

# The Computer Law and Security Report



ELSEVIER  
ADVANCED  
TECHNOLOGY

*Now available!*

**COMPSEC**  
**ONLINE**

[www.compseconline.com](http://www.compseconline.com)

# DATA PROTECTION - THIRD COUNTRY TRANSFERS

## DATA TRANSFER TO THIRD COUNTRIES: STANDARD CONTRACTUAL CLAUSES OF THE EUROPEAN COMMISSION

*Robert TJ Bond, Hobson Audley and Rainer S Knyrim, Schoenherr*

On 15 June 2001, the European Commission proposed Standard Contractual Clauses ("Clauses"), to allow data transfers to third countries that do not ensure an adequate level of data protection. The Commission has summarised these Clauses in a model contract to be concluded between a data exporter and a data importer. This model contract is ready-to-sign; the contracting parties only have to add their name and address. Even an area for the company seal is reserved. The Clauses look as if they could be signed 'blind'. The following article shows that this may lead to worrying surprises later.

### 1. INTRODUCTION

Under Art 25 of the EU Data Protection Directive ("DP Directive"),<sup>1</sup> a transfer of personal data to a third country may only take place if the third country in question ensures an adequate level of data protection. Under the UK Data Protection Act (DP Act), the Eighth Data Protection Principle sets out the same requirements.<sup>2</sup> The Commission assesses, with the help of the Member States, which third country ensures an adequate level of data protection. At the moment, the Commission has found that only Canada, Hungary and Switzerland, as well as all US Companies that registered under "Safe Harbor"<sup>3</sup> ensure an adequate level of data protection.<sup>4</sup> Therefore, a transfer of personal data from the EU (EEA under DP Act) may only be made to Hungary, Switzerland and "Safe Harbor" companies.<sup>5</sup>

Art 26 of the DP Directive provides several exemptions to the restrictions of Art 25: Under Art 26 (1) of the DP Directive, a transfer of personal data to third countries not ensuring an adequate level of data protection may take place, for example, on condition that the data subject has given their consent unambiguously to the proposed transfer; or the transfer is necessary for the performance of a contract between the data subject and the controller, or the implementation of pre-contractual measures taken in response to the data subject's request; or the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and a third party. Art 26 (2) DP Directive enables Member States to authorize a transfer of personal data to a third country that does not ensure an adequate level of data protection where the controller adduces adequate safeguards with respect to the protection of the privacy

and fundamental rights and freedoms of individuals and as regards the exercise of the corresponding rights; such safeguards may, in particular, result from appropriate contractual clauses. With regard to such clauses, Art 26 (4) provides that the Commission decides that certain standard contractual clauses offer sufficient safeguards. This provision is the legal basis for the decision on the Clauses published by the Commission on 15 June 2001.<sup>6</sup>

The Clauses are not the only means of legalising a data transfer to third countries. If a UK company wishes to export data into a third country<sup>7</sup> that does not have an adequate level of data protection, but does not want to sign the proposed Clauses, the data subject could strive for the applicability of one of the exemptions of Art 26 (1) DP Directive (for example, the data subject has given their consent unambiguously to the proposed transfer; the transfer is necessary for the performance of a contract between the data subject and the controller, or the implementation of pre-contractual measures taken in response to the data subject's request).

Currently, the Commissioner has not stated whether, since the Clauses have been published, it will still be possible for UK data exporters to follow the 'Good Practice Approach' set out by the Commissioner. This approach is described in the Commissioner's guideline "The Eighth Data Protection Principle and Transborder Dataflows"<sup>8</sup> and consists of an Adequacy Test involving an assessment of "all the circumstances of the case" to be followed by the data exporter. In addition, it is currently not clear if it will be possible to ask the Commissioner for an authorization of the transfer. Currently, such authorization is possible in extremely limited circumstances, namely only if the data exporter demonstrates that (i) the proposed transfer did not satisfy the Adequacy

Test; (ii) it would be inappropriate for him/her to rely on one of the other exemptions of Art 26 (1) DP Directive (Schedule 4 of the DP Act); and (iii) if he/she is satisfied that the manner in which he/she intends to make the particular transfer, and in respect of which he/she seeks the Commissioner's authorization, ensures adequate safeguards for the rights and freedoms of data subjects.

Under the DP Directive, it should still be possible to export data without signing the Clauses, as Art 26 (2) DP Directive states that the controller has to establish adequate safeguards, and such safeguards may "in particular" result from appropriate contractual clauses, which indicate that such safeguards may result from other reasons. Therefore, in our opinion, the Good Practice Approach should still be possible. The Commission itself, in its decision, states that the Clauses should be without prejudice to national authorizations. Member States may grant in accordance with national provisions implementing Art 26 (2) DP Directive. The circumstances of specific transfers may require that data controllers provide different safeguards within the meaning of Art 26 (2). In any case, the Clauses only have the effect of requiring the Member States not to refuse to recognize the Clauses as providing adequate safeguards, and therefore do not have any effect on other contractual clauses.<sup>9</sup> Therefore, it should also still be possible to use other contractual clauses. Nevertheless, the lower the level of data protection in the data importers country, the greater contractual provision will be necessary to provide adequate safeguards, and the more such provision will have to be adapted to the Clauses.

The Clauses may only be used for a transfer of personal data from a data controller to a data controller in a third country, but are not applicable to the transfer of personal data to data processors. As regards such cases, the Commission has currently drafted a further decision.<sup>10</sup>

The introduction of the Decision<sup>11</sup> gives the impression that the Clauses have been developed solely by the Commission and its working group.<sup>12</sup> In fact, the Clauses are very similar to the Model Clauses of the International Chamber of Commerce (ICC), published in 1998, which deal with the same issue.<sup>13</sup> To bring new ideas in at an earlier stage of developing the clauses, the Commission invented a 'ready-to-go' version of the Clauses in the form of boxes to tick to implement parts of the Clauses or not ('a tick-wrap' contract approach).<sup>14</sup> Fortunately, the Commission removed these boxes in the final version, which would not have motivated the contracting parties to study the content of the contract any more carefully.<sup>15</sup> The ICC, together with other trade bodies, in response to the Commission's Clauses, has developed a new proposal of standard contractual clauses, which were published on 17 September 2001. These have been sent to Commissioner Frits Bolkestein for approval, in the hope that if approved, they will be less complex and more acceptable for companies.<sup>16</sup>

## 2. 'ORDINARY' CLAUSES

### 2.1. Definitions, content of the data transfer

Under Clause 1, a 'Data Exporter' shall mean the controller who transfers the personal data. 'Data Importer' shall mean the controller who agrees to receive from the data exporter personal data for further processing in accordance with the

terms of these clauses, and who is not subject to a third country's system ensuring adequate protection.

Details of the transfer have to be stated in Appendix 1 to the Clauses; for example, the activities of the Data Exporter and Data Importer; the categories of data subjects concerned by the transfer; the categories of data transferred; and the purpose of the transfer. If appropriate, the categories of sensitive data have to be stated separately. Furthermore, the recipients, or categories of recipients, to whom the transferred data may be disclosed, as well as the storage limit, have to be stated.

## 2.2 Obligations

Under Clause 4, the Data Exporter agrees and warrants to carry out the data transfer in accordance with the relevant provision of the Member State (i.e. the Data Protection Act 1998 for data exporters established in the UK). If the transfer involves special categories of data (in particular sensitive data), the Data Exporter has to inform the data subject before making the transfer. Upon the request of the data subject, the Data Exporter has to make available a copy of the Clauses. In addition he/she has to respond to enquiries from the data subject, or from the supervisory authority (Office of the Information Commissioner) concerning the processing.

The Data Importer, under Clause 5, agrees and warrants that he/she has no reason to believe that the legislation applicable to him/her prevents him/her from fulfilling his obligations under the contract, and that in the event of a change in that legislation adversely affecting on the guarantees provided by the Clauses, he/she will notify the change to the Data Exporter and to the supervisory authority where the Data Exporter is established. Furthermore, he/she is obligated to deal promptly and properly with all reasonable inquiries from the Data Exporter or the data subject, to hand out a copy of the Clauses to the data subject on request, and to submit its data processing facilities for audit by the Data Exporter. As the Data Importer is not bound to the EU data protection principles, he/she has to choose between two kinds of data protection principles set out in Appendix 2 and 3 of the Clauses, which must be complied with.

## 2.3 Other 'ordinary' Clauses

Under Clause 8, the parties agree to deposit a copy of the Clauses with the supervisory authority if it so requests.

Under Clause 9, the parties agree that the termination of the Clauses does not exempt them from the obligations and/or conditions under the Clauses as regards the processing of the data transferred.

## 3. 'EXTRAORDINARY' CLAUSES

### 3.1 Third-party beneficiary clause

Clause 3 enables data subjects to enforce the majority of the Clauses concerning the obligations of the Data Exporter, the Data Importer, and their liability as third-party beneficiaries. The concept of this third-party beneficiary clause had already been discussed in the Working Paper of the Data Protection Working Party.<sup>17</sup> The Working Paper discussed

different options to enhance the legal position of the data subject towards the Data Exporter and Data Importer. One of the options discussed is the "complex mechanism" of "some legal systems allowing third parties to claim rights under a contract", which could be applied to the contract between the Data Exporter and the Data Importer.<sup>18</sup> Such third-party claims in particular have been possible under the legal systems of some of the Member States; for example, Germany and Austria. Since the strict common-law doctrine of privity of contract has been reformed by the Contracts (Right of Third Parties) Act 1999, such claims are also possible by law in the UK. The Preconditions of such a claim under the Contracts (Right of Third Parties) Act 1999 are that the contract expressly provides that a third party may in his/her own right enforce a term of the contract, and that the third party is expressly identified in the contract by name as a member of a class, or as answering a particular description. Both preconditions are fulfilled by the Clauses, as Clause 3 expressly enables the data subject as third party to enforce particular clauses, and the data subject is identified as being subject to the data transfer between the Data Exporter and the Data Importer.

This third-party beneficiary clause is uncommon, but not too 'dangerous' on its own, as it develops its full consequences in conjunction with the following liability clauses.

### 3.2 Liability clauses

Worrying and almost unacceptably uncommercial liabilities are established by Clause 6. Under 6 (1), the parties agree that a data subject who has suffered damage as a result of any violation of the provisions referred to in Clause 3, is entitled to receive compensation from the parties for the damage suffered; the parties agree that they may be exempted from this liability only if they prove that neither of them is responsible for the violation of those provisions. As per 6 (2), they agree that they will be **jointly and severally liable** for damage to the data subject resulting from any violation referred to in paragraph 1. In the event of such a violation, the data subject may take legal action against the Data Exporter, the Data Importer or both.<sup>19</sup> Finally, under 6 (3), the parties agree that if one party is held liable for a violation referred to in paragraph 1 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. Para 6 (3) is optional.

The provision in Clause 6 (1) that the parties agree that they may be exempted from this liability only if they prove that *neither* of them is responsible for the violation, in our opinion exceeds the frame of Art 23 (2) DP Directive, which states that the Data Exporter may be exempted from his/her liability, in whole or in part, if he/she proves that he/she is not responsible for the event giving rise to the damage. Under the DP Directive, it is sufficient if the Data Exporter proves that he/she is not responsible. Under Clause 6 (1), this is not enough as the Data Exporter will still be liable if the Data Importer – or someone on behalf of the Data Importer – fails to prove that he/she is not also responsible. By this clause, the Commission expressly wants to save the data subject from the difficulty of finding out which of the parties is responsible for the damage.<sup>20</sup>

Clause 6 (2) interprets the DP Directive in the same wide manner. The joint and several liability provided there is not expressly foreseen in the DP Directive. Art 26 (2) DP Directive states that a data transfer is allowed "where the controller adduces adequate safeguards with respect to the protection of the privacy and fundamental rights and freedoms of individuals and as regards the exercise of the corresponding rights". The DP Directive does not give guidelines as to how these "adequate safeguards" need to be addressed – therefore, there is no reason why such "adequate safeguards" should be given in the form of a joint and several liability. Even the Commission's working paper did not mention such a liability.<sup>21</sup> In addition, the ICC Model Clauses<sup>22</sup> do not establish such a liability.

We think that, in most cases, it will not be acceptable for the Data Exporter to be joint and severally liable to the data subject for any violations of the Data Importer. A violation of the rights of the data subject usually will also comprise a violation of the duties between the contracting parties. In such a case, the Data Exporter – in particular if he/she opts for Clause 6 (3), will have to start action against the Data Importer but, at the same time, should defend him/herself in conjunction with the Data Importer against the data subject under Clause 6 (2). Although it is a good idea to opt for Clause 6 (3), it will escalate, rather than solve, the problem.

The person who will profit from Clause 6 is the data subject. He/she benefits from a much easier chance of taking action in case of a violation of his/her rights: In the case of a breach of the Clauses by the Data Importer established in a third country, instead of suing the Data Importer in his/her own country, he/she could take action against the Data Exporter established in the UK or another Member State (see 3.3 below). The burden to sue the Data Importer in his/her own country has to be borne by the Data Exporter (which he/she may only do if he/she has opted for Clause 6 (3)). The Commission decided that it is fairer to put this burden on the Data Exporter, rather than on the data subject.<sup>23</sup>

### 3.3 Governing Law and Jurisdiction

Under Clause 10, the governing law of the Clauses shall be the law of the Member State in which the Data Exporter is established. This law has to be completed in Clause 10, and will be one of the laws of a Member State. It is not possible to choose the law of the third country the Data Importer is established in. Therefore, indirectly, the Clauses will always be governed by the DP Directive.

If there is a dispute between a data subject and one of the parties, and the data subject invokes the third-party beneficiary provision in Clause 3, the data subject may choose to either refer the dispute to mediation by an independent person or, where applicable, by the supervisory authority, or to refer the dispute to the courts in the Member State in which the Data Exporter is established. A UK Data Exporter therefore can be sued by a data subject for the breach of the duties of Clause 3 by the foreign Data Importer in the UK under UK law.

## 4. CONCLUSION

The Clauses contain extraordinary provisions which, *inter alia*, establish a third-party beneficiary situation of the data subjects, as well as the joint and several liability of the

contracting parties. We advise not to sign the Clauses 'blind', even if the Clauses, as per their form-like appearance, seem to be 'ready-to-go'. Without detailed study of the Clauses, and risk evaluation of the 'hidden', uncommon legal consequences, the signing of the Clauses may lead to liabilities that a UK Data Exporter might never have expected.

In the event that a UK company wishes to export data into a third country without an adequate level of data protection, but does not want to sign the proposed Clauses, the data subject could strive for the applicability of one of the exemptions of Art 26 (1) DP Directive (for example: the data subject has given his/her consent unambiguously to the proposed transfer; the transfer is necessary for the performance of a contract between the data subject and the controller).

Currently, the Commissioner has not stated if it will still be possible for UK Data Exporters to follow the "Good Practice Approach" set out by the Commissioner, or whether it will be possible to ask the Commissioner for an authorization of the transfer under the DP Directive.

**Robert Bond**, Head of the Innovation & Technology Group at Hobson Audley, London, and **Rainer Knyrim**, data protection specialist of Schoenherr attorneys-at-law, Vienna, Austria.

For further information on any of the above, please contact Robert Bond (tel: +44 (0)20 7450 4500, email [rbond@hobsonaudley.co.uk](mailto:rbond@hobsonaudley.co.uk)), or Rainer Knyrim, (tel: +43 1 53437 245 email [r.knyrim@schoenherr.at](mailto:r.knyrim@schoenherr.at)).

## FOOTNOTES

<sup>1</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, published in the Official Journal on 23 November 1995 (L 281/31).

<sup>2</sup> The Eight Data Protection Principle reads as follows: "Personal data shall not be transferred to a country or territory outside the European Economic Area, unless that country or territory ensures an adequate level of protection of the rights and freedoms of data subjects in relation to the processing of personal data".

<sup>3</sup> American English: "safe harbor", English "safe harbour".

<sup>4</sup> Commission Decisions of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequate protection of personal data provided in Hungary/Switzerland/on the adequacy of the protection provided by the Safe Harbor Privacy Principles and related Frequently Asked Questions issued by the US Department of Commerce, published in the Official Journal on 25 August 2000 (L 215) (see at: [http://www.europa.eu.int/comm/internal\\_market/en/dataprot/news/safeharbor.htm](http://www.europa.eu.int/comm/internal_market/en/dataprot/news/safeharbor.htm)).

<sup>5</sup> The Eight Data Protection Principle of the DP Act widens the range of exporting countries from EU Member States under Art 26 DP Directive to the Members of the European Economic Area (EU Member states plus Iceland, Liechtenstein and Norway).

<sup>6</sup> Commission Decision of 15 June 2001 on standard contractual clauses for the transfer of personal data to third countries, under Directive 95/94/EC (2001/497/EC), published in the Official Journal on 4 July 2001 (L 181/19). The decision is applicable since 3 September 2001.

<sup>7</sup> Under the DP Act, the exporting companies are the EEA member states.

<sup>8</sup> See "International transfers" in the "Legal guidance" section at: <http://www.dataprotection.gov.uk/dpr/dpdoc.nsf>.

<sup>9</sup> *Op Cit.* note 1 ante, consideration no. 6.

<sup>10</sup> See the draft of this Decision at: [http://www.europa.eu.int/comm/internal\\_market/en/dataprot/news/sccprocessors.htm](http://www.europa.eu.int/comm/internal_market/en/dataprot/news/sccprocessors.htm).

<sup>11</sup> *Op Cit.* note 7 ante, consideration no. 3.

<sup>12</sup> See in particular *Op Cit.* note 1 ante, considerations no. 3, 22 and 23.

<sup>13</sup> International Chamber of Commerce, Model clauses for use in contracts involving transborder data flows, 23 September 1998.

<sup>14</sup> See draft of 29 September 2000 at: <http://www.europa.eu.int/>

[comm/internal\\_market/en/dataprot/news/calcom.htm](http://www.comm/internal_market/en/dataprot/news/calcom.htm).

<sup>15</sup> Clause 5 (b) erroneously still refers to such boxes.

<sup>16</sup> Proposed standard contractual clauses for the transfer of personal data from the EU to third countries, published 17 September 2001 at: [www.iccwbo.org/home/statements\\_rules/statements/2001/contractual\\_clauses\\_for\\_transfer.asp](http://www.iccwbo.org/home/statements_rules/statements/2001/contractual_clauses_for_transfer.asp) together with, *inter alia*, Federation of European Direct Marketing (FEDMA), the EU Committee of the American Chamber of Commerce in Belgium (Amcham), the Japan Business Council in Europe (JBCE), the Confederation of British Industry (CBI), International Communications Round Table (ICRT) and the European Information and Communications Technology Industry Association (EICTA). The proposal has been elaborated, as the Commission's Clauses contain some provisions that companies have so far found unpalatable. For example, the joint and several liability of the parties towards the data subject is one clause that scares US lawyers to distraction, with fears of data infringement class actions on the horizon. The proposal is designed to co-exist with the Clauses. It provides a flexible alternative to the Clauses and better reflect the global business realities of data transfers, while still offering just as high a level of data protection. See also Robert Bond, Trade bodies overhaul EU data protection contracts, World e-Business Law Report of 5 November 2001 at: [www.worldbusinesslawreport.com](http://www.worldbusinesslawreport.com).

<sup>17</sup> European Commission, Working Party on the Protection of Individuals with regard to the Processing of Personal Data, Working Paper: 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, DG XV D/5025/98 WP 12.

<sup>18</sup> *Ibid.* p. 19.

<sup>19</sup> Please note that in the English version of Clause 6 (2) published in OJ L181/26, the second sentence is incomplete as it only says "In the event of such a violation, the data exporter or the data importer or both." The French and German versions are correct.

<sup>20</sup> European Commission, Standard contractual clauses for the transfer of personal data to third countries - frequently asked questions of 18 June 2001, see at: [http://www.europa.eu.int/comm/internal\\_market/en/dataprot/news/clauses2faq.htm](http://www.europa.eu.int/comm/internal_market/en/dataprot/news/clauses2faq.htm).

<sup>21</sup> *Op Cit.* note 17 ante, p. 20.

<sup>22</sup> *Op Cit.* note 16 ante.

<sup>23</sup> *Op Cit.* note 20 ante.