COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Strasbourg, 22 February 2024   T-PD(2023)5rev1Comp

**CONSULTATIVE COMMITTEE OF THE CONVENTION FOR THE PROTECTION
OF INDIVIDUALS WITH REGARD TO AUTOMATIC PROCESSING
OF PERSONAL DATA**

CONVENTION 108

**Compilation of Comments on Model Contractual Clauses for the Transfer of
Personal Data
Module 3: from Processor to Processor**

www.coe.int/dataprotection

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UNITED KINGDOM

SECTION II – DATA PROTECTION SAFEGUARDS: RIGHTS AND OBLIGATIONS OF THE PARTIES

Clause 8.   Instructions

8.1.   The Data exporter has informed the Data importer that it acts as processor under the instructions of its controller(s), which the Data exporter shall make available to the Data importer prior to processing. The controller retains control of the Personal data and remains responsible for its compliance obligations under the applicable Data Protection Legislation, and the [Data exporter] will ensure that the controller has any required notices and consents in place to enable lawful processing of the Personal data by the Data exporter and the Data importer.

Clause 13. Data security

[…]

13.3   If there is a substantial change in the security measures implemented and described in Annex 3, the Parties shall update the Annex. The Data exporter and Data importer must review the security measures described in Annex 3 at least once a year to confirm its current accuracy and update it when required to reflect current practices.

Clause 23.   Obligations of the Data importer in case of access by public authorities

23.1   In so far as domestic law of Data importer allows, the Data importer shall notify the Data exporter, and where possible the Data subjects promptly or use its best efforts to do so - if necessary with the help of the Data exporter - if it is compelled to preserve, grant access, make available or disclose Personal data transferred from the Data exporter to a Third party including to a public authority. The Data exporter shall forward the information to the Data controller.

23.2.   Review of legality and data minimisation

[…]

(b)   The Data importer shall document its legal assessment and any challenge to the request for disclosure and, to the extent permissible under the laws of the country of destination, shall make the relevant documentation available to the Data exporter. The Data exporter shall make the assessment available to the Data controller. The Data importer It shall also make it available to the competent Supervisory authority on request

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Commented [A1]: 8.1 - 4 are exact copies of MODULE THREE, 8.1(a)-8.1(d) of EU SCCs - other than applicable law in 8.4. Clause 9,10,12,16,17,18 are also lifted from EU SCCs

Commented [A2]: Consider adding from requirements of IDTA: "The controller retains control of the Personal data and remains responsible for its compliance obligations under the applicable Data Protection Legislation, and the [Data exporter] will ensure that the controller has any required notices and consents in place to enable lawful processing of the Personal data by the Data exporter and the Data importer."

Reasoning: Although the current drafting is the same wording as used in the EU Commission SCCs, this additional wording from the IDTA strengthens the requirement to ensure that the Data controller retains responsibility for compliance, even when the chain expands to include sub-processors.

Commented [A3]: Consider: Including an annual review to ensure security measures are accurate and up to date. *Reasoning*: This additional requirement (again contained in the IDTA) provides protection for data subjects as it requires the parties to ensure that the security measures listed in the agreement are kept up to date.

Commented [A4]: Reasoning: The Data controller retains responsibility for compliance and safeguarding the rights of individuals so where permissible should be kept up to date of any such access.

Commented [A5]: Reasoning:
The Data controller retains responsibility for compliance and safeguarding the rights of individuals so where permissible should be kept up to date of any such access. Clause 23.2 requires the Data importer to check the legality of the request and only give over the least amount of data. Clause 23.2 (b) requires the Data importer to keep a documentary record of their assessment and give this to the Data exporter. We consider that the Data exporter should then give a copy of this assessment to the data controller as well. In this way it will ensure that the Data controller is kept informed.

EUROPEAN COMMISSION

Clause 17.   Use of Sub-processors

OPTION 1: SPECIFIC PRIOR AUTHORISATION

17.1 The Data importer shall not sub-contract any of its Processing activities performed on behalf of the Data exporter under these Clauses to a Sub-processor without the ~~Data exporter's~~Controller's prior specific written authorisation. The Data importer shall submit the request for specific authorisation at least [Specify time period]/[leaving enough time for the ~~Data exporter~~Controller to consider it] prior to the engagement of the sub-processor, together with the information necessary to enable the ~~Data exporter~~Controller to decide on the authorisation. The list of Sub-processors already authorised by the ~~Data exporter~~Controller can be found in Annex 4. The Parties shall keep Annex 4 up to date.

OPTION 2: GENERAL WRITTEN AUTHORISATION

17.1 The Data importer has the ~~Data exporter's~~Controller's general authorisation for the engagement of Sub-processor(s) from an agreed list. The Data importer shall specifically inform the ~~Data exporter~~Controller in writing of any intended changes to that list through the addition or replacement of Sub-processors at least [Specify time period] in advance, thereby giving the ~~Data exporter~~Controller sufficient time to be able to object to such changes prior to the engagement of the Sub-processor(s). The Data importer shall provide the ~~Data exporter~~Controller with the information necessary to enable the ~~Data exporter~~Controller to exercise its right to object. The Data importer shall inform the Data exporter of the engagement of the sub-processor(s).

17.2   Where the Data importer engages ~~with the approval of the Data exporter~~ a Sub-processor to carry out specific Processing activities (on behalf of the ~~Data exporter~~Controller), it shall do so by way of a written contract that provides for, in substance, the same data protection obligations as those binding the Data importer under these Clauses, including in terms of Third-party beneficiary rights for Data subjects. The Parties agree that, by complying with this Clause, the Data importer fulfils its obligations under Clause 15. The Data importer shall ensure that the sub-processor complies with the obligations to which the Data importer is subject pursuant to these Clauses.

17.3   The Data importer shall provide, at the Data exporter's or the Controller's request, a copy of such a sub-processor agreement and any subsequent amendments ~~to the Data exporter~~. To the extent necessary to protect business secrets or other confidential information, including Personal data, the Data importer may redact the text of the agreement prior to sharing a copy.

Clause 18.   Rights of Data subjects

18.1   The Data importer shall promptly notify the Data exporter of any request it has received from a Data subject. It shall not respond to that request itself unless it has been instructed to do so by the ~~Data exporter~~Controller, as communicated to it by the Data exporter.

18.2   The Data importer shall assist, through the Data exporter, the Controller in fulfilling its obligations to respond to Data subjects' requests for the exercise of their rights under these Clauses and the Applicable law. In this regard, the Parties shall set out in Annex 2 the appropriate technical and organisational measures, taking into account the nature of the Processing, by which the assistance shall be provided, as well as the scope and the extent of the assistance required.

Commented [A6]: In our view, the approval of sub-processors should be done by the controller, not another (sub-)processor, hence the changes we propose.

Commented [A7]: In our view the instruction can only come from the controller, since this is the enitty in charge of handling data subject rights. The data exporter, as a processor, will have no say itself in how to handle a request

Commented [A8]: See our previous comment, it will be the responsibility of the controller to fulfil obligations with respect to data subject rights. The processor (exporter) and sub-processor (importer) can only assist the controller

18.3   In fulfilling its obligations under paragraphs 18.1 and 18.2, the Data importer shall comply with the instructions from the Controller, as communicated by the Data exporter.

SECTION III – Domestic LAWS AND OBLIGATIONS IN CASE OF ACCESS BY PUBLIC AUTHORITIES

Clause 22.   Domestic laws and practices affecting compliance with the Clauses (to change in Module 1 as well)

22.5   The Data importer agrees to notify the Data exporter promptly if, after having agreed to these Clauses and for the duration of the contract, it has reason to believe that it is or has become subject to laws or practices not in line with the requirements pursuant to paragraph 22.1, including following a change in the laws of the country of destination or a measure (such as a disclosure request) indicating an application of such laws in practice that is not in line with the requirements in paragraph 22.1. The data exporter shall forward the notification to the controller.

22.6   Following a notification pursuant to paragraph 22.5, or if the Data exporter otherwise has a reason to believe that the Data importer can no longer fulfil its obligations under these Clauses, the Data exporter shall promptly identify appropriate measures (e.g., technical or organisational measures to ensure security and confidentiality) to be adopted by the Data exporter and/or Data importer to address the situation, if appropriate in consultation with the Controller. The Data exporter shall suspend the Transfer if it considers that no appropriate safeguards for such Transfer can be ensured, or if instructed by the Controller or competent Supervisory authority to do so. In this case, the Data exporter shall be entitled to terminate the contract, insofar as it concerns the Processing of Personal data under these Clauses. If the contract involves more than two Parties, the Data exporter may exercise this right to termination only with respect to the relevant Party, unless the Parties have agreed otherwise. Where the contract is terminated pursuant to this Clause, Clauses 24.4 shall apply.

Clause 23.   Obligations of the Data importer in case of access by public authorities

23.1   In so far as domestic law of Data importer allows, the Data importer shall notify the Data exporter, and where possible the Data subjects promptly or use its best efforts to do so - if necessary with the help of the Data exporter - if it is compelled to preserve, grant access, make available or disclose Personal data transferred from the Data exporter to a Third party including to a public authority. The data exporter shall forward the notification to the Controller.

[..]

(c) Where permissible under the laws of the country of destination, the Data importer agrees to provide the Data exporter, on request, with as much relevant information as possible on any requests for disclosure it has received (in particular, number of requests, type of data requested, requesting authority/ies, whether requests have been challenged and the outcome of such challenges, etc.). The data exporter shall forward the notification to the Controller.

[…]

23.2.   Review of legality and data minimisation

[..]

(b) The Data importer shall document its legal assessment and any challenge to the request for disclosure and, to the extent permissible under the laws of the country of destination, shall make the relevant documentation available to the Data exporter. It shall also make it

Commented [A9]: See previous comments

Commented [A10]: This is in our view useful to make sure that the controller, who bears the final responsibility for the processing, is informed

Commented [A11]: In our view useful to recall, since it may be needed to involve the controller (who in the end will be held responsible also for the processing by the exporter and importer)

Commented [A12]: See previous comments

available to the competent Supervisory authority on request. The data exporter shall make the assessment available to the Controller.

[..]

SECTION IV – FINAL PROVISIONS

Clause 24.   Non-compliance with the Clauses and termination

[..]

24.3

[..]

In these cases, it shall inform the Controller and competent Supervisory authority of such non-compliance. Where the contract involves more than two Parties, the Data exporter may exercise this right to termination only with respect to the non-compliant Party, unless the Parties have agreed otherwise.

> **Commented [A13]:** While this may also follow from the C-P contract between the controller and the data exporter, it would in our view still be useful to recall here

EDPS

[…]

Clause 16.   Documentation and compliance

16.1 The Data importer shall promptly and adequately deal with enquiries from the Controller , as communicated to the data importer by the Data exporter, and any additional enquiries from the Data exporter through the Data exporter that relate to the processing under these Clauses.

Clause 17.   Use of Sub-processors

OPTION 1: SPECIFIC PRIOR AUTHORISATION

17.1 The Data importer shall not sub-contract any of its Processing activities performed on behalf of the Data exporter under these Clauses to a Sub-processor without the Data exporter's controller's prior specific written authorisation. The Data importer shall submit the request for specific authorisation at least [Specify time period]/[leaving enough time for the Data exporter controller to consider it] prior to the engagement of the sub-processor, together with the information necessary to enable the Data exporter controller to decide on the authorisation. The list of Sub-processors already authorised by the Data exporter controller can be found in Annex 4. The Parties shall keep Annex 4 up to date.

OPTION 2: GENERAL WRITTEN AUTHORISATION

17.1 The Data importer has the Data controllerexporter's general authorisation for the engagement of Sub-processor(s) from an agreed list. The Data importer shall specifically inform the Data exporter controller in writing of any intended changes to that list through the addition or replacement of Sub-processors at least [Specify time period] in advance, thereby giving the Data exporter controller sufficient time to be able to object to such changes prior to the engagement of the Sub-processor(s). The Data importer shall provide the Data exporter controller with the information necessary to enable the Data exporter controller to exercise its right to object.

17.2   Where the Data importer engages with the approval of the Data exporter controller a Sub-processor to carry out specific Processing activities (on behalf of the Data exportercontroller), it shall do so by way of a written contract that provides for, in substance, the same data protection obligations as those binding the Data importer under these Clauses, including in terms of Third-party beneficiary rights for Data subjects. The Parties agree that, by complying with this Clause, the Data importer fulfils its obligations under Clause 15. The Data importer shall ensure that the sub-processor complies with the obligations to which the Data importer is subject pursuant to these Clauses.

17.3   The Data importer shall provide, at the Data exporter's or the Data controller request, a copy of such a sub-processor agreement and any subsequent amendments to the Data exporter and to the Data controller. To the extent necessary to protect business secrets or other confidential information, including Personal data, the Data importer may redact the text of the agreement prior to sharing a copy.

[…]

Clause 18.   Rights of Data subjects

18.1   The Data importer shall promptly notify the Data exporter of any request it has received from a Data subject. It shall not respond to that request itself unless it has been instructed to

Commented [A14]: Should we align this article a bit more with the wording used for instance in Clause 8.2 :

"The Data importer shall process the Personal data only on documented instructions from the controller, as communicated to the data importer by the Data exporter, and any additional documented instructions from the Data exporter"

See some wording proposals directly in the text

Commented [A15]: Here we disagree with the proposed wording. In our view, it is up to the controller (and not the exporter) to authorise the sub-processing.

The entire clause should be redrafted accordingly.

If needed, we may include an additional sentence to mention that the communication between the importer and the controller can be done through the intermediary of the data exporter as long as the data controller remains fully informed and in a capacity to decide.

Commented [A16]: Same comment as above, this is up to the controller to give its authorisation.

do so by the the Data controller, as communicated to the data importer by the Data exporter, or directly by the~~Data exporter~~ the Data controller.

18.2   The Data importer shall assist the Data exporter in helping the Data controller fulfilling its obligations to respond to Data subjects' requests for the exercise of their rights under these Clauses and the Applicable law. In this regard, the Parties shall set out in Annex 2 the appropriate technical and organisational measures, taking into account the nature of the Processing, by which the assistance shall be provided, as well as the scope and the extent of the assistance required.

18.3   In fulfilling its obligations under paragraphs 18.1 and 18.2, the Data importer shall comply with the instructions from the Data controller, as communicated to the data importer by the Data exporter, or directly by the the Data controller~~the Data exporter~~.

Clause 20.   Liability

[…]

20.3. Notwithstanding paragraph 20.2, the Data exporter shall be liable to the data subject, and the Data subject shall be entitled to receive compensation, for any material or non-material damages the data exporter or the data importer (or its sub-processor) causes the Data subject by breaching the third-party beneficiary rights under these Clauses. This is without prejudice to the liability of the data exporter and, ~~where the Data exporter is a processor acting on behalf of a controller,~~ to the liability of the controller under the Applicable law.

SECTION III – Domestic LAWS AND OBLIGATIONS IN CASE OF ACCESS BY PUBLIC AUTHORITIES

Clause 22.   Domestic laws and practices affecting compliance with the Clauses (to change in Module 1 as well)

[...]

22.5   The Data importer agrees to notify the Data exporter promptly if, after having agreed to these Clauses and for the duration of the contract, it has reason to believe that it is or has become subject to laws or practices not in line with the requirements pursuant to paragraph 22.1, including following a change in the laws of the country of destination or a measure (such as a disclosure request) indicating an application of such laws in practice that is not in line with the requirements in paragraph 22.1.

Clause 23.   Obligations of the Data importer in case of access by public authorities

23.1   In so far as domestic law of Data importer allows, the Data importer shall notify the Data exporter, and where possible the Data subjects promptly or use its best efforts to do so - if necessary with the help of the Data exporter - if it is compelled to preserve, grant access, make available or disclose Personal data transferred from the Data exporter to a Third party including to a public authority.

Commented [A17]: Important addition in our view

Commented [A18]: At the end this is an obligation for the data controller.

Alternatively, we may say:
" assist the controller, where appropriate in cooperation with the data exporter,"

Commented [A19]: Important addition in our view

Commented [A20]: Should we delete ? As this the scenario covered in this module

Commented [A21]: Not sure to understand what is the change required in Module 1.

Commented [A22]: The exporter should also inform the controller in our view.

Commented [A23]: here as well, the controller should be informed by the exporter