

Data Protection Update

Data Adequacy & Data Transfers Overseas

June 2021

This update details the consequences of the data adequacy decision for transfers of personal data overseas.

The UK formally left the European Union (EU) on 31 December 2020 however the General Data Protection Regulation (GDPR) still applies in the UK. The GDPR has been incorporated into UK law. So data protection requirements remain largely the same although the UK does have the right to keep them under review. The 'UK GDPR' sits alongside an amended version of the Data Protection Act (DPA) 2018.

The UK's data protection regime has now been formally deemed 'adequate' by the EU.

Data transfers from the EU to the UK

An adequacy decision allows organisations that transfer personal data from the EU (and the European Economic Area) to the UK, to continue to do so; there is no need to put alternative transfer mechanisms (such as standard contractual clauses (SCCs)) to be put in place.

Data transfers from UK to EU

These transfers have continued irrespective of the adequacy decision without the need for any additional safeguards because the UK has already designated EEA member countries as providing an adequate level of protection (of personal data for the purposes of the UK GDPR).

In addition, the UK has adopted the same adequacy decisions as the EU and so transfers can be made from the UK to these 'adequate' countries e.g. Japan, without additional safeguards.

Data transfers from the UK to third countries

For transfers of personal data to those countries not covered by an adequacy decision (known as 'third countries'), an alternative means of keeping the data secure to UK standards needs to be put in place.

- In July 2020 the 'Privacy Shield' was judged invalid by the EU Court of Justice (EUCJ) and so can no longer be used to safeguard transfers of personal data between EU and US organisations. The USA is a third country.

The most likely alternative means are Standard Contractual Clauses (SCCs) or Binding Corporate Rules (BCRs).

Standard Contractual Clauses

SCCs can be used as they are recognised in UK law and are likely to be the most appropriate alternative. These approved clauses enable the free flow of data when included in a contract or added as an appendix to a contract. They cover the contractual obligations between both parties to protect the rights of the individuals whose data is being transferred.

Updated EU SCCs have been developed by the European Data Protection Board (EDPB) and are now available. For more information on these see

<https://www.bhbia.org.uk/resources/news/data-protection-news-new-eu-standard-contractual-clauses-sccs>

However, the new EU SCCs will not apply for transfers of personal data from the UK to a third country. Data exports from the UK should continue to be based on the old/legacy SCCs until the UK's Information Commissioner's Office (ICO) publishes its own SCCs in 2021 or recognise the new EU SCCs (which is under consideration).

Supplementary measures for SCCs

In July 2020 the EUCJ ruled that the use of SCCs needs to be assessed on a case-by-case basis and that "supplementary measures" e.g. encryption, might be necessary to protect the data subject.

Basically it is important to make sure that SCCs are fit for purpose and that they do genuinely provide the security intended. So, a data exporter should consider whether and what additional security measures are needed when transferring data to a third country. Determining those measures will largely depend on the data protection regime in the receiving country.

Binding Corporate Rules

Binding Corporate Rules (BCRs) may also be an option for some organisations or group of enterprises engaged in a joint economic activity. BCRs authorised before 31 January 2020 can be used as they too are recognised in UK law.

Other options

Other options such as a GDPR Code of Conduct, the use of a derogation or the research exemption are either unavailable or likely to be of limited value in healthcare business intelligence at present. The UK's Market Research Society (MRS) is working on the development of a GDPR Code for social, opinion and market research which may for those that sign up to it provide a means to secure unrestricted data transfers.

Advice to BHBIA members

- Identify cross border data transfers your organisation makes/is likely to make.
- Review contracts with partners based overseas to check that they include transfers of data to the UK (an ex-EU/EEA country granted EU adequacy status).
- Update your data protection agreements to make sure that they allow for the transfer of personal data to the UK and include the correct details for Data Protection Officers, local representatives and/or lead supervisory authorities.
- Revise privacy notices so that data subjects are informed of the transfer of their personal data outside the EU.
- Privacy notices, internal policies, contracts and other documents may need to be updated to reflect the applicable regime(s).
- Organisations relying on BCRs for transfers to territories outside the EU/UK may need to have those rules validated by the ICO or an EU supervisory authority.

Subject to change

The UK adequacy decision has a four year term and will expire in 2025. Renewal is dependent on the UK not diverging from EU GDPR standards. The European Commission will monitor how the UK system evolves, with the power to intervene if it feels that the UK is no longer meeting the EU's standards when it comes to personal data protection.

The BHBIA's guidance is subject to change. We will do our best to keep members up to date but please monitor news from the ICO <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2020/01/statement-on-data-protection-and-brexit-implementation-what-you-need-to-do/>

Further Information

Market Research Society Brexit Hub <https://www.mrs.org.uk/standards/brexit-hub>

The MRS's '*Brexit and research: What's Next?*' is likely to be of particular interest.

Government Guidance: Using personal data in your business or other organisation during and after the transition period <https://www.gov.uk/guidance/using-personal-data-after-brexit>

Information Commissioner's Office: Data Protection at the end of the transition period <https://ico.org.uk/for-organisations/data-protection-at-the-end-of-the-transition-period/>

European Commission Standard Contractual Clauses
https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2847

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