



Data Protection Act 1998

Legal Guidance

International Transfers / Transborder Data Flows Guidance on the Use of Model Contract Clauses

The Information Commissioner has to date made one “class” authorisation under paragraph 9 of Schedule 4 to the Data Protection Act 1998 (the “Act”). This authorises transfers of personal data, by data controllers established in the EU to data controllers in third countries, made pursuant to the model contract clauses (“model terms”) contained in the Commission Decision on Standard Contractual Clauses for the transfer of personal data to third countries under Directive 95/46/EC¹ (the “Decision”).

The text of the Decision, including the model terms is available from the Commission’s website at www.europa.eu.int/comm/internal-market/en/dataprot/news/clauses2faq.

The Information Commissioner has taken the view that the following options are available to data controllers who wish to rely on paragraph 9 of Schedule 4 to the Act:

1. Use of the model terms word-for-word as a stand-alone contract, with completion of the “blanks”.
2. Use of the model terms word-for-word, with completion of the “blanks”, but including further terms, provided that the further terms do not contradict in any way the model terms.
3. Incorporation of the model terms into a contract containing other business terms, either word-for-word or with minimal changes required solely to enable the model terms to fit the context of the contract, in both cases with completion of the “blanks”.
4. Incorporation of the model terms into a contract containing other business terms, by reference to the Decision, by including the following wording within the contract:

“The Standard Contractual Clauses for the transfer of personal data to third countries under Directive 95/46/EC contained in the Annex to the Commission Decision of 15 June 2001 are incorporated into the contract with the following changes:

Data Exporter shall mean [name of data controller organisation]

Data Importer shall mean [name of data controller organisation to which data are transferred]

In Clause 5(b) the box in the first subparagraph should be treated as [being/not being] ticked and the box in the second subparagraph should be treated as [being/not being] ticked.

[Clause 8 shall not be incorporated]

With reference to Appendix 1:

The Data Exporter is [specify activities relevant to the transfer]

The Data Importer is [specify activities relevant to transfer]

The personal data transferred concern the following categories of Data Subjects: [specify]

The transfer is necessary for the following purposes: [specify]

The personal data transferred fall within the following categories of data: [specify]

The personal data transferred fall within the following categories of sensitive personal data: [specify]

The personal data transferred may be disclosed only to the following recipients or categories of recipients: [specify].

The personal data transferred may be stored for no more than [specify] (months/years)."

Use of the model terms, whether as a stand-alone contract or incorporated into another contract, where the wording is changed but without altering the intended meaning or effect of any clause, does not amount to use that is authorised by the Information Commissioner under paragraph 9 of Schedule 4. However, this does not prevent the data controller from taking the view that the transfer is made on terms which provide adequate safeguards to the data subjects, and indeed the use of terms with the same meaning and effect as those in the model terms would be a significant factor were the Commissioner required to assess the adequacy of any safeguards.

The Commissioner's authorisation does not extend to the transfer of personal data by data controllers established in the EU to data processors established outside the EU. The European Commission are currently considering draft model contract clauses for use in respect of such transfers.

The availability of the model terms does not affect the Good Practice Approach as set out in the Commissioner's guidance on International Transfersⁱⁱ. In addition, data controllers may still, by following the steps as recommended by the guidance, come to a justified conclusion that there is adequate protection in place, without the use of such model terms.

Information Commissioner

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ⁱ C(2001) 1539 (15 June 2001)

ⁱⁱ available from the Commissioner's website at www.dataprotection.gov.uk