

## Article 29 Working Party issues draft model clauses for processor-to-processor data transfers

*On 21st March 2014, the Article 29 Working Party (“WP 29”) issued a working document (WP 214) proposing new contractual clauses for cross-border transfers between an EU-based processor and a non-EU-based sub-processor (“draft model clauses”). This document addresses the situation where personal data are initially transferred by a controller to a processor within the European Union (“EU”) and are subsequently transferred by the processor to a sub-processor located outside the EU.*

Back in 2010, the EU Commission adopted a revised version of its model clauses for transfers between a controller in the EU and a processor outside the EU, partly to integrate new provisions on sub-processing. However, it deliberately chose not to apply these new model clauses to situations whereby a processor established in the EU and performing the processing of personal data on behalf of a controller established in the EU subcontracts his processing operations to a sub-processor established in a third country (see recital 23 of the EU Commission’s Decision 2010/87/EU).

### A lack of compliance options

Absent Binding Corporate Rules, many EU data processors were left with few options for transferring the data outside the EU. This issue is particularly relevant in the context of a growing digital economy where more and more companies are transferring their data to cloud computing service providers who are often based outside the EU. Negotiating ad hoc model clauses on a case-by-case basis with the DPAs seemed to be the only solution available. This is precisely what the Spanish DPA undertook in 2012 when it adopted a specific set of standard contractual clauses for processor-to-sub-processor transfers and put in place a new procedure allowing data processors based in Spain to obtain authorizations for transferring data processed on behalf of their customers (the data controllers) to sub-processors based outside the EU.

This has inspired the WP 29 to use the Spanish model as a basis for preparing draft ad hoc model clauses for transfers from an EU data processor to a non-EU sub-processor that could be used by any processor established in the EU. However, these draft model clauses have yet to be formally adopted by the European Commission before they can be used by companies and it may

take a while before the EU Commission adopts a new official set of model clauses for data processors. Meanwhile, companies cannot rely on the draft model clauses to obtain approval from their DPAs to transfer data outside the EU. While the WP 29’s document certainly paves the way in the right direction, it remains to be seen how these draft model clauses will be received by the business sector and whether they can work in practice.

Below is a list of the key provisions under the draft model clauses for data processors:

- **Structure:** the overall structure and content of these draft clauses are similar to those that already exist under the controller-to-processor model clauses, but have been adapted to the context of transfers between a processor and sub-processor.
- **Framework Contract:** the EU data processor must sign a Framework Contract with its controller, which contains a detailed list of obligations (16 in total) specified in the draft model clauses – including restrictions on onward sub-processing. The practical effect of this could be to see the service terms between controllers and their EU processors expand to include a substantially greater number of data protection commitments, all with a view to facilitating future extra-EU transfers by the processor to international sub-processors under these model clauses.
- **Sub-processing:** the EU processor must obtain its controller’s prior written approval in order to subcontract data processing activities to non-EU processors. It is up to the controller to decide, under the Framework Contract, whether it grants a general consent up front for all sub-processing activities, or whether a specific case-by-case approval is required each time the EU processor intends to subcontract its activities. The same applies to the sub-processing by the importing non-EU sub-processors. Any non-EU sub-processor must be contractually bound by the same obligations (including the technical and organisational security measures) as those that are imposed on the EU processor under the Framework Agreement.
- **List of sub-processing agreements:** the EU processor must keep an updated list of all sub-processing agreements concluded and notified to it by its non-EU sub-processor at least once per year and must make this list available to the controller.
- **Third party beneficiary clause:** depending on the situation, the data subject has three options to enforce model clause breaches against data processing parties to it – including initially against the exporting EU data processor (where the controller has factually disappeared or has ceased to exist in law), the importing non-EU data processor (where both the controller and the EU data

processor have factually disappeared or have ceased to exist in law), or any subsequent sub-processor (where the controller, the exporting EU data processor and the importing non-EU data processor have all factually disappeared or have ceased to exist in law).

- **Audits:** the exporting EU data processor must agree, at the request of its controller, to submit its data processing facilities for audit of the processing activities covered by the Framework Contract, which shall be carried out by the controller himself, or alternatively, an independent inspection body selected by the controller. The DPA competent for the controller has the right to conduct an audit of the exporting EU data processor, the importing non-EU data processor, and any subsequent sub-processor under the same conditions as those that would apply to an audit of the controller. The recognition of third party independent audits is especially important for cloud industry businesses who – for security and operational reasons – will often be reluctant to have clients conduct on-site audits but will typically be more comfortable holding themselves to independent third party audits.
- **Disclosure of the Framework Contract:** the controller must make available to the data subjects and the competent DPA upon request a copy of the Framework Contract and

*“Further afield in the US, Phil Lee in the Palo Alto office “ranks among the finest practitioners” on data privacy and online regulation, with a particular specialism in behavioural profiling, cookies, data transfers and binding corporate rules.”*

**Quotation from  
Who’s Who Legal—Information Technology**

any sub-processing agreement with the exception of commercially sensitive information which may be removed. In practice, it is questionable how many non-EU suppliers will be willing to sign sub-processing agreements with EU data processors on the understanding that provisions within those agreements could end up being disclosed to regulators and other third parties.

- **Termination of the Framework Contract:** where the exporting EU processor, the importing non-EU data processor or any subsequent sub-processor fails to fulfil their model clauses obligations, the controller may suspend the transfer of data and/or terminate the Framework Contract.

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**Quotation from  
Chambers & Partners 2013**

## Contacts



**Olivier Proust**  
Partner - Brussels

E: [Olivier.proust@fieldfisher.com](mailto:Olivier.proust@fieldfisher.com)  
T: +32(0) 2 742 7015



**Phil Lee**  
Partner - Palo Alto

E: [phil.lee@fieldfisher.com](mailto:phil.lee@fieldfisher.com)  
T: +1(650) 513 2769



**Mark Webber**  
Partner - Palo Alto

E: [mark.webber@fieldfisher.com](mailto:mark.webber@fieldfisher.com)  
T: +1 (650) 513 2684



**Nick Holland**  
Partner - London

E: [nick.holland@fieldfisher.com](mailto:nick.holland@fieldfisher.com)  
T: +44 (0)20 7861 4977