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## The EU Article 29 Working Party's Draft Contractual Clauses for Processor-to-Subprocessor Data Transfers

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On March 21, 2014, the EU Article 29 Data Protection Working Party ("WP 29") issued a working document ("WP 214") proposing new contractual clauses for cross-border data transfers between an EU-based processor and a non-EU-based subprocessor ("Draft Model Clauses").<sup>1</sup> This document addresses the situation where personal data are initially transferred by a controller to a processor within the EU and then subsequently transferred by the processor to a subprocessor located outside the EU.

Back in 2010, the European Commission adopted a revised version of its model clauses for transfers between a controller in the EU and a processor outside the EU, partly to integrate new provisions on subprocessing<sup>2</sup> (see analysis at *WDPR, July 2010, page 32*). However, it deliberately chose not to apply these new model clauses to situations whereby a processor established in the EU and performing the processing of personal data on behalf of a controller established in the EU subcontracts its processing operations to a subprocessor established in a third country.<sup>3</sup>

Absent Binding Corporate Rules and the U.S-EU Safe Harbor Program, many EU data processors were left

with few options for transferring data outside the EU. This issue is particularly relevant in the context of a growing digital economy where more and more companies are transferring their data to cloud computing service providers that are often based outside the EU. Negotiating *ad hoc* model clauses on a case-by-case basis with national data protection authorities ("DPAs") seemed to be the only solution available.

Then, in 2012, Spain's DPA adopted a specific set of standard contractual clauses for processor-to-subprocessor transfers, and put in place a new procedure allowing data processors based in Spain to obtain authorizations for transferring data processed on behalf of their customers (data controllers) to subprocessors based outside the EU (see report at *WDPR, December 2012, page 28*).

The WP 29 was inspired to use the Spanish model as a basis for preparing draft *ad hoc* model clauses for transfers from an EU data processor to a non-EU subprocessor that could be used by any processor established in the EU.

While these Draft Model Clauses are most welcome, it remains to be seen whether the European Commission

will formally adopt new model clauses for processors and how effective they will be in practice.

## Key Provisions under the Draft Model Clauses

### Scope

The Draft Model Clauses provide a new set of contractual clauses aimed at facilitating data transfers between an EU processor (acting on behalf of an EU controller) and a non-EU subprocessor.

### Structure

The overall structure and content of these draft clauses are similar to those that already exist under the controller-to-processor model clauses, but they have been adapted to the context of transfers between a processor and a subprocessor.

Most of the clauses under the Draft Model Clauses replicate the existing controller-to-processor model clauses, but at times they are ill-adapted to data transfers between an EU processor and a non-EU subprocessor (as discussed further below).

### Framework Contract

Under the Draft Model Clauses, the EU data processor would have to sign a Framework Contract with its controller. The Framework Contract contains a detailed list of obligations (16 in total) specified in the Draft Model Clauses — including restrictions on onward subprocessing.

This obligation is based on Article 17 of the EU Data Protection Directive (95/46/EC), which requires controllers to enter into an agreement with any data processor that is acting on their behalf. The practical effect of this could be to see the service terms between controllers and their EU processors expand to include a substantially greater number of data protection commitments, all with a view to facilitating future extra-EU transfers by EU processors to international subprocessors under these model clauses.

### Subprocessing

#### Subprocessing by the EU Processor

The EU processor would be required to obtain its controller's prior written approval in order to subcontract data processing activities to non-EU processors. It would be up to the controller to decide, under the Framework Contract, whether to grant a general consent up front for all subprocessing activities, or whether a specific case-by-case approval would be required each time the EU processor intended to subcontract its activities.

Depending on the terms agreed upon between the controller and the EU processor, this clause could be seen as either an advantage or a burden. Where there was express recognition for a general approval consent to subcontract, this would allow EU processors to build this into their standard terms with their customers. On the other hand, if the controller authorized subcontracting

on a case-by-case basis, this could create an unnecessary burden on EU processors that would have to sign the Draft Model Clauses with the non-EU processor **and** obtain prior approval from the controller under the Framework Contract in order to transfer personal data outside the European Economic Area ("EEA"). This would put EU processors at a significant economic disadvantage compared with non-EU processors, which could receive the data directly from the controller (by entering into controller-to-processor model clauses) and find themselves less exposed to EU compliance requirements.

#### Subprocessing by the Non-EU Processor

The non-EU processor could not subcontract any of its processing operations without the prior written approval of the controller or the EU processor given on behalf and according to the instructions of the controller. Any non-EU subprocessor would be contractually bound by the same obligations (including the technical and organizational security measures) as those imposed on the EU processor under the Framework Contract.

Here again, this clause would be more or less burdensome, depending on how it was negotiated between the controller and the EU processor. In most situations, these terms would turn into a flowed down general permission for the non-EU processor to subcontract in service terms with the EU processor. But, nevertheless, some non-EU processors could find these terms onerous and be reluctant to enter into an agreement with EU processors for that reason.

#### List of Subprocessing Agreements

The EU processor would be required to keep an updated list of all subprocessing agreements concluded and notified to it by its non-EU subprocessor at least once per year, and would have to make this list available to the controller, which, in turn, would have to make this list available to the competent DPA.

In practice, most multinational organizations are never in contact with their subcontractors beyond the initial processor to which they have outsourced their activities. The business reality is that, as service providers become more specialized, companies tend to outsource their processing activities more frequently, thus adding more parties to the chain of contracts. Therefore, this clause could impose administrative burdens on companies that might not all be able to comply.

#### Third Party Beneficiary Clause

Depending on the situation, the data subject would have three options to enforce model clause breaches against data processing parties to it — initially against **the exporting EU data processor** (where the controller had factually disappeared or had ceased to exist in law), **the importing non-EU data processor** (where both the controller and the EU data processor had factually disappeared or had ceased to exist in law), or any subsequent **subprocessor** (where the controller, the exporting EU

data processor and the importing non-EU data processor had all factually disappeared or had ceased to exist in law).

Non-EU processors could be reluctant to sign a commercial deal with an EU processor if there were a risk of them being sued by EU third party beneficiaries. In practice, however, the likelihood that an EU data subject will bring an action against a company outside the EU is very slim, and therefore the risk of that happening is very low.

## Audits

### Audit by the Controller

The exporting EU processor would have to agree, at the request of its controller, to submit its data processing facilities for audit of the processing activities covered by the Framework Contract, which shall be carried out by the controller itself or, alternatively, an independent inspection body selected by the controller. A similar obligation would apply to non-EU processors for the processing activities covered by the *ad hoc* model clauses.

The recognition of third party independent audits is especially important for cloud industry businesses that — for security and operational reasons — will often be reluctant to have clients conduct on-site audits, but will typically be more comfortable holding themselves to independent third party audits.

### Audit by the DPA

The DPA competent for the controller would have the right to conduct an audit of the exporting EU data processor, the importing non-EU data processor, and any subsequent subprocessor under the same conditions as those that would apply to an audit of the controller.

This clause (which already exists under the controller-to-processor model clauses) is legally questionable. The powers of DPAs to conduct audits fall within the remit of their competences as defined under national law and are limited geographically to the territory of each EU member state. However, for practical reasons, it is unlikely that DPAs will ever audit companies outside the EU.

### Disclosure of the Framework Contract

The controller would have to make available to the data subjects and the competent DPA upon request a copy of the Framework Contract and any subprocessing agreement, with the exception of commercially sensitive information, which may be removed.

In practice, it is questionable how many non-EU processors would be willing to sign subprocessing agreements with EU data processors on the understanding that provisions within those agreements could end up being disclosed to regulators and other third parties.

### Termination of the Framework Contract

Where the exporting EU processor, the importing non-EU data processor or any subsequent subprocessor

failed to fulfill its model clauses obligations, the controller would be able to suspend the transfer of data and/or terminate the Framework Contract.

## Comments

The WP 29 has certainly made a commendable effort to fill in a gap in the current legal regime by proposing a new legal framework for data transfers between EU processors and non-EU processors. While this initiative certainly moves in the right direction, it remains to be seen how the business sector will react to these Draft Model Clauses.

The concept of processor-to-processor model clauses is intended to provide an alternate solution to service providers, but, given the onerous nature of these clauses, it is uncertain how effective they would be in practice.

Depending on how the Draft Model Clauses are incorporated into the service level agreements, they could impose heavy duties and obligations on EU processors, such as having to obtain the controller's prior approval before transferring the data or having to disclose the terms on which they entered into subprocessing arrangements with their own subcontractors.

In today's globalized economy, EU processors are increasingly exporting data outside the EEA and directly managing their own subcontractor chains. Therefore, if overburdened with legal obligations, EU processors could be faced with a competitive disadvantage in comparison with non-EU processors, which can receive data directly from their controllers and so find themselves less directly exposed to EU compliance requirements. The risk is that EU processors would either not want to sign these clauses, or would fail to comply with them.

One could also argue whether the current controller/processor dichotomy is still valid in today's business world. If adopted, the draft Data Protection Regulation intended to replace the Data Protection Directive could require controllers **and** processors to adduce appropriate safeguards when transferring personal data outside the EEA.<sup>4</sup> As a consequence, the EU compliance requirements (including restrictions on data transfers) would apply directly to EU processors without a need for them to obtain the controller's prior approval. This would also be in line with the ongoing developments on processor Binding Corporate Rules, which in fact require EU processors to provide appropriate safeguards for the data they transfer outside the EEA (*see analysis at WDP, July 2013, page 7*).

## Next Steps

The WP 29's Draft Model Clauses must be formally adopted by the European Commission before they can be used by companies. The WP 29 hopes that these Draft Model Clauses will provide an incentive to the Commission to start drafting its own processor model clauses, but it may take a while before the Commission adopts a new official set of such clauses.

Meanwhile, companies cannot rely on the Draft Model Clauses to obtain approval from their DPAs to transfer

data outside the EU, and so Binding Corporate Rules are effectively the only global data transfer solution available today for EU processors.

## NOTES

<sup>1</sup> Working document 01/2014 (WP 214) on Draft Ad Hoc contractual clauses “EU data processor to non-EU sub-processor”, adopted on March 21, 2014, available at [http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp214\\_en.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp214_en.pdf).

<sup>2</sup> 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 (2010/87/EU), available at [http://eur-](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2010.039.01.0005.01.ENG)

[lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2010.039.01.0005.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2010.039.01.0005.01.ENG).

<sup>3</sup> See Recital 23 of the Commission’s Decision 2010/87/EU.

<sup>4</sup> See Article 42 under the draft Data Protection Regulation.

*The text of the Article 29 Working Party’s “Working document 01/2014 (WP 214) on Draft Ad Hoc contractual clauses ‘EU data processor to non-EU sub-processor’ ” can be accessed at [http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp214\\_en.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp214_en.pdf).*

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