# Model Contract Clauses

## International transfers of personal data

## Data Protection Act

The Data Protection Act 1998 (DPA) is based around eight principles of 'good information handling'. These give people specific rights in relation to their personal information and place certain obligations on those organisations that are responsible for processing it.

An overview of the main provisions of DPA can be found in [The Guide to Data Protection](#).

This is part of a series of guidance, which goes into more detail than the Guide to DPA, to help you to fully understand your obligations, as well as promoting good practice.

This guidance explains one of the methods of transferring personal data outside the EEA in compliance with the DPA – using Model Contract clauses.

## Overview

A data controller may only transfer personal data outside the EEA to a country whose data protection laws have not been approved by the European Commission as providing adequate protection for data subjects' rights if there is an adequate level of protection for the rights of data subjects.

The adequacy of the level of protection associated with a particular transfer may be ensured in a number of ways. The data controller may:
- carry out his own assessment of the adequacy of the protection;
- use contracts to ensure adequacy;
- obtain Commission approval for a set of Binding Corporate Rules governing intra-group data transfers; or
- rely on one of the exceptions to the prohibitions on transfers of personal data outside the EEA.

This guidance considers how a data controller may carry use contracts, in particular model contracts approved by the European Commission, to transfer personal data outside the EEA.

## What the DPA says

The eighth data protection principle provides that:

"Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data"

(Part 1 of Schedule 1 to the DPA).

If you decide you need to transfer personal data outside the EEA, and the recipient is not in a country subject to a positive finding of adequacy by the Commission, nor signed up to the EU-US Privacy Shield, you will need to:

- conduct a risk assessment into whether the proposed transfer will provide an adequate level of protection for the rights of the data subjects; or
- if you do not find there is an adequate level of protection, put in place adequate safeguards to protect the rights of the data subjects, possibly using Model Contract Clauses or Binding Corporate Rules; or
- consider using one of the other statutory exceptions to the Eighth Principle restriction on international transfers of personal data.

This page provides advice on the use of Model Contract Clauses as referred to in the second of these options – putting in place adequate safeguards. The use of 'adequate safeguards' is recognised in Article 26(2) of the EU Directive on Data Protection and paragraphs 8 & 9, Schedule 4, DPA.

Adequate safeguards may be put in place in a variety of ways including using model contract clauses, binding corporate rules or other contractual arrangements. This page looks at adequate safeguards in the form of 'model contract clauses'.

## Model Contract Clauses as a basis for transferring personal data outside the EEA

The European Commission is empowered to recognise standard contractual clauses (known as model contract clauses) as offering adequate safeguards for the purposes of Article 26(2)[1]. The Commission has approved four sets of model contract clauses listed below.

The Information Commissioner is empowered to authorise transfers of personal data in such a manner 'as to ensure adequate safeguards for the rights and freedoms of data subjects' under paragraph 9, Schedule 4, DPA. Following approval by the Commission, the Information Commissioner has in turn also approved the following sets of model contract clauses.

- **Set I controller-controller**

  Commission Decision 2001/497/EC, dated 15 June 2001 – in which the Commission approved model clauses for transfers from data controllers in the EEA to data controllers outside the EEA.

  Authorised by the Information Commissioner on 21st December 2001.

- **Set I controller-processor**

  Commission Decision 2002/16/EC, dated 27 December 2001 – in which the Commission approved model clauses for transfers from data controllers in the EEA to data processors outside the EEA.

  Authorised by the Information Commissioner on 18th March 2003.

  (Note – this set is no longer available for new users but continues to have effect in relation to arrangements put in place prior to 15th May 2010).

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[1] Article 26(4) of the Directive

- **Set II controller – controller**

  [Commission Decision 2004/915/EC](), dated 27 December 2004 – in which the Commission approved an alternative set of model clauses for transfers from data controllers in the EEA to data controllers outside the EEA.

  Authorised by the Information Commissioner on 27th May 2005.

- **Set II controller – processor**

  [Commission Decision 2010/87/EU](), dated 5th February 2010 – in which the Commission approved a new set of model clauses for transfers from data controllers in the EEA to data processors outside the EEA to replace the Set I controller to processor clauses.

  Authorised by the Information Commissioner on 17th May 2010.

If you use these model clauses in their entirety in your contract, you will not have to make your own assessment of the adequacy of protection afforded to the rights of data subject in connection with your transfer of their personal data.

# Controller to controller clauses

The model clauses impose obligations on both the exporter and the importer of the data to ensure that the transfer arrangements protect the rights and freedoms of the data subjects. Two of the sets of model clauses (the controller to controller clauses) relate to transferring personal data from one company to another company, which will then use it for its own purposes. You may choose to use either set of clauses, depending on which better suits your business arrangements.

The Set I controller-controller model clauses provide that you, the data exporter, and the data importer are jointly and severally liable to the data subject for any damage he may suffer as a result of a breach by either party of the model clauses. The data subject has a direct right of action under these model clauses by virtue of a third party beneficiary clause.  This differs from the Set II controller-controller model clauses under which the data subject can only enforce his rights against the party who is responsible for the relevant breach. Where the data importer is at fault, if the data subject is having trouble taking action against the data importer he may be able to take action against you as data exporter for failing

to use reasonable efforts to ensure that the importer is able to satisfy its obligations under the clauses[2].

## Controller to processor clauses

The other sets of model clauses relate to the transfer of personal data to a processor acting under your instructions, such as a company that provides you with IT services or runs a call centre for you.

The Set I controller-processor model clauses (no longer available for new transfers) provided that the data exporter was primarily liable to the data subject for damage arising from a breach by either party of the clauses. In certain circumstances the data importer would be required to indemnify the data exporter in relation to the breach.

The Set II controller to processor clauses (like the Set II controller to controller clauses) allow for liability to follow fault – that is to say, the party causing the breach will be held liable for the breach rather than liability always lying with the data controller. In addition, the Set II controller to processor clauses envisage circumstances involving the onward transfer of personal data by the processor outside the EEA to a sub-processor. Any such sub-processing arrangements must contractually extend the protection for the rights of data subjects to the sub-processing and any sub-processing must be authorised by the data controller. The data subject may, by virtue of the third party beneficiary clause, take action in relation to any breach of the clauses primarily against the party at fault, be that the controller, the processor or the sub-processor. However, the controller will always retain responsibility for any harm arising from its initial transfer of the data.

## Amending the clauses, incorporating the clauses in other contracts and inserting additional clauses

If you are relying on any of the European Commission sets of model contract clauses as 'stand-alone contracts' you cannot change the

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[2] The Set II controller-controller model clauses are intended to provide greater flexibility for contracting parties. The clauses also give the data importer greater discretion in deciding how to comply with data protection laws and how to respond to subject access requests. However, to prevent abuses arising from this additional flexibility, data protection authorities can more easily prohibit or suspend data transfers based on the Set II controller-controller model clauses in those cases where the data exporter refuses to take appropriate steps to enforce contractual obligations against the data importer or the latter refuses to cooperate in good faith with competent supervisory data protection authorities (Paragraph 7 of the Commission Decision 2004/915/EC dated 27 December 2004)

clauses in any way (save to add an additional party, such as an additional data importer).

The model contract clauses may however be incorporated into other contracts (such as data processing service agreements) or additional provisions may be added[3] provided nothing in the other contract or additional clauses alters the effect of any of the model clauses. The addition of an extra data importer into the model contract clauses (so that you may use the clauses to, for example, export personal data to a processor in New Zealand and a processor in Australia) will not change the status of the clauses provided obligations of all the parties remain clear and legally binding.

**Impact of amending the model contract clauses – use of 'Other Contracts'**

Use of any version of the model clauses, whether as a stand-alone contract or incorporated into another contract, where the wording is changed (even if the meaning or effect of the changed clause remain unaltered), will **not** amount to use of clauses that are authorised by the Information Commissioner as providing adequate safeguards under one of the Information Commissioner authorisations set out above.

If you choose to amend the model contract clauses, you may take the view that your amended clauses are sufficient to provide adequate safeguards for the protection of the rights of the data subjects whose personal data you propose to transfer. Your amended clauses will not be 'model contract clauses' (attracting the Commission 'guarantee' that they provide adequate safeguards for data subjects rights) but may operate as contractual arrangements which in the reasonable view of the data controller provide adequate safeguards for data subjects' rights. Providing adequate safeguards by using your own clauses is an equally valid basis on which to proceed with a transfer as is the use of model contract clauses. The only difference is that you need to be prepared to offer evidence in support of your view (that your clauses provide adequate safeguards) if it is challenged. If you use model contract clauses, given that the Commission has determined that such clauses offer adequate safeguards, there can be no challenge as to the effectiveness of the safeguards the model contract clauses offer.

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[3] Indeed, the Set II controller-controller model clauses include some suggested commercial clauses to be incorporated (e.g. an indemnity provision, dispute resolution clause and extra termination right). The Set II controller-controller clauses also allow the parties to update the description of the transfer that the parties will have originally set out in Annex B, to reflect changes as the relationship develops.

# Other considerations

Using model contract clauses is only one method of ensuring a transfer of personal data outside the EEA complies with the Directive.

Guidance on other transfer arrangements is available:

- [Making your own assessment of the adequacy of the level of protection for the rights of data subjects](#)
- [Binding Corporate Rules](#)
- [International outsourcing arrangements](#)

# More information

This guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, Tribunals and courts.

It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.

If you need any more information about this or any other aspect of freedom of information or data protection, please [contact us](#), or visit our website at [www.ico.org.uk](http://www.ico.org.uk).