Editorial

Global outsourcing in a safe box

Frustrated. Perplexed. Disappointed. Now multiply these feelings by a factor of 13 (see the reason for this factor below) and you will have an idea of how most global vendors feel after digesting the new set of controller to processor model clauses approved by the European Commission. After years of hope for a truly flexible contractual solution suited to the dynamic nature of today's data flows and cloud computing services, the expectation was that the Commission would deliver just that. Clearly, this was an unrealistic expectation as the new standard clauses overlook the realities of global outsourcing in the 21st century.

When, in 2004, the European Commission approved the alternative model clauses for transfers of data to controllers based outside the EEA, this was hailed as a victory for common sense data protection. The momentum created by this development was quickly seized by those involved in international outsourcing and a project to devise an EU approved set of clauses for transfers to processors started to take shape. Five years later, the result seems a little *déjà vu* compared to the efforts that have taken place behind the scenes. The big novelty in the new standard clauses is the recognition that a modern outsourcing relationship does not involve just two parties, but a chain of service providers that perform different roles. That alone deserves some credit, as it legitimises the power of a processor to subcontract its services, and ends an unhelpful taboo.

However, if anyone was hoping for a commercially balanced approach to data protection standards, this is not it. The exporter's obligations bear a scarily tough resemblance to the requirements of the original model clauses, including the warranty regarding ongoing compliance with the exporter's law, the assessment of the security requirements and the provision of notice to individuals where the transfer involves sensitive personal data. Although there is nothing in those obligations that is more onerous than before, they are far from the easy going amendments of the 2004 controller to controller clauses.

A similar pattern – if not worse – can be found in the importer's obligations. So, whilst the controller to controller alternative model clauses inclued toned down requirements in respect of adverse local legislation and audit rights, the new controller to processor clauses retain the full severity of the original version. On top of that, the importer's obligations include very strict rules concerning the processor's ability to subcontract some of its services. These rules are part of the 13 different conditions that must be met by the parties to make sub-processing lawful. Yes, 13 specific circumstances that must take place everytime that some aspect of the outsourced service is flowed down to a sub-processor.

As a result, the jewel of the crown of the new model clauses – the ability to subcontract – is so cumbersome that it hardly solves the problem that it was meant to address. Here is the deal. Before subcontracting any of its processing operations, the importer must inform the controller and obtain its written consent. Then processor and sub-processor must enter into an agreement with the same obligations as the model clauses - this agreement must be sent to the exporter and, where requested, made available to individuals. Then the importer must accept liability for the sub-processor's actions whilst the sub-processor must remain subject to the third party beneficiary clause and to the law of the exporter. The exporter must then keep a list of all of the sub-processing agreements and that list must be available to the data protection authority, who will also be entitled to audit the sub-processor. Finally, on termination, the sub-processor must return or destroy the data and allow the controller to audit compliance with this obligation. To say that these conditions are hard to swallow is a massive understatement.

Why the European Commission has gone for the belt and braces approach is not difficult to understand. After 15 years of European data protection law and its prohibition on unsafe data transfers, now it is not the time to start lowering the guard. Whether it is realistic to think that it is possible to place data processing operations in a safe box is a different matter. In the meantime, whilst global vendors struggle to digest the new model clauses, it is encouraging to see that the data protection authorities are warming up to the idea of Binding Safe Processor Rules. Perhaps the trick for creating a safe box for global outsourcing is to think outside the box.

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