

RE: 19 January 2001 Draft of Model Contracts

Dear Fabrizia,

Thank you for providing the draft model contract provisions of the Data Protection Directive. Patty is out of the office this week and she asked that I respond to you directly. We have had the opportunity to review the 19 January 2001 draft and offer the following comments:

Relation to the U.S. Safe Harbor Principles. The draft model contract and the Safe Harbor Principles (the "Principles") offer U.S. firms alternative means of providing the "adequate protection" called for by the Data Protection Directive. Accordingly, U.S. firms that comply with the Safe Harbor Principles have no need to use the model contract in order to effectuate the transfer of personal information from Europe. *Nevertheless, we would like to register our deep concern that the model contract would impose highly burdensome requirements that exceed what was contemplated in our agreement on the Safe Harbor Principles.*

In his letter to former Under Secretary LaRussa, Director General Mogg wrote in reference to the use of contracts:

The Commission and the Member States are of the view that the "safe harbor" principles may be used in such agreements for the substantive provisions on data protection.

While the Mogg letter went on to note that contractual agreements "may need to include other provisions on issues such as liability and enforcement," the model contract that the Commission has published would require data importers to "top up" in other respects as well. Specifically, a data importer would have to warrant to process the personal information "without prejudice to compliance with the purpose limitation, restrictions on onward transfers and the rights of access

limitation, restrictions on onward transfers and the rights of access, rectification, deletion and objection mentioned in the 'Mandatory Data Protection Principles,'" even where it promise to adhere to the Safe Harbor Principles. This exceeds the requirements of the Safe Harbor Principles, particularly with respect to access and data integrity, and is thus inconsistent with the understanding set out in the Mogg letter.

Use by Safe Harbor organizations. Paragraph c of Clause 1 and Paragraph c of Clause 5 would allow only organizations that are not in the safe harbor to use the model contract. We see no reason for this limitation which is contrary to our agreement. The draft model contract and the Safe Harbor Principles both provide adequate protection for the privacy of data subjects. Where the Principles apply, use of the model contract can only supplement and enhance the protection afforded data subjects. There may be many occasions where safe harbor organizations would need to use the model contract as the basis to receive personal information. For example, the information could be of a type that the organization did not handle at the time of its safe harbor commitments and would therefore fall outside of the representations made by the organization at that time. Inasmuch as the model contract ensures adequate protection, regardless of whether the U.S. organization is also within the safe harbor, there is no justification not to allow safe harbor organizations to use the model contract.

Transfers to Third-Countries. From time to time, companies that have received personal information from Europe under the Safe Harbor Principles may need to send that information to another country which has not received an adequacy determination. In such a case, U.S. firms that are in the safe harbor have to comply with the onward transfer principle as well as the Principles on notice and choice. In the absence

of an adequacy finding for the destination third-country, the U.S. safe harbor firm will have to "enter[] into a written agreement ... that provides at least the same level of privacy protection as is required by the relevant Principles." Thus, once again, U.S. firms that adhere to the Safe Harbor Principles will not have to utilize the model contract.

As for U.S. firms that are not in the safe harbor, the model contract by its terms will apply only to transfers of personal information from the European Community (although the "Mandatory Principle" on onward transfer suggests that parties can use the standard contractual clauses to transfer information to "another controller established outside the Community"). If this is the case, it would mean that U.S. firms will not be able to use the model contract to effectuate transfers of this information from the United States. Inasmuch as the model contract will suffice to transfer personal information from the European Community to countries that have not received an adequacy determination, it makes little sense that it cannot be used for transfers from the United States to those same countries. Preventing or inhibiting can be disruptive to the flows of e-commerce, and would be unnecessary.

"Sensitive data." Under Clause 1(a) of the model contract, "special categories of data" or "sensitive data" will have the same meaning as the definitions in the Data Protection Directive. At the same time, Clause 3(c) will permit U.S. firms to chose to apply the Safe Harbor Principles to personal information received under the contract. The Safe Harbor Principles also have a definition for sensitive information. Consequently, the two articles in the model contract will require application of two different definitions for the same term. Where the U.S. data importer elects to adhere to the Safe Harbor Principles, then the relevant provisions of those Principles, including the definition of "sensitive data",

should apply.

Mandatory requirements of national law. Paragraph a of Clause 5 will require the data importer to attest that he is not subject to any law which would limit compliance "beyond what is necessary in a democratic society to safeguard one of the grounds list in Article 13 of the [Data Protection] Directive." This provision is troubling for a number of reasons. First, it will force the data importer to determine whether local law meets or fails this requirement. Presumably, the data importer can be held liable for a determination later judged to be incorrect. Second, this provision would establish the Directive as the standard of "what is necessary in a democratic society." This would be clearly contrary to international comity. Finally, the Safe Harbor Principles expressly stipulate that compliance is subject to applicable legal requirements. In agreeing to this, our two sides recognized the need to show deference to the legislative prerogatives of our respective governments. For these reasons, this requirement should be deleted.

Auditing and certification. Clause 5(e) will require the data importer to submit its data processing facilities for audit at the request of the data exporter. In addition to being potentially burdensome and disruptive, this provision could also subject the data importer to the risk of having to expose proprietary operations and other trade secrets. To avoid prejudice to the data importer, the model contract should allow the data importer the right to have the audit done by independent experts instead of the data exporter. Furthermore, the model contract should expressly limit the frequency of audits or to authorize the data exporter to request an audit only when there is reason to believe the data importer is in breach of the contract. At a minimum, the members of the inspection team should be selected by mutual agreement between the data

exporter and the data importer.

Disclosure of contractual clauses. Clause 5(g) will require data importers to provide a copy of the contract to data subjects upon request. This provision is unnecessary for two reasons. First, the contractual clauses must conform with the model contract. The very purpose of the model contract is to set a standard for all contracts for the transfer of personal information where no adequacy finding applies, thereby lending uniformity. More importantly, Clause 4(c) already imposes the same requirement on the data exporters. Indeed, it would be more convenient for data subjects to ask the data exporter in Europe for a copy of the contract that pertains to the handling of their personal information.

Joint and several liability. Clause 6 of the model contract calls for the data exporter and the data importer to agree to joint and several liability for violations of their obligations to the data subjects. It is not unreasonable to hold the data exporter responsible for ensuring the proper handling of personal information that he transfers to others. However, it is unreasonable to hold the data importer liable for the actions of the exporter. In this case, the violation will have to occur while the personal information is still in the possession of the data exporter. Clause 6 will make the data importer liable for the improper handling of personal information that it has yet to receive and cannot control. While paragraph 3 of Clause 6 allows the data importer to be exempt from liability "if he proves that the Data Exporter is solely responsible," this unfairly shifts the burden of proof to the data importer. The data importer is thus liable until proven innocent. The model contract should not hold the data importer liable for the actions of the data exporter unless it is shown that the data importer is actually responsible for such actions.

Mediation and jurisdiction. Clause 7 will give data subjects the right to seek recourse through arbitration, third-party mediation, or litigation in Member State courts. However, these remedies are "will not prejudice the Data Subject's right to seek remedies in accordance with other provisions of national or international private law." This creates the very real possibility of duplicative liability for the same offense contrary to the principle of preclusion. Our concern is heightened by the lack of specificity or certainty regarding what such "other provisions" might entail. The model contract should require the data subject to choose which recourse against the data importer to pursue. At a minimum, the data subject should not be allowed to seek remedies under national or international private law on the same legal grounds as those already addressed in the prior forum, whether through mediation, arbitration or litigation.

Please do not hesitate to contact me should you have any questions.

Sincerely,

Jeff