

MODEL CONTRACT DESIGNED TO ENSURE EQUIVALENT DATA PROTECTION FOR TBDF

The basis for industry's argument against Articles 24 and 25 of the EC data protection draft directive on the export of personal data outside member states is that these procedures are too bureaucratic. A common industry view, actively promoted by the International Chamber of Commerce (ICC), is that a contract between the exporting and importing parties could achieve adequate protection in safeguarding individuals' privacy. Is the contractual approach viable? In the following model, EC and national data protection laws are ignored. Your comments, please.

Even if such a contract were based on the Council of Europe Convention (and its inherent problems in guaranteeing equivalence are summarized in Dr. Nugter's report on page 2), this contractual approach is full of difficulties. Three main problems are:

1. How could data subjects benefit from a contract to which they are not parties?
2. If individuals have rights, how would they exercise them? Individuals would need expensive legal aid to fight for their rights on equal terms against a large company in the EC and another entity in a non-EC country to which it is transferring the data.
3. What would be the substance of such a contract?

This third question has been addressed by academic lawyers representing different legal traditions whose work was supported by both the EC and the Council of Europe (CoE).

A drafting group then drew up proposed clauses for inclusion in a "model contract designed to ensure equivalent data protection in the context of transborder data flows." The following results of their work have been discussed by the CoE Convention's Consultative Committee and have subsequently been circulated to the ICC for comment.

These draft clauses do not reflect an official position of the Council of Europe or the EC.

The model contract

The licensor and licensee having agreed on a license giving the right to use personal data.

The agreement between the parties shall be governed by the following conditions.

1. License granting the right to use data

The licensor, in consideration of a sum of, grants to the licensee the right to use the data. This right to use the data shall in no way confer on the licensee a right of property in the data. The data shall remain the property of the licensor.

The licensee shall use the data exclusively for his own use and shall not be entitled to transfer, either free of charge or in return for payment, the data to any other legal or natural person.

The licensor represents and warrants to the licensee that the data may be lawfully transferred and that they:

- a) have been obtained and processed fairly and lawfully;
- b) have been stored for specific and legitimate purposes and not used in a way incompatible with these purposes;
- c) are adequate, relevant and not excessive in regard to the purposes for which they will be licensed;
- d) are accurate and up to date;
- e) have been authorised to be stored for a period of....

The licensee represents and warrants for his part that in using the data he will respect in all regards the principles set out in the representations and warranties of the licensor and that he will prohibit any processing or use of the data which would be in contradiction to the contract. For this purpose, the licensee undertakes in particular to respect the following non-exhaustive list of obligations:

- a) the licensee will use the data for the following purposes, to the exclusion of any

other purposes, namely [the purposes in question would be listed];

b) the licensee shall refrain from any processing concerning data which might reveal directly or indirectly political opinions, religious or other convictions, as well as any processing of personal data relating to health or sexual life or criminal convictions, unless the processing falls within the purposes set out above.

c) the licensee shall immediately rectify, delete and update the data on receiving appropriate instructions to this effect from the licensor. The licensee undertakes in particular to rectify, complete or delete all or part of the data if it appears that such measures are required by the law of the State of the licensor or are based on new circumstances occurring in the State of the licensor. The licensor shall notify and justify the circumstances to the licensee as soon as he has knowledge of them.

2. Right of access of the data subjects

Should the execution of the contract directly or indirectly put in question the data subjects concerned by the data, the parties expressly agree that the data subjects may have access to their data and may require their rectification.

The right of access shall be exercised by data subjects without their having to incur excessive expense.

3. Liability

The licensee shall be liable for the use made of the data which have been transferred by the licensor.

The licensee undertakes as a consequence to indemnify the licensor for any manifest breach resulting from his obligations under the contract or for any manifest fault or negligence linked to the execution of the contract.

4. Indemnity

Without prejudice to any general right to damages which may arise under this contract, the licensee agrees that if he is held liable for any breach whatsoever of his obligations in accordance with the procedure defined in clause 5, he shall indemnify the licensor for each instance of breach.

Should the licensee refuse to allow data subjects to exercise the right of access provided for in clause 2, or refuse to carry out the corrective measures requested by the data subject pursuant to his exercise of his right of access, the licensor shall be able, if this appears reasonably justified:

a) to set in motion the procedure for designation of an arbitrator foreseen in Article 5; or

b) to terminate purely and simply the contract, on the conditions and with the consequences which result from this as foreseen in Article 6.

5. Arbitration

Any dispute arising out of the implementation of this agreement shall be submitted to the arbitration and the adjudication of an arbitrator. The arbitrator shall be chosen from a list of experts drawn up by the Consultative Committee established under the Council of Europe Convention for the protection of individuals with regard to automatic processing of personal data.

In settling any dispute, the arbitrator shall base himself on the general principles of data protection laid down in the above mentioned Convention, taking account of any relevant judgement of the European Court of Human Rights.

6. Termination of the contract

Should the licensee show bad faith in the implementation of the contract or refuse to respect, in particular, the recommendations of the arbitrator, the licensor reserves the right to terminate the contract by registered letter with recorded delivery, or by any other equivalent means, and without prejudice to any claim for damages and interest.

The termination of the contract shall automatically require the licensee to destroy the data.

As regards cases of failure to respect the preceding clause, the licensee undertakes to pay as regards any sort of breach, the sum of The licensor shall be the sole beneficiary of this sum.