

World Data Protection Report

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The E.U. Alternative Standard Contractual Clauses for International Data Transfers

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On December 27, 2004, the European Commission approved the alternative standard contractual clauses for data transfers proposed by seven international business associations as offering an “adequate level of data protection” under E.U. data protection law.¹ The clauses were proposed and negotiated with the European Commission and the Article 29 Working Party by seven international business organisations, namely the American Chamber of Commerce to the European Union in Brussels (AmCham EU); Confederation of British Industry (CBI); European Information, Communications and Consumer Electronics Technology Industry Association (EICTA); Federation of European Direct and Interactive Marketing (FEDMA); International Chamber of Commerce (ICC); International Communication Round Table (ICRT); and the Japan Business Council in Europe (JBCE).

Approval of the business associations’ clauses came after years of negotiation, and marks the first time the Commission has officially approved a mechanism for data transfers proposed by the private sector. This article explains the background to the clauses, gives a detailed analysis of their provisions and differences with the Commission’s original set of controller-to-controller standard contractual clauses, and finally draws some conclusions about the implications of the alternative clauses.

Background

Legal Background

Under Article 25(1) of the E.U. Data Protection Directive 95/46/EC² (the “General Data Protection Directive” or “the General Directive”),

“the transfer to a third country of personal data which are undergoing processing or are intended for processing after transfer may take place only if ... the third country in question ensures an adequate level of data protection”.

Under Article 26(2) of the General Directive, transfers to third countries not offering an adequate level of protection may be authorised,

“where the controller adduces adequate safeguards with respect to the protection of the privacy and fundamental rights and freedoms of individuals and as regards the exercise of the corresponding rights”.

Article 26(2) then goes on to say that “such safeguards may in particular result from appropriate contractual clauses”, while Article 26(4) notes that the Commission may decide,



“in accordance with the procedure referred to in Article 31(2), that certain standard contractual clauses offer sufficient safeguards as required by paragraph 2....”.

The clauses approved by the Commission are known as “model clauses” since they are a standardised set of clauses which provide a legal basis for data transfers from each Member State. The Commission had previously approved a set of model contract clauses for *controller-to-controller* transfers on June 15, 2001, and a set of model clauses for *controller-to-processor* transfers was also approved by the Commission on December 27, 2001.³

Negotiation History

The alternative model clauses have a long history. The beginnings of the effort reach back to November 2, 1992, when the International Chamber of Commerce (ICC), the European Commission and the Council of Europe jointly published a model contract for the international transfer of personal data.⁴ This contract was written at a very high level, and was designed to outline the major requirements that should be fulfilled to ensure an adequate level of data protection, rather than to satisfy the applicable legal requirements for data transfers.

After conclusion of the safe harbor in the summer of 2000, the Commission indicated that it would soon begin drafting model clauses for data transfers, as foreseen in Article 26(4) of the General Directive. ICC had been working on its own standard contractual clauses since the late 1990s, and a period of negotiations with the Commission ensued, during which time ICC joined together with the six other business organisations. Business argued throughout the negotiations that the Commission’s draft was unworkably inflexible, and contained a number of onerous provisions which would make it difficult to use the clauses in practice.

Following publication of the Commission’s model clauses for controller-to-controller transfers on June 15, 2001, the seven business associations decided to propose their own draft of alternative model clauses for the Commission’s approval, motivated in part by a challenge that the Commission had given. Work proceeded over the next four years, during which time frequent discussions were held with the Commission, the Article 29 Working Party, and individual Member State DPAs; the Working Party also adopted an opinion on an earlier draft of the clauses.⁵ Final points of disagreement were ironed out in the autumn of 2004, and the clauses received the unanimous approval of the Article 31 Committee later in the year, with the College of European Commissioners approving the text formally on December 27, 2004.

Analysis of the Clauses

The alternative clauses are in no way meant to be a “light” version of the Commission’s clauses; rather, the drafting approach was to adopt a more flexible, pragmatic approach which would result in the same level of protection but using different means. The Commission’s controller-to-controller clauses from 2001 remain in effect, so that companies now have two sets of clauses to choose from. The clauses are legally valid for transfers as from April 1, 2005.

The following is an analysis of the major provisions of the industry alternative standard clauses.

Introduction and Definitions

The title of the clauses makes it clear that they are to be used only for controller-to-controller transfers. The definitions are more extensive than in the Commission’s contract, on the theory that this will be easier for the parties to apply the contract. Most of the definitions are taken directly from the Directive. It is important to note that the definition of the “clauses” excludes any separate commercial business terms agreed upon by the parties; this is intended to prevent application of the model clauses to commercial undertakings between the parties.

Obligations of the Data Exporter

Clause I.(a): The obligation that personal data must be processed legally in accordance with applicable law before transfer is one of the basic principles of data protection law.

Clause I.(b): The phrase “reasonable efforts” was the matter of much discussion with the Commission. Earlier versions of the alternative clauses had used the words “commercially reasonable”, but the Commission objected to this on the grounds that the data exporter’s duty could not be conditioned on economic factors. After much discussion, the business associations agreed to delete the word “commercially”.

Clause I.(c): This clause is intended to result in enhanced protection of the data transferred by ensuring that the data importer has the possibility to receive relevant information about the data protection laws of the country of the exporter; this could be important both in cases in which the data importer has elected to process the data under the law of the country of the data exporter (Clause II.(h)(i)), and in general to ensure that the exporter has collected, processed, and transferred the data in accordance with its own national law (Clause I.(a)).

Clause I.(d): One of the industry criticisms of the Commission’s clauses was that they obligate the data exporter in all cases to respond to inquiries from the data subject and from the relevant data protection authority concerning processing of personal data by the data importer (Clause 4(d) of the Commission’s clauses). This could be quite burdensome on the data exporter, since once the data has been transferred, the importer will be in a better position to report on its processing of it than the exporter will. Furthermore, there will be many cases (such as in the case of intra-corporate transfers) where the parties have intended responsibility for inquiries to pass to the importer. This clause meets those concerns by providing the possibility for the importer to respond to such inquiries if the parties have so agreed. However, as protection for data subjects, the data exporter is still obligated to respond if the importer is unwilling or unable to do so.

Clause I.(e): From the beginning, the industry associations were concerned that, by providing the clauses, confidential business information could be disclosed. On the other hand, the Commission made the point that it would be impossible for data subjects to assert their rights as third-party beneficiaries of the clauses if they were not able to obtain a copy of them. Thus, in the end the formulation of Clause I.(e) was agreed upon as a compromise.

Obligations of the Data Importer

Clause II.(a): The clause reflects the obligations of Article 17 of the General Data Protection Directive.

Clause II.(b): The clauses originally proposed by the business associations consisted of the present first sentence only. The second sentence was added later, reflecting the fact that under data protection law a third party data processor must process personal data only upon instructions from a data controller. The final sentence was added to protect data importers, who were particularly worried about being forced to breach this clause in cases when law enforcement or regulatory authorities gained access to the personal data.

Clause II.(c): Under the original Commission Clause 5(a), the data importer warrants that it has “no reason to believe that the legislation applicable to him prevents him from fulfilling his obligations under the contract ...”. Companies argued that this imposes a heavy burden on data importers, since it would be nearly impossible to monitor all national laws in their country to ensure that they are not prevented from fulfilling their obligations under the contract. The alternative model clauses thus substitute a more flexible and reasonable standard, under which the importer warns that it has no reason to believe in the existence of any local laws that would have a “substantial adverse effect” on the protections under the contract. The time for this duty is limited to the point at which the clauses are signed, so that the data importer does not have a continuing obligation to monitor his national law.

Clause II.(d): This clause was one of the most controversial of the entire negotiations. Originally, the business associations argued that data importers should be able to process the personal data for any purpose not incompatible with the purposes for which the data was originally collected, reflecting Article 6(1)(b) of the General Data Protection Directive. However, the Commission objected to this formulation, as did the Article 29 Working Party, arguing that it would be impossible for the data importer to know which were the purposes for which the data had originally been processed or collected. Moreover, it became clear that there is a split among the Member States in interpreting the purpose limitation principle, and in particular in deciding on which purposes are “not incompatible” with those for which the data was originally processed. After discussion, the business associations thus agreed to have the purposes of the processing listed in Annex B, with the data importer’s authority to process limited to these purposes. This was coupled with informal assurances from the Commission that the purposes of processing could be broadly described in the Annex.

Clauses II.(e): Response to inquiries and co-operation with data subjects and the data protection authorities was also a key point of contention in the negotiations. The Commission insisted that the data importer name a specific person within its organisation to whom inquiries could be directed, while the business associations argued that naming a specific person or giving a specific telephone number would be too limited, since personnel can change. In the end, the formulation of “contact point” was agreed upon. There was also disagreement on the time period within which inquiries would have to be responded to; in the end, the Commission accepted the associations’ formulation of “within a reasonable time”. The final sentence of Clause II.(e) also makes it clear

that the primary responsibility for providing a copy of the clauses to data subjects rests with the data exporter, but that the data importer has a subsidiary duty to provide a copy if the data exporter’s organisation ceases to exist.

Clause II.(f): This clause is intended to be interpreted flexibly, so that the data exporter is not required to obtain any specific assurances (such as a copy of a bank account statement, etc.) from the data importer; rather, the data importer must simply provide at the exporter’s request sufficient information of financial resources which are relevant to the importer’s ability to fulfil its responsibilities under the clauses.

Clause II.(g): The Commission’s Clause 5(d) requires the data importer, at the exporter’s request, to submit its data processing facilities to audit by the exporter or an independent third party selected by the exporter and agreed by the data protection authority. Business groups felt from the beginning that it was unreasonable to require the data importer to submit itself at any time to an audit at the exporter’s request, and that this did not fit with existing business practices. The formulation of the present Clause II.(g) contains the following improvements as compared with the Commission’s clause:

- the request by the data exporter must be “reasonable”;
- the data importer has an opportunity to make reasonable objections to any third party auditing agent selected by the data exporter;
- reasonable notice must be given for any audit and then must only be carried out during normal business hours; and
- any auditing is subject to consent or approval by a regulatory authority in the data importer’s country, which is important since data importers were concerned about being forced to undergo data protection audits that would put them in breach of national regulatory requirements.

Clause II.(h): The applicable law for data processing by the importer proved to be perhaps the most controversial issue of all. Clause II.(h) simplifies the language of the Commission’s Clause 5(d) to make it more understandable, but does not deviate from the three possible options according to which the importer may process the data, namely:

- the data protection laws of the exporter’s country;
- the relevant provisions of a Commission adequacy decision; or
- the data processing principles set forth in the Annex.

The business associations had originally proposed a formulation that would make it possible for the data importer to process personal data based on the relevant provisions of a Commission adequacy decision if the data importer was “affiliated with a company” in the third country to which the decision applied; this would have allowed, for example, affiliates of U.S. companies covered by the safe harbor decision to apply the safe harbor principles to their data processing worldwide.⁶ This provision was objected to by the Commission, and after a great deal of discussion the associations reluctantly agreed to drop it. The provisions of Annex A.5 concerning rights of access, rectification, deletion and objection must be applied when option (2) (the relevant provisions of a Commission adequacy decision) is chosen and

take precedence over any comparable provisions of the Commission Decision selected.

Clause II.(i): The industry clause clarifies the wording of the Commission's clauses, which, for example, was found confusing with regard to onward transfers of sensitive data, and softens the informational requirements that must be given to data subjects regarding onward transfers (compare alternative model Clause II.(i)(iii) with Appendix 2(6)(a) and Appendix 3(3)(a) of the Commission's clauses). Thus, for example, the alternative model clauses require that the data subject be informed that "the countries to which data is exported may have different data protection standards", rather than using the Commission's language that "the data may be processed by a controller established in a country where there is not an adequate level of protection of the privacy of individuals".

Liability and Third Party Rights

Clause III.(a): The business associations objected from the beginning to the Commission's liability clause (Clause 6), which contains a joint and several liability provision that is highly unusual in a commercial contract. As described above, the alternative clauses avoid joint and several liability by imposing "due diligence" requirements on both importer and exporter (e.g., Clauses I.(b) and II.(f)), and making each party liable only for the damages it caused. Thus, this clause states that:

- each party is liable to the other party only for the damages it causes (i.e., no joint and several liability) and only for actual damages;
- punitive damages are excluded;
- both parties are liable to data subjects for their damages, but only for damages that they themselves cause; and
- liability of the data exporter under existing data protection law is not affected by these rules.

Clause III.(b): The final compromise on this clause reached in June 2004 provides that both exporter and importer accept jurisdiction for breach of the Clauses in the exporter's country of establishment; this is consistent with the obligation of the parties to comply with a decision of a court of the exporter's country of establishment or of a data protection authority (Clause V(c)). This requirement does not require the parties to waive their procedural rights, such as rights of appeal. In addition, the final compromise clarifies the procedure to be followed in cases involving allegations of breach by the importer, namely that the data subject must first request the exporter to take appropriate action to enforce his rights against the data importer, and the data subject may then enforce his rights against the importer directly if the exporter does not take such action within a reasonable period.

DeltaViewDeletion "Appropriate action" does not mean that the data exporter has to immediately sue the data importer; such action can take the form of warning letters, audits etc. as appropriate to the circumstances.

Law Applicable to the Clauses

Clause IV. corresponds to Clause 10 of the Commission's contract on governing law, which provides simply that "the clauses shall be governed by the law of the Member State in which the data exporter is established". The business

associations felt that this clause introduced dangerous uncertainty, since it could be seen to conflict with the parties' choice of the data protection rules applicable to the data importer under Clause II.h. Moreover, in many cases data may be transferred under the clauses from many Member States, and according to the Commission's formulation a data importer could therefore be required to process personal data under multiple national laws simultaneously. The alternative clauses provide enhanced legal certainty by explicitly separating the issues of the law applicable to data processing by the importer (dealt with under Clause II.h) and the law applicable to other matters (such as general contract law and private international law issues). Thus, data importers need process the personal data only under a single legal standard.

Resolution of Disputes with Data Subjects or the Authority

Clause V.(a): The business associations felt that the dispute resolution provision (Clause 7) of the Commission's clauses was unworkable, and therefore proposed a new formulation based on the following principles:

- co-operation and assistance between the exporter and importer in case of a dispute;
- co-operation with data subjects and the data protection authority; and
- abiding by a final judgment of a competent court or data protection authority.

Clause V.(a) mandates that the exporter and importer keep each other informed and generally co-operate in an amicable fashion to resolve any disputes with data subjects and data protection authorities. Such co-operation can be crucial, since resolution of a dispute may depend on clarifying facts or obtaining information from one or both of the parties, which the other party can do more easily than can a data subject or DPA.

Clause V.(b): The Commission requested the business associations to consider setting up an online arbitration or alternative dispute resolution (ADR) system to handle disputes arising under the clauses. The business associations responded that it was not feasible to set up an entire ADR mechanism simply for the alternative model clauses, and that experience (including that of Commission institutions which have tried to do this) showed that the establishment of an arbitral institution is a highly complex and lengthy process. However, in order to demonstrate their goodwill, the business associations indicated in this clause the willingness of the parties to respond to any complaint brought under a non-binding mediation procedure.

Clause V.(c): The business associations objected to the provision of the Commission's clauses (Clause 5(c)) stating that the data importer agrees to "abide by the advice of the supervisory authority with regard to the processing of the data transferred", pointing out that "advice" is a colloquial term, not a legal concept, and that this clause would seem to obligate data importers to comply with every informal statement made by the data protection authority. Alternative Clause V.(c) obligates both parties, not just the importer, to abide by a decision of a court of the data exporter's country or of a data protection

authority, providing that no further appeal is possible against such a decision. The language “which is final and against which no further appeal is possible” means that, for example, a party is not contractually bound to comply immediately with a provisional ruling by an authority that might be overruled on appeal (subject of course to the rules of national civil procedure law).

Termination

Clause VI.(a): The Commission’s clauses contain no provisions on termination, besides Clause 9 providing that data protection obligations continue in force after termination of the agreement. By contrast, the alternative model clauses contain a number of provisions regarding termination which are designed to be closer to what parties are used to encounter in commercial transactions. Clause VI.(a) provides an additional protection to data subjects by recognising that a breach of the agreement may best be dealt with by actions which fall short of full termination. Thus, the data exporter is allowed to temporarily suspend transfer of the data to the importer until the breach is repaired or the contract is terminated, which leaves open the possibility of fixing the breach and thus avoiding full termination of the clauses.

Clause VI.(b): The alternative model clauses provide additional legal certainty to the parties by listing a set of situations in which the data exporter is entitled to terminate the clauses; in addition, the data importer may also terminate for some of the same reasons (namely those described in the first, second, and fourth bullet points below). The conditions listed in this clause which can be a basis for termination are as follows:

- If the data exporter has suspended transfer to the data importer because of a breach of the clauses for a substantial period of time (here one month), then the exporter should be allowed to terminate the clauses.
- The data importer should not be required to continue performance of the clauses if doing so would subject it to legal liability in its own country because of a conflict with national law. This provision also provides additional protection to data subjects: while under Clause II.(c) the data importer warrants that it has no reason to believe that any local laws exist which would have a substantial adverse effect on the protections provided by the clauses at the time that it enters into them, this provision allows the importer to terminate the clauses if such an event occurs also after initial conclusion of the clauses.
- The exporter should be able to terminate the clauses upon substantial or persistent breach of them by the importer.
- Either party is also allowed to terminate the clauses when a court of the data exporter’s country or a data protection authority rules that either party has been in breach of the clauses. Note that such a decision must, however, be (similar to Clause V.(c)) “a final decision against which no further appeal is possible” (i.e., termination is not possible after merely a preliminary finding or other appealable decision).
- A data importer will not be able to assure adequate protection of personal data if it goes out of business, becomes bankrupt, or if some other similar event happens. This clause contains a definition of such events similar to what is normally found in a commercial

contract, and thus gives the data exporter power to terminate the clauses if the data importer is no longer able to fulfil its obligations, thus providing additional protections to data subjects.

Clause VI.(c): The business associations argued from the beginning that the protections of the clauses need not continue if the country or sector in which the data is imported is later found by the Commission to offer an adequate degree of data protection as provided in Article 25(6) of the General Data Protection Directive; the same is true if such a country itself enacts or becomes subject to the Directive. In such circumstances, it would be illogical, contradictory and confusing for the protections of the model clauses to continue in effect when the country or sector already enjoys an adequate degree of data protection. Furthermore, the FAQs to the Commission’s contract make it clear that the protections of the clauses are not necessary in cases where the country of import enjoys an adequate degree of data protection. Thus, the alternative clauses allow either party to terminate them when an adequacy decision or the General Directive becomes applicable to the country of the data importer.

Clause VI.(d): This clause reproduces Clause 9 of the Commission’s contract, with the addition that the protections of the clauses should be allowed to terminate in cases where a Commission adequacy decision becomes applicable in the data importer’s country or sector, or where the data exporter’s country enacts the Directive, as provided for in Clause VI.(c) above.

Variation of the Clauses

The business associations believed that the Commission’s insistence on excluding any possible variations of the clauses was inflexible and unrealistic, since changing circumstances might mandate adaptation of the clauses, and the parties might want to make additions to them to cover a particular transfer or transaction. At the same time, the associations also accepted the Commission’s argument that, once they had been agreed to, the clauses should not be diluted by making changes to the level of data protection. This formulation thus accepts the premise that no modification of the clauses is possible, but it does explicitly allow updating of the information in Annex B to permit the changing circumstances of the data processing to be taken into account. The clause also makes it clear that the parties may add additional clauses to the contract which are commercially relevant but do not adversely affect the level of data protection.

Description of the Transfer

The Commission’s contract fails to include much explanation as to the status of its Appendix 1 containing information about the transfer. The alternative model clauses remedy this in Annex B (the counterpart to the Commission’s Appendix 1) by addressing several important issues which were not dealt with in the Commission’s clauses. First of all, the business associations had always been concerned about the status of confidential information which might be disclosed in the clauses. While data protection authorities are under a statutory duty of confidentiality, this clause also includes an explicit confidentiality obligation of the parties to the clauses not to

disclose any information in Annex B to third parties, except as required by law or when the clauses are given to data subjects upon request under Clause I.(e). The clause also explicitly allows the parties to execute additional annexes to cover additional transfers, or to use Annex B to cover multiple transfers, upon the parties' option. This helps make the clauses easier to use, and should allow parties to conclude a single set of the clauses with multiple annexes, or a single "master agreement" signed by all data exporters and importers, rather than having to sign multiple copies of the clauses as is now often the case.

Annex A: Data Processing Principles

The data protection principles of Annex A provide a basis for data processing by the data importer under Clause 2(h)iii, and thus are the equivalent to the Appendix 2 of the Commission's clauses.

Para. 1. Purpose limitation: As explained under Clause II.(d), the personal data may be processed and subsequently used only as set forth in the purposes described in Annex B, or as subsequently consented to by the data subject.

Para. 2. Data quality and proportionality: This clause is nearly identical to paragraph 2 of the Commission's Appendix 2.

Para. 3. Transparency: The alternative model clauses set a standard of "fair processing", which is defined in reference to two specific examples, namely the purposes of processing and information about the transfer. Thus, it is up to the parties to the contract to determine in each instance what information the data subjects should receive to ensure fair processing under the applicable law. Such information need not be given if the data subject has already received it from the data exporter.

Para. 4. Security and confidentiality: The industry alternative formulation includes language taken specifically from Article 17 of the General Directive.

Para. 5. Rights of access, rectification, deletion, and objection: The business associations had been concerned about the possibility of data subjects making abusive and repetitive requests for access to their personal data. The compromise text agreed upon in June 2004 explicitly allows the importer to deny access requests from data subjects which are obviously abusive based on unreasonable intervals or their number or repetitive or systematic nature, or for which access need not be granted under the law of the country of the exporter. Additionally, if the appropriate data protection authority agrees, the importer may deny access when granting it would be likely to seriously harm the interests of the importer or other organisations dealing with the importer and such interests are not overridden by the interests for fundamental rights and freedoms of the Data Subject.

Para. 6. Sensitive data: The alternative model clause appropriately makes reference to the data importer's obligations to protect sensitive data under Clause II, and refrains from including a long list of such protective measures, since they are likely to be determined by the circumstances.

Para. 7. Data used for marketing purposes: This clause repeats verbatim the formulation in the Commission's clauses.

Para. 8. Automated decision: This clause includes language from Article 15 of the General Directive to define automated decisions, and then provides two possible bases for automated decisions being made by the data importer concerning a data subject, namely:

- if the data subject has been given an opportunity to discuss the result and relevance of such decision, or
- if the decision is legal under the law of the data exporter.

This actually goes further than principle 9 of the Commission's Appendix 2, which merely provides that the data subject should "have the right to know the reasoning" for any automated decision.

Annex B: Description of the Transfer

This annex provides an opportunity for the parties to provide information about the data transfer. Most of the entries match those in the Commission's Appendix 1, but the language has been changed somewhat to make it more understandable. There are also lines for additional information not included in the Commission's clauses (such as data protection registration information of the data exporter) which provide additional protection for data subjects.

Optional Commercial Clauses

The business associations argued that clauses which are wholly commercial in nature should be left up to the parties under the principle of contractual autonomy. At the same time, it is important to allow the parties to include such additional clauses if they so agree and as long as this does not adversely affect the protection of data subjects. The business associations therefore included four optional commercial clauses dealing with indemnification, dispute resolution, allocation of costs, and termination, which the parties may include in a contract, but are not obligated to. These are merely illustrative formulations reflecting the wording in similar commercial agreements, and the parties are wholly free to change the wording of these clauses, substitute other similar clauses of their own, or not include any at all.

Conclusions

The Commission's original clauses made the mistake of viewing international data transfers purely from a data protection point of view, and not taking into account that the vast majority of such transfers are conducted in the context of commercial transactions. Thus, any standard contractual clauses that do not take the realities of international business into account will either not be used, or will be signed and then filed in a drawer and forgotten.

The alternative model clauses provide a better option for business by adopting a level of data protection which is fully "adequate" under E.U. law, but which is achieved by means that are more flexible and suited to business realities than are the Commission's original controller-to-controller clauses. The alternative clauses also

include some protections for data subjects that go beyond those contained in the original clauses.

The Commission's adequacy decision is an important signal that business and government can work together on data transfer issues, and gives international business an additional tool to transfer personal data outside of Europe. The approval will also hopefully help facilitate recognition by the E.U. of additional global data transfer solutions, such as binding corporate rules. Indeed, many of the formulations agreed upon in the alternative clauses could prove useful in making progress on similar issues that arise in the context of binding corporate rules (e.g., audit procedures).

The following are some of the main differences between the Commission's original clauses and the new alternative standard clauses:

- **Liability:** The alternative clauses do not contain a joint and several liability clause, but instead place due diligence requirements on both importer and exporter (e.g., Clauses I.b. and II.f), and make each party liable only for the damages it caused (Clause III.a).
- **Access rights:** The alternative clauses allow access to be denied for requests "which are obviously abusive based on unreasonable intervals or their number or repetitive or systematic nature, or for which access need not be granted under the law of the country of the Data Exporter" (Annex A.5).
- **Third Party Beneficiary Rights:** The alternative clauses (Clause III.b) do not specifically require the parties to waive objections to consumer organisations bringing suit on behalf of data subjects as do the Commission's original clauses (Clause 3). Also, the alternative clauses allow direct suits by data subjects against the importer only if the exporter has not taken action to enforce the clauses within a reasonable period (normally one month).
- **Making clauses available to data subjects:** The alternative clauses limit to the exporter the obligation to provide a copy of the clauses (Clause I.e), and then allow the exporter to remove confidential information from the clauses.
- **Handling of complaints:** The alternative clauses allow, in effect, for the exporter and the importer to "outsource" to the importer the task of responding to inquiries from national data protection authorities (DPAs) (Clauses I.d and II.e).
- **Monitoring compliance with local law:** Alternative Clause II.c limits the importer's obligation to warrant that local law does not prevent it from fulfilling its obligations under the contract to knowledge the importer has at the time it enters into the clauses, and to legal obligations "which would have a substantial adverse effect" on its compliance with the clauses. The alternative clauses also oblige the importer to notify only the exporter if it becomes aware of a conflicting legal obligation.
- **Audits:** The alternative provision on auditing (Clause II.g) gives the data importer more rights than the Commission's does. For instance, in the alternative clauses the exporter's request for an audit is limited by several reasonableness requirements, and the auditor need not be agreed to by the DPA of the exporter's country as in the Commission's clause.
- **Co-operation with DPAs:** The Commission's clauses require the importer to abide by "the advice" of the DPA, which term is dangerously vague. The alternative clauses require compliance with "a decision" of a competent court or a DPA "which is final and against which no further appeal is possible" (Clause V.c).
- **Termination:** The alternative clauses contain detailed rules for termination and concerning the rights and obligations of the parties in the event of termination (Clause VI); the Commission's clauses contain only a single sentence dealing with termination.
- **Variation of the clauses:** The alternative clauses allow the updating of factual information in Annex B, and for additional commercial provisions to be added. In addition, the alternative clauses allow for more flexible administration of the clauses, by explicitly allowing for the execution of additional annexes to cover additional transfers or for a single annex to cover multiple transfers.
- **Notice of onward transfers:** The alternative Clause II.i.iii allows the importer to tell the data subject that the countries to which data will be further transferred "may have different data protection standards", rather than saying that "there is not an adequate level of protection of the privacy of individuals" in such countries as the Commission's clauses require.

1 The full text of the clauses and the Commission's adequacy decision are available at www.europa.eu.int/comm/internal_market/privacy/modelcontracts_en.htm. FAQs explaining some of the differences between the new clauses and the existing Commission clauses are available on the ICC website at www.iccwbo.org/home/e_business/ICC_model_clauses_FAQs.pdf.

2 Directive 95/46/EC of the European Parliament and of the Council of October 24, 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.

3 For further information about E.U. data protection law, including the difference between controller-to-controller and controller-to-processor transfers, see Christopher Kuner, *European Data Privacy Law and Online Business*, Oxford University Press (2003).

4 Council of Europe/European Commission/ICC, Model Contract to Ensure Equivalent Data Protection in the Context of Transborder Data Flows with Explanatory Memorandum, www.coe.int/T/E/Legal_affairs/Legal_co-operation/Data_protection/Documents/Publications/1ModelContract.asp.

5 Opinion 8/2003 on the draft standard contractual clauses submitted by a group of business associations (WP 84), December 17, 2003, www.europa.eu.int/comm/internal_market/privacy/docs/wpdocs/2003/wp84_en.pdf.

6 The Commission seemed to impliedly endorse this position in statements made following conclusion of the safe harbor (see letter of former DG Internal Market Director General John Mogg of January 28, 2000, www.export.gov/safeharbor/EUletter27JulyHeader.htm), and apparently supported it as well in oral assurances given during the safe harbor negotiations.