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Opinion 7/2001

on the Draft Commission Decision (version 31 August 2001) on Standard Contractual Clauses for the transfer of Personal Data to data processors established in third countries under Article 26(4) of Directive 95/46

Adopted on 13 September 2001

THE WORKING PARTY ON THE PROTECTION OF INDIVIDUALS WITH REGARD TO THE PROCESSING OF PERSONAL DATA

set up by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995[1]

having regard to Articles 29 and 30 paragraphs 1 (a) and 3 of that Directive,
having regard to its Rules of Procedure and in particular to articles 12 and 14 thereof

has adopted the following OPINION:

1. Introduction

The Working Party welcomes the draft Commission decision on standard contractual clauses for the transfer of personal data to processors established in third countries and reiterates the urgency of its approval as expressed in its previous Opinion 1/2001[2]. The Working Party thanks the efforts of the Subgroup in the preparation of this opinion[3] and highlights the importance of this draft decision aimed at facilitating uncountable world-wide data transfers routinely made from the Community while putting in place sufficient safeguards for the protection of the privacy of individuals when the personal data is transferred outside the Community.

2. Processors established inside the Community versus Processors established outside the Community

The Working Party would like to start this opinion by establishing a clear differentiation between the clauses of a contract within the meaning of Article 17 of the Directive and the standard contractual clauses object of the present opinion.

It is true that at a first glance both data transfers seem very similar as they have the same parties to the contract (data controller and data processor) and the same purpose of the transfer (data processing services). However, under the provisions of the Directive 95/46/EC, the fact that the data processor is established outside the Community changes entirely the nature of the transfer (intra-community transfer and international transfer) as well as the provisions stipulating the content of the contract (Article 17 and Article 26.4).

In this respect, the Working Party would like to stress the fact that the data controller's compliance with national provisions adopted pursuant Article 17 of Directive 95/46/EC does not constitute, *per se*, the exercise described in Article 26 (2) of the Directive, that is, to adduce sufficient safeguards that could lead a Member State to authorise a transfer or a set of transfers within the meaning of Article 26 (2), because

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[1] Official Journal no. L 281 of 23/11/1995, p. 31, available at: http://europa.eu.int/comm/internal_market/en/dataprot/index.htm

[2] See Opinion 1/2001, third page, last paragraph of Chapter II.

[3] A, ES, FR, NL and UK

these contracts need to supply for the lack of adequate protection in the country of destination which is not the purpose of Article 17 of Directive 95/46/EC.

In addition to that, as a matter of principle, subcontracting data processing services outside the Community may expose the privacy of individuals to higher risks than those performed inside the Community. The physical location of the data in third countries makes the enforcement of the contract or the decisions taken by Supervisory Authorities considerably more difficult .

Finally, as it has been pointed out by this Group in its Opinion 1/2001, there is always the possibility of data processors in third countries being subject to public interventions which might go beyond what is necessary in a democratic society.

3. The issue of the security measures

It is precisely when considering this issue of the security measures where the differences between these two categories of data transfers become more evident. As Article 17 applies only to the establishment of a processor in a Member State[4] it is necessary to respond to the question of what are the security measures the Data Importer should implement and the Data Exporter should ensure compliance with.

The Working Party is of the view that the Data Importer must implement those security measures defined by the law of the Member State in which the Data Exporter is established. This is coherent both with the general principle that the Data Importer is bound by the Data Exporter's legislation and with the fact that the Data Exporter instructs the Data Importer in accordance with the terms of his own legislation.

The Working Party appreciates the reasons why the Commission draft would like to introduce more flexibility as regards security measures, in particular where the Data Importer receives personal data from Data Exporters established in different Member States. However, the Directive at present only allows for limited scope for such flexibility. Therefore, the Working Party would recommend the Commission and the Article 31 Committee to approve standard contractual clauses stipulating that, on the one hand, security measures should be specified and, on the other hand, that the adequacy of these measures should be determined against the background of the applicable law, being the Data Exporter’s Law. This should be made clear in the text of the clauses and also Recital 11 of the Decision should be amended in that sense. Given that Industry has attached great importance to have a more flexible solution to this issue, it would be important that the Commission would put forward in the future detailed proposals for consideration of the Working Party addressing that problem.

4. The third party beneficiary rights

The Working Party would like to recognise the importance of those provisions of the Commission draft, which give data subject third party beneficiary rights. These

[4] Article 17, third paragraph, second indent "the obligations set out in paragraph 1, as defined by the law of the Member State in which the processor is established"

provisions are extremely useful to grant data subjects full enforceability not only of his rights under the standard contractual clauses but also by their own domestic legislation.

Indeed, European companies use processing services located outside the European Union for different reasons, inter alia, either for the purpose of concentrating data processing facilities or for the purpose of subcontracting cheaper data processing services. It is well know, for instance, that some multinational organisations (in particular in the financial sector) use processing services located in different continents in order to obtain uninterrupted 24 hours of processing operations.

This general phenomenon of externalisation of the processing services is likely to be increased in the future. Irrespective of any economic consideration, the practical result of this process is that large distances and national borders separate the data controller in Europe from the data processor established in a different region of the planet and that while it is true that the enforcement of Supervisory Authorities and national courts can reach the data controller established in the Community, the physical location of the data may be a real problem.

In those cases where the Data Exporter does not for whatever reasons instruct the Data Importer properly (legal disappearance and bankruptcy, for example), the data subject should additionally be able to rely on the third party beneficiary rights conferred by the standard contractual clauses to make effective basic data protection rights such as access to his personal data, cancellation, rectification, objection, etc.[5]

An example of this type of provisions may be Clause 4 e), that is, the Data Exporter's obligation of informing the Data Importer of the inquiries made by Data Subjects or the Supervisory Authority concerning processing activities carried out by him. Although it is true that this provision can be considered already to be covered by clause 4 a) (that is, general Data Exporter's obligations), there is no doubt that such clause 4 e) may facilitate the enforcement of cases mentioned in the previous paragraph.

The Working Party supports the amendments made by the Commission to the version of 1st of July in order to clarify the scope of the third party beneficiary rights against the Data Importer.

5. The duty of informing the data subjects when the transfer involves special categories of Data (Clause 5 d)

The Working Party has doubts about the suggestion of some business organisations to delete this clause. Although this might benefit to the simplicity of the transfer and the standard contractual clauses, it seems fair to the data subject in view of the special protection afforded to sensitive data to inform them, at least in these cases, about the data controller's intention of carrying the processing in a third country not providing adequate protection.

[5] Some delegations (A, B, DE, EL, IRL and UK) were of the view that the enforcement against the Data Importer should be limited to those cases where the Data Exporter is unable to instruct the Data Importer, that is, in any cases of legal disappearance or bankruptcy.

Therefore, the special nature of the sensitive data and the specific risks associated to the processing of this personal information lead the Working Party to recommend clause 4 d) not to be removed from the clauses.

The Working Party recommends the Commission to include in the recitals of the Commission Decision (or in the clauses themselves) the Data Exporter's obligation to respect national provisions implementing Article 10 c) of the Directive.

6. Onward transfers

The Working Party supports the Subgroup's recommendation (taken up by the Draft Commission decision) of deleting Clause 5 c), a clause supposed to deal partially with onward transfers.

The Working Party is of the view that (as it was the case with the decision 497/201) it is extremely difficult to define onward transfers in a fully satisfactory way. The proposal would be, therefore, to delete such provision with the result that onward transfers to third parties would only be possible if in accordance with the applicable data protection law, the clauses and the instructions given by the Data Exporter. The Working Party therefore recommends to add some wording to that extent in Recital 14 of the Commission Decision.

7. Liability issues

The Working Party welcomes the idea of exceptional liability of the Data Importer in those limited cases specified in the standard contractual clauses, that is, when the Data Exporter is in bankruptcy or has legally disappeared and, in addition to this, there is a wrongdoing of the Data Importer as regards his obligations under the clauses resulting in the damages caused to the data subjects. A more far-reaching solution would oblige the Data Importer to check the conformity of all the instructions received from the Data Exporter with the data protection law applicable to him, which does not seem to be justified.

The Working Party recommends in addition to make crystal clear in the recitals of the Commission Decision that the exercise of the rights under the contract (third party beneficiary rights) should take in the first place against the Data Exporter, being the enforcement against the Data Importer exceptional.

8. Audits

As pointed out by this Group in one of its first orientations and recommendations about the transfer of personal data to third countries (Working Party 12), the feasibility and enforceability of any given data protection system are vital elements to assess its adequacy.

When coming to the question of contractual solutions, the possibility for Data Protection Authorities to exercise their investigative powers is fundamental.

Although it is clear that such audits in third countries' processors are not likely to happen frequently and it is expected that they would be limited to really exceptional and grave cases where important damages for the fundamental rights of individuals may be involved, the Working Party would like to remind that the warranty given by the Data Importer in Clause 8 (2) is fully coherent with the submission of the Data Importer to the Exporting country's Law and, therefore, is a very important element for the standard contractual clauses to provide sufficient safeguards within the meaning of Article 26 (2) of the Directive.

9. Conclusions

Subject to the foregoing recommendations, the Working Party issues a favourable opinion on the draft Commission decision on standard contractual clauses for the transfer of personal data to data processors established in third countries, and invites the Article 31 Committee to accelerate its works to have this Commission decision operational at the shortest time possible.

Done at Brussels, 13 September 2001

For the Working Party

The Chairman

Stefano RODOTA