

**Working Document Setting Forth a Co-Operation Procedure for Issuing
Common Opinions on “Contractual clauses” Considered as compliant with
the EC Model Clauses**

Adopted on 26 November 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

I. INTRODUCTION

- Article 26.2 of Directive 95/46/EC enables companies to make use of contractual clauses to adduce sufficient safeguards to legally frame international transfers of personal data from EU.
- To facilitate the use of contractual clauses, the European Commission has previously issued three decisions on standard contractual clauses. Two of these said decisions regulate transfers from data controllers to data controllers¹, while the third regulates transfers from data controllers to data processors².
- In many Member States, national authorisations are not only required for the use of ad hoc contracts³ but also for the use of Model Clauses⁴. In practice, when a contract is compliant with the standard contractual clauses, it reduces the number of national authorizations required for the international transfer of data (depending on national legislation).
- Most contracts currently used by companies to legally frame international transfers are either entirely based on the standard contractual clauses, or are mostly based on them with some divergences such as additional clauses. Some of these divergences, however, have no impact on whether the contract is considered as “compliant” with the set of standard contractual clauses adopted by the EU Commission⁵.
- In some situations, identical clauses are used in different Member States to frame the same type or similar transfers starting from those different Member States. For instance, in certain corporate groups, data systems are centralized outside the EEA; and subsequently, the same set of contractual clauses are signed by the different EU subsidiaries.
- **In those situations, different DPAs may be tasked with analysing the same contract in order to assess its compliance with a model clause. Therefore, there is a risk they do not come to the same conclusion.**

¹ Decisions 2001/497/CE and 2004/915/CE.

² Decision 2010/87/EU.

³ Such as in Austria, Belgium, Bulgaria, Cyprus, Czech Rep., Denmark, Estonia, France, Germany (depending on the Länder), Greece, Ireland, Italy, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and Spain.

⁴ Such as in Austria, Bulgaria, Cyprus, Denmark, Estonia, France, Lithuania, Luxembourg, Malta, Poland, Romania, Slovenia and Spain.

⁵ The use of Model clauses does not mean that a company cannot add other clauses, as long as they do not directly or indirectly contradict the standard contractual clauses approved by the Commission or prejudice fundamental rights or freedoms of the data subjects, See FAQ B.1.9 published by the EC on http://ec.europa.eu/justice/policies/privacy/docs/international_transfers_faq/international_transfers_faq.pdf, recital 84 of the proposed Regulation, clause VII of Model Clause 2004/915/EC and clause 10 of Model Clauses 2010/87/EU.

- With this document, the Article 29 Working Party is creating a procedure enabling companies who are willing to make use of identical contractual clauses (which are based on Model Clauses with some divergences such as additional clauses) in different Member States, in order to: frame transfers from different EU Member States; obtain a coordinated position of the competent DPAs regarding the proposed contract; and decide in particular if the contract is still in conformity with a standard contractual clause.

II. PROCEDURE

A. Launching of the procedure

“The Company” wants to know whether its contract is compliant with the approved European Commission Model Clauses, and respects data subjects’ fundamental rights and freedoms.

It may decide to ask the DPA it believes is entitled to act as the lead DPA to launch an EU cooperation procedure in order to obtain a common point of view on the contract and, in particular, on whether the proposed contract is compliant with the Standard Contractual Clauses.

The Company will then have to send a copy of the contract (also in an electronic version enabling copy/paste) clearly indicating the reference number of the utilized Model Clauses as well as clearly highlighting all divergences and additional clauses. The Company should also indicate the list of EEA Countries from which they will be carrying out the transfers.

DPAs may freely decide if, on the basis on the circumstances, a co-operation procedure is opportune or not (for instance, where the added clauses are not data protection related).

A Lead DPA should be selected from competent DPAs, namely DPAs in Member States from which the transfers will take place⁶. The Company should propose a Data Protection Authority (DPA) as the lead authority for the co-operation procedure. The decision as to which DPA should act as the lead authority is based upon the criteria contained in this document. It is for the organisation to justify the reasons why a given DPA should be considered as the lead authority.

An applicant corporate group should justify the selection of the lead authority on the basis of relevant criteria such as:

- a. the location from which the contractual clauses are decided and elaborated;
- b. the place where most decisions in terms of the purposes and the means of the processing are taken;
- c. the best location (in terms of management functions, administrative burden, etc.) for the handling of the application and the enforcement of the contractual clauses;
- d. the Member States within the EU from which most transfers outside the EEA will take place;

⁶ If all the data are first transferred to an EU entity and then transferred out of EEA, the originating subsidiaries in the different Member States should, however, comply with art. 25 and 26 of Directive 95/46/EC. If a company or controller knows from the beginning that the personal data will be transferred out of EEA, this should be considered as an international transfer (even if the data first transit in another EU country).

- e. the location of the group's European headquarters or the location of the company within the group with delegated data protection responsibilities⁷.

Nevertheless, these possible decisive factors are not formal criteria. The data protection authorities may decide which authority is in fact the most appropriate data protection authority to be designated as the Lead DPA. In any case, data protection authorities may decide to transfer the application to a different data protection authority (other than the one to which the company applied) in cases of, for instance, an overload of requests that prevent it from respecting the procedural delays⁸. In this later case, the Presidency of the Article 29 Working Party is contacted for the transferring of the request to another DPA.

The entry point will give an answer to the applicant within 2 weeks of the application's reception indicating if, on the basis on the circumstances, a co-operation procedure is appropriate or not (for instance, where the added clauses are not privacy related), and where the procedure is opportune if it accepts to act as Lead DPA⁹.

In the case where the DPA accepts to act as Lead DPA, it will simultaneously forward this information to all competent DPAs (i.e., all the DPAs in the countries from where transfers will take place) and identify the proposed reviewer(s) DPA(s)¹⁰. The other competent DPAs will be asked to raise any objections or any particular reasons they deem necessary to be designated as Lead DPA within two weeks; moreover, the proposed reviewer(s) DPA(s) will indicate whether they agree to act as reviewing DPA.

The Lead DPA will be in charge of analysing if the proposed contract is in conformity with the model clauses.

B. EU Co-operation procedure

1. Review process in the context of Mutual Recognition

A system of Mutual Recognition, similar as the one proposed for BCR will be put in place and DPAs may freely decide to participate to it.

The geographical scope of Contractual clauses may differ depending on the particular cases. In some situations, the transfers will take place only from a few MS and the number of EEA countries where the contract will be used will not be so important. In other situations, the same contract will be used in every MS.

⁷ The fact that a same contract is used in different member states does not necessarily imply that the transfers will be made between establishments of a same multinational company. This is the reason why the criterion of the headquarter location is not highlighted in the same manner as for BCR.

⁸ See below under point B.1.

⁹ The entry point may refuse to act as Lead DPA for instance in case of overload of requests that prevent it to respect the delay of the procedure. In this case, it may contact the presidency of the working party 29 order to transfer the request to another DPA.

¹⁰ See below under point B.1.

The review procedure that currently exists for BCR procedure is relevant to ensure harmonization but also in terms of exchange of expertise. Therefore, when there will be 10 or more countries from where transfers are to take place, 2 DPAs will be involved as reviewers (1 Lead + 2 co-reviewers). When the contract will be used in less than 10 countries, only 1 DPA will be involved as reviewer (1 Lead + 1 reviewer).

In the situation where a company initially intends to transfer data from few MS but later on (such as, after the end of the co-operation procedure) will extend the geographical scope of its contract, the additional competent DPAs are free to conduct their own analysis of the contract and, of course, they are not bound by the decision taken in the context of the co-operation procedure they were not party of.

From the moment the lead authority is of the view that the proposed contract is in conformity with a model clause (for instance where the applicant has addressed satisfactorily all comments received), it express its opinion in a draft letter and should communicate the draft letter, the proposed contract and its analysis to the co-reviewer(s) which should review the draft letter within a 1-month deadline, which can only be extended in exceptional circumstances. The comments provided by a co-reviewer shall be communicated to the other co-reviewer. In case there is no answer from a co-reviewer within the given timeframe, it will be deemed to have agreed to the draft letter.

2. Co-operation with the other competent DPAs

At the end of the review process in the context of the Mutual recognition, the draft letter, the analysis and the draft contract should be communicated to the other competent DPAs.

DPAs part of the Mutual recognition process will only acknowledge receipt of the documentation and, when the draft letter indicates that the proposed contract is in conformity with a Standard contractual clause, it will accept this opinion as sufficient basis for providing, where required according to their national law, their own national permit or authorisation for the contractual clause, or for giving positive advice to the body that provides that authorisation.

DPAs that are not part of the Mutual recognition procedure will have one month - which can only be extended in exceptional circumstances - to comment the draft letter. In case there is no answer from those DPAs within the given timeframe, they will be deemed to have agreed to the draft letter.

3. Ending of the co-operation procedure

Once the Lead DPA has finished this process of EU co-operation (reviewers and all DPA not part of Mutual recognition have agreed on the draft letter), it will sign the letter on behalf of the other competent DPAs and send the letter to the company, indicating whether the proposed contract is in conformity with the relevant Standard contractual clauses.

From the moment the letter indicates that the contract is in conformity with a Standard contractual clause, the EU cooperation procedure is closed and the company may contact the national competent bodies in order to ask, were required, the necessary national authorization

or permit (the positive result of the cooperation procedure will be taken into consideration by DPAs for providing their own national permit or authorisation for the contractual clause, or for giving positive advice to the body that provides that authorisation).

4. Remaining role of national DPAs

The decision relates to conformity, if any, with model clauses. This does not exclude that permits or authorisations at national level are legally required. There may also be other national requirements, such as notification or administrative formalities.

When permits or authorization are legally required, national DPAs may still analyse the annexes and particularly the description of transfers in order to assess if these are lawful under their specific national laws.