

EURIM Privacy & Surveillance Working Group

Response to European Commission Consultation

Commission Decision on Draft Standard Contractual Clauses for the transfer of personal data to processors established in third countries.

Background

EURIM is the Parliamentary/Industry group concerned with Information Society issues both in the UK and across the European Union. In addition to its membership of MPs, Peers and MEPs, we have about 100 corporate and associate members including both suppliers and users of IT, as well as representative organisations (eg IEE, BCS).

It must be stressed that this response is a draft prepared by the working group concerned with privacy and data protection issues and does not carry the status of being an agreed EURIM position as it has not yet been circulated for political approval.

Nothing in this response is confidential.

General Comments

In general the clauses are considered to be too long and when added to a commercial contract will not be in the best interests of any organisation.

It should also be taken into account that Article 17 of the Data Protection Directive (and, for the UK, the 7th Principle of the 1998 Data Protection Act) make provision for security and confidentiality. We, therefore, question the need to impose additional requirements for transfers outside the EEA. Is there a real business requirement for a contract of this type?

The duplication of contractual clauses over and above the original contract between the trading partners is too much for e-business. Legal clarity and simplicity are important, but on a practical level the flexibility of the data protection regime is perhaps more realistic. Whilst current definitions should be used evenly throughout the standard contract, too many definitions of terms might make the standard contract over restrictive.

If the Commission is intending that Third Country Data Processors must carry some level of liability, then it must be made absolutely clear about the circumstances in which this is likely to happen. Our understanding is that the main reason is if the Data Controller cannot be sued and this is most likely to arise out of circumstances when he is no longer trading. If this is the intention of this provision, it needs to be spelt out in black and white. If a more onerous burden of liability is placed upon the Data Processor it is likely to reduce the impact of use of this standard contract.

There is a requirement for clarification in relation to the liability of the Data Processor in circumstances when a third party becomes involved in handling the data. Does this mean that any liability possessed by the Data Processor is then passed on to the third party, or does the liability remain with the Data Processor?

Specific Points

Clause 1: Definitions

1(a) Although to do so would increase the length of the document, references to the EU Directive should be replaced with the appropriate text. It is unrealistic to expect organisations worldwide to tackle EU data protection legislation.

Clause 3: Third Party Beneficiary Clause

The effect of this clause as drafted is to give individuals a degree of protection over and above that which they have in the Directive. It is assuming acceptance of a whole raft of obligations which there is no other obligation to provide and effectively creates more protection for processing carried out overseas than in a Member State.

Under the UK Third Party Rights Act, unless specifically stated otherwise, the parties to the contract will not be able to amend or terminate it without the consent of any of the third parties involved. There should be a provision to allow for revision or amendment without reference to the third party data subjects so long as this does not damage their fundamental rights and freedoms.

The right to take action against both Importer and Exporter should be qualified and the Data Subject should only have the right to act against the Data Processor if it is not possible to take such action against the Data Controller.

Clause 4: Obligations of the Data Exporter

4(a) Do we not need a definition of Authorities?

4 (c) places an obligation on the Data Importer to provide ‘sufficient guarantees’ regarding security. Why in addition does the Data Exporter need to ensure compliance?

4(e) What is the definition of ‘at a reasonable time’?

4(g) Exactly what clauses are to be made available to the Data Subject – it is unlikely that organisations would be willing to hand over a copy of the entire contract. This should be amended along the lines of “only those parts of the contract dealing with the processing of personal data”.

Clause 5: Obligations of the Data Importer

5(a) The Exporter should be able to terminate the agreement or suspend for breach of any of the warranties/breach of the agreement. Standard termination clauses must be included. There is also a need to clarify if notice of termination is required in all cases and for how long.

5(b) The question should be asked whether Exporters would want Importers notifying their Supervisory Authority directly, or would they want to notify themselves as they have the relationship.

5(f) Is there a need for this to be in such detail?

Clause 6: Liability

If the Data Exporter has to pay damages due to some fault of the Data Importer as cited in 6.1, the Exporter should be able to reclaim such damages from the Importer. As it stands, this is a one sided contract with the Exporter facing all the penalties.

Clause 7: Mediation and Jurisdiction

In this clause it should be made clear that if there are other disputes not involving the Data Subject then the parties must be free to settle those disputes as they wish.

Clause 8: Co-operation with Supervisory Authorities

8.2 This is very wide and should restrict the right of audit to cases where there is cause for concern.

8.3. Surely the main interface with the Supervisory Authority should be by the Exporter rather than the Importer.

Clause 10: Variation of the Contract

A need to vary or modify could arise from changes in the law or changes in circumstances e.g. scope of the purpose. It would be more appropriate to say: “will not modify these clauses in a way which adversely affects their data protection obligations towards the Data Subjects as described above”. (Note that under the UK Third Party Rights Act, it will be necessary to state that the consent of Data Subject is not needed to make such modifications.)
