

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 15 June 2001

on standard contractual clauses for the transfer of personal data to third countries, under Directive 95/46/EC

(notified under document number C(2001) 1539)

(Text with EEA relevance)

(2001/497/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to 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 ⁽¹⁾, and in particular Article 26(4) thereof,

Whereas:

- (1) Pursuant to Directive 95/46/EC, Member States are required to provide that 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 and the Member States' laws, which comply with the other provisions of the Directive, are respected prior to the transfer.
- (2) However, Article 26(2) of Directive 95/46/EC provides that Member States may authorise, subject to certain safeguards, a transfer or a set of transfers of personal data to third countries which do not ensure an adequate level of protection. Such safeguards may in particular result from appropriate contractual clauses.
- (3) Pursuant to Directive 95/46/EC, the level of data protection should be assessed in the light of all the circumstances surrounding the data transfer operation or set of data transfer operations. The Working Party on Protection of Individuals with regard to the processing of personal data established under that Directive ⁽²⁾ has issued guidelines to aid with the assessment ⁽³⁾.

⁽¹⁾ OJ L 281, 23.11.1995, p. 31.

⁽²⁾ The Internet address of the Working Party is:
http://www.europa.eu.int/comm/internal_market/en/medial/dataprot/wpdocs/index.htm.

⁽³⁾ WP 4 (5020/97) 'First orientations on transfers of personal data to third countries working document — possible ways forward in assessing adequacy', a discussion document adopted by the Working Party on 26 June 1997.
WP 7 (5057/97) 'Judging industry self regulation: when does it make a meaningful contribution to the level of data protection in a third country?', working document: adopted by the Working Party on 14 January 1998.
WP 9 (3005/98) 'Preliminary views on the use of contractual provisions in the context of transfers of personal data to third countries', working document: adopted by the Working Party on 22 April 1998.
WP 12: 'Transfers of personal data to third countries: applying Articles 25 and 26 of the EU data protection directive', working document adopted by the Working Party on 24 July 1998, available, in the web-working document site 'europa.eu.int/comm/internal_market/en/media/dataprot/wpdocs/wp12/en' hosted by the European Commission.

- (4) Article 26(2) of Directive 95/46/EC, which provides flexibility for an organisation wishing to transfer data to third countries, and Article 26(4), which provides for standard contractual clauses, are essential for maintaining the necessary flow of personal data between the Community and third countries without unnecessary burdens for economic operators. Those Articles are particularly important in view of the fact that the Commission is unlikely to adopt adequacy findings under Article 25(6) for more than a limited number of countries in the short or even medium term.
- (5) The standard contractual clauses are only one of several possibilities under Directive 95/46/EC, together with Article 25 and Article 26(1) and (2), for lawfully transferring personal data to a third country. It will be easier for organisations to transfer personal data to third countries by incorporating the standard contractual clauses in a contract. The standard contractual clauses relate only to data protection. The data exporter and the data importer are free to include any other clauses on business related issues, such as clauses on mutual assistance in cases of disputes with a data subject or a supervisory authority, which they consider as being pertinent for the contract as long as they do not contradict the standard contractual clauses.
- (6) This Decision should be without prejudice to national authorisations Member States may grant in accordance with national provisions implementing Article 26(2) of Directive 95/46/EC. The circumstances of specific transfers may require that data controllers provide different safeguards within the meaning of Article 26(2). In any case, this Decision only has the effect of requiring the Member States not to refuse to recognise as providing adequate safeguards the contractual clauses described in it and does not therefore have any effect on other contractual clauses.
- (7) The scope of this Decision is limited to establishing that the clauses in the Annex may be used by a controller established in the Community in order to adduce sufficient safeguards within the meaning of Article 26(2) of Directive 95/46/EC. The transfer of personal data to third countries is a processing operation in a Member State, the lawfulness of which is subject to national law. The data protection supervisory authorities of the Member States, in the exercise of their functions and powers under Article 28 of Directive 95/46/EC, should remain competent to assess whether the data exporter has complied with national legislation implementing the provisions of Directive 95/46/EC and, in particular, any specific rules as regards the obligation of providing information under that Directive.
- (8) This Decision does not cover the transfer of personal data by controllers established in the Community to recipients established outside the territory of the Community who act only as processors. Those transfers do not require the same safeguards because the processor acts exclusively on behalf of the controller. The Commission intends to address that type of transfer in a subsequent decision.
- (9) It is appropriate to lay down the minimum information that the parties must specify in the contract dealing with the transfer. Member States should retain the power to particularise the information the parties are required to provide. The operation of this Decision should be reviewed in the light of experience.
- (10) The Commission will also consider in the future whether standard contractual clauses submitted by business organisations or other interested parties offer adequate safeguards in accordance with Directive 95/46/EC.
- (11) While the parties should be free to agree on the substantive data protection rules to be complied with by the data importer, there are certain data protection principles which should apply in any event.
- (12) Data should be processed and subsequently used or further communicated only for specified purposes and should not be kept longer than necessary.
- (13) In accordance with Article 12 of Directive 95/46/EC, the data subject should have the right of access to all data relating to him and as appropriate to rectification, erasure or blocking of certain data.

- (14) Further transfers of personal data to another controller established in a third country should be permitted only subject to certain conditions, in particular to ensure that data subjects are given proper information and have the opportunity to object, or in certain cases to withhold their consent.
- (15) In addition to assessing whether transfers to third countries are in accordance with national law, supervisory authorities should play a key role in this contractual mechanism in ensuring that personal data are adequately protected after the transfer. In specific circumstances, the supervisory authorities of the Member States should retain the power to prohibit or suspend a data transfer or a set of transfers based on the standard contractual clauses in those exceptional cases where it is established that a transfer on contractual basis is likely to have a substantial adverse effect on the guarantees providing adequate protection to the data subject.
- (16) The standard contractual clauses should be enforceable not only by the organisations which are parties to the contract, but also by the data subjects, in particular, where the data subjects suffer damage as a consequence of a breach of the contract.
- (17) The governing law of the contract should be the law of the Member State in which the data exporter is established, enabling a third-party beneficiary to enforce a contract. Data subjects should be allowed to be represented by associations or other bodies if they so wish and if authorised by national law.
- (18) To reduce practical difficulties which data subjects could experience when trying to enforce their rights under the standard contractual clauses, the data exporter and the data importer should be jointly and severally liable for damages resulting from any violation of those provisions which are covered by the third-party beneficiary clause.
- (19) The Data Subject is entitled to take action and receive compensation from the Data Exporter, the Data Importer or from both for any damage resulting from any act incompatible with the obligations contained in the standard contractual clauses. Both parties may be exempted from that liability if they prove that neither of them was responsible.
- (20) Joint and several liability does not extend to those provisions not covered by the third-party beneficiary clause and does not need to leave one party paying for the damage resulting from the unlawful processing of the other party. Although mutual indemnification between the parties is not a requirement for the adequacy of the protection for the data subjects and may therefore be deleted, it is included in the standard contractual clauses for the sake of clarification and to avoid the need for the parties to negotiate indemnification clauses individually.
- (21) In the event of a dispute between the parties and the data subject which is not amicably resolved and where the data subject invokes the third-party beneficiary clause, the parties agree to provide the data subject with the choice between mediation, arbitration or litigation. The extent to which the data subject will have an effective choice will depend on the availability of reliable and recognised systems of mediation and arbitration. Mediation by the supervisory authorities of a Member State should be an option where they provide such a service.
- (22) The Working Party on the protection of individuals with regard to the processing of personal data established under Article 29 of Directive 95/46/EC has delivered an opinion on the level of protection provided under the standard contractual clauses annexed to this Decision, which has been taken into account in the preparation of this Decision ⁽¹⁾.
- (23) The measures provided for in this Decision are in accordance with the opinion of the Committee established under Article 31 of Directive 95/46/EC,

⁽¹⁾ Opinion No 1/2001 adopted by the Working Party on 26 January 2001 (DG MARKT 5102/00 WP 38), available in the website 'Europa' hosted by the European Commission.

HAS ADOPTED THIS DECISION:

Article 1

The standard contractual clauses set out in the Annex are considered as offering 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 as required by Article 26(2) of Directive 9/46/EC.

Article 2

This Decision concerns only the adequacy of protection provided by the standard contractual clauses for the transfer of personal data set out in the Annex. It does not affect the application of other national provisions implementing Directive 95/46/EC that pertain to the processing of personal data within the Member States.

This Decision shall not apply to the transfer of personal data by controllers established in the Community to recipients established outside the territory of the Community who act only as processors.

Article 3

For the purposes of this Decision:

- (a) the definitions in Directive 95/46/EC shall apply;
- (b) 'special categories of data' means the data referred to in Article 8 of that Directive;
- (c) 'supervisory authority' means the authority referred to in Article 28 of that Directive;
- (d) 'data exporter' means the controller who transfers the personal data;
- (e) 'data importer' means the controller who agrees to receive from the data exporter personal data for further processing in accordance with the terms of this Decision.

Article 4

1. Without prejudice to their powers to take action to ensure compliance with national provisions adopted pursuant to chapters II, III, V and VI of Directive 95/46/EC, the competent authorities in the Member States may exercise their existing powers to prohibit or suspend data flows to third countries in order to protect individuals with regard to the processing of their personal data in cases where:

- (a) it is established that the law to which the data importer is subject imposes upon him requirements to derogate from the relevant data protection rules which go beyond the restrictions necessary in a democratic society as provided for in Article 13 of Directive 95/46/EC where those requirements are likely to have a substantial adverse effect on the guarantees provided by the standard contractual clauses; or
- (b) a competent authority has established that the data importer has not respected the contractual clauses; or
- (c) there is a substantial likelihood that the standard contractual clauses in the Annex are not being or will not be complied with and the continuation of transfer would create an imminent risk of grave harm to the data subjects.

2. The prohibition or suspension pursuant to paragraph 1 shall be lifted as soon as the reasons for the prohibition or suspension no longer exist.

3. When Member States adopt measures pursuant to paragraphs 1 and 2, they shall without delay inform the Commission which will forward the information to the other Member States.

Article 5

The Commission shall evaluate the operation of this Decision on the basis of available information three years after its notification to the Member States. It shall submit a report on the findings to the Committee established under Article 31 of Directive 95/46/EC. It shall include any evidence that could affect the evaluation concerning the adequacy of the standard contractual clauses in the Annex and any evidence that this Decision is being applied in a discriminatory way.

Article 6

This Decision shall apply from 3 September 2001.

Article 7

This Decision is addressed to the Member States.

Done at Brussels, 15 June 2001.

For the Commission
Frederik BOLKESTEIN
Member of the Commission

ANNEX

STANDARD CONTRACTUAL CLAUSES

for the purposes of Article 26(2) of Directive 95/46/EC for the transfer of personal data to third countries which do not ensure an adequate level of protection

Name of the data exporting organisation:

.....

Address:

Tel. fax e-mail:

Other information needed to identify the organisation:

(the data **exporter**)

and

Name of the data importing organisation:

.....

Address:

tel. fax e-mail:

Other information needed to identify the organisation:

(the data **importer**)

HAVE AGREED on the following contractual clauses ('the Clauses') in order to adduce adequate safeguards with respect to the protection of privacy and fundamental rights and freedoms of individuals for the transfer by the data exporter to the data importer of the personal data specified in Appendix 1:

Clause 1

Definitions

For the purposes of the Clauses:

- a) 'personal data', 'special categories of data', 'process/processing', 'controller', 'processor', 'data subject' and 'supervisory authority' shall have the same meaning as in 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 ('hereinafter the Directive');
- b) the 'data exporter' shall mean the controller who transfers the personal data;
- c) the '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.

Clause 2

Details of the transfer

The details of the transfer, and in particular the categories of personal data and the purposes for which they are transferred, are specified in Appendix 1 which forms an integral part of the Clauses.

*Clause 3***Third-party beneficiary clause**

The data subjects can enforce this Clause, Clause 4(b), (c) and (d), Clause 5(a), (b), (c) and (e), Clause 6(1) and (2), and Clauses 7, 9 and 11 as third-party beneficiaries. The parties do not object to the data subjects being represented by an association or other bodies if they so wish and if permitted by national law.

*Clause 4***Obligations of the data exporter**

The data exporter agrees and warrants:

- (a) that the processing, including the transfer itself, of the personal data by him has been and, up to the moment of the transfer, will continue to be carried out in accordance with the relevant provisions of the Member State in which the data exporter is established (and where applicable has been notified to the relevant authorities of that State) and does not violate the relevant provisions of that State;
- (b) that if the transfer involves special categories of data the data subject has been informed or will be informed before the transfer that this data could be transmitted to a third country not providing adequate protection;
- (c) to make available to the data subjects upon request a copy of the Clauses; and
- (d) to respond in a reasonable time and to the extent reasonably possible to enquiries from the supervisory authority on the processing of the relevant personal data by the data importer and to any enquiries from the data subject concerning the processing of this personal data by the data importer.

*Clause 5***Obligations of the data importer**

The data importer agrees and warrants:

- (a) that he has no reason to believe that the legislation applicable to him prevents him from fulfilling his obligations under the contract and that in the event of a change in that legislation which is likely to have a substantial adverse effect on the guarantees provided by the Clauses, he will notify the change to the data exporter and to the supervisory authority where the data exporter is established, in which case the data exporter is entitled to suspend the transfer of data and/or terminate the contract;
- (b) to process the personal data in accordance with the mandatory data protection principles set out in Appendix 2; or, if explicitly agreed by the parties by ticking below and subject to compliance with the mandatory data protection principles set out in Appendix 3, to process in all other respects the data in accordance with:
 - the relevant provisions of national law (attached to these Clauses) protecting the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data applicable to a data controller in the country in which the data exporter is established, or
 - the relevant provisions of any Commission Decision under Article 25(6) of Directive 95/46/EC finding that a third country provides adequate protection in certain sectors of activity only, if the data importer is based in that third country and is not covered by those provisions, in so far as those provisions are of a nature which makes them applicable in the sector of the transfer;
- (c) to deal promptly and properly with all reasonable inquiries from the data exporter or the data subject relating to his processing of the personal data subject to the transfer and to cooperate with the competent supervisory authority in the course of all its inquiries and abide by the advice of the supervisory authority with regard to the processing of the data transferred;
- (d) at the request of the data exporter to submit its data processing facilities for audit which shall be carried out by the data exporter or an inspection body composed of independent members and in possession of the required professional qualifications, selected by the data exporter, where applicable, in agreement with the supervisory authority;
- (e) to make available to the data subject upon request a copy of the Clauses and indicate the office which handles complaints.

*Clause 6***Liability**

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.

2. The data exporter and the data importer 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 exporter or the data importer or both.

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. (*).

Clause 7

Mediation and jurisdiction

1. The parties agree that if there is a dispute between a data subject and either party which is not amicably resolved and the data subject invokes the third-party beneficiary provision in clause 3, they accept the decision of the data subject:

- (a) to refer the dispute to mediation by an independent person or, where applicable, by the supervisory authority;
- (b) to refer the dispute to the courts in the Member State in which the data exporter is established.

2. The parties agree that by agreement between a data subject and the relevant party a dispute can be referred to an arbitration body, if that party is established in a country which has ratified the New York convention on enforcement of arbitration awards.

3. The parties agree that paragraphs 1 and 2 apply without prejudice to the data subject's substantive or procedural rights to seek remedies in accordance with other provisions of national or international law.

Clause 8

Cooperation with supervisory authorities

The parties agree to deposit a copy of this contract with the supervisory authority if it so requests or if such deposit is required under national law.

Clause 9

Termination of the Clauses

The parties agree that the termination of the Clauses at any time, in any circumstances and for whatever reason does not exempt them from the obligations and/or conditions under the Clauses as regards the processing of the data transferred.

Clause 10

Governing Law

The Clauses shall be governed by the law of the Member State in which the Data Exporter is established, namely
.....

Clause 11

Variation of the contract

The parties undertake not to vary or modify the terms of the clauses.

On behalf of the data exporter:

Name (written out in full):

Position:

Address:

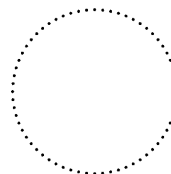
(*) Paragraph 3 is optional.

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

.....

.....

(signature)



(stamp of organisation)

On behalf of the data importer:

Name (written out in full):

Position:

Address:

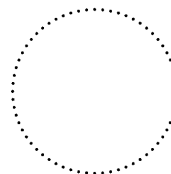
Other information necessary in order for the contract to be binding (if any):

.....

.....

.....

(signature)



(stamp of organisation)

Appendix 1
to the standard contractual clauses

This Appendix forms part of the 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.)

Data exporter

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

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

Data importer

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

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

Data subjects

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

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

Purposes of the transfer

The transfer is necessary for the following purposes (please specify):

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

Categories of data

The personal data transferred fall within the following categories of data (please specify):

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

Sensitive data (if appropriate)

The personal data transferred fall within the following categories of sensitive data (please specify):

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

Recipients

The personal data transferred may be disclosed only to the following recipients or categories of recipients (please specify):

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

Storage limit

The personal data transferred may be stored for no more than (please indicate): (months/years)

Data exporter

Data importer

Name:

Name:

.....
(Authorised signature)

.....
(Authorised signature)

Appendix 2

to the standard contractual clauses

Mandatory data protection principles referred to in the first paragraph of Clause 5(b)

These data protection principles should be read and interpreted in the light of the provisions (principles and relevant exceptions) of Directive 95/46/EC.

They shall apply subject to the mandatory requirements of the national legislation applicable to the data importer which do not go beyond what is necessary in a democratic society on the basis of one of the interests listed in Article 13(1) of Directive 95/46/EC, that is, if they constitute a necessary measure to safeguard national security, defence, public security, the prevention, investigation, detection and prosecution of criminal offences or of breaches of ethics for the regulated professions, an important economic or financial interest of the State or the protection of the data subject or the rights and freedoms of others.

1. *Purpose limitation*: data must be processed and subsequently used or further communicated only for the specific purposes in Appendix I to the Clauses. Data must not be kept longer than necessary for the purposes for which they are transferred.
2. *Data quality and proportionality*: data must be accurate and, where necessary, kept up to date. The data must be adequate, relevant and not excessive in relation to the purposes for which they are transferred and further processed.
3. *Transparency*: data subjects must be provided with information as to the purposes of the processing and the identity of the data controller in the third country, and other information insofar as this is necessary to ensure fair processing, unless such information has already been given by the data exporter.
4. *Security and confidentiality*: technical and organisational security measures must be taken by the data controller that are appropriate to the risks, such as unauthorised access, presented by the processing. Any person acting under the authority of the data controller, including a processor, must not process the data except on instructions from the controller.
5. *Rights of access, rectification, erasure and blocking of data*: as provided for in Article 12 of Directive 95/46/EC, the data subject must have a right of access to all data relating to him that are processed and, as appropriate, the right to the rectification, erasure or blocking of data the processing of which does not comply with the principles set out in this Appendix, in particular because the data are incomplete or inaccurate. He should also be able to object to the processing of the data relating to him on compelling legitimate grounds relating to his particular situation.
6. *Restrictions on onwards transfers*: further transfers of personal data from the data importer to another controller established in a third country not providing adequate protection or not covered by a decision adopted by the Commission pursuant to Article 25(6) of Directive 95/46/EC (onward transfer) may take place only if either:
 - (a) data subjects have, in the case of special categories of data, given their unambiguous consent to the onward transfer or, in other cases, have been given the opportunity to object.

The minimum information to be provided to data subjects must contain in a language understandable to them:

- the purposes of the onward transfer,
- the identification of the data exporter established in the Community,
- the categories of further recipients of the data and the countries of destination, and
- an explanation that, after the onward transfer, the data may be processed by a controller established in a country where there is not an adequate level of protection of the privacy of individuals; or

- (b) the data exporter and the data importer agree to the adherence to the Clauses of another controller which thereby becomes a party to the Clauses and assumes the same obligations as the data importer.

7. *Special categories of data*: where data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union memberships and data concerning health or sex life and data relating to offences, criminal convictions or security measures are processed, additional safeguards should be in place within the meaning of Directive 95/46/EC, in particular, appropriate security measures such as strong encryption for transmission or such as keeping a record of access to sensitive data.
8. *Direct marketing*: where data are processed for the purposes of direct marketing, effective procedures should exist allowing the data subject at any time to 'opt-out' from having his data used for such purposes.

9. *Automated individual decisions*: data subjects are entitled not to be subject to a decision which is based solely on automated processing of data, unless other measures are taken to safeguard the individual's legitimate interests as provided for in Article 15(2) of Directive 95/46/EC. Where the purpose of the transfer is the taking of an automated decision as referred to in Article 15 of Directive 95/46/EC, which produces legal effects concerning the individual or significantly affects him and which is based solely on automated processing of data intended to evaluate certain personal aspects relating to him, such as his performance at work, creditworthiness, reliability, conduct, etc., the individual should have the right to know the reasoning for this decision.

Appendix 3

to the standard contractual clauses

Mandatory data protection principles referred to in the second paragraph of Clause 5(b)

1. *Purpose limitation*: data must be processed and subsequently used or further communicated only for the specific purposes in Appendix I to the Clauses. Data must not be kept longer than necessary for the purposes for which they are transferred.
2. *Rights of access, rectification, erasure and blocking of data*: as provided for in Article 12 of Directive 95/46/EC, the data subject must have a right of access to all data relating to him that are processed and, as appropriate, the right to the rectification, erasure or blocking of data the processing of which does not comply with the principles set out in this Appendix, in particular because the data is incomplete or inaccurate. He should also be able to object to the processing of the data relating to him on compelling legitimate grounds relating to his particular situation.
3. *Restrictions on onward transfers*: further transfers of personal data from the data importer to another controller established in a third country not providing adequate protection or not covered by a decision adopted by the Commission pursuant to Article 25(6) of Directive 95/46/EC (onward transfer) may take place only if either:
 - (a) data subjects have, in the case of special categories of data, given their unambiguous consent to the onward transfer, or, in other cases, have been given the opportunity to object.

The minimum information to be provided to data subjects must contain in a language understandable to them:

 - the purposes of the onward transfer,
 - the identification of the data exporter established in the Community,
 - the categories of further recipients of the data and the countries of destination, and
 - an explanation that, after the onward transfer, the data may be processed by a controller established in a country where there is not an adequate level of protection of the privacy of individuals; or
 - (b) the data exporter and the data importer agree to the adherence to the Clauses of another controller which thereby becomes a party to the Clauses and assumes the same obligations as the data importer.