

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)

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

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(Text with EEA relevance)

(2010/87/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

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,

After consulting the European Data Protection Supervisor,

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 the protection of individuals with regard to the processing of personal data established under that Directive has issued guidelines to aid with the assessment.
- (4) Standard contractual clauses should relate only to data protection. Therefore, the data exporter and the data importer are free to include any other clauses on business related

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issues which they consider as being pertinent for the contract as long as they do not contradict the standard contractual clauses.

- (5) 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. This Decision should only have the effect of requiring the Member States not to refuse to recognise, as providing adequate safeguards, the standard contractual clauses set out in it and should not therefore have any effect on other contractual clauses.
- (6) Commission Decision 2002/16/EC of 27 December 2001 on standard contractual clauses for the transfer of personal data to processors established in third countries, under Directive 95/46/EC⁽²⁾ was adopted in order to facilitate the transfer of personal data from a data controller established in the European Union to a processor established in a third country which does not offer adequate level of protection.
- (7) Much experience has been gained since the adoption of Decision 2002/16/EC. In addition, the report on the implementation of Decisions on standard contractual clauses for the transfers of personal data to third countries⁽³⁾ has shown that there is an increasing interest in promoting the use of the standard contractual clauses for international transfers of personal data to third countries not providing an adequate level of protection. In addition, stakeholders have submitted proposals with a view to updating the standard contractual clauses set out in Decision 2002/16/EC in order to take account of the rapidly expanding scope of data-processing activities in the world and to address some issues that were not covered by that Decision⁽⁴⁾.
- (8) The scope of this Decision should be limited to establishing that the clauses which it sets out may be used by a data controller established in the European Union in order to adduce adequate safeguards within the meaning of Article 26(2) of Directive 95/46/EC for the transfer of personal data to a processor established in a third country.
- (9) This Decision should not apply to the transfer of personal data by controllers established in the European Union to controllers established outside the European Union which fall within the scope of Commission Decision 2001/497/EC of 15 June 2001 on standard contractual clauses for the transfer of personal data to third countries, under Directive 95/46/EC⁽⁵⁾.
- (10) This Decision should implement the obligation provided for in Article 17(3) of Directive 95/46/EC and should not prejudice the content of the contracts or legal acts established pursuant to that provision. However, some of the standard contractual clauses, in particular as regards the data exporter's obligations, should be included in order to increase clarity as to the provisions which may be contained in a contract between a controller and a processor.
- (11) Supervisory authorities of the Member States play a key role in this contractual mechanism in ensuring that personal data are adequately protected after the transfer. In exceptional cases where data exporters refuse or are unable to instruct the data importer properly, with an imminent risk of grave harm to the data subjects, the standard contractual clauses should allow the supervisory authorities to audit data importers

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and sub-processors and, where appropriate, take decisions which are binding on data importers and sub-processors. The supervisory authorities should have 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 warranties and obligations providing adequate protection for the data subject.

- (12) Standard contractual clauses should provide for the technical and organisational security measures to be applied by data processors established in a third country not providing adequate protection, in order to ensure a level of security appropriate to the risks represented by the processing and the nature of the data to be protected. Parties should make provision in the contract for those technical and organisational measures which, having regard to applicable data protection law, the state of the art and the cost of their implementation, are necessary in order to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access or any other unlawful forms of processing.
- (13) In order to facilitate data flows from the European Union, it is desirable for processors providing data-processing services to several data controllers in the European Union to be allowed to apply the same technical and organisational security measures irrespective of the Member State from which the data transfer originates, in particular in those cases where the data importer receives data for further processing from different establishments of the data exporter in the European Union, in which case the law of the designated Member State of establishment should apply.
- (14) It is appropriate to lay down the minimum information that the parties should 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.
- (15) The data importer should process the transferred personal data only on behalf of the data exporter and in accordance with his instructions and the obligations contained in the clauses. In particular the data importer should not disclose the personal data to a third party without the prior written consent of the data exporter. The data exporter should instruct the data importer throughout the duration of the data-processing services to process the data in accordance with his instructions, the applicable data protection laws and the obligations contained in the clauses.
- (16) The report on the implementation of Decisions on standard contractual clauses for the transfers of personal data to third countries recommended the establishment of appropriate standard contractual clauses on subsequent onwards transfers from a data processor established in a third country to another data processor (sub-processing), in order to take account of business trends and practices for more and more globalised processing activity.
- (17) This Decision should contain specific standard contractual clauses on the sub-processing by a data processor established in a third country (the data importer) of his processing services to other processors (sub-processors) established in third countries. In addition, this Decision should set out the conditions that the sub-processing

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should fulfil to ensure that the personal data being transferred continue to be protected notwithstanding the subsequent transfer to a sub-processor.

- (18) In addition, the sub-processing should only consist of the operations agreed in the contract between the data exporter and the data importer incorporating the standard contractual clauses provided for in this Decision and should not refer to different processing operations or purposes so that the purpose limitation principle set out by Directive 95/46/EC is respected. Moreover, where the sub-processor fails to fulfil his own data-processing obligations under the contract, the data importer should remain liable toward the data exporter. The transfer of personal data to processors established outside the European Union should not prejudice the fact that the processing activities should be governed by the applicable data protection law.
- (19) 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.
- (20) The data subject should be entitled to take action and, where appropriate, receive compensation from the data exporter who is the data controller of the personal data transferred. Exceptionally, the data subject should also be entitled to take action, and, where appropriate, receive compensation from the data importer in those cases, arising out of a breach by the data importer or any sub-processor under it of any of its obligations referred to in the paragraph 2 of Clause 3, where the data exporter has factually disappeared or has ceased to exist in law or has become insolvent. Exceptionally, the data subject should be also entitled to take action, and, where appropriate, receive compensation from a sub-processor in those situations where both the data exporter and the data importer have factually disappeared or ceased to exist in law or have become insolvent. Such third-party liability of the sub-processor should be limited to its own processing operations under the contractual clauses.
- (21) In the event of a dispute between a data subject, who invokes the third-party beneficiary clause, and the data importer, which is not amicably resolved, the data importer should offer the data subject a choice between mediation 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. Mediation by the data protection supervisory authorities of the Member State in which the data exporter is established should be an option where they provide such a service.
- (22) The contract should be governed by 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. The same law should also govern the provisions on data protection of any contract with a sub-processor for the sub-processing of the processing activities of the personal data transferred by the data exporter to the data importer under the contractual clauses.
- (23) Since this Decision applies only to subcontracting by a data processor established in a third country of his processing services to a sub-processor established in a third country, it should not apply to the situation by which a processor established in

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the European Union and performing the processing of personal data on behalf of a controller established in the European Union subcontracts his processing operations to a sub-processor established in a third country. In such situations, Member States are free whether to take account of the fact that the principles and safeguards of the standard contractual clauses set out in this Decision have been used to subcontract to a sub-processor established in a third country with the intention of providing adequate protection for the rights of data subjects whose personal data are being transferred for sub-processing operations.

- (24) 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.
- (25) Decision 2002/16/EC should be repealed.
- (26) 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,

HAS ADOPTED THIS DECISION:

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- (1) [OJ L 281, 23.11.1995, p. 31.](#)
- (2) [OJ L 6, 10.1.2002, p. 52.](#)
- (3) SEC(2006) 95, 20.1.2006.
- (4) The International Chamber of Commerce (ICC), Japan Business Council in Europe (JBCE), EU Committee of the American Chamber of Commerce in Belgium (Amcham), and the Federation of European Direct Marketing Associations (FEDMA).
- (5) [OJ L 181, 4.7.2001, p. 19.](#)