



INFORMATION LAW AND PRIVACY ALERT

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New Alternative Model Contract for the Transfer of Personal Data from the EEA

Introduction

The EU Data Protection Directive¹ contains significant, and some consider onerous, restrictions regarding the transfer of personal data² outside the EEA³, including to the US. These restrictions mean that businesses must consider carefully the issues arising when making personal data transfers from the EEA.

One of the ways personal data may be transferred from the EEA is by using the model contractual clauses approved by the European Commission. On 27 December 2004, the European Commission approved an alternative set of model contractual clauses proposed by a number of business organisations led by the International Chamber of Commerce (ICC).

The existing EU model contract clauses have been widely criticised by businesses as being too onerous on the data exporter and importer. The new alternative model clauses have been drafted with the intention of providing a more business-friendly alternative to the current EU model contract while still protecting the individuals whose data are being transferred. While the new alternative model contract does provide advantages over the existing EU model contract, some of the clauses impose new obligations which businesses will need to consider before deciding whether to use the alternative model contract in preference to the existing one. Subject to any formal approval by EU national privacy authorities, the alternative model contract may be used from 1 April 2005.

Background

When transferring personal data outside the EEA, the EU Data Protection Directive requires that the country receiving the data has in place an adequate level of protection. In assessing adequacy, data exporters should first check whether the importer country is one which has been deemed by the European Commission to

¹ Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

² Under the Directive personal data means "any information relating to an identified or identifiable natural person".

³ The EEA (European Economic Area) consists of the 25 EU Member States together with Iceland, Liechtenstein and Norway.

have adequate safeguards in place.⁴ If the transfer is to the US, certain organisations there may sign up to the ‘safe harbor’ scheme which meets the adequacy requirement. If these do not apply, exceptions to the adequacy requirement must be considered, such as consent of the data subject. If consent or another exception is not available, the exporter may wish to achieve adequacy by using the EU model contract or now the new alternative model contract.

Key Provisions in EU Model Contract

One of the key provisions of the EU model contract is that data subjects can enforce certain clauses as third party beneficiaries and claim damages for the loss suffered. The exporter and importer are jointly and severally liable for such damages with the exporter and importer agreeing that they may only be exempted from this liability if they prove that neither of them is responsible for the violation of such clauses. The EU model contract also provides that in the event of a violation of the protections afforded to him or her, the data subject may bring an action before a court against either the data exporter or the data importer or both. Such onerous liability requirements have been widely criticised by businesses and have led to the alternative model contract.

Advantages of the Alternative Model Contract

The main advantages for businesses in using the new alternative model contract include:

Liability

The alternative model contract has replaced the joint and several liability and cross indemnification provisions of the existing model contract with provisions that limit each party’s liability to the damages it causes by any breach of the clauses.

Effect of Local Laws

The importer of data in the new alternative model contract now only has to warrant that it has no reason to believe, at the time of entering into the model contract, that any local laws would have a “substantial adverse effect” on the guarantees provided by it under the model contract. This contrasts with the EU model contract where the importer has to warrant that it has no reason to believe legislation prevents it from fulfilling its obligations under the model contract.

Dispute Resolution

In the new alternative model contract the importer and exporter no longer have to accept the decision of the data subject to refer a dispute to mediation but can agree to generally available non-binding mediation initiated by the data subject or by the national authority.

Termination

Under the alternative model contract, the exporter is given specific rights to terminate the model contract. Despite the greater certainty over termination, the alternative model contract, like the current EU model contract, provides that termination does not release the parties from obligations regarding the processing of personal data which has been transferred.

Variation

In the new alternative model contract the parties have more flexibility and can vary the details of the data transfer and can add certain optional clauses. The optional clauses include an indemnity between the exporter and importer, an arbitration clause, an allocation of costs clause and a clause dealing with the effects of termination including the return of personal data to the exporter.

⁴ As at February 2005, the European Commission had only deemed the following countries as ‘adequate’: Argentina, Canada, Guernsey, Switzerland and The Isle of Man.

New Obligations under the Alternative Model Contract

While there are undoubted advantages with the new alternative model contract, consideration should also be given to some of the new obligations on the data exporter and importer.

Obligations on the Data Exporter

The alternative model contract contains a new requirement that the exporter must be able to prove it used “reasonable efforts” to check that the data importer is able to meet its obligations under the model contract. It is not clear what would be considered “reasonable efforts” and much may depend on the view of the exporter’s national privacy authority.

Obligations on the Data Importer

The alternative model contract also contains a new requirement that the data importer provide the exporter, on request, with evidence of financial resources sufficient to fulfill its responsibilities. This may include evidence on insurance coverage. There is no guidance for the exporter as to how to determine whether such financial resources are sufficient.

National privacy authorities may be able to assist in providing guidance on these points and any other questions of interpretation of the alternative model contract. If such guidance is consistent through the EU, businesses will be able to use the alternative model contract with increased confidence.

Conclusion

Whilst the alternative model contract is certainly an improvement on the existing contract, particularly with the removal of the concept of joint and several liability, the ability of data subjects to enforce a breach of the clauses as third party beneficiaries remains together with new obligations on the exporter and importer. As a consequence, the decision for businesses whether to use the alternative model contract in preference to other permitted ways of being able to transfer personal data from the EEA still needs to be considered carefully.

Sidley’s Information Law and Privacy Practice group regularly publishes articles on topics related to its practice on the firm’s CyberLaw website at <http://www.sidley.com/cyberlaw>.

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