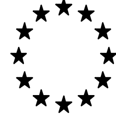
ARTICLE 29 DATA PROTECTION WORKING PARTY



00070/2010/EN
WP 176

FAQs in order to address some issues raised by the entry into force of the EU Commission Decision 2010/87/EU 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

Adopted on 12 July 2010

This Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC.

The secretariat is provided by Directorate C (Fundamental Rights and Union Citizenship) of the European Commission, Directorate General Justice, B-1049 Brussels, Belgium, Office No LX-46 01/190.

Website: http://ec.europa.eu/justice/policies/privacy/index_en.htm

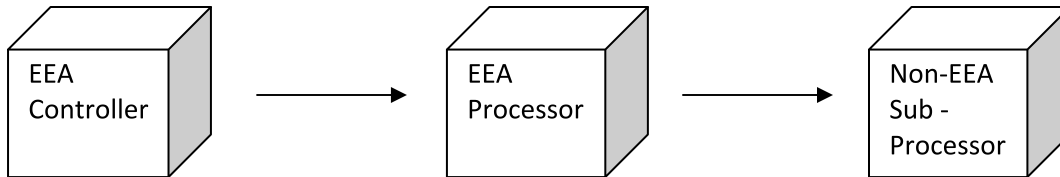
On 5 February 2010, the European Commission has adopted a decision updating the standard contractual clauses for the transfer of personal data to processors established in non-EU countries that do not ensure an adequate level of data protection (contractual clauses "controller to processor").

The new decision 2010/87/EU regulates the transfers of data between EEA-based controllers and non-EEA-based processors and lists the conditions for subprocessing of data between the non-EEA-based processor and non-EEA-based subprocessors.

The following FAQs, prepared by the Article 29 Working Party, intend to address some issues raised by the application of these New Model Clauses since they entered into force on 15 May 2010. This document reflects the harmonised position of the European data protection authorities.

These FAQs are not exhaustive and may be updated as required.

I. EEA-based processor issues



1) **Do Model Clauses 2010/87/EU apply when personal data is transferred from an EEA-based controller to an EEA-based processor and then to a non-EEA-based subprocessor?**

No. As stated under recital 23 of the Commission decision, the Decision applies only to subcontracting by a data processor established in a third country of his processing services to a subprocessor established in a third country.

2) **Is it nevertheless possible to use Model Clauses 2010/87/EU as such when personal data is transferred from an EEA-based controller to an EEA-based processor and then to a non-EEA-based subprocessor?**

No, this is not possible.

First of all, the EEA-based processor must not be considered as a "data importer" in the meaning of Model Clauses 2010/87/EU since the definition requires an establishment out of the EEA.

Secondly, the obligations imposed on the importer in Model Clauses 2010/87/EU are inappropriate for an EEA-based processor (particularly, regarding the applicable law regime and the processor liability regime).

Thirdly, the EEA-based processor must not be considered as a "data exporter" in the meaning of Model Clauses 2010/87/EU since the definition provides that the data exporter acts as data controller.

In conclusion, the WP29 holds that the inclusion of an EEA-based processor as a party of Model Clauses 2010/87/EU is inappropriate.

3) **In this context, how to provide a legal framework for the transfer from an EEA-based processor to a non-EEA-based subprocessor?**

Pending the possible adoption of a new separate and specific legal instrument that allows for international subprocessing by processors established in the Union to subprocessors in a third country (see the working paper 161), the Working Party has identified three different possibilities (at the choice of the company):

a. Direct contracts between EEA-based controllers and non-EEA-based processors;
b. Clear mandate from EEA-based controllers to EEA-based processors in order to use Model Clauses 2010/87/EU in their name and on their behalf;
c. Ad-hoc contracts.

a. Direct contracts between the EEA-based controller and the non-EEA-based processor

The Model Clauses may be signed directly between the EEA-based controller and the non-EEA-based processor. In this situation, the non-EEA-based processor will have to sign clauses 2010/87/EU as data importer and not as subprocessor. The relationship between the EEA-based processor and the EEA-based controller would be organized in the service provider agreement signed by both parties and containing the instructions given by the EEA-based controller to the EEA-based processor as well as all relevant requirements set up by Articles 16 and 17 of the EU Directive.

b. Clear mandate from the EEA-based controller to the EEA-based processor in order to sign Model Clauses 2010/87/EU in his name and on his behalf

Another solution, having similar legal effects to those of the first solution but with different modalities, would be to include in the service provider agreement a clear mandate to the EEA-based processor to sign the Model Clauses 2010/87/EU with the non-EEA-based subprocessor in the name and on behalf of the EEA-based controller. The latter remains the data exporter and the subprocessor is the data importer.

The controller should also agree in advance to the content of Appendices 1 and 2 of Model Clauses 2010/87/EU.

As explained in FAQ II. 1), it is up to the data exporter to decide if the mandate will be general (generally allowing the subprocessing of the data described in Appendices 1 and 2) or specific (specific mandate for each new subprocessing).

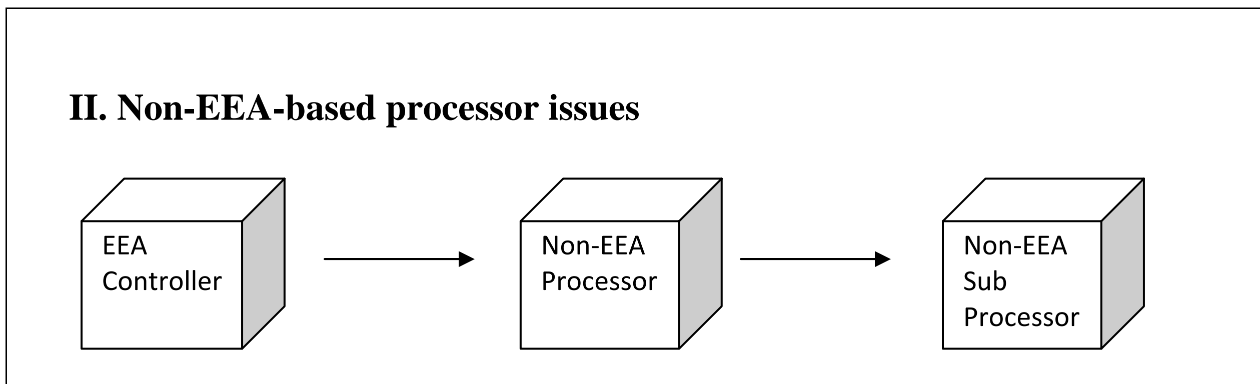
c. Ad-hoc contracts

According to the second part of recital 23 of the Commission decision, “*Member States are free whether to take account of the fact that the principles and safeguards of the standard contractual clauses set out in this Decision have been used to subcontract to a subprocessor established in a third country with the intention of providing adequate protection for the rights of data subjects whose personal data are being transferred for subprocessing operations*”.

The ad-hoc contract shall therefore contain the principles and safeguards included in the Model Clauses 2010/87/EU (such as the third-party beneficiary clause). In principle, the EEA-based controller and the non-EEA-based subprocessor should be bound by the same duties and rules of liability as in Model Clauses 2010/87/EU. The legal regime applicable to the EEA-based processor should be in line with the EU Directive regime. In particular, the EEA-based processor must not avoid any liability towards the data subject that he would have to assume under the relevant national law implementing EU Directive 95/46/EC. At the same time, the contract will allow EEA-based processors to apply his own applicable law to technical and security measures, while the non-EEA-based subprocessor will have to respect the controller's national law.

Each data protection authority may assess the ad-hoc contracts submitted and may retain the right to authorize transfers on the basis of these contracts.

II. Non-EEA-based processor issues



1) **Could the prior written consent given by the controller (clause 11.1) to allow the sub-processing be general or should it be specific for any additional sub processing?**

Model Clauses 2010/87/EU do not specify this. According to the Working Party, it is up to the controller to decide if general prior consent would be sufficient or if specific consent is required for each new sub processing.

This decision will probably vary depend on the context of the processing, the type of data (sensitive or not), and the level of involvement of the controller for this type of choice. Some controllers may decide that a full prior check of the identity of each sub processor is necessary while others may consider that prior information (clause 5.h), the duty to communicate the clause (clause 5.j) and the guarantee to have the same level of protection (clause 11.1) are enough.

2) **What does the term "a copy of any sub processor agreement" (clause 5.j) encompass?**

The targeted contract is the one referred to in clause 11.1 (a written agreement between the data importer and the non-EEA-based sub processor that impose the same obligations on the sub processor as are imposed on the processor under the clauses).

Therefore, the data importer does not automatically have to send all documents relating to outsourcing agreements, but only data protection related sub processing terms (including security measures).

3) **What types of "changes of transfers and data processing operations that are the subject matter of the contract" are targeted in art. 7 of the EU Decision?**

According to art. 7.2, a contract concluded under the previous version of the Model Clauses (2002/16/EC) shall remain in force and does not to have to be repealed unless the transfers and data processing operations that are the subject matter of the contract have changed. In this situation, parties shall be required to enter into a new contract complying with Model Clauses 2010/87/EU.

According to the Working Party, this will be the case when a change must be made in the Appendix 1 (new party, change of data subjects, categories of data and processing operation).

In this case, the parties may decide to sign a new contract complying with Model Clauses 2010/87/EU or to keep the contract they previously signed under the Model Clauses 2002/16/EC. However, since the new Model Clauses 2010/87/EU replace the Model Clauses 2002/16/EC, the latter model will no longer be considered as Model Clauses, but as an ad-hoc contract.

4) **When a data importer transfers data to different non-EEA-based processors (under a global contract signed with the data exporter), shall they be considered as sub processors or shall they be considered as additional data importers?**

As defined by Model Clauses 2010/87/CE, the sub processor is any processor <u>engaged</u> by the data importer or by any other sub processor of the data importer.

If all non-EEA-based processors are engaged by the data exporter, they may all sign the model clauses as data importers.

If non-EEA-based processors are engaged by the data importer, they will sign the contract as sub processors. In this situation, according to clause 11.1, the data importer shall remain fully liable towards the data exporter for the performance of the sub processor's obligations under the agreement.

5) **When a data importer transfers data to a sub processor who provides services to the data importer for several data exporters, is it possible to make use of one single contract between the data importer and the sub processor?**

No. It is not possible to sign just one contract for all. Appendix 1 to the contract will always be different since the identity of the data exporter will vary and probably also the categories of data, the data subjects, and the description of the processing operation.

Nevertheless, parties may decide to sign each contract making a reference to more generic agreements , such as the content of Model Clauses 2010/87/EU and possibly its Appendix 2 relating to technical measures (if they are the same for the different contracts and if they are accepted by the data importer and meet the data exporters' requirements).

6) **If the sub processor co-signs the clauses concluded between the data exporter and the data importer, does this meet the condition of a written agreement between the data importer and the data sub processor which imposes the same obligations on the sub processor as are imposed on the data importer under the original clauses entered into by the data exporter and the data importer (clause 11.1)?**

As clearly stated in footnote 9 of the Model Clause 2010/87/EU, this requirement can be met by the sub processor co-signing the contract entered into between the data exporter and the data importer under Model Clause 2010/87/EU.

In this case, the parties will add at the end of the contract (where it is signed) a section "on behalf of the sub processor" including the "Name (written out in full)", "Position", "Address", "Other information necessary in order for the contract to be binding (if any)", "Signature", "(stamp of organization)".

7) **Is it possible to add commercial clauses to the Model Clauses?**

As clearly stated in clause 10, parties must not vary or modify the Model Clauses, but this shall not prevent the parties from adding clauses on business-related issues where required, as long as they do not contradict the Model Clauses.

8) Are data exporters obliged to deposit the sub processing agreements signed between their data importers and their sub processors to the Data protection authorities, even if they are not a party to this contract?

According to clause 11.4, the data exporter shall keep a list of sub processing agreements he has received from the data importer pursuant to Clause 5 (j) and he must make sure this list is available to his data protection authority.

The data exporter needs to deposit only the agreement he is party to (according to clause 8.1).