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WP 214

Working document 01/2014 on Draft Ad hoc contractual clauses “EU data processor to non-EU sub-processor”

Adopted on 21 March 2014

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.

The secretariat is provided by Directorate C (Fundamental Rights and Union Citizenship) of the European Commission, Directorate General Justice, B-1049 Brussels, Belgium, Office No MO-59 02/013.

Website: http://ec.europa.eu/justice/data-protection/index_en.htm

INTRODUCTION

Decision 2010/87/EU on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46/EC of the European Parliament and of the Council sets out the safeguards and conditions to frame the processing activities of a processor in a third country but also the sub-processing activities. It ensures that the data controller maintains sufficient control over those activities thus ensuring that the personal data being transferred continue to be protected notwithstanding the subsequent transfer to a sub-processor.

This Decision applies to transfers of personal data from data controllers established in the EU to data processors established in third countries. It does not apply to the situation by which a processor established in the EU performs the processing of personal data on behalf of a controller established in the EU and subcontracts his processing operation to a sub-processor established in a third country. Recital 23 of Decision 2010/87/EU provides that “in such situations, Member States are free whether to take account of the fact that the principles and safeguards of the standard contractual clauses set out in this Decision have been used to subcontract to a sub-processor established in a third country with the intention of providing adequate protection for the rights of data subjects whose personal data are being transferred for sub-processing operations”.

The Article 29 Working Party considers it appropriate to work on a new set of contractual clauses dedicated to the international transfers of personal data from an EU data processor to a non-EU data sub-processor. This working document contains a draft of such a set of contractual clauses.

The contractual clauses contained in this working document have not been adopted by the European Commission and therefore do not constitute a new official set of model clauses, nor a finalised set of ad hoc clauses that may be used by companies in order to offer sufficient guarantees in accordance with Article 26.2 of Directive 95/46/EC. This working document captures the state of play of the current reflections of the Article 29 Working Party on this matter. The reflections are still ongoing and may result in further updates to this document in due course.

This aim of this working document is to provide advice to the Commission should the Commission in the future consider the possibility of amendments or supplementations to the existing model clauses adopted by the Commission pursuant to Article 26 of Directive 95/46/EC. It also aims to contribute to the uniform application of national measures authorising transfers of personal data.

DRAFT AD HOC CONTRACTUAL CLAUSES
(“EU DATA PROCESSOR TO NON-EU SUB-PROCESSOR”)

on data transfer from processors to sub-processors established in third countries according to article 26(2) of Directive 95/46/EC of the European Parliament and of the Council.

Name of the data exporting organisation (Processor):

.....

Address:

.....

Tel.:; fax:; e-mail:

Other information needed to identify the organisation:

.....

(Hereinafter, the **data exporter**)

And

Name of the data importing organisation (Sub-processor):

.....

Address:

.....

Tel.:; fax:; e-mail:

Other information needed to identify the organisation:

.....

(Hereinafter, the **data importer**)

each a “party”; together “the parties”,

HAVE AGREED on the following ad hoc contractual clauses (hereinafter “the Ad hoc clauses”), in order to adduce adequate safeguards with respect to the protection of privacy and fundamental rights and freedoms of individuals for the transfer of personal data by the data exporter to the data importer of the personal data specified in Appendix 1. Provided that the data controller and the data exporter have agreed in a contract, as provided for in article 17 of

Directive 95/46/EC and in accordance with the provisions of the applicable data protection law (hereinafter the “Framework Contract”), that data processing, as specified in this Framework Contract and in Appendix 1 of these Ad hoc clauses, may be provided by the data importer.

Clause 1

Definitions

For the purposes of the Ad hoc clauses:

- a) “personal data”, “special categories of data”, “process/processing”, “controller”, “processor” and “data subject” shall have the same meaning as in 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;
- b) “data exporter” means the processor that processes personal data on behalf of and under the instruction of the controller and transfers personal data to a third country outside the European Economic Area;
- c) “data importer” means the sub-processor engaged by the data exporter who agrees to receive personal data intended for processing on behalf of the controller and in accordance with its instructions, the provisions of the Framework Contract and the terms of the Ad hoc clauses and who is not subject to a third country’s system ensuring an adequate protection within the meaning of Article 25(1) of Directive 95/46/EC;
- d) “subsequent sub-processor” means any subsequent sub-processor engaged by the data importer or by any other subsequent sub-processor who agrees to process, personal data on behalf of the controller in accordance with its instructions, with the provisions of the Framework Contract, the terms of the Ad hoc clauses and the terms of the written sub-processing agreement in accordance with the Ad hoc clauses;
- e) “Framework Contract” means the agreement concluded between the controller and the data exporter in accordance with applicable national data protection law transposing Article 17 of Directive 95/46/EC;
- f) “applicable data protection law” means the legislation protecting the fundamental rights and freedoms of individuals and in particular, their right to privacy with respect to the processing of personal data, applicable to the controller. However, as regards to the security measures, the law where the data exporter is established will also be applicable. If detailed rules regarding to security measures in the law applicable to the controller and the law applicable to the data exporter as provided by Article 17(3) of Directive 95/46/EC are in conflict, the law of the data exporter prevails;

- g) “technical and organisational security measures” or “security measures” means those measures aimed at protecting personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access, in particular where the processing involves the transmission of data by networks, or any other illicit forms of processing. Having regard to the state of the art and the cost of their implementation, such measures shall ensure a level of security appropriate to the risks represented by the processing and the nature of the data to be protected.

Clause 2

Details of the transfer

The details of the transfer and in particular the special categories of personal data, where applicable, are specified in Appendix 1 which forms an integral part of the Ad hoc clauses.

Clause 3

Third-party beneficiary clause

1. The data subject can enforce against the data exporter this Clause, Clause 4(a) to (e), and (g) to (q), Clause 5 (a) to (c), and (e) to (k), Clauses 6 and 7, Clause 8(2), and Clauses 9 to 13 as third-party beneficiary, where the controller has factually disappeared or has ceased to exist in law, unless any successor entity has assumed the entire legal obligations of the controller by contract or by operation of law, as a result of which it takes on the rights and obligations of the controller, in which case the data subject can enforce them against such entity.
2. The data subject can enforce against the data importer this Clause, Clause 5(a) to (c), and (e) to (k), Clauses 6 and 7, Clause 8(2), and Clauses 9 to 13 as third-party beneficiary, in cases where both the controller and the data exporter have factually disappeared or have ceased to exist in law unless any successor entity has assumed the entire legal obligations of the controller and the exporter by contract or by operation of law, as a result of which it takes on the rights and obligations of the controller and the data exporter, in which case the data subject can enforce them against such entity.
3. The data subject can enforce against the subsequent sub-processor this Clause, Clause 5(a) to (c) and (e) to (k), Clauses 6 and 7, Clause 8(2) and Clauses 9 to 13 as third-party beneficiary, in cases where both the controller, the data exporter and the data importer have factually disappeared or ceased to exist in law or have become insolvent, unless any successor entity has assumed the entire legal obligations of the data importer by contract or by operation of law as a result of which it takes on the rights and obligations of the data importer, in which case the data subject can enforce them against such entity. Such third-party liability of the subsequent sub-processor shall be limited to its own processing operations under the Ad hoc clauses.

4. The parties do not object to a data subject being represented by an association or other body if the data subject so expressly wishes and if permitted by applicable law.

5. The controller can enforce against the data exporter or the entity at the origin of the breach (i.e. the data importer or any subsequent sub-processor) this Clause, Clauses 4 and 5, Clause 6(4), and Clauses 7 to 13 as third-party beneficiary.

Clause 4

Obligations of the data exporter

The data exporter agrees and warrants:

(a) That it has signed a contract (“Framework Contract”) with the controller in accordance with the applicable data protection law;

(b) That the Framework Contract provides for:

(1) The controller has processed and will continue to process the personal data in accordance with the relevant provisions of the applicable data protection law and the processing does not violate this law;

(2) The controller instructs the data exporter and that it will instruct it throughout the duration of the personal data processing services to process the personal data exclusively on the controller’s behalf and in accordance with the applicable data protection law and the Framework Contract;

(3) The controller ensures that the Framework Contract including the technical and organisational security measures described in it are in accordance with the applicable data protection law and that the data exporter and any importer or subsequent sub-processors provides sufficient guarantees in respect of the technical and organisational security measures described in the Framework Contract;

(4) The controller will ensure compliance with the security measures;

(5) The controller has given its prior written authorisation¹ to the data exporter to allow that data processing services (specified in Appendix 1) entrusted to the data exporter could be subcontracted to the data importer in conformity with the Framework Contract and the applicable data protection law;

¹ Depending on the provisions of the Framework Contract, the controller may have decided that its general prior written authorisation is sufficient, or that its specific authorisation will be required for each new sub-processing. If a general authorisation is given, the controller should be informed on any intended changes concerning the addition or replacement of importers/sub-processors in such a timely fashion that the controller has the possibility to object to the change or to terminate the contract before the data are communicated to the data importer/sub-processors.

(6) The controller remains free to agree if the data importer may engage subsequent sub-processors and if these latter may subsequently engage other subsequent sub-processors. Any sub-processing could be allowed only with the prior information to the controller and its prior written authorisation²;

(7) Any sub-processing by the data exporter, the data importer or any subsequent sub-processor shall be subject to a sub-processing agreement binding upon them which imposes the same obligations including the technical and organisational security measures (specified in the Framework Contract) as imposed on the data exporter under the Framework Contract. Where the data exporter, data importer or any subsequent sub-processor fail to fulfil their obligations, the data exporter shall promptly inform the controller of such fact, as soon as it is aware about it; in which case the controller is entitled to suspend the transfer of data and/or terminate the Framework Contract which automatically will have the same consequence on the ad hoc clause and any sub-processing contract. Where the data importer or any subsequent sub-processor fails to fulfil its data protection obligations under the Ad hoc clauses or any sub-processing agreement, the data exporter shall remain fully liable to the controller for the performance of the data importer's and subsequent sub-processor's obligations under this Ad hoc clauses and such agreement;

(8) If the transfer by the data exporter to the data importer includes special categories of data, the controller will inform the data subjects that their data could be transferred to a third country which does not provide an adequate level of protection according to Directive 95/46/EC;

(9) The controller agrees to deposit a copy of any contractual solution provided to offer sufficient safeguards in respect of the protection of privacy within the meaning of Article 26(2) of Directive 95/46/EC, such as these Ad hoc clauses, with the data protection supervisory authority competent according to the applicable data protection law if it is so required under the applicable data protection law;

(10) The controller completes the necessary formalities with the Data protection supervisory authority competent according to the applicable data protection law in order to obtain the authorisation to carry out international data transfers if it is so required under the applicable data protection law; or the controller authorises the data exporter, when permitted according to the applicable data protection law, to complete the necessary formalities for it and on its behalf before the data protection supervisory authority competent according to the applicable data protection law;

(11) The controller will forward any notification received from the data exporter according to Clause 4(1) and 4(m) first bullet point, or similar notification from the data

² If the sub-processing is allowed, the Framework Contract shall specify if a general prior authorisation given would be sufficient or if specific authorisation will be required for each new sub-processing. If a general authorisation is given, the controller should be informed on any intended changes concerning the addition or replacement of subsequent sub-processors in such a timely fashion that the controller has the possibility to object to the change or to terminate the contract before the data are communicated to the new subsequent sub-processor.

importer or any subsequent sub-processor to the data protection supervisory authority where the controller is established if the controller decides to continue the transfer or to lift the suspension;

(12) The controller will make available to the data subjects and the Data protection supervisory authority competent according to the applicable data protection law upon request a copy of the Framework Contract as well as a copy of any contract for sub-processing services, such as these Ad hoc clauses, with the exception of Appendix 2, and a summary description of the security measures, unless the Framework Contract, the Ad hoc clauses or the contract for sub-processing services contain commercial secret information, in which case it may remove such commercial secret information;

(13) The controller shall keep an updated list of any sub-processing agreements concluded, and notified by the data exporter pursuant to Clause 4(o) of the Ad hoc clauses, which shall be updated at least once a year. This list shall be available to the data protection supervisory authority competent according to the applicable data protection law;

(14) The controller shall decide if on the termination of the provision of data-processing services, the data exporter, data importer and any subsequent sub-processor shall return or destroy all the personal data transferred and the copies thereof directly to the controller. The data exporter shall certify to the controller the respect of clause 13;

(15) The data subject, who has suffered damage as a result of any breach, by the controller, of its obligations pursuant to the Framework Contract, the applicable data protection law and according to Clauses 4 (b) (1) to (16), or any breach by the data exporter, the data importer and/or the subsequent sub-processors of their obligations according to the Ad hoc clauses, and any further sub-processing agreements, is entitled to receive compensation from the controller for the damage suffered;

(16) The controller shall ensure compliance with Clauses 4(b) (1) to 4 (b) (16);

(c) That it processes the data only on behalf of the controller's instructions laid down in the Framework Contract to carry out the service, in accordance with the applicable data protection law and these Ad hoc clauses;

(d) That it has implemented and complies with the technical and organizational security measures specified in the Framework Contract and in accordance with the applicable data protection law;

(e) That it will deal promptly with all inquiries from the controller relating to the processing of the personal data and to abide by the advice of the competent data protection supervisory authorities according to the applicable data protection law;

(f) That it will agree, at the request of the controller, to submit its data-processing facilities for audit of the processing activities covered by the Framework Contract which shall be carried out by the controller or an inspection body composed of independent members and in

possession of the required professional qualifications bound by a duty of confidentiality, selected by the controller, where applicable, in agreement with the competent data protection supervisory authorities according to the applicable data protection law;

(g) That it has obtained the prior written authorisation³ from the controller according to the Framework Contract for sub-processing its activities to the data importer;

(h) That, in the event of sub-processing by the data importer or by a subsequent sub-processor, the processing activity is carried out in accordance with Clause 11 by a subsequent sub-processor providing at least the same level of protection for the personal data and the rights of data subjects as the data importer under the ad hoc Clauses. The data exporter will inform the data importer on the decision taken by the controller according to the Framework Contract and will transfer any necessary information to the data importer;

(i) That the data importer and any subsequent sub-processor of the importer provide sufficient guarantees in respect of the technical and organizational security measures and that a sub-processing agreement binding upon the data importer and any subsequent sub-processor will impose the same obligations including the technical and organisational security measures (specified in Appendix 2 to the Ad hoc clauses) and the duty to process data in accordance with the controller's instructions as are imposed on the data exporter under the Framework Contract and will guarantee the respect of those duties;

(j) That it will promptly inform the controller upon request about the effective implementation of the security measures by the data importer and by any subsequent sub-processor, in accordance with the instructions of the controller;

(k) That it has communicated the instructions and throughout the duration of the personal data processing services subject to the Ad hoc clauses, will communicate the instructions of the controller to the data importer to process the personal data transferred exclusively on controller's behalf and in accordance with its instruction and with the terms of the Framework Contract, the applicable data protection law and the Ad hoc clauses;

(l) That it has no reason to believe that the legislation applicable to the data importer and any subsequent sub-processor prevents the latter(s) from fulfilling the controller's instructions and their respective obligations under the Ad hoc clauses and their sub-processing agreements, and if the data exporter becomes aware of such facts, for instance from a notification received from the importer according to Clause 5(h) or in the event of a change of legislation which is likely to have a substantial adverse effect on the warranties and obligations provided by the Ad hoc clauses, the Framework Contract and the applicable data protection law, the data exporter will promptly inform the controller of such fact, as soon as it is aware about it; in which case the controller is entitled to suspend the transfer of data and/or terminate the Framework Contract;

³ See note 1 above.

(m) That the data exporter will promptly notify the controller about:

- Any legally binding request for disclosure of the personal data by a law enforcement authority made to the data importer or any subsequent sub-processor, unless the data importer or any subsequent sub-processor are otherwise prohibited, such as a prohibition under criminal law to preserve the confidentiality of a law enforcement investigation;
- Any accidental or unauthorised access;
- Any request received directly by the data exporter, the data importer or any subsequent sub-processor from the data subjects without responding to that request, unless it has been otherwise authorised to do so; and
- Any notification of the data importer in accordance with Clause 5 or 13(1);

(n) That the Ad hoc clauses are made binding towards the controller through a specific reference to it in the Framework Contract, for instance as an appendix;

(o) That it shall give to the controller an updated list of any sub-processing agreements and notified by the data importer pursuant to Clause 5(f) of the Ad hoc clauses, which shall be updated at least once a year. Such updates shall be promptly communicated to the controller. The data exporter shall send promptly to the controller upon request a copy of these Ad hoc clauses and any sub-processing agreement and in particular Clause 11;

(p) To make available to the data subjects upon request a copy of the Ad hoc clauses, or any sub-processing agreement in those cases where the data subject is unable to obtain a copy from the controller with the exception of Appendix 2 which shall be replaced by a summary description of the security measures, unless the Ad hoc clauses or the sub-processing agreement contains commercial secret information, in which case it may remove such commercial secret information;

(q) That it will ensure compliance with Clauses 4(a) to (q). Where the data exporter cannot provide compliance to its duties according to the Framework contract or the Ad hoc clauses or where the data importer or any subsequent sub-processor fail to fulfil their duties, the data exporter agrees to inform promptly the controller of such inability to comply, in which case the data exporter shall remain fully liable to the controller and this latter is entitled to suspend the transfer of data and/or terminate the Framework Contract. If it does so, the data exporter shall suspend the transfer of data and/or terminate the Ad hoc clauses in accordance with the controller's instructions.

Clause 5

Obligations of the data importer

The data importer agrees and warrants:

(a) To process the personal data only on behalf of the controller and in compliance with its instructions, either given directly by the latter or through the data exporter, and in accordance with the terms of the Framework Contract, the applicable data protection law and the Ad hoc clauses;

(b) That it has implemented and complies with the technical and organisational security measures specified in Appendix 2 of the Ad hoc clauses, and in accordance with the applicable data protection law;

(c) To deal promptly and properly with all inquiries from the controller or from the data exporter according to the controller's instructions, relating to the processing of the personal data subject to the transfer and to abide by the advice of the data protection supervisory authority competent according to the applicable data protection law;

(d) That it will agree, at the request of the controller or the data exporter on behalf of the controller, to submit its data-processing facilities for audit of the processing activities covered by the Ad hoc clauses, which shall be carried out by the controller, the data exporter on behalf of the controller, or an inspection body composed of independent members and in possession of the required professional qualifications bound by a duty of confidentiality, selected by the controller or the data exporter on behalf of the controller, where applicable, in agreement with the data protection supervisory authority competent according to the applicable data protection law;

(e) That, in the event of sub-processing by the data importer or by a subsequent sub-processor, the processing activity is carried out in accordance with Clause 11 by a subsequent sub-processor providing at least the same level of protection for the personal data and the rights of data subjects as the data importer under the ad hoc Clauses. The data importer will inform the subsequent sub-processor on the decision taken by the controller according to the Framework Contract and will transfer any necessary information to the subsequent sub-processor;

(f) That if the sub-processing carried out by himself or any subsequent sub-processor is allowed by the controller, it shall communicate to the data exporter an updated list of any sub-processing agreements which shall be updated at least once a year. The data importer shall send promptly to the data exporter upon request any sub-processor agreement concluded according to the Ad hoc clauses and in particular Clause 11;

(g) That it will promptly inform the data exporter upon request about the effective implementation of the security measures by itself and by any subsequent sub-processor, in

accordance with the instructions of the controller;

(h) That it has no reason to believe that the legislation applicable to it or to any subsequent sub-processor prevents it from fulfilling the controller's instructions and its obligations and that in the event of a change in this legislation which is likely to have a substantial adverse effect on the warranties and obligations provided by the Ad hoc clauses, the Framework Contract and the applicable data protection law, it will promptly inform the data exporter of such changes, as soon as it is aware of it; in which case the controller is entitled to suspend the transfer of data and/or terminate the Framework Contract. If it does so, the data exporter shall suspend the transfer of data and/or terminate the Ad hoc clauses in accordance with the controller's instructions. If the controller or the data importer do so, the data importer shall suspend the transfer of data and/or terminate any sub-processing agreement in accordance with the controller's instructions;

(i) That it will promptly notify the data exporter about:

- Any legally binding request disclosure of the personal data by a law enforcement authority, unless otherwise prohibited, such as a prohibition under criminal law to preserve the confidentiality of a law enforcement investigation;
- Any accidental or unauthorised access;
- Any request received directly by the data importer or any subsequent sub-processor from the data subjects without responding to that request, unless it has been otherwise authorised to do so; and
- In case of sub-processing, any notification of the subsequent sub-processor in accordance with Clause 5 or 13(1);

(j) To make available to the data subjects upon request a copy of the Ad hoc clauses, or any sub-processing agreement in those cases where the data subject is unable to obtain a copy from the controller or the data exporter with the exception of Appendix 2 which shall be replaced by a summary description of the security measures, unless the Ad hoc clauses or the sub-processing agreement contain commercial secret information, in which case it may remove such commercial secret information;

(k) That it will ensure compliance with Clauses 5(a) to (k). If it cannot provide such compliance for whatever reasons, it agrees to inform promptly the data exporter of its inability to comply. In this case, the controller is entitled to suspend the transfer of data and/or terminate the Framework Contract. If it does so, the data importer shall suspend the transfer of data and/or terminate any sub-processing contract in accordance with the controller's instructions.

Clause 6

Liability

1. The parties agree that any data subject, who has suffered damage as a result of any breach of the obligations, referred to in Clause 3 or in Clause 11 by the data exporter, the data importer or any subsequent sub-processor is entitled to receive compensation from the data exporter for the damage suffered, where the controller has factually disappeared or has ceased to exist in law, unless any successor entity has assumed the entire legal obligations of the controller by contract or by operation of law, in which case the data subject can enforce its rights against such entity. The data exporter may not rely on a breach by the data importer or by any subsequent sub-processor of its obligations in order to avoid its own liabilities.
2. If a data subject is not able to bring a claim against the data exporter referred to in paragraph 1, arising out of a breach by the data exporter or data importer or any subsequent sub-processor of any of their obligations referred to in Clause 3 or in Clause 11 because the data exporter has factually disappeared or ceased to exist in law or has become insolvent, the data importer agrees that the data subject may issue a claim as if it were the data exporter, unless any successor entity has assumed the entire legal obligations of the data exporter by contract or by operation of law, in which case the data subject can enforce its rights against such entity. The data importer may not rely on a breach by its sub-processor of its obligations in order to avoid its own liabilities.
3. If a data subject is not able to bring a claim against the data exporter or the data importer referred to in paragraphs 1 and 2, arising out of a breach by any subsequent sub-processor of any of its obligations referred to in Clause 3 or in Clause 11 because both the data exporter and the data importer have factually disappeared or ceased to exist in law or have become insolvent, the subsequent sub-processor agrees that the data subject may issue a claim against the subsequent sub-processor as if it were the data exporter or the data importer, unless any successor entity has assumed the entire legal obligations of the data, the data exporter or data importer by contract or by operation of law, in which case the data subject can enforce his/her rights against such entity. The liability of the subsequent sub-processor shall be limited to its own processing operations under the Ad hoc clauses.
4. Notwithstanding clause 3.5 and 11, the data exporter shall be liable to the controller for any breach of the Framework Contract, the Ad hoc Clauses or any sub-processing agreement by itself, the data importer or any subsequent sub-processor.
5. Clause 6 is without prejudice of the liability of the controller in accordance to the Framework Contract and the applicable data protection law.
6. The provisions of Clause 6 shall be understood without prejudice to any data exporter's liability, as a data processor according to the provisions of the applicable data protection law.

Clause 7

Mediation and jurisdiction

1. The data exporter agrees that if the data subject invokes against it third-party beneficiary rights and/or claims compensation for damages under the Ad hoc clauses, the data exporter will accept the decision of the data subject:

(a) To refer the dispute to mediation, by an independent person or, where applicable, by the Data protection supervisory authority competent according to the applicable data protection law;

(b) To refer the dispute to the court competent according to the applicable data protection law.

2. The data importer agrees that if the data subject invokes against it third-party beneficiary rights and/or claims compensation for damages under the Ad hoc clauses, the data importer will accept the decision of the data subject:

(a) To refer the dispute to mediation, by an independent person or, where applicable, by the Data protection supervisory authority competent for the controller;

(b) To refer the dispute to the court competent for the controller.

3. The parties agree that the choice made by the data subject will not prejudice its substantive or procedural rights to seek remedies in accordance with other provisions of national or international law.

Clause 8

Cooperation with the Data protection supervisory authority competent for the controller

1. The parties agree that the Data protection supervisory authority competent for the controller has the right to conduct an audit of the data exporter, the importer, and of any subsequent sub-processor, which has the same scope and is subject to the same conditions as would apply to an audit of the controller under the applicable data protection law.

2. The data importer shall promptly inform the data exporter about the existence of any legislation applicable to it or to any subsequent sub-processor preventing the conduct of an audit of the data importer, or any subsequent sub-processor, pursuant to paragraph 1. In such a case the data exporter shall be entitled to take the measures foreseen in Clause 5(h).

Clause 9

Governing law

The Ad hoc clauses shall be governed by the law of the Member State in which the controller is established.

Clause 10

Variation of the contract

The parties undertake not to vary or modify the Ad hoc clauses. This does not preclude the parties from adding clauses on business related issues where required as long as they do not contradict the Ad hoc clauses.

Clause 11

Sub-processing by the data importer

1. The data importer shall not subcontract any of its processing operations performed on behalf of the controller under the Ad hoc clauses without the prior written authorisation of the controller⁴ or of the data exporter given on behalf and according to the instructions of the controller. The data importer will warrant that any subsequent sub-processor provides sufficient guarantees, notably in respect of the technical and organizational security measures. Where the data importer subcontracts its obligations under the Ad hoc clauses, with the prior written authorisation of the controller, it shall do so only by way of a sub-processing agreement with the subsequent sub-processor which imposes the same obligations on the subsequent sub-processor as are imposed on the data importer under the Ad hoc clauses including the technical and organisational security measures (specified in Appendix 2 to these Ad hoc clauses) and the duty to process data in accordance with the controller's instructions and will guarantee the respect of those duties⁵. Where any subsequent sub-processor fails to fulfil its data protection obligations under such sub-processing agreement, the data exporter shall remain fully liable to the controller for the performance of the subsequent sub-processor's obligations under such agreement.

2. The sub-processing agreement concluded between the data importer and the subsequent

⁴ Depending on the provisions of the Framework Contract, the controller may have decided that its general prior written authorisation is sufficient, i.e. given by the controller at the beginning of the service, or that its specific authorisation will be required for each new sub-processing. If a general authorisation is given, the data importer itself or with the intermediary of the data exporter should inform the controller on any intended changes concerning the addition or replacement of sub-processors in such a timely fashion that the controller has the possibility to object to the change or to terminate the Framework Contract before the data are communicated to the new sub-processor.

⁵ This requirement may be satisfied by the subsequent sub-processor co-signing the contract entered into between the data exporter and the data importer.

sub-processor shall also provide for a third-party beneficiary clause as laid down in Clause 3(1) to (4), for cases where the data subject is not able to bring the claim for compensation referred to in Clause 6 against the data exporter or the data importer because they have factually disappeared or have ceased to exist in law or have become insolvent and no successor entity has assumed the entire legal obligations of the data exporter or data importer by contract or by operation of law. Such third-party liability of the subsequent sub-processor shall be limited to its own processing operations under the Ad hoc clauses.

3. That, in the event of sub-processing by the data importer or the subsequent sub-processor, the data importer has communicated the controller's instructions and will do so throughout the duration of the personal data processing services to any subsequent sub-processor to process the personal data exclusively on the controller's behalf and in accordance with its instruction and with the terms of the Framework Contract, the Ad hoc clauses, any sub-processing agreement and the applicable data protection law.

4. The sub-processing agreement between the data importer and the subsequent sub-processor shall also provide for a third-party beneficiary clause for the benefit of the controller as laid down in Clause 3(5).

5. In case of subcontracting the processing operations referred to in paragraph 1, the provisions on data protection are those of the applicable data protection law.

Clause 12

Termination of the contract

1. The data exporter shall suspend the transfer of data and/or terminate the Ad hoc clauses according to the instruction of the controller, and notably when the Framework Contract is terminated.

2. The data importer shall suspend the data transfer and/or terminate any sub-processing contract concluded with subsequent sub-processors according to the controller's instructions, and notably when the Ad hoc clauses or the Framework Contract is terminated.

Clause 13

Obligations after the termination of personal data-processing services

1. On the termination of personal data-processing services or of the Framework Contract, the data exporter shall, at the choice of the controller, return all the personal data processed on behalf of the controller by the data exporter, the data importer or any subsequent sub-processor and the copies thereof to the controller or shall destroy all the personal data and certify to the controller that it has done so, as well as the data importer and any subsequent sub-processor, unless legislation imposed upon data exporter, the data importer or any subsequent sub-processor prevents one of the latter from returning or destroying all or part of

the personal data transferred and processed. In that case, the data exporter warrants making full transparency of it towards the controller, and that it, as well as the data importer, and any subsequent sub-processor will guarantee the confidentiality of the personal data transferred and processed and will not actively process the personal data anymore.

2. On the termination of the Ad hoc clauses, the data importer shall, at the choice of the controller that may be expressed on its behalf by the data exporter, return all the personal data processed by the data importer or any subsequent sub-processor and the copies thereof to the controller or to the data exporter on the controller's behalf or shall destroy all the personal data and certify to the controller or to the data exporter on the controller's behalf that it has done so, as well as any subsequent sub-processor, unless legislation imposed upon the data importer or any subsequent sub-processor prevents one of the latter from returning or destroying all or part of the personal data transferred and processed. In that case, the data importer warrants making full transparency of it towards the controller or to the data exporter on controller's behalf and that it, as well as any subsequent sub-processor will guarantee the confidentiality of the personal data transferred and processed and will not actively process the personal data anymore.

3. The data exporter, the data importer and any subsequent sub-processor warrant that upon request of the controller or of the data exporter on behalf of the controller and/or of the Data protection supervisory authority competent for the controller, it will submit its data-processing facilities for an audit of the measures referred to in paragraphs 1 and 2.

On behalf of the data exporter

Name (written out in full):

.....

Position:

.....

Address:

.....

Other information necessary in order for the contract to be binding (if any):

.....

(Stamp of organisation)

Signature:

On behalf of the data importer

Name (written out in full):

.....

Position:

.....

Address:

.....

Other information necessary in order for the contract to be binding (if any):

.....

(Stamp of organisation)

Signature:

Appendix 1 to the Ad hoc clauses

This Appendix forms part of the Ad hoc clauses and must be completed and signed by the parties.

The Member States may complete or specify, according to their national procedures, any additional necessary information to be contained in this Appendix.

Controller

The controller is *(please list the controller(s) to which the data exporter provides personal data processing services, and specify briefly its/their activities relevant to the transfer)*:

.....
.....
.....

Data exporter

The data exporter is *(please specify briefly your activities relevant to the transfer)*:

.....
.....
.....

Data importer

The data importer is *(please specify briefly activities relevant to the transfer)*:

.....
.....
.....

Data subjects

The personal data transferred concern the following categories of data subjects *(please specify)*:

.....
.....
.....

Categories of data

The personal data transferred concern the following categories of data (*please specify*):

.....
.....
.....

Special categories of data (if appropriate)

The personal data transferred concern the following special categories of data (*please specify*):

.....
.....
.....

Processing operations

The personal data transferred will be subject to the following basic processing activities (*please specify*) and purposes:

.....
.....
.....

DATA EXPORTER:

Name:

.....

Authorised

signature.....

DATA IMPORTER:

Name:

.....

Authorised

signature.....

Appendix 2 to the Ad hoc clauses

This Appendix forms part of the Ad hoc clauses and must be completed and signed by the parties.

Description of the technical and organisational security measures implemented by the data importer in accordance with Clauses 4(d) and 5(b) (or document/legislation attached):

.....
.....
.....
.....

ILLUSTRATIVE INDEMNIFICATION CLAUSE (OPTIONAL)

Liability

The parties agree that if one party is held liable for a violation of the Ad hoc clauses committed by the other party, the latter will, to the extent to which it is liable, indemnify the first party for any cost, charge, damages, expenses or loss it has incurred.

Indemnification is contingent upon:

- a) The data exporter promptly notifying the data importer of a claim; and
- b) The data importer being given the possibility to cooperate with the data exporter in the defence and settlement of the claim⁶.

⁶ Paragraph on liabilities is optional.