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COMMISSION DECISION

of 15 June 2001

on standard contractual clauses for the transfer of personal data to third countries, under Directive 95/46/EC

(notified under document number C(2001) 1539)

(Text with EEA relevance)

(2001/497/EC)

(OJ L 181, 4.7.2001, p. 19)

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COMMISSION DECISION

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on standard contractual clauses for the transfer of personal data to third countries, under Directive 95/46/EC

(notified under document number C(2001) 1539)

(Text with EEA relevance)

(2001/497/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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,

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 Protection of Individuals with regard to the processing of personal data established under that Directive ⁽²⁾ has issued guidelines to aid with the assessment ⁽³⁾.
- (4) Article 26(2) of Directive 95/46/EC, which provides flexibility for an organisation wishing to transfer data to third countries, and Article 26(4), which provides for standard contractual clauses, are essential for maintaining the necessary flow of personal data between the Community and third countries without unnecessary burdens for economic operators. Those Articles are particularly important in view of the fact that the Commission is unlikely to adopt adequacy findings under Article 25(6) for more than a limited number of countries in the short or even medium term.

⁽¹⁾ OJ L 281, 23.11.1995, p. 31.

⁽²⁾ The Internet address of the Working Party is:
http://www.europa.eu.int/comm/internal_market/en/medial/dataprot/wpdocs/index.htm.

⁽³⁾ WP 4 (5020/97) 'First orientations on transfers of personal data to third countries working document — possible ways forward in assessing adequacy', a discussion document adopted by the Working Party on 26 June 1997.

WP 7 (5057/97) 'Judging industry self regulation: when does it make a meaningful contribution to the level of data protection in a third country?', working document: adopted by the Working Party on 14 January 1998.

WP 9 (3005/98) 'Preliminary views on the use of contractual provisions in the context of transfers of personal data to third countries', working document: adopted by the Working Party on 22 April 1998.

WP 12: 'Transfers of personal data to third countries: applying Articles 25 and 26 of the EU data protection directive', working document adopted by the Working Party on 24 July 1998, available, in the web-working document site 'europa.eu.int/comm/internal_market/en/media.dataprot/wpdocs/wp12/en' hosted by the European Commission.

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- (5) The standard contractual clauses are only one of several possibilities under Directive 95/46/EC, together with Article 25 and Article 26(1) and (2), for lawfully transferring personal data to a third country. It will be easier for organisations to transfer personal data to third countries by incorporating the standard contractual clauses in a contract. The standard contractual clauses relate only to data protection. The data exporter and the data importer are free to include any other clauses on business related issues, such as clauses on mutual assistance in cases of disputes with a data subject or a supervisory authority, which they consider as being pertinent for the contract as long as they do not contradict the standard contractual clauses.
- (6) 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. The circumstances of specific transfers may require that data controllers provide different safeguards within the meaning of Article 26(2). In any case, this Decision only has the effect of requiring the Member States not to refuse to recognise as providing adequate safeguards the contractual clauses described in it and does not therefore have any effect on other contractual clauses.
- (7) The scope of this Decision is limited to establishing that the clauses in the Annex may be used by a controller established in the Community in order to adduce sufficient safeguards within the meaning of Article 26(2) of Directive 95/46/EC. The transfer of personal data to third countries is a processing operation in a Member State, the lawfulness of which is subject to national law. The data protection supervisory authorities of the Member States, in the exercise of their functions and powers under Article 28 of Directive 95/46/EC, should remain competent to assess whether the data exporter has complied with national legislation implementing the provisions of Directive 95/46/EC and, in particular, any specific rules as regards the obligation of providing information under that Directive.
- (8) This Decision does not cover the transfer of personal data by controllers established in the Community to recipients established outside the territory of the Community who act only as processors. Those transfers do not require the same safeguards because the processor acts exclusively on behalf of the controller. The Commission intends to address that type of transfer in a subsequent decision.
- (9) It is appropriate to lay down the minimum information that the parties must 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.
- (10) The Commission will also consider in the future whether standard contractual clauses submitted by business organisations or other interested parties offer adequate safeguards in accordance with Directive 95/46/EC.
- (11) While the parties should be free to agree on the substantive data protection rules to be complied with by the data importer, there are certain data protection principles which should apply in any event.
- (12) Data should be processed and subsequently used or further communicated only for specified purposes and should not be kept longer than necessary.
- (13) In accordance with Article 12 of Directive 95/46/EC, the data subject should have the right of access to all data relating to him and as appropriate to rectification, erasure or blocking of certain data.
- (14) Further transfers of personal data to another controller established in a third country should be permitted only subject to certain

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conditions, in particular to ensure that data subjects are given proper information and have the opportunity to object, or in certain cases to withhold their consent.

- (15) In addition to assessing whether transfers to third countries are in accordance with national law, supervisory authorities should play a key role in this contractual mechanism in ensuring that personal data are adequately protected after the transfer. In specific circumstances, the supervisory authorities of the Member States should retain 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 guarantees providing adequate protection to the data subject.
- (16) The 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.
- (17) The governing law of the contract should be 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.
- (18) To reduce practical difficulties which data subjects could experience when trying to enforce their rights under the standard contractual clauses, the data exporter and the data importer should be jointly and severally liable for damages resulting from any violation of those provisions which are covered by the third-party beneficiary clause.
- (19) The Data Subject is entitled to take action and receive compensation from the Data Exporter, the Data Importer or from both for any damage resulting from any act incompatible with the obligations contained in the standard contractual clauses. Both parties may be exempted from that liability if they prove that neither of them was responsible.
- (20) Joint and several liability does not extend to those provisions not covered by the third-party beneficiary clause and does not need to leave one party paying for the damage resulting from the unlawful processing of the other party. Although mutual indemnification between the parties is not a requirement for the adequacy of the protection for the data subjects and may therefore be deleted, it is included in the standard contractual clauses for the sake of clarification and to avoid the need for the parties to negotiate indemnification clauses individually.
- (21) In the event of a dispute between the parties and the data subject which is not amicably resolved and where the data subject invokes the third-party beneficiary clause, the parties agree to provide the data subject with the choice between mediation, arbitration 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 and arbitration. Mediation by the supervisory authorities of a Member State should be an option where they provide such a service.
- (22) 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 ⁽¹⁾.

⁽¹⁾ Opinion No 1/2001 adopted by the Working Party on 26 January 2001 (DG MARKT 5102/00 WP 38), available in the website 'Europa' hosted by the European Commission.

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- (23) 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:

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 9/46/EC.

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Data controllers may choose either of the sets I or II in the Annex. However, they may not amend the clauses nor combine individual clauses or the sets.

▼B*Article 2*

This Decision concerns only the adequacy of protection provided by the standard contractual clauses for the transfer of personal data set out in the Annex. 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 not apply to the transfer of personal data by controllers established in the Community to recipients established outside the territory of the Community who act only as processors.

Article 3

For the purposes of this Decision:

- (a) the definitions in Directive 95/46/EC shall apply;
- (b) 'special categories of data' means the data referred to in Article 8 of that Directive;
- (c) 'supervisory authority' means the authority referred to in Article 28 of that Directive;
- (d) 'data exporter' means the controller who transfers the personal data;
- (e) 'data importer' means the controller who agrees to receive from the data exporter personal data for further processing in accordance with the terms of this Decision.

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 is subject imposes upon him requirements to derogate from the relevant data protection rules 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 standard contractual clauses; or
- (b) a competent authority has established that the data importer has not respected the contractual clauses; 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

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continuation of transfer would create an imminent risk of grave harm to the data subjects.

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2. For the purposes of paragraph 1, where the data controller adduces adequate safeguards on the basis of the standard contractual clauses contained in set II in the Annex, the competent data protection authorities are entitled to exercise their existing powers to prohibit or suspend data flows in either of the following cases:

- (a) refusal of the data importer to cooperate in good faith with the data protection authorities, or to comply with their clear obligations under the contract;
- (b) refusal of the data exporter to take appropriate steps to enforce the contract against the data importer within the normal period of one month after notice by the competent data protection authority to the data exporter.

For the purposes of the first subparagraph, refusal in bad faith or refusal to enforce the contract by the data importer shall not include cases in which cooperation or enforcement would conflict with mandatory requirements of the national legislation applicable to the data importer which do not go beyond what is necessary in a democratic society on the basis of one of the interests listed in Article 13(1) of Directive 95/46/EC, in particular sanctions as laid down in international and/or national instruments, tax-reporting requirements or anti-money-laundering reporting requirements.

For the purposes of point (a) of the first subparagraph cooperation may include, in particular, the submission of the data importer's data processing facilities for audit or the obligation to abide by the advice of the data protection supervisory authority in the Community.

3. The prohibition or suspension pursuant to paragraphs 1 and 2 shall be lifted as soon as the reasons for the prohibition or suspension no longer exist.

4. When Member States adopt measures pursuant to paragraphs 1, 2 and 3, they shall without delay inform the Commission which will forward the information to the other Member States.

▼B*Article 5*

►**M1** The Commission shall evaluate the operation of this Decision on the basis of available information three years after its notification and the notification of any amendment thereto to the Member States. ◀ 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 3 September 2001.

Article 7

This Decision is addressed to the Member States.

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ANNEX

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SET I

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STANDARD CONTRACTUAL CLAUSES

for the purposes of Article 26(2) of Directive 95/46/EC for the transfer of personal data to third countries which do not ensure an adequate level of protection

Name of the data exporting organisation:

.....

Address:

Tel. fax e-mail:

Other information needed to identify the organisation:

(the data **exporter**)

and

Name of the data importing organisation:

.....

Address:

tel. fax e-mail:

Other information needed to identify the organisation:

(the data **importer**)

HAVE AGREED on the following contractual clauses ('the Clauses') in order to adduce adequate safeguards with respect to the protection of privacy and fundamental rights and freedoms of individuals for the transfer by the data exporter to the data importer of the personal data specified in Appendix 1:

Clause 1

Definitions

For the purposes of the Clauses:

- a) 'personal data', 'special categories of data', 'process/processing', 'controller', 'processor', 'data subject' and 'supervisory authority' shall have the same meaning as in 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 (hereinafter the Directive);
- b) the 'data exporter' shall mean the controller who transfers the personal data;
- c) the 'data importer' shall mean the controller who agrees to receive from the data exporter personal data for further processing in accordance with the terms of these clauses and who is not subject to a third country's system ensuring adequate protection.

Clause 2

Details of the transfer

The details of the transfer, and in particular the categories of personal data and the purposes for which they are transferred, are specified in Appendix 1 which forms an integral part of the Clauses.



Clause 3

Third-party beneficiary clause

The data subjects can enforce this Clause, Clause 4(b), (c) and (d), Clause 5(a), (b), (c) and (e), Clause 6(1) and (2), and Clauses 7, 9 and 11 as third-party beneficiaries. The parties do not object to the data subjects being represented by an association or other bodies if they so wish and if permitted by national law.

Clause 4

Obligations of the data exporter

The data exporter agrees and warrants:

- (a) that the processing, including the transfer itself, of the personal data by him has been and, up to the moment of the transfer, will continue to be carried out in accordance with the relevant provisions of the Member State in which the data exporter is established (and where applicable has been notified to the relevant authorities of that State) and does not violate the relevant provisions of that State;
- (b) that if the transfer involves special categories of data the data subject has been informed or will be informed before the transfer that this data could be transmitted to a third country not providing adequate protection;
- (c) to make available to the data subjects upon request a copy of the Clauses; and
- (d) to respond in a reasonable time and to the extent reasonably possible to enquiries from the supervisory authority on the processing of the relevant personal data by the data importer and to any enquiries from the data subject concerning the processing of this personal data by the data importer.

Clause 5

Obligations of the data importer

The data importer agrees and warrants:

- (a) that he has no reason to believe that the legislation applicable to him prevents him from fulfilling his obligations under the contract and that in the event of a change in that legislation which is likely to have a substantial adverse effect on the guarantees provided by the Clauses, he will notify the change to the data exporter and to the supervisory authority where the data exporter is established, in which case the data exporter is entitled to suspend the transfer of data and/or terminate the contract;
- (b) to process the personal data in accordance with the mandatory data protection principles set out in Appendix 2; or, if explicitly agreed by the parties by ticking below and subject to compliance with the mandatory data protection principles set out in Appendix 3, to process in all other respects the data in accordance with:
 - the relevant provisions of national law (attached to these Clauses) protecting the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data applicable to a data controller in the country in which the data exporter is established, or
 - the relevant provisions of any Commission Decision under Article 25(6) of Directive 95/46/EC finding that a third country provides adequate protection in certain sectors of activity only, if the data importer is based in that third country and is not covered by those provisions, in so far as those provisions are of a nature which makes them applicable in the sector of the transfer;
- (c) to deal promptly and properly with all reasonable inquiries from the data exporter or the data subject relating to his processing of the personal data subject to the transfer and to cooperate with the competent supervisory authority in the course of all its inquiries and abide by the advice of the supervisory authority with regard to the processing of the data transferred;
- (d) at the request of the data exporter to submit its data processing facilities for audit which shall be carried out by the data exporter or an inspection body composed of independent members and in possession of the required professional qualifications, selected by the data exporter, where applicable, in agreement with the supervisory authority;
- (e) to make available to the data subject upon request a copy of the Clauses and indicate the office which handles complaints.

Clause 6

Liability

1. The parties agree that a data subject who has suffered damage as a result of any violation of the provisions referred to in Clause 3 is entitled to receive compensation from the parties for the damage suffered. The parties agree that they may be exempted from this liability only if they prove that neither of them is responsible for the violation of those provisions.

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2. The data exporter and the data importer agree that they will be jointly and severally liable for damage to the data subject resulting from any violation referred to in paragraph 1. ►^(*)In the event of such a violation, the data subject may bring an action before a court against either the data exporter or the data importer or both. ◀

3. The parties agree that if one party is held liable for a violation referred to in paragraph 1 by the other party, the latter will, to the extent to which it is liable, indemnify the first party for any cost, charge, damages, expenses or loss it has incurred. (*).

*Clause 7***Mediation and jurisdiction**

1. The parties agree that if there is a dispute between a data subject and either party which is not amicably resolved and the data subject invokes the third-party beneficiary provision in clause 3, they accept the decision of the data subject:

- (a) to refer the dispute to mediation by an independent person or, where applicable, by the supervisory authority;
- (b) to refer the dispute to the courts in the Member State in which the data exporter is established.

2. The parties agree that by agreement between a data subject and the relevant party a dispute can be referred to an arbitration body, if that party is established in a country which has ratified the New York convention on enforcement of arbitration awards.

3. The parties agree that paragraphs 1 and 2 apply without prejudice to the data subject's substantive or procedural rights to seek remedies in accordance with other provisions of national or international law.

*Clause 8***Cooperation with supervisory authorities**

The parties agree to deposit a copy of this contract with the supervisory authority if it so requests or if such deposit is required under national law.

*Clause 9***Termination of the Clauses**

The parties agree that the termination of the Clauses at any time, in any circumstances and for whatever reason does not exempt them from the obligations and/or conditions under the Clauses as regards the processing of the data transferred.

*Clause 10***Governing Law**

The Clauses shall be governed by the law of the Member State in which the Data Exporter is established, namely

*Clause 11***Variation of the contract**

The parties undertake not to vary or modify the terms of the clauses.

On behalf of the data exporter:

Name (written out in full):

Position:

Address:

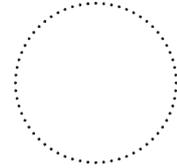
^(*) Paragraph 3 is optional.

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Other information necessary in order for the contract to be binding (if any):

.....

.....
(signature)



(stamp of organisation)

On behalf of the data importer:

Name (written out in full):

Position:

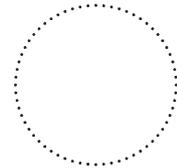
Address:

Other information necessary in order for the contract to be binding (if any):

.....

.....

.....
(signature)



(stamp of organisation)

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Appendix 1

to the standard contractual clauses

This Appendix forms part of the Clauses and must be completed and signed by the parties.

(The Member States may complete or specify, according to their national procedures, any additional necessary information to be contained in this Appendix.)

Data exporter

The data exporter is (please specify briefly your activities relevant to the transfer):

.....
.....
.....

Data importer

The data importer is (please specify briefly your activities relevant to the transfer):

.....
.....
.....

Data subjects

The personal data transferred concern the following categories of data subjects (please specify):

.....
.....
.....

Purposes of the transfer

The transfer is necessary for the following purposes (please specify):

.....
.....
.....

Categories of data

The personal data transferred fall within the following categories of data (please specify):

.....
.....
.....

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Sensitive data (if appropriate)

The personal data transferred fall within the following categories of sensitive data (please specify):

.....
.....
.....

Recipients

The personal data transferred may be disclosed only to the following recipients or categories of recipients (please specify):

.....
.....
.....

Storage limit

The personal data transferred may be stored for no more than (please indicate): (months/years)

Data exporter

Data importer

Name:

Name:

.....
(Authorised signature)

.....
(Authorised signature)



Appendix 2

to the standard contractual clauses

Mandatory data protection principles referred to in the first paragraph of Clause 5(b)

These data protection principles should be read and interpreted in the light of the provisions (principles and relevant exceptions) of Directive 95/46/EC.

They shall apply subject to the mandatory requirements of the national legislation applicable to the data importer which do not go beyond what is necessary in a democratic society on the basis of one of the interests listed in Article 13(1) of Directive 95/46/EC, that is, if they constitute a necessary measure to safeguard national security, defence, public security, the prevention, investigation, detection and prosecution of criminal offences or of breaches of ethics for the regulated professions, an important economic or financial interest of the State or the protection of the data subject or the rights and freedoms of others.

1. *Purpose limitation*: data must be processed and subsequently used or further communicated only for the specific purposes in Appendix I to the Clauses. Data must not be kept longer than necessary for the purposes for which they are transferred.
2. *Data quality and proportionality*: data must be accurate and, where necessary, kept up to date. The data must be adequate, relevant and not excessive in relation to the purposes for which they are transferred and further processed.
3. *Transparency*: data subjects must be provided with information as to the purposes of the processing and the identity of the data controller in the third country, and other information insofar as this is necessary to ensure fair processing, unless such information has already been given by the data exporter.
4. *Security and confidentiality*: technical and organisational security measures must be taken by the data controller that are appropriate to the risks, such as unauthorised access, presented by the processing. Any person acting under the authority of the data controller, including a processor, must not process the data except on instructions from the controller.
5. *Rights of access, rectification, erasure and blocking of data*: as provided for in Article 12 of Directive 95/46/EC, the data subject must have a right of access to all data relating to him that are processed and, as appropriate, the right to the rectification, erasure or blocking of data the processing of which does not comply with the principles set out in this Appendix, in particular because the data are incomplete or inaccurate. He should also be able to object to the processing of the data relating to him on compelling legitimate grounds relating to his particular situation.
6. *Restrictions on onwards transfers*: further transfers of personal data from the data importer to another controller established in a third country not providing adequate protection or not covered by a decision adopted by the Commission pursuant to Article 25(6) of Directive 95/46/EC (onward transfer) may take place only if either:
 - (a) data subjects have, in the case of special categories of data, given their unambiguous consent to the onward transfer or, in other cases, have been given the opportunity to object.

The minimum information to be provided to data subjects must contain in a language understandable to them:

 - the purposes of the onward transfer,
 - the identification of the data exporter established in the Community,
 - the categories of further recipients of the data and the countries of destination, and
 - an explanation that, after the onward transfer, the data may be processed by a controller established in a country where there is not an adequate level of protection of the privacy of individuals; or
 - (b) the data exporter and the data importer agree to the adherence to the Clauses of another controller which thereby becomes a party to the Clauses and assumes the same obligations as the data importer.
7. *Special categories of data*: where data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union memberships and data concerning health or sex life and data relating to offences, criminal convictions or security measures are processed, additional safeguards should be in place within the meaning of Directive 95/46/EC, in

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particular, appropriate security measures such as strong encryption for transmission or such as keeping a record of access to sensitive data.

8. *Direct marketing*: where data are processed for the purposes of direct marketing, effective procedures should exist allowing the data subject at any time to 'opt-out' from having his data used for such purposes.
9. *Automated individual decisions*: data subjects are entitled not to be subject to a decision which is based solely on automated processing of data, unless other measures are taken to safeguard the individual's legitimate interests as provided for in Article 15(2) of Directive 95/46/EC. Where the purpose of the transfer is the taking of an automated decision as referred to in Article 15 of Directive 95/46/EC, which produces legal effects concerning the individual or significantly affects him and which is based solely on automated processing of data intended to evaluate certain personal aspects relating to him, such as his performance at work, creditworthiness, reliability, conduct, etc., the individual should have the right to know the reasoning for this decision.

*Appendix 3***to the standard contractual clauses****Mandatory data protection principles referred to in the second paragraph of Clause 5(b)**

1. *Purpose limitation*: data must be processed and subsequently used or further communicated only for the specific purposes in Appendix I to the Clauses. Data must not be kept longer than necessary for the purposes for which they are transferred.
2. *Rights of access, rectification, erasure and blocking of data*: as provided for in Article 12 of Directive 95/46/EC, the data subject must have a right of access to all data relating to him that are processed and, as appropriate, the right to the rectification, erasure or blocking of data the processing of which does not comply with the principles set out in this Appendix, in particular because the data is incomplete or inaccurate. He should also be able to object to the processing of the data relating to him on compelling legitimate grounds relating to his particular situation.
3. *Restrictions on onward transfers*: further transfers of personal data from the data importer to another controller established in a third country not providing adequate protection or not covered by a decision adopted by the Commission pursuant to Article 25(6) of Directive 95/46/EC (onward transfer) may take place only if either:
 - (a) data subjects have, in the case of special categories of data, given their unambiguous consent to the onward transfer, or, in other cases, have been given the opportunity to object.

The minimum information to be provided to data subjects must contain in a language understandable to them:

- the purposes of the onward transfer,
 - the identification of the data exporter established in the Community,
 - the categories of further recipients of the data and the countries of destination, and
 - an explanation that, after the onward transfer, the data may be processed by a controller established in a country where there is not an adequate level of protection of the privacy of individuals; or
- (b) the data exporter and the data importer agree to the adherence to the Clauses of another controller which thereby becomes a party to the Clauses and assumes the same obligations as the data importer.

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SET II

Standard contractual clauses for the transfer of personal data from the Community to third countries (controller to controller transfers)*Data transfer agreement*

between

_____ (name)
 _____ (address and country of establishment)
 hereinafter data exporter)

and

_____ (name)
 _____ (address and country of establishment)
 hereinafter 'data importer'

each a 'party'; together 'the parties'.

Definitions

For the purposes of the clauses:

- (a) 'personal data', 'special categories of data/sensitive data', 'process/processing', 'controller', 'processor', 'data subject' and "supervisory authority/authority" shall have the same meaning as in Directive 95/46/EC of 24 October 1995 (whereby 'the authority' shall mean the competent data protection authority in the territory in which the data exporter is established);
- (b) 'the data exporter' shall mean the controller who transfers the personal data;
- (c) 'the data importer' shall mean the controller who agrees to receive from the data exporter personal data for further processing in accordance with the terms of these clauses and who is not subject to a third country's system ensuring adequate protection;
- (d) 'clauses' shall mean these contractual clauses, which are a free-standing document that does not incorporate commercial business terms established by the parties under separate commercial arrangements.

The details of the transfer (as well as the personal data covered) are specified in Annex B, which forms an integral part of the clauses.

I. Obligations of the data exporter

The data exporter warrants and undertakes that:

- (a) The personal data have been collected, processed and transferred in accordance with the laws applicable to the data exporter.
- (b) It has used reasonable efforts to determine that the data importer is able to satisfy its legal obligations under these clauses.
- (c) It will provide the data importer, when so requested, with copies of relevant data protection laws or references to them (where relevant, and not including legal advice) of the country in which the data exporter is established.
- (d) It will respond to enquiries from data subjects and the authority concerning processing of the personal data by the data importer, unless the parties have agreed that the data importer will so respond, in which case the data exporter will still respond to the extent reasonably possible and with the information reasonably available to it if the data importer is unwilling or unable to respond. Responses will be made within a reasonable time.
- (e) It will make available, upon request, a copy of the clauses to data subjects who are third party beneficiaries under clause III, unless the clauses contain confidential information, in which case it may remove such information. Where information is removed, the data exporter shall inform data subjects in writing of the reason for removal and of their right to draw the removal to the attention of the authority. However, the data exporter shall abide by a decision of the authority regarding access to the full text of the clauses by data subjects, as long as data subjects have agreed to respect the confidentiality of the confidential information removed. The data exporter shall also provide a copy of the clauses to the authority where required.

▼ **M1****II. Obligations of the data importer**

The data importer warrants and undertakes that:

- (a) It will have in place appropriate technical and organisational measures to protect the personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access, and which provide a level of security appropriate to the risk represented by the processing and the nature of the data to be protected.
- (b) It will have in place procedures so that any third party it authorises to have access to the personal data, including processors, will respect and maintain the confidentiality and security of the personal data. Any person acting under the authority of the data importer, including a data processor, shall be obligated to process the personal data only on instructions from the data importer. This provision does not apply to persons authorised or required by law or regulation to have access to the personal data.
- (c) It has no reason to believe, at the time of entering into these clauses, in the existence of any local laws that would have a substantial adverse effect on the guarantees provided for under these clauses, and it will inform the data exporter (which will pass such notification on to the authority where required) if it becomes aware of any such laws.
- (d) It will process the personal data for purposes described in Annex B, and has the legal authority to give the warranties and fulfil the undertakings set out in these clauses.
- (e) It will identify to the data exporter a contact point within its organisation authorised to respond to enquiries concerning processing of the personal data, and will cooperate in good faith with the data exporter, the data subject and the authority concerning all such enquiries within a reasonable time. In case of legal dissolution of the data exporter, or if the parties have so agreed, the data importer will assume responsibility for compliance with the provisions of clause I(e).
- (f) At the request of the data exporter, it will provide the data exporter with evidence of financial resources sufficient to fulfil its responsibilities under clause III (which may include insurance coverage).
- (g) Upon reasonable request of the data exporter, it will submit its data processing facilities, data files and documentation needed for processing to reviewing, auditing and/or certifying by the data exporter (or any independent or impartial inspection agents or auditors, selected by the data exporter and not reasonably objected to by the data importer) to ascertain compliance with the warranties and undertakings in these clauses, with reasonable notice and during regular business hours. The request will be subject to any necessary consent or approval from a regulatory or supervisory authority within the country of the data importer, which consent or approval the data importer will attempt to obtain in a timely fashion.
- (h) It will process the personal data, at its option, in accordance with:
 - (i) the data protection laws of the country in which the data exporter is established, or
 - (ii) the relevant provisions ⁽¹⁾ of any Commission decision pursuant to Article 25(6) of Directive 95/46/EC, where the data importer complies with the relevant provisions of such an authorisation or decision and is based in a country to which such an authorisation or decision pertains, but is not covered by such authorisation or decision for the purposes of the transfer(s) of the personal data ⁽²⁾, or
 - (iii) the data processing principles set forth in Annex A.

Data importer to indicate which option it selects: _____

Initials of data importer: _____;

⁽¹⁾ 'Relevant provisions' means those provisions of any authorisation or decision except for the enforcement provisions of any authorisation or decision (which shall be governed by these clauses).

⁽²⁾ However, the provisions of Annex A.5 concerning rights of access, rectification, deletion and objection must be applied when this option is chosen and take precedence over any comparable provisions of the Commission Decision selected.

▼ **M1**

- (i) It will not disclose or transfer the personal data to a third party data controller located outside the European Economic Area (EEA) unless it notifies the data exporter about the transfer and
 - (i) the third party data controller processes the personal data in accordance with a Commission decision finding that a third country provides adequate protection, or
 - (ii) the third party data controller becomes a signatory to these clauses or another data transfer agreement approved by a competent authority in the EU, or
 - (iii) data subjects have been given the opportunity to object, after having been informed of the purposes of the transfer, the categories of recipients and the fact that the countries to which data is exported may have different data protection standards, or
 - (iv) with regard to onward transfers of sensitive data, data subjects have given their unambiguous consent to the onward transfer

III. Liability and third party rights

- (a) Each party shall be liable to the other parties for damages it causes by any breach of these clauses. Liability as between the parties is limited to actual damage suffered. Punitive damages (i.e. damages intended to punish a party for its outrageous conduct) are specifically excluded. Each party shall be liable to data subjects for damages it causes by any breach of third party rights under these clauses. This does not affect the liability of the data exporter under its data protection law.
- (b) The parties agree that a data subject shall have the right to enforce as a third party beneficiary this clause and clauses I(b), I(d), I(e), II(a), II(c), II(d), II(e), II(h), II(i), III(a), V, VI(d) and VII against the data importer or the data exporter, for their respective breach of their contractual obligations, with regard to his personal data, and accept jurisdiction for this purpose in the data exporter's country of establishment. In cases involving allegations of breach by the data importer, the data subject must first request the data exporter to take appropriate action to enforce his rights against the data importer; if the data exporter does not take such action within a reasonable period (which under normal circumstances would be one month), the data subject may then enforce his rights against the data importer directly. A data subject is entitled to proceed directly against a data exporter that has failed to use reasonable efforts to determine that the data importer is able to satisfy its legal obligations under these clauses (the data exporter shall have the burden to prove that it took reasonable efforts).

IV. Law applicable to the clauses

These clauses shall be governed by the law of the country in which the data exporter is established, with the exception of the laws and regulations relating to processing of the personal data by the data importer under clause II(h), which shall apply only if so selected by the data importer under that clause.

V. Resolution of disputes with data subjects or the authority

- (a) In the event of a dispute or claim brought by a data subject or the authority concerning the processing of the personal data against either or both of the parties, the parties will inform each other about any such disputes or claims, and will cooperate with a view to settling them amicably in a timely fashion.
- (b) The parties agree to respond to any generally available non-binding mediation procedure initiated by a data subject or by the authority. If they do participate in the proceedings, the parties may elect to do so remotely (such as by telephone or other electronic means). The parties also agree to consider participating in any other arbitration, mediation or other dispute resolution proceedings developed for data protection disputes.
- (c) Each party shall abide by a decision of a competent court of the data exporter's country of establishment or of the authority which is final and against which no further appeal is possible.

VI. Termination

- (a) In the event that the data importer is in breach of its obligations under these clauses, then the data exporter may temporarily suspend the transfer of personal data to the data importer until the breach is repaired or the contract is terminated.

▼ **M1**

(b) In the event that:

- (i) the transfer of personal data to the data importer has been temporarily suspended by the data exporter for longer than one month pursuant to paragraph (a);
- (ii) compliance by the data importer with these clauses would put it in breach of its legal or regulatory obligations in the country of import;
- (iii) the data importer is in substantial or persistent breach of any warranties or undertakings given by it under these clauses;
- (iv) a final decision against which no further appeal is possible of a competent court of the data exporter's country of establishment or of the authority rules that there has been a breach of the clauses by the data importer or the data exporter; or
- (v) a petition is presented for the administration or winding up of the data importer, whether in its personal or business capacity, which petition is not dismissed within the applicable period for such dismissal under applicable law; a winding up order is made; a receiver is appointed over any of its assets; a trustee in bankruptcy is appointed, if the data importer is an individual; a company voluntary arrangement is commenced by it; or any equivalent event in any jurisdiction occurs

then the data exporter, without prejudice to any other rights which it may have against the data importer, shall be entitled to terminate these clauses, in which case the authority shall be informed where required. In cases covered by (i), (ii), or (iv) above the data importer may also terminate these clauses.

- (c) Either party may terminate these clauses if (i) any Commission positive adequacy decision under Article 25(6) of Directive 95/46/EC (or any superseding text) is issued in relation to the country (or a sector thereof) to which the data is transferred and processed by the data importer, or (ii) Directive 95/46/EC (or any superseding text) becomes directly applicable in such country.
- (d) The parties agree that the termination of these clauses at any time, in any circumstances and for whatever reason (except for termination under clause VI(c)) does not exempt them from the obligations and/or conditions under the clauses as regards the processing of the personal data transferred.

VII. Variation of these clauses

The parties may not modify these clauses except to update any information in Annex B, in which case they will inform the authority where required. This does not preclude the parties from adding additional commercial clauses where required.

VIII. Description of the Transfer

The details of the transfer and of the personal data are specified in Annex B. The parties agree that Annex B may contain confidential business information which they will not disclose to third parties, except as required by law or in response to a competent regulatory or government agency, or as required under clause I(e). The parties may execute additional annexes to cover additional transfers, which will be submitted to the authority where required. Annex B may, in the alternative, be drafted to cover multiple transfers.

Dated: _____

FOR DATA IMPORTER

FOR DATA EXPORTER

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▼ M1

ANNEX A

DATA PROCESSING PRINCIPLES

1. Purpose limitation: Personal data may be processed and subsequently used or further communicated only for purposes described in Annex B or subsequently authorised by the data subject.
2. Data quality and proportionality: Personal data must be accurate and, where necessary, kept up to date. The personal data must be adequate, relevant and not excessive in relation to the purposes for which they are transferred and further processed.
3. Transparency: Data subjects must be provided with information necessary to ensure fair processing (such as information about the purposes of processing and about the transfer), unless such information has already been given by the data exporter.
4. Security and confidentiality: Technical and organisational security measures must be taken by the data controller that are appropriate to the risks, such as against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access, presented by the processing. Any person acting under the authority of the data controller, including a processor, must not process the data except on instructions from the data controller.
5. Rights of access, rectification, deletion and objection: As provided in Article 12 of Directive 95/46/EC, data subjects must, whether directly or via a third party, be provided with the personal information about them that an organisation holds, except for requests which are manifestly abusive, based on unreasonable intervals or their number or repetitive or systematic nature, or for which access need not be granted under the law of the country of the data exporter. Provided that the authority has given its prior approval, access need also not be granted when doing so would be likely to seriously harm the interests of the data importer or other organisations dealing with the data importer and such interests are not overridden by the interests for fundamental rights and freedoms of the data subject. The sources of the personal data need not be identified when this is not possible by reasonable efforts, or where the rights of persons other than the individual would be violated. Data subjects must be able to have the personal information about them rectified, amended, or deleted where it is inaccurate or processed against these principles. If there are compelling grounds to doubt the legitimacy of the request, the organisation may require further justifications before proceeding to rectification, amendment or deletion. Notification of any rectification, amendment or deletion to third parties to whom the data have been disclosed need not be made when this involves a disproportionate effort. A data subject must also be able to object to the processing of the personal data relating to him if there are compelling legitimate grounds relating to his particular situation. The burden of proof for any refusal rests on the data importer, and the data subject may always challenge a refusal before the authority.
6. Sensitive data: The data importer shall take such additional measures (e.g. relating to security) as are necessary to protect such sensitive data in accordance with its obligations under clause II.
7. Data used for marketing purposes: Where data are processed for the purposes of direct marketing, effective procedures should exist allowing the data subject at any time to opt-out from having his data used for such purposes.
8. Automated decisions: For purposes hereof 'automated decision' shall mean a decision by the data exporter or the data importer which produces legal effects concerning a data subject or significantly affects a data subject and which is based solely on automated processing of personal data intended to evaluate certain personal aspects relating to him, such as his performance at work, creditworthiness, reliability, conduct, etc. The data importer shall not make any automated decisions concerning data subjects, except when:
 - (a) (i) such decisions are made by the data importer in entering into or performing a contract with the data subject, and
 - (ii) (the data subject is given an opportunity to discuss the results of a relevant automated decision with a representative of the parties making such decision or otherwise to make representations to that parties.

or

 - (b) where otherwise provided by the law of the data exporter.

▼ **M1***ANNEX B***DESCRIPTION OF THE TRANSFER***(To be completed by the parties)***Data subjects**

The personal data transferred concern the following categories of data subjects:

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Purposes of the transfer(s)

The transfer is made for the following purposes:

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Categories of data

The personal data transferred concern the following categories of data:

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Recipients

The personal data transferred may be disclosed only to the following recipients or categories of recipients:

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Sensitive data (if appropriate)

The personal data transferred concern the following categories of sensitive data:

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Data protection registration information of data exporter (where applicable)

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Additional useful information (storage limits and other relevant information)

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Contact points for data protection enquiries**Data importer****Data exporter**

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▼ M1**ILLUSTRATIVE COMMERCIAL CLAUSES (OPTIONAL)***Indemnification between the data exporter and data importer:*

The parties will indemnify each other and hold each other harmless from any cost, charge, damages, expense or loss which they cause each other as a result of their breach of any of the provisions of these clauses. Indemnification hereunder is contingent upon (a) the party(ies) to be indemnified (the “indemnified party(ies)”) promptly notifying the other party(ies) (the “indemnifying party(ies)”) of a claim, (b) the indemnifying party(ies) having sole control of the defence and settlement of any such claim, and (c) the indemnified party(ies) providing reasonable cooperation and assistance to the indemnifying party(ies) in defence of such claim..

Dispute resolution between the data exporter and data importer (the parties may of course substitute any other alternative dispute resolution or jurisdictional clause):

‘In the event of a dispute between the data importer and the data exporter concerning any alleged breach of any provision of these clauses, such dispute shall be finally settled under the rules of arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said rules. The place of arbitration shall be []. The number of arbitrators shall be [].’

Allocation of costs:

‘Each party shall perform its obligations under these clauses at its own cost.’

Extra termination clause:

‘In the event of termination of these clauses, the data importer must return all personal data and all copies of the personal data subject to these clauses to the data exporter forthwith or, at the data exporter’s choice, will destroy all copies of the same and certify to the data exporter that it has done so, unless the data importer is prevented by its national law or local regulator from destroying or returning all or part of such data, in which event the data will be kept confidential and will not be actively processed for any purpose. The data importer agrees that, if so requested by the data exporter, it will allow the data exporter, or an inspection agent selected by the data exporter and not reasonably objected to by the data importer, access to its establishment to verify that this has been done, with reasonable notice and during business hours.’