

MODEL CLAUSES FOR INCLUSION IN A MODEL TBDF CONTRACT

The following text is the version of the transborder flow model contract agreed by the Council of Europe's Consultative Committee in October and updates the version published last year in Privacy Laws & Business Newsletter (Oct '91 p.6).

The licensor and licensee agree on a license giving the right to use personal data against payment of a sum of

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

1. Obligations of the licensor

The licensor represents and warrants to the licensee that the data are lawfully transferred to the licensee and that in accordance with domestic law, 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) are authorised to be stored for a period of....

2. Obligations of the licensee

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 not be in accordance with 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 processing personal data revealing racial origin, political opinions, or religious or other beliefs, as well as personal data concerning health or sexual life or criminal convictions, unless the processing is governed by such guarantees as would have been applied under the domestic law of the licensor.

- c) the licensee shall use the data exclusively for his own use and shall not communicate, either free of charge or in return for payment the data to any other legal or natural person, except when there is an obligation under his domestic law, which shall be mentioned.

- d) the licensee shall immediately rectify, delete and update the data on receiving 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 legal notice is published in the State of the licensor.

The licensee undertakes to ensure that data subjects have rights of access to and rectification and erasure of their data in the same way as they would have had under the domestic law of the licensor.

Should the licensee refuse to allow data subjects to exercise the right of access, or refuse rectification or erasure requested by the data subject, the licensor shall:

- either terminate purely and simply the contract, on the conditions and with the consequences which result from this as foreseen in clause 5,
- or set in motion the procedure for designation of an arbitrator foreseen in clause 4.

3. Liability and indemnity

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

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

4. Settlement of disputes

See paragraphs [on] "Settlement of disputes" in the explanatory memorandum.

6. Termination of the contract

Should the licensee show bad faith in the implementation of the contract or refuse to respect, in particular, the decisions of the arbitrators, 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.

On termination of the contract, the licensee shall destroy the data and inform the licensor accordingly.

In case of failure to respect the preceding clause, the licensee undertakes to pay the licensor the sum of

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[EC revised directive..continued from p. 5]

an Advisory Committee to represent the political interests of the member states. The rationale of having two committees is to reflect the balance of power within the Community with the Commission taking "utmost account" of the views of the member states. However, an advantage of this system is that the national supervisory authorities would have a place to articulate their views and exchange their experience, a mechanism lacking under the Council of Europe Data Protection Convention 108. In meetings of the Council of Europe's Consultative Committee, some countries' representation, notably France and Germany, generally does not include members or staff of the Data Protection Authorities and therefore their valuable perspectives are missing from the decision-making process.

Rule-making powers of the Commission (Art. 33)

The potentially dangerous provision giving power to the Commission to adopt technical measures necessary to apply the Directive to specific sectors, only taking account of the Advisory Committee's opinion and by-passing the normal legislative procedure envisaged by the Community law, has remained intact.

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