractual clauses is an interesting approach which the Article 29 Working Party could support but only if the system is further clarified and complemented as indicated bellow:

- a) Either Clause III itself or a separate annex to which this clause would refer to as an integral part of the standard contractual clauses, should clarify that the exercise of third party beneficiary rights by the data subjects would be a three steps exercise:
 - a. Invitation to the data exporter to enforce the contract against the data importer within one month
 - b. Enforcement action against the data importer, if necessary judicial, in the EU.
 - c. Subsidiary action against the data exporter for "culpa in eligendo"
- b) The reasonable period mentioned at the end of clause III b) should be limited to a maximum of one month.
- c) The clauses must state (not being this sufficiently clear at the moment) that individuals may sue data importers in the Community, in other words, that the data importer accepts to be sued in the Community by data subjects exercising third party beneficiary rights under the contract. Additionally, clause II f) should foresee "evidence of financial resources sufficient to fulfil its responsibilities under Clause III (which may include insurance coverage)" in the European Union.
- d) The clauses must similarly clarify that the data subject would be entitled to turn any compensation claims against the data exporter when the data subject was unable to get compensation from the data importer for whatever reasons or after three months of lodging a compensation claim without any answer:

- e) The Commission decision should also clarify the effective scope of the subsidiary liability of the data exporter for data importer's violations, that is, the general liability for "culpa in eligendo" resulting from clause I b) and from clause II f) in those cases, in particular, where the data importer turned out to be insolvent.
- f) Finally, the Commission decision should also make it clear that either the refusal of the data exporter to enforce the contract against the importer within one month, or the refusal of the data importer to respect their clear obligations under the contract will be most likely deemed by the competent data protection authority as evidence that the standard contractual clauses are not being complied with in general, and the refusal to compensate damages where appropriate in particular, as creating an imminent risk of grave harm for the data subjects within the meaning of Article 4.1.c) of Commission Decision 497/2001/EC and therefore these facts may lead to the total or partial prohibition or suspension of the data transfer to a third country.

Conclusion

The Article 29 Working Party gives a favourable opinion to the proposed standard contractual clauses for the transfer of personal data from the EU to third countries (controller to controller transfers) (final version September 2003)⁷ as long as the three major shortcomings reflected in this document are overcome.

The Working Party calls on the European Commission to make sure that the concerns expressed in this opinion are satisfactorily met and that the ambiguities detected are addressed, if necessary, in the text of a future Commission decision. It reserves its right to issue an opinion, if necessary, on the Draft Commission decision.

Done at Brussels, 17 December 2003
For the Working Party
The Chairman
Stefano RODOTÀ

⁷ Proposal submitted to the Commission by the ICC, The EU Committee of the American Chamber of Commerce, FEDMA, JBCE, ICRT, EICT and CBI.