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The New EU Standard Contractual Clauses For International Data Transfers to Data Processors



BY CHRISTOPHER KUNER

On Feb. 5, 2010, the European Commission approved a new set of standard contractual clauses for international data transfers to data processors as offering an “adequate level of data protection” under

Christopher Kuner is a partner with Hunton & Williams LLP, Brussels (ckuner@hunton.com). As Chairman of the ICC Data Protection Task Force, Kuner was the primary author of the original proposal that was submitted to the Commission in 2006. The author is indebted to Bojana Bellamy, Bridget Treacy, and Boris Wojtan for their valuable comments on previous drafts of this article.

EU data protection law.¹ The clauses were proposed to the Commission by four international business organizations, namely the American Chamber of Commerce to the European Union (AmCham EU), the Federation of European Direct and Interactive Marketing (FEDMA), the International Chamber of Commerce (ICC), and the Japan Business Council in Europe (JBCE), with ICC taking the lead in negotiations with the Commission.

¹ Commission Decision (EC) 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 (EC) 95/46/EC of the European Parliament and of the Council [2010], OJ L39/5. The full text of the clauses is available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:039:0005:0018:EN:PDF>.

Approval of the clauses represents a major step forward in providing companies with more workable tools to perform international data transfers. Given the explosive growth in the global outsourcing of data processing, and the frequent use by companies of third parties to perform tasks such as remote data storage, data analysis, and database maintenance, the new clauses will be of fundamental importance for any company transferring personal data from the European Union. Despite the pending development of new legal instruments for the transfer of personal data for data processing purposes (such as binding corporate rules (BCRs) for data processors), standard contractual clauses will retain an important role in a company's armory of data transfer instruments. In particular, BCRs for data processors have not yet attained full legal recognition, and are likely to be of use mainly for data processing within large multinational companies. Moreover, the adoption of BCRs requires intense preparation by a company over a long period of time, whereas standard contractual clauses are the only "off the shelf" data transfer solution that can be quickly implemented and used also with unrelated third parties.

In some ways, the new clauses represent a substantial improvement versus the original set of clauses for transfers to data processors approved by the Commission in 2001.² At the same time, the Commission's failure to make more extensive changes to the original set of clauses represents a missed opportunity to radically rethink the purpose and function of standard contractual clauses as a method to provide legal protection for international data transfers.

I. Background

The clauses approved by the Commission are a standardized set of clauses which provide a legal basis for transfers of personal data from each EU Member State under Articles 26(2) and 26(4) of the EU Data Protection Directive 95/46/EC.³ The clauses are designed to be used only for transfers to "data processors," but not for ones to "data controllers,"⁴ for which two sets of clauses have already been approved by the Commission.⁵

Following approval by the Commission on Dec. 27, 2004 of an alternative set of standard contractual clauses for controller to controller transfers that had

been proposed by ICC and six other business groups,⁶ ICC decided to propose revisions to the Commission's existing controller to processor clauses as well. This initiative was based on feedback from ICC member companies that there were substantial problems with the original set of controller to processor clauses, in particular the following:

- The clauses contain no mention of the possibility that personal data might be transferred from one data processor to another one, even though such transfers have become common (for example, when one data processor engages another one to perform routine maintenance on its IT systems, or in cloud computing situations). The failure to set forth conditions under which transfers to subprocessors may be conducted has led to substantial legal uncertainty.
- When processing personal data transferred from multiple EU Member States, the clauses require the application of the data security requirements of each such Member State (notwithstanding a cryptic statement in Recital 12 concerning the desirability of applying only a single set of such requirements). This creates problems in practice, given that it is usually neither feasible nor desirable to apply separate security measures to different sets of data depending on their geographic origin.
- Several Member States apply various formal requirements to the clauses that make them difficult to use in practice.⁷ For example, in Austria, the DPA requires that all elements of the data that are to be transferred be listed in detail in the annexes to the various sets of standard contractual clauses, even though the clauses only require the listing of "categories of data." And in Slovakia, the DPA requires that separate applications be filed for each country to which the data are to be transferred, and also requests copies of the commercial register extracts of the data importers to prove that they are actually a member of the data exporter's corporate group. These are just a few examples of formal requirements imposed by Member States which seem to undermine the pan-European effect of the clauses and raise questions about their compatibility with EU law.⁸
- Uncertainties exist with regard to use of the clauses by multiple parties. For example, companies often seek to sign a single version of the clauses as a 'master agreement', thus eliminating the need to potentially conclude hundreds or even thousands of separate contracts. This approach is not explicitly foreseen in the clauses, thus raising questions about its legality.
- Clause 7(2) contains a commitment by the parties to submit disputes with individuals to interna-

² Commission Decision (EC) 2001/16 of 27 December 2001 on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive (EC) 95/46, [2002] OJ L6/52.

³ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 1995 OJ L281/31.

⁴ On the distinction between data processors and data controllers, see Article 29 Working Party, 'Opinion 1/2010 on the concepts of "controller" and "processor"' (WP 169, 16 February 2010).

⁵ Commission Decision (EC) 2001/497/EC of 15 June 2001 on standard contractual clauses for the transfer of personal data to third countries under Directive 95/46/EC, [2001] OJ L181/19; and Commission Decision (EC) 2004/915 of 27 December 2004 amending Decision (EC) 2001/497 as regards the introduction of an alternative set of standard contractual clauses for the transfer of personal data to third countries, [2004] OJ L385/74.

⁶ Commission Decision (EC) 2004/915 of 27 December 2004, fn 5. For an in-depth examination of the 2004 clauses, see Christopher Kuner, "The EU Alternative Standard Contractual Clauses for International Data Transfers" BNA International's World Data Protection Report, February 2005, p. 17.

⁷ These examples apply to use of both the controller to processor clauses and the controller to controller clauses.

⁸ See in this regard Christopher Kuner, "Improper Implementation of EU Data Protection Law Regarding Use of the Standard Contractual Clauses in Germany," http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1444813.

tional commercial arbitration, which is far too expensive and cumbersome for most data protection disputes.

Together with the other business groups, ICC then proposed a redrafted version of the clauses, which it submitted to the Commission in October 2006.⁹ Occasional discussions between the business associations and the Commission were held over the next three years, but for the most part the Commission worked on the clauses on its own. On March 5, 2009, the Article 29 Working Party issued its opinion on the clauses,¹⁰ and the Article 31 Committee approved the clauses at the end of September 2009. The Commission continued to make changes to the text throughout 2009; in particular, earlier drafts contained a number of amendments requested by the business associations which were subsequently deleted from the text. The Commission then gave final approval to the clauses on Feb. 5, 2010.

II. Analysis of the clauses (except for sub-processing under Clause 11)

The following is an analysis of the major changes brought about by the new controller to processor clauses versus the old ones. Many of the changes in the new clauses are linguistic in nature, and will not be commented on. Because of its importance, Clause 11 dealing with sub-processing is dealt with separately in section III below.

Recitals

Recital 13: The business associations had suggested that this recital be amended so that a data importer would not be expected to apply the security measures of each Member State from which data were imported, as long as the security measures used met the requirements of Article 17 of the EU Data Protection Directive. However, this suggestion was not accepted.

Recital 23: The possibility of transferring personal data from a data processor to a sub-processor under Clause 11 only applies to transfers performed by a data processor outside the EU to a non-EU sub-processor, and not to transfers from a data processor located in the EU. This point is discussed further in section III.

Recital 25: This recital repeals the Commission decision approving the original set of clauses for controller to processor transfers. This approach is different from that adopted by the Commission in its 2004 Decision approving the alternative set of controller to controller clauses, which allowed those clauses to remain in force (see discussion under Articles 6-7 below).

The business associations suggested further changes to the recitals that were not accepted, such as the following:

- Member States' procedural requirements for use and filing of the clauses should not go beyond checking to ensure that the clauses have been properly filled out.

⁹ The original proposal is available at http://www.iccwo.org/uploadedFiles/ICC/policy/e-business/pages/BRUSSELS-1257-v1-Controller_to_processor_clauses_submission_October_2006.pdf.

¹⁰ 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 (*data controller to data processor*) (WP 161), 5 March 2009.

- DPAs need not be provided with an annual updating of parties to the clauses or other information entered in the appendices unless they have a specific concern about such information.
- The clauses may be entered into between multiple parties, and the parties may sign a single version of the clauses as a "master agreement," eliminating the need to conclude hundreds or thousands of separate contracts.
- The clauses may be appended to another commercial agreement. In some cases, the parties to the clauses may be different from those to the underlying agreement.

These changes were included in earlier versions of the Commission's working draft, but inexplicably disappeared in the draft discussed with the business associations in the summer of 2009.

Commission Decision

Article 3(e): This provision contains for the first time in EU data protection law a definition of a "sub-processor" (also contained in Clause 1(d)), defined here as "any processor engaged by the data importer or by any other sub-processor of the data importer and who agrees to receive from the data importer or from any other sub-processor of the data importer personal data exclusively intended for the processing activities to be carried out on behalf of the data exporter after the transfer in accordance with the data exporter's instructions, the standard contractual clauses set out in the Annex, and the terms of the written contract for sub-processing."

Article 4(1): This provision clarifies that the rules allowing DPAs to prohibit or suspend data flows in certain cases also apply to transfers to sub-processors. Thus, for example, if a sub-processor is located in a country where new legislation is passed allowing law enforcement authorities to access personal data in a way that is considered inappropriate under EU data protection law, then DPAs may order the suspension of transfers to such sub-processor.

Articles 6-7: According to Article 7(2), "a contract concluded between a data exporter and a data importer pursuant to Decision 2002/16/EC before 15 May 2010 shall remain in force and effect for as long as the transfers and data-processing operations that are the subject matter of the contract remain unchanged and personal data covered by this Decision continue to be transferred between the parties. Where contracting parties decide to make changes in this regard or subcontract the processing operations that are the subject matter of the contract they shall be required to enter into a new contract which shall comply with the standard contractual clauses set out in the Annex." Thus, as of May 15, 2010, only the new set of clauses can be used for any new transfers to data processors outside the EU, any substantial changes to existing transfers (such as changes to the purpose of the transfer), or any transfers from data processors outside the EU to sub-processors. ICC successfully insisted on the language adopted here that existing clauses shall remain in force, in order to provide parties some measure of legal certainty. However, uncertainties do remain, such as how extensive "changes" to existing data flows need to be in order to necessitate the conclusion of a new set of clauses; hopefully this will be clarified by the European Commission (for example, in a set of FAQs to the clauses), rather

than being subject to the vagaries of national interpretation.

Annex—Standard Contractual Clauses

Clause 3(2): Here the business associations successfully argued that a data subject should not be able to enforce certain clauses against the data importer when the data exporter has ceased to exist and a successor entity has assumed the legal obligations of the data exporter by contract or by operation of law, in which case the data subject may enforce them against the new owner. In most cases it will also be easier for a data subject to enforce his rights against the exporter's successor than to proceed against a data importer located outside the EU.

Clause 3(3): This clause makes it clear that in certain cases particular obligations of both the data exporter and data importer may be enforceable against the sub-processor, with the same limitations as noted above under Clause 3(2). The final sentence of the clause was included at the insistence of the business associations, namely that "such third-party liability of the sub-processor shall be limited to its own processing operations under the clauses." That is, any liability of the sub-processor is limited to matters that fall within the scope of the services it provided, and there is no unlimited vicarious liability of the sub-processor for actions or omissions of the exporter or importer over which it had no control.

Clause 4(f): The business associations had argued that, where the identical wording was used in both the existing controller to processor clauses and the original controller to controller clauses, and such language had been changed in the 2004 controller to controller clauses, the changes should also be incorporated into the new controller to processor clauses, in order to maintain consistency between the various sets of clauses. However, this suggestion was not broadly implemented. An example occurs in this clause: whereas in the 2004 controller to controller clauses the phrase "not providing adequate protection" was replaced by "with different data protection standards," the Commission resisted making the same change in the present clause. Similarly, most of the language changes adopted in the 2004 clauses have not been included in the corresponding sections of the new set of controller to processor clauses (for example, in Clauses 5(b) and 5(f)).

Clause 4(h): Under this clause, there is an obligation on the data exporter to provide to data subjects upon request a copy of the clauses signed with the data importer, as well as a copy of any agreements for sub-processing services (i.e., clauses between the data importer and a sub-processor, which must also be provided by the importer to the data exporter upon request; see further discussion under Clause 5(j) below). Based on a suggestion of the business associations, the data exporter may provide only a summary of security measures and may redact any commercial information from copies provided to data subjects.

Clauses 5(g) and 5(j): The data importer must provide to the data subject upon request a copy of its agreement with the sub-processor (Clause 5(g)), and must also send a copy to the data exporter whenever a sub-processor is engaged, whether the data exporter requests it or not (Clause 5(j)). The business associations argued strenuously against an automatic obligation on

the data importer to send copies of subcontracts to the data exporter, since it is not clear what data exporters are to do with them and presents a considerable administrative burden. As is the case under Clause 4(h), the data importer need provide only a summary of security measures to data subjects, and may redact any commercial information from the copies provided, but such limitations do not apply to copies of sub-contracting agreements provided to the data exporter under Clause 5(j) (i.e., the data importer must provide full copies of such agreements).

Clause 6: This clause contains the main liability provisions. Basically, the data subject may always proceed against the data exporter for any injury or damage, even when it is caused by the data importer or a sub-processor (Clause 6(1)). If the data exporter ceases to exist or becomes insolvent, the data subject may instead proceed against the data importer, unless a successor entity has assumed the liabilities of the data exporter (Clause 6(2)). The data importer may also not rely on a breach by the sub-processor to avoid its own liability. In certain limited circumstances, the sub-processor may also be liable for breaches by the data exporter and data importer, but only if the exporter and importer have legally disappeared or become insolvent, and if there is no successor entity against which the data subject may proceed. The sub-processor's liability is limited to its own processing operations, so that it is not liable for acts carried out by the exporter or importer that do not relate to the sub-processing.

Clause 7: The business associations argued that the former clause 7(2), which required the data importer to submit disputes with data subjects to arbitration under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, was dangerously vague and lacked many elements of an useable arbitration clause. Moreover, international arbitration and enforcement of an arbitral award under the New York Convention are far too expensive and cumbersome to be of use in almost any data protection dispute, and putting a dispute before an arbitral tribunal under the New York Convention could also cause data protection authorities to be deprived of jurisdiction (see Article II(3) of the New York Convention, which requires a national court to refuse to hear a claim when such claim validly falls within the jurisdiction of an arbitral tribunal). Thus, former Article 7(2) was deleted from the clauses.

Clause 8(2): Having the data exporter and importer agree to allow an audit of a sub-processor by the DPA, as this clause requires, is problematic for a number of reasons. The exporter and importer have no legal authority to require a third party (i.e., the sub-processor) to submit to an audit by a governmental authority (such as a DPA), and even if the sub-processor does later counter-sign the contract it may still be subject to restrictions under public international law against a foreign regulatory authority performing an audit outside its jurisdiction. ICC strenuously argued for any audits to be subject to restrictions under applicable local law and public international law, but the only concession in the clauses to the possibility that the law of the data importer or the sub-processor may limit the ability of a DPA to conduct audits is Clause 8(3), which requires the data importer to inform the data exporter of any such restrictions, and then allows the exporter to sus-

pend transfers or terminate the contract under Clause 5(b).

Clause 10: Some companies have been uncertain about the extent to which they may add provisions to the clauses. The business associations successfully persuaded the Commission to allow the addition of provisions dealing with commercial issues, as long as they do not contradict the protections contained in the clauses. This should best be done by annexing the extra provisions to the clauses, rather than amending these, since the language of the clauses may not be varied or modified.

Clause 12: It is significant that obligations to return data or to destroy it after termination of the data processing services are now extended to sub-processors, as well as to data importers.

III. Processor to sub-processor data transfers (Clause 11)

Clause 11, which provides a legal basis for data transfers from data processors to sub-processors, is the main innovation of the new clauses, and deserves a separate discussion.

Data processors often engage other entities to process personal data on their behalf (for example to maintain a database or provide limited processing services). The concept of transfers to a sub-processor has received little attention in data protection literature and pronouncements by DPAs, and is nowhere mentioned in the two EU data protection directives 95/46/EC and 2002/58/EC. However, in the past the European Commission has suggested that “it should be permissible for the data importer/processor to outsource the processing to other processors, if the controller/data exporter has specifically instructed him to do so and assuming that the second processor is bound to observe the same protections as those to which the original processor is bound.”¹¹ In recent years some national data protection laws and DPAs have also begun to accept the concept of transfers to sub-processors, and to specify the conditions under which such transfers may be carried out. For example, the U.K. Information Commissioner has endorsed the possibility of conducting such transfers,¹² and the French Data Protection Act also seems to recognize onward transfers from one data processor to another one.¹³ However, not all Member States accept the concept of transfers to a sub-processor; for example, Article 12(2) of the Spanish Data Protection Act provides that a data processor may not communicate personal data it is processing even for the purpose of preserving the data, which seems to rule out the possibility of transferring it to a sub-processor. This lack of clarity

¹¹ European Commission, Commission Staff Working Document on the implementation of the Commission decisions on standard contractual clauses for the transfer of personal data to third countries (2001/497/EC and 2002/16/EC), SEC(2006) 95 (20 January 2006) 8. This language was suggested to the Commission by ICC.

¹² U.K. Information Commissioner, ‘The Eighth Data Protection Principle and international data transfers’ (30 May 2006) paras 5.9-5.10.

¹³ See French Data Protection Act Art 35, stating in the official English translation on the CNIL web site (<http://www.cnil.fr/>) that “a processor, or a person who acts under the authority of the data controller or that of the processor, may process personal data only under the data controller’s instructions” (emphasis added).

as to the conditions under which processor to sub-processor transfers may be carried out, or even if they are permissible at all, has created substantial legal uncertainty. Thus, by setting forth rules for conducting such transfers on a pan-European basis, Clause 11 represents a significant advance in European data protection law. The following are some of the most important points to keep in mind when performing transfers to sub-processors under Clause 11:

Conditions for sub-processing: Under Clause 11(1), transfers from a processor to a sub-processor may be carried out only if 1) the data exporter has given its prior written consent, and 2) the sub-processing is carried out according to the terms of a written agreement between the processor and the sub-processor that impose the same obligations on the sub-processor as are imposed on the processor under the clauses. The written agreement between processor and sub-processor must state that the sub-processor will process the data in compliance with the instructions of the data exporter (Clause 1(d)), and must contain a third-party beneficiary clause as set forth in Clause 3 (Clause 11(2)).

However, the rules allowing the transfer of personal data to a sub-processor only apply to data processors located outside the EU that transfer personal data to non-EU sub-processors, and not to transfers from a data processor located in the EU to a non-EU sub-processor (see Recital 23). This limitation seems to be based on the Commission’s interpretation of its mandate to approve standard contractual clauses as only covering transfers initiated by data controllers located in the EU. However, the exclusion of transfers made by EU-based data processors from the rules of Clause 11 places them at a substantial disadvantage in the marketplace.¹⁴ Indeed, this is in effect an incentive for data controllers to use data processors outside the EU rather than those inside the EU, which seems perverse given the fact that the EU Data Protection Directive restricts data transfers outside the EU.

The Article 29 Working Party opinion (p. 3) notes that, without the possibility of being able to transfer personal data to sub-processors under Clause 11, EU-based data processors should use “the current legal system,” but it is not clear what is meant by this, since there are currently no legal rules for transfers to sub-processors either at the EU level or in most Member States. Probably the only option at present for EU-based data processors is to review their existing practices for transfers to sub-processors and attempt to incorporate as many of the protections of Clause 11 into them as possible. Companies can also seek clarification from DPAs as to what their approach will be in this regard. Recital 23 does allow Member States to apply the rules of Clause 11 to transfers from an EU-based data processor to a sub-processor outside the EU, even if it does not mandate that they do so,¹⁵ meaning that, in

¹⁴ This is recognized in the Article 29 Working Party’s opinion (n 10, p. 3), which states “This situation could cause a competitive disadvantage for European companies that would be required to bear an administrative burden greater than that of their equivalents in third countries, in order to perform equivalent processing as service providers.”

¹⁵ Recital 23: ‘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 sub-processor established in a third

practice, the rules for transfers to sub-processors will likely differ between the Member States and DPAs, and a fragmentation of the legal framework is likely. This issue requires urgent attention of the Commission and the Working Party so that EU-based data processors do not continue to be disadvantaged.

Liability scheme: The primary liability (including for breaches by the data importer or by a sub-processor) rests with the data exporter (Clause 6(1)). Then, if a data subject is unable to bring a claim against the exporter because it has “factually disappeared” or become insolvent, it may proceed against the importer, unless a successor entity has assumed the obligations of the exporter, in which case it must proceed against that entity rather than against the importer (Clause 6(2)). Finally, if the data subject may proceed neither against the exporter nor the importer because both have factually disappeared or become insolvent, it may take action against the sub-processor as if it were the exporter or importer, unless a successor entity has assumed the obligations of the exporter or importer; in any event, the liability of the sub-processor is limited to its own data processing operations under the clauses (Clause 6(3)). In addition, the data importer always remains liable to the exporter for any breaches by the sub-processor (Clause 11(1)), and the data subject may enforce particular clauses against the exporter, importer, and sub-processor as third-party beneficiaries, with certain restrictions (see Clause 3).

Practical remarks: Perhaps the most significant result of Clause 11 is that it will force data exporters to take a greater role in supervising the sub-processors used by data importers, and it will also force exporters and importers to communicate about the importers’ sub-processing arrangements to a greater extent than both may be used to. For data exporters in the EU, this means that “know thy sub-processor” will become an important fact of life when transferring personal data to non-EU data processors.

The data processor will have to find a way to bind its sub-processor to a set of guarantees that fulfill the requirements of Clause 11. There is no requirement that the sub-processor enter into a contract with exactly the same wording as the model clauses, only that the contract provide “at least the same level of protection for the personal data and the rights of data subject as the data importer under the clauses” (Clause 4(i)). However, in most cases, the simplest approach will be to have the sub-processor co-sign the original clauses entered into by the data exporter and data importer; this possibility was provided for at the insistence of the business associations under footnote 3 to Clause 11(1).

Under Clause 11(3), the data protection aspects of the sub-processing are governed by the law of the data exporter. This limitation of the data exporter’s law to data protection aspects of the agreement was included at the suggestion of ICC, which pointed out that in a typical contract for sub-processing services, there might be hundreds of pages of commercial terms and only a few paragraphs concerning data protection, and making the entire contract subject to the law of the data exporter could conflict with the parties’ desire to sub-

ject the commercial provisions of the contract to a different applicable law.

In addition to complying with the terms of its contract with the data processor, the sub-processor must also comply with the terms of the data exporter’s original instructions to the data importer (Clause 1(d)), so that these will have to be communicated by the importer to the sub-processor. The data exporter must also develop procedures to store copies of sub-processing agreements received from data importers, and to keep them ready for inspection by DPAs (Clause 11(4)). The data importer must inform the data exporter and the DPA with jurisdiction over the data exporter about any legislation that would prevent the sub-processor from fulfilling its duties under the clauses (Clause 8(3)), in which case the data exporter may decide to suspend data transfers to the importer or terminate the agreement (Clause 5(b)). The processor and sub-processor are advised to agree between themselves on a scheme for giving copies of the sub-processing agreement (minus any commercial provisions) to data subjects if they so request under Clauses 4(h) and 5(g). On the other hand, it is the duty of the data importer, and not of the sub-processor, to send copies of sub-processing agreements to the data exporter (Clause 5(j)). It is also advisable for the exporter and importer to agree on procedures for the exporter to audit the importer (Clause 5(f)), and for exporter, importer, and sub-processor to notify each other if an audit is carried out by a DPA (Clause 8(2) and 12(2)).

IV. Conclusions

The new standard contractual clauses for transfers to data processors represent a substantial improvement over the existing clauses in some areas, in particular the following:

- For the first time in European data protection law, conditions for the legal transfer of personal data from a data processor to a sub-processor are explicitly recognized (Clause 11). This acknowledges an important fact of data processing in the networked economy, gives enhanced legal security, and increases confidence in global data processing. Certain provisions of the Commission’s original text dealing with sub-processing were also improved based on input from the business associations, such as the limitation of liability of sub-processors to issues dealing with their own data processing (Clause 3(3)), and the possibility of having the sub-processor co-sign a copy of the original clauses (footnote 3 to Clause 11(1)). While the procedures for legalizing transfers to sub-processors may seem onerous, in this age of increased breaches of data security it makes good business sense for data processors to inform data controllers of their sub-processing arrangements, and for data processors to insist that sub-processors apply the same legal protections to personal data that they themselves are obligated to apply.
- Certain clauses have been improved to take account of business realities. For example, certain obligations of the data importer are limited when the data exporter has ceased to exist and its liabilities have been assumed by a successor entity (e.g., Clauses 3(2) and 6(2)). In addition, the obligation to provide copies of sub-processing agreements to

country with the intention of providing adequate protection for the rights of data subjects whose personal data are being transferred for sub-processing operations.’

data subjects is limited to data protection provisions and commercial provisions may be excluded (Clause 4(h)). The possibility of adding extra clauses on commercial issues is also explicitly recognized (Clause 10).

- The arbitration clause (former Clause 7(2)), which was unsuited to data protection disputes, has been deleted.

The Commission should be applauded for making these changes and thus enhancing the acceptability of the clauses in light of the business realities. At the same time, the new clauses also represent a missed opportunity to radically re-think the use of standard contractual clauses. While the use of sub-processors is undoubtedly an extremely important issue, both the Commission and the DPAs seemed to focus most of their attention on it to the exclusion of other issues that have also caused substantial problems with use of the clauses in practice, such as the imposition of burdensome formal requirements by certain DPAs. Moreover, the new clauses contain several provisions that could actually hamper the development of data processing services in the EU, such as the failure to extend mandatory legal recognition to data transfers from EU-based data processors to sub-processors outside the EU, and the imposition of bureaucratic requirements such as the necessity to send copies of sub-processing agreements to data exporters.

The European Commission is presently re-evaluating the EU legal framework for data protection in light of the EU Data Protection Directive, and this would be an ideal opportunity also to make some fundamental changes to the legal structure of standard contractual clauses. This could include, for example:

- Merging the various standard clauses into a single document, to reduce the confusion over which set to use. The document could be a general framework, which could be supplemented with various standardized modules to be used in different situ-

ations (e.g., controller to controller transfers, controller to processor transfers, and situations involving the use of sub-processors).

- Reworking the new clauses to extend them to EU-based data processors that use sub-processors located outside the EU; indeed, the Article 29 Working Party opinion on the clauses urges the Commission to take such a step.¹⁶
- Enhancing the legal status of the clauses, by having the Commission monitor more closely divergent interpretation and implementation of them by Member States and DPAs, and by taking action when such divergences exceed their permissible extent under EU law, so that the clauses truly have a pan-European legal effect. For example, DPAs should be required at least to report to the Article 29 Working Party and the Commission any actions they take to interpret the clauses, and the Commission and the Working Party should publish a document containing information on any legal formalities or restrictions on use of the clauses in each Member State.

The new clauses represent a step forward in producing a more realistic and less burdensome legal framework for transferring personal data outside the EU, but much work remains to be done to realize their full potential.

¹⁶ See p. 3 of the Working Party opinion (n 10), stating: 'In this regard, the Working Party urges the Commission to develop promptly a new separate and specific legal instrument that allows international sub processing by processors established in the Union to sub processors in a third country. Such an instrument could for instance take the form of a new set of Standard Contractual Clauses, through which the controller and the processor established in the EU/EEA could provide for trans border sub processing, in accordance with the necessary and adequate guarantees for such transfers'.