

Commission Decision of 5 February 2010 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 (notified under document C(2010) 593) (Text with EEA relevance) (2010/87/EU)

*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 95/46/EC.

*Article 2*

This Decision concerns only the adequacy of protection provided by the standard contractual clauses set out in the Annex for the transfer of personal data to processors. 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 apply to the transfer of personal data by controllers established in the European Union to recipients established outside the territory of the European Union who act only as processors.

*Article 3*

For the purposes of this Decision the following definitions shall apply:

- (a) ‘special categories of data’ means the data referred to in Article 8 of Directive 95/46/EC;
- (b) ‘supervisory authority’ means the authority referred to in Article 28 of Directive 95/46/EC;
- (c) ‘data exporter’ means the controller who transfers the personal data;
- (d) ‘data importer’ means the processor established in a third country who agrees to receive from the data exporter personal data intended for processing on the data exporter’s behalf after the transfer in accordance with his instructions and the terms of this Decision and who is not subject to a third country’s system ensuring adequate protection within the meaning of Article 25(1) of Directive 95/46/EC;
- (e) ‘sub-processor’ means any processor engaged by the data importer or by any other sub-processor of the data importer and who agrees to receive from the data importer or from any other sub-processor of the data importer personal data exclusively intended for the processing activities to be carried out on behalf of the data exporter after the transfer in accordance with the data exporter’s instructions, the standard contractual clauses set out in the Annex, and the terms of the written contract for sub-processing;
- (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 a data controller in the Member State in which the data exporter is established;
- (g) ‘technical and organisational 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 over a network, and against all other unlawful forms of processing.

#### *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 or a sub-processor is subject imposes upon him requirements to derogate from the applicable data protection law 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 applicable data protection law and the standard contractual clauses;
- b a competent authority has established that the data importer or a sub-processor has not respected the standard contractual clauses in the Annex; 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 continuing 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 suspension or prohibition 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 adoption. 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 15 May 2010.

#### *Article 7*

1 Decision 2002/16/EC is repealed with effect from 15 May 2010.

2 A contract concluded between a data exporter and a data importer pursuant to Decision 2002/16/EC before 15 May 2010 shall remain in force and effect for as long as the transfers and data-processing operations that are the subject matter of the contract remain unchanged and personal data covered by this Decision continue to be transferred between the parties. Where contracting parties decide to make changes in this regard or subcontract the processing operations that are the subject matter of the contract they shall be required to enter into a new contract which shall comply with the standard contractual clauses set out in the Annex.

#### *Article 8*

This Decision is addressed to the Member States.

Done at Brussels, 5 February 2010.

*For the Commission*

Jacques BARROT

*Vice-President*