

# Data Protection Update

## International data transfer mechanisms under the UK GDPR

### February 2022

If you transfer personal data from the UK to countries without adequacy status such as the USA, your organisation needs to be aware that **from 21 March 2022** new mechanisms for secure transfers will be introduced in the UK:

- **International Data Transfer Agreement (IDTA)**: this will be a UK equivalent to the EU's standard contractual clauses (SCCs) and is most likely to be used for transfers of personal data to a single country.
- **UK Addendum to the EU SCCs**: this can be appended to EU SCCs and is most likely to be used for transfers involving EU data; it will reduce the need for organisations to use both EU SCCs and the UK IDTA.
- For existing contracts, concluded on/before 21 September 2021, using the old SCCs, is considered to provide appropriate safeguards until 21 March 2024.
- For new contracts, the new mechanisms will need to be used going forward.

The changes are further explained below.

#### ***A reminder of terminology and definitions***

Transfers of personal data from the UK to a 'third' country are 'restricted' transfers unless there is some form of over-arching legal agreement in place to safeguard the data to a standard deemed 'adequate'. For example, a transfer from the UK to Japan is unrestricted as there is an adequacy agreement in place between the two countries; a transfer from the UK to the USA is a restricted transfer to a third country as there is no form of adequacy arrangement in place.

#### ***EU background***

In June 2021 the European Commission (EC) adopted new SCCs which can be used to provide safeguards for restricted transfers of personal data from the EU. From 27 September 2021, use of these new SCCs was mandatory for new data transfers. For existing transfers, organisations have until 27 December 2022, to replace old SCCs with the new SCCs.

#### ***UK background***

It is expected the IDTA and the UK Addendum (together with a document setting out transitional provisions), will come in to force on 21 March 2022.

The IDTA and UK Addendum will replace use of the previous/old EU SCCs still in use in the UK (i.e. not the recently approved EU SCCs).

## Timings

- **From 21 March 2022**, the IDTA or the UK Addendum to the EU SCCs can be used for transfers from the UK.
- **From 21 September 2022**, the old EU SCCs cannot be used anymore for transfers from the UK for new contracts.
- **From 21 March 2024**, the 2-year transition period expires. All contracts will need to incorporate either the IDTA or the UK Addendum for transfers from the UK.

## Changes to UK guidance on data transfers

The changes include a set of contractual templates to facilitate restricted transfers of personal data from the UK, including:

1. an international data transfer agreement (“IDTA”); and
2. an international transfer addendum to be appended to the EU standard contractual clauses (“EU Addendum”).

There is also a transfer impact assessment tool designed to help controllers and processors transferring personal data securely under the UK GDPR and satisfy the requirements of the Court of Justice of the European Union in the *Schrems II* decision.

UK organisations will need to make a choice between using the IDTA or using the EU SCCs and the UK Addendum.

- The **International Data Transfer Agreement (IDTA)** which to quote the ICO is a “contract for you to use when making a restricted transfer of personal data to a country outside the UK.” The IDTA replaces the SCCs for transfers of personal data from the UK.

The IDTA (sometimes referred to as the UK SCCs) modifies parts of the EU SCCs which refer to EU or member state law/institutions, so that the clauses can be used for data transfers from the UK.

The IDTA is designed to be an easy to use, one-size fits all agreement. It includes tables to allow the parties to specify all the “variables” of the agreement – such as details of the parties, the personal data being transferred, the purposes of the transfer etc.

It can be used for a wide range of scenarios e.g. transfers from a processor to a recipient who is not a sub-processor. Parties can also make the agreement multi-party and can nominate one party to make decisions on everyone’s behalf.

- The **UK Addendum to the EU SCCs** does not come with any accompanying guidance, however it appears that it is intended to be entered into by parties which have already entered into the EU SCCs. The addendum would be used with international data transfer agreements issued by other jurisdictions including the EU, New Zealand and the Association of Southeast Asian Nations, thereby reducing the need for organisations to enter into both EU SCCs and the UK SCCs.

- The accompanying **Transfer Risk Assessment (TRA) and tool**. Carrying out a risk assessment is required when relying on SCCs or any other Article 46 UK GDPR transfer tool; although risk assessment is mandatory, use of the ICO tool for this purpose is not.

The TRA suggests organisations consider the risk to data subjects if the transfer mechanism fails to provide the “right level” of protection. It contains useful examples of what may be regarded as low, medium and high risk, scenarios showing when transfers may be permitted as well as examples of measures that can be implemented to provide additional protection.

The guidance accompanying the TRA makes it clear that the level of protection does not need to be identical to that under the UK GDPR, but it should be similar enough not to undermine the protection under this legislation.

The guidance is quite long - 49 pages, and it is proposed the TRA is reviewed annually.

### **Further information**

For further information, visit the ICO's website, see the *International data transfer agreement and guidance* section:

<https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/international-data-transfer-agreement-and-guidance/>

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