

Data Protection Update

International data transfers under the UK GDPR

September 2021

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 late 2021 or early 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 the recently approved 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.

These are currently available in draft form. The proposed changes are 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, the new SCCs can be used for new data transfers; for existing transfers, organisations have until 27 December 2022, to replace old SCCs with the new SCCs.

UK background

The UK Information Commissioner's Office is planning to introduce a UK-specific equivalent to the EU SCCs and on 11 August 2021, launched a consultation on its proposed new guidance on protecting personal data when restricted transfers are made from the UK (<https://ico.org.uk/about-the-ico/ico-and-stakeholder-consultations/ico-consultation-on-data-transferred-outside-of-the-uk/>). The consultation is relevant to anyone who makes restricted transfers personal data from the UK, or who provides services to UK organisations. The deadline for responding is 7 October 2021.

ICO proposed changes to UK guidance on data transfers

The ICO's draft proposals include a draft set of contractual templates to facilitate restricted transfers of personal data from the UK, including:

1. a draft international data transfer agreement ("IDTA"); and
2. a draft international transfer addendum to be appended to the recently approved EU standard contractual clauses ("EU Addendum").

Plus a draft 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.

- 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 would replace the SCCs for transfers of personal data from the UK.

The IDTA (sometimes referred to as the UK SCCs) would modify 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 if they want – and can nominate one party to make decisions on everyone's behalf.

- A **UK Addendum to the EU SCCs** has also been published. There is no guidance accompanying the Addendum, 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.
- An 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.

During and after the consultation

Even if the ICO does approve and issue the new guidance promptly, it is not likely to come into effect until late 2021 or early 2022. During this gap organisations will have to have two different data transfer agreements, one for the EU and one for the UK.

In the EU - Use of the new EU SCCs

From 27th September, the new EU SCCs must be used for new international transfers of personal data from the EU. However, the EU SCCs cannot currently be used in the UK.

In the UK – Use of the old SCCs

Until the new UK-specific transfer mechanisms are available, organisations currently relying on SCCs must use the old EU SCCs (or forms of the old EU SCCs changed in line with guidance from the ICO, so they make sense in a UK context, provided the legal meaning is not changed e.g. changing references from the Data Protection Directive 95/46/EC to the UK GDPR).

In the UK - Introduction of new ICO guidance once approved

Once the new guidance, transfer mechanisms and tools has been approved the 'old' EU SCCs can no longer be used for:

- New data transfers, from 3 months and 40 days after the new UK IDTA is laid before Parliament;
- Existing data transfers, from 21 months after the date above.

The BHBIA's Ethics & Compliance Committee will keep members up to date on developments, in the meantime, it may be useful to review current practices and transfers and consider changes that may be required.

The BHBIA's Ethics & Compliance Committee is providing this guidance as general information for its members. It is not legal advice and should not be relied upon as such. Specific legal advice should be taken in relation to any specific legal problems or matters. Whilst every reasonable effort is made to make sure the information is accurate, no responsibility for its accuracy or for any consequences of relying on it is assumed by the BHBIA

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