EUROPEAN DATA PROTECTION SUPERVISOR

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Mr Jonathan Faull
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Dear Mr Faull,

Thank you for your letter of 1 July 2009 concerning the Draft Commission Decision on standard contractual clauses for the transfer of personal data to processors established in third countries.

The official consultation of the EDPS at this stage follows an informal consultation with your service, and a consultation of the Article 29 Working Party in which the EDPS has also taken part. Further to this fruitful dialogue with DPAs in general and the EDPS in particular, only two points of concern remain in my view, which are developed in the attached note.

Yours sincerely,

(signed)

Peter Hustinx

cc. Mr Renaudière (Commission, Data Protection Officer)
Ms Niovi Ringou, Mr Jose Manuel de Frutos Gómez (DG JLS, Data Protection Unit)

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Note concerning the Draft Commission Decision on standard contractual clauses for the transfer of personal data to processors established in third countries

General appreciation of data protection safeguards included in the draft decision

The EDPS supports the initiative of the Commission to update the contractual clauses scheme in order to take into account the importance of global outsourcing, and more specifically the sub-processing of personal data. He considers that the envisaged update could contribute to a clearer and more efficient framework for data transfers, provided adequate data protection safeguards are ensured.

The EDPS notes in this respect that most of the observations made by the Article 29 Working Party (further WP29)[1] in order to improve the quality of data protection safeguards have been taken into account in the version which has been sent to him. These improvements relate in particular to the following points:

- the purpose limitation principle: the new draft now clearly includes an obligation for the sub-processing to consist only of operations agreed in the contract between the importer and exporter (recital 19 and Article 3. f);
- the possibility for DPAs to conduct audits at every point of the chain of controllers and sub-processors (recital 12 and clause 8 of the annex);
- the law applicable to sub-processors: it will be the law of the Member State where the exporter is established (recital 23, clause 11 of the annex);
- the particular case of processors established in the community and subcontracting processing operations to a processor outside the EU: while the Commission does not regulate this specific hypothesis in its draft decision, it has inserted in a recital the idea, suggested by the WP29, to apply by analogy the same principles and safeguards as those set out in the decision, with a view to facilitating the acknowledgement of the adequate level of protection provided in such case (recital 24).

Remaining issues: the scope of audits and the transparency of the chain of sub-processors

a. Audits

As stated above, the draft decision foresees the possibility for DPAs to conduct audits at every stage of the processing, and thus also with regard to the processing of personal data by a sub-processor established in a third country. The conditions of audit would be the same as for the auditing of the exporter established in the EU.

In the last version of the draft decision, the EDPS notes however that this principle applies "without prejudice to the legislation applicable to the data importer or subprocessor" (clause 8.2. of the Annex). Further indications given by the Commission tend to illustrate this exception by the fact that the legal framework in the country of the importer might oppose the auditing of the processing by a data protection authority from a foreign (European) country.

The EDPS strongly doubts whether this exception is necessary and appropriate. It should be noted first that a similar provision - without any exception - for an audit at the importer has been part of the annex since 2001. It is not clear why the current revision should lead to the

[1] Opinion 3/2009 on the draft Commission decision on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46/EC, adopted on 5 March 2009, WP 161.

introduction of such an exception without sufficient evidence as to its need. The EDPS is not aware of any third country's legislation opposing the auditing by a data protection authority from a foreign country. While a direct claim for jurisdiction might meet justified objections under international law, this is different for contractual arrangements such as those at stake here. It should also be recalled that the data protection law applicable to the whole chain of processing and sub-processing activities remains in principle the law of the country of the exporter. This means that there is a legitimate interest for that country's DPA to have adequate means to verify compliance with its law by a foreign processor or sub-processor.

However, if an exception would nevertheless be felt necessary, the EDPS considers that it should at least be clarified, since the proposed language is not sufficiently precise and may give rise to inappropriate situations in practice. The draft decision should in that case also go one step further with regard to the consequences of a possible conflict of legislation, and provide for minimum fall-back guarantees, in line with those provided in clause 5 b) of the annex: an obligation of transparency should be put on the importer, who should inform the exporter and the competent DPA about the existence of a legislation preventing audits as foreseen in the draft decision. As a result, the exporter could decide to suspend the transfer, and the adequacy of the transfer could be put into question by the competent DPA if no alternative solution is found, such as - in certain cases - a joint audit in cooperation with a supervisory authority of the third country, as would be possible in similar situations within the EU (see Article 28.6 of Directive 95/46/EC). Clauses 5 and 8 of the draft decision could be amended to include such provisions.

b. Transparency of the chain of sub-processors

One of the essential pre-conditions to allow subsequent processing by different subcontractors is that measures are put in place to have a clear view on the chain(s) of sub-processors and on their respective tasks and responsibilities. In that sense, the WP29 considered that, in parallel with the obligation on the importer to inform the exporter and send him a copy of any subcontracting agreement he concludes, the exporter should keep an updated list of individual processors and sub-processors making up the contractual chain. This list would be available to the competent DPA and would enable it to assess the sub-processing activities in an efficient way.

The draft decision does not include this proposal. The EDPS has not received convincing justification why such a safeguard should not be included in the text. He considers that, far from being an administrative burden, such a list of the chain of sub-processing activities would constitute a measure of good administration for the exporter; it is indeed under his final responsibility that sub-processing activities are conducted.