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ICO consultation on international data transfers: what to do now

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An article discussing the Information Commissioner's Office (ICO) consultation on international data transfers and setting out what to do now.

On 11 August 2021, the Information Commissioner's Office (ICO) launched a public consultation on key aspects of the international transfer regime under the UK GDPR (see Legal update, ICO consults on updated guidance and draft ICO international data transfer agreement for personal data transfers outside UK).

The consultation, due to close at 5pm on 7 October 2021, seeks input on the following issues:

- Updates to the ICO's guidance on international data transfers and interpretation of the extra-territorial effect of UK GDPR.
- Comments on the ICO's draft international transfer risk assessment guidance and tool, intended to assist organisations conduct a transfer adequacy assessment pursuant to *Data Protection Commissioner v Facebook Ireland and Maximillian Schrems (Case C-311/18) EU:C:2020:559* (Schrems II) (see Legal update, Schrems II: controller to processor standard contractual clauses valid but EU-US Privacy Shield invalid (ECJ)).
- Comments on the ICO's proposed international data transfer agreements (IDTA), including guidance and draft model clauses intended to constitute standard data protection clauses under the UK GDPR and the adoption of model IDTAs issued in other jurisdictions.
- Disapplying Standard Contractual Clauses (SCCs) under the Data Protection Directive (95/46/EC) when the ICO issues the final model IDTA.

Another consultation?

The ICO's consultation comes amidst various UK Government proposals, policy measures and consultations relating to the future of data protection in the UK. For example, the UK Government, led by the Department for Digital, Culture, Media and Sport (DCMS) has recently published a statement of intent on international data transfers and UK adequacy plans, as well as a consultation on changes to UK data protection laws, entitled "Data: A new direction" which contains proposals for adequacy and alternative transfer mechanisms. These developments are outside of the scope of this article and for further information see Legal updates, UK launches post-Brexit global data plans and DCMS announces plans to reform UK data protection regime.

However, in the light of the UK Government's intention – "*to deliver innovative alternative mechanisms and remove unjustified barriers to international data transfers*" – the ICO's consultation should be considered closely. If the ICO demonstrates a willingness to depart from its and the European Data Protection Board's (EDPB) previous guidance on the EU GDPR, and offer alternative approaches to applying UK GDPR standards (currently equivalent to EU GDPR), we may see further UK-EU divergence.

In any case, it is notable that the ICO is seeking public views on its interpretation of the law. This is not standard practice and may indicate that the ICO is adopting a more pragmatic approach than was possible under the EU GDPR when subject to EDPB guidance.

Draft international data transfer guidance

The ICO seeks input on:

- The extra-territorial effect of the UK GDPR (under Article 3).
- The principles of international data transfers (that is to say, when and which appropriate safeguards are required under Chapter V of the UK GDPR).

The ICO identifies tension between the broad extra-territorial application of the UK GDPR via Article 3 and the provisions of Chapter V – including, whether the UK GDPR automatically applies to an importer processing UK data in a third country, and if so, whether an Article 46 transfer tool (and a transfer adequacy assessment) is still required for transfers to that importer.

The ICO indicates a preference for requiring appropriate safeguards for transfers to third country importers who

are directly subject to the UK GDPR. This would change the ICO's current approach (which also remains a proposal for consultation) that maintains no such Article 46 transfer tool is required. Indeed, it is unlikely following Schrems II that the ICO would impose *no* safeguards or mechanisms in such circumstances, though exactly what safeguards are appropriate remains unclear. Irrespective of whether a third country importer is subject to the UK GDPR, there is still a risk of third party access and surveillance in the third country.

The equivalent issue in the EU GDPR is conspicuous following the European Commission's adoption of the new standard contractual clauses in June 2021 (the EU SCCs) (see Article, European Commission's new standard contractual clauses: what they mean for UK businesses). As Recital 7 of the Commission Implementing Decision indicates, the EU SCCs do not constitute a valid transfer mechanism to importers in a third country whose processing is directly subject to the EU GDPR. In the absence of EDPB guidance, it remains unclear whether (and which) other safeguards (if any) are necessary for the processing of data by such importers. EDPB guidance is awaited.

The ICO also considers the interpretation of Article 3 of the UK GDPR, and whether the UK GDPR applies directly to entities processing data on behalf of, or jointly with, a controller subject to the UK GDPR (a UK GDPR Controller). One proposition includes *always* extending the UK GDPR to any third country processor of (or joint controller with) a UK GDPR Controller. The ICO suggests that this interpretation is easy to understand and maintains a level playing field for both UK and non-UK processors. However, the current wording of Chapter V does not support this interpretation.

In addition, the ICO is seeking input on the application of Article 49 derogations, including whether such derogations are available for repetitive, regular or predictable transfers, and if organisations should be required to implement an Article 46 transfer mechanism before relying on a derogation. The ICO also requests feedback on whether the requirement for a derogation to be "necessary", should in fact be interpreted as "*strictly* necessary". This possible limitation appears at odds with DCMS' intention (in *Data: A new direction*) to enable greater flexible use of derogations.

Draft international transfer risk assessment (TRA): guidance and tool

Schrems II is retained in UK law by virtue of the European Union (Withdrawal) Act 2018, as amended by the European Union (Withdrawal Agreement) Act 2020. As a result, organisations relying on appropriate safeguards under Article 46 of the UK GDPR remain obliged to conduct an assessment as to the destination country's laws and practices to ensure the Article 46 transfer mechanism provides appropriate safeguards.

The ICO has produced draft guidance and a draft tool to help organisations conduct these assessments for routine transfers. The step-by-step tool is optional and organisations can adopt other methods to conduct transfer assessments. The ICO also acknowledges that conducting a TRA can be challenging and indicates a degree of leniency (in the event of enforcement action) if an organisation's decisions on the basis of a TRA are incorrect, to the extent the organisation used its best efforts to conduct a TRA (whether or not it uses the ICO's TRA tool).

The three steps in the ICO TRA tool align with similar content in EDPB guidance, though the ICO provides additional and more granular guidance. However, the ICO notably departs from the EDPB's approach to incorporating risk into the assessment:

- The ICO draft guidance focusses on the risk of the transfer – seen in the designation of the assessment as a "transfer *risk* assessment", as opposed to a transfer *adequacy* assessment or transfer *impact* assessment. Both ICO and EDPB guidance require an assessment on the *impact* of a third country's laws and practices (on the safeguards of the Article 46 transfer tool). However, the TRA places greater emphasis on whether the transfer poses actual risk of harm to individuals (assessed via flowcharts at the end of each step).
- The TRA explicitly indicates organisations can proceed with a transfer if there is a low risk of harm to individuals, even if there are significant or substantive concerns of third party access or surveillance. In contrast, EDPB guidance focuses on the eradication or absence of risk, and indicates exporters can only proceed with a transfer to a problematic third country (without implementing supplementary measures to remove the risk) if it demonstrates that the problematic laws and practices will not apply in practice. This considers whether the risk arises in the first place, not the actual risk or harm to individuals if third party access or surveillance could occur.

The TRA requires organisations to consider whether the protection provided in the third country is "sufficiently similar" to the UK, departing from the term "essentially equivalent" (used in the Schrems II judgment and EDPB guidance). As the ICO confirms the basis of this term comes from the test of essential equivalence, it is possible that this change in terminology is to avoid inadvertent confusion with the more general adequacy assessment in Article 45 of the UK GDPR. However, there may be some who seek to argue that whether a regime is *sufficiently similar* could be construed as a lower bar than demonstrating *essential equivalence*.

Draft international data transfer agreement (IDTA)

The ICO has published two proposals for data transfer agreements:

- A model international data transfer agreement, which provides a set of mandatory clauses (IDTA).
- A short form addendum that incorporates the clauses of model data transfer agreements issued in other jurisdictions (as amended for UK transfers) (see Draft international data transfer agreement (addendum)).

The IDTA, once adopted, will constitute UK standard data protection clauses under Article 46(2)(c) UK GDPR (issued under section 119A(1) DPA 2018). It is unclear why the ICO has adopted the term "IDTA" and not, for example, "UK SCCs".

The IDTA is intended to facilitate a wide range of transfer scenarios and permits a significant degree of flexibility in the format and incorporation of the required information and mandatory clauses. The ICO attempts to streamline the process of agreeing an IDTA by providing optional tabular and tick-box sections describing the data transfers. The ICO also acknowledges that international transfers are subject to separate commercial agreements and builds mechanisms into the IDTA for parties to incorporate by reference the relevant sections of the corresponding commercial agreement. As a result, unlike the EU SCCs, the IDTA is not intended to satisfy the requirements of Article 28(3) UK GDPR clauses (if the exporter acts as controller and the importer acts as processor).

The IDTA also differs in approach from the EU SCCs in other key areas, including:

- A contractual requirement that parties review the IDTA at least annually, unless for one-off transfers or if the importer does not retain the data.
- The onus on conducting the TRA is placed on the exporter (and not on both exporter and importer under Article 14(a)/(b) EU SCCs).
- The importer is subject to less prescriptive (and onerous) obligations to review and challenge public authorities' requests to access data, or to obtain a waiver of any prohibition on informing the exporter of such access request. There is also no explicit data minimisation obligation in the TRA in relation to disclosure to public authorities.

Draft international data transfer agreement (addendum)

As an alternative to the draft model clauses (the IDTA), the ICO proposes issuing ICO-approved addenda to model transfer agreements issued by specific jurisdictions (explicitly referencing New Zealand and ASEAN). This addendum approach will appeal to large multinational organisations wishing to simplify existing and complex intra-group and customer data transfer arrangements by applying a single set of transfer clauses (as far as possible) in multiple jurisdictions. It may also appeal to organisations with UK and EU operations who wish to apply consistent standards across their business functions.

In practice, producing an addendum for other jurisdictions (other than for the EU) may require considerable guidance from the ICO to help assist UK organisations unfamiliar with non-EU and non-UK legislation. The ICO has only provided a draft model addendum to the EU SCCs for the purposes of consultation.

The draft addendum for the EU SCCs is simple, and incorporates the clauses of the EU SCCs by reference, as amended for the purposes of UK transfers. The addendum can therefore operate as an addendum to an existing agreement incorporating the EU SCCs entered into by the parties, or as a standalone agreement.

Both options require tailoring of the EU SCCs in order for the provisions to work effectively for UK transfers. For example, parties still need to identify the relevant EU SCCs module, select the relevant optional clauses in the EU SCCs, and include a description of the UK GDPR transfers. To the extent that the UK regime diverges substantively from the EU regime, the usefulness of this addendum will become limited, especially insofar as the obligations under the EU SCCs become more onerous than, or conflict with, comparable obligations under UK GDPR.

Which SCCs can I use in the meantime?

Prior to the formal adoption of the IDTA (or addendum), the only available standard contractual clauses for both new and existing UK GDPR transfers are those issued by the European Commission under the Data Protection Directive 95/46/EC (Directive SCCs).

As the Directive SCCs were adopted prior to the UK's withdrawal of the EU, the ICO has published annotated versions of the Directive SCCs with guidance and proposed amendments to facilitate new UK GDPR transfers (accessible here: https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/international-transfers-after-uk-exit/sccs-after-transition-period/). The ICO versions of the Directive SCCs are not mandatory, and parties can amend the Directive SCCs themselves to the extent necessary to ensure they operate for UK transfers. However, no additional changes to the SCCs are permitted unless such

provisions enhance the protections under, or constitute commercial clauses that do not weaken, the protections contained in the Directive SCCs.

Following the formal adoption of the IDTA, the ICO has indicated a two-year transition period for organisations relying on Directive SCCs. This means that if the IDTA is laid before parliament in early 2022, organisations will have until early 2024 to transition from Directive SCCs to the IDTA. The consultation document is silent as to the approval process of the addendum (if separate to the IDTA). The ICO is also consulting on the date on which the Directive SCCs cease to be a valid transfer mechanism for new UK GDPR transfers, and when organisations will be required to use the IDTA for new transfers.

What can I do now to prepare?

The ICO intends to update its guidance and issue the IDTA in 2021. However, the exact timelines remain subject to change, not least as the IDTA requires parliamentary approval. It is therefore difficult for organisations to anticipate and prepare for the outcome of the consultation.

However, organisations can still prepare for the eventual transition to the IDTA (or other approved standard data protection clauses under UK GDPR) by maintaining good international transfer practices. For example:

- **Ensure visibility over UK GDPR transfers (including onward transfers).** Organisations should map UK data transfers and understand which categories of data are transferred, the purposes of transfer, and whether any (and if so, which) commercial agreements apply to the transfer and processing of relevant personal data (such agreements may need to be referenced in the IDTA).
- **Confirm transfer tool.** Organisations should consider whether the IDTA (or in current terminology, standard contractual clauses) remains the most appropriate transfer mechanism for its transfers. Organisations should monitor the outcome of the DCMS' consultation on UK data protection laws, and the extent to which alternative transfer mechanisms (such as codes of conduct or certification schemes) become viable (though these are unlikely in the short term).
- **Conduct and evaluate transfer risk assessments.** Organisations should continue to conduct transfer risk assessments for third country transfers, incorporating the TRA tool where appropriate. There is a degree of flexibility in how organisations conduct transfer adequacy and risk assessments pursuant to Schrems II; however, organisations should not wait until the final IDTA or TRA guidance before conducting a TRA in relation to existing transfers.

Can I incorporate the addendum into agreements now in anticipation of EU SCCs?

Organisations replacing existing Directive SCCs with EU SCCs for EU GDPR transfers are required to enter into EU SCCs for new data transfers from 27 September 2021 and repaper existing transfers by 27 December 2022. As the ICO consultation will close after 27 September 2021, organisations are unable to "future-proof" international transfer agreements (incorporating both EU and UK GDPR requirements) for future UK transfer mechanisms.

However, organisations – particularly those with cross-border UK and EEA operations – may be tempted to incorporate or reflect the draft UK data transfer addendum (as a transfer option) in updated agreements or contracting templates in the expectation that the ICO will approve the addendum as a valid transfer mechanism.

If organisations adopt this approach, they should be mindful that – prior to the addendum's adoption (if at all) – the only permitted standard contractual clauses under UK GDPR are the Directive SCCs. In the event the ICO does not publish or approve the addendum as a valid transfer mechanism following consultation, or approves the approach with substantive changes to the formatting or content requirements of the current draft, any executed agreements attempting to incorporate the draft UK addendum will require subsequent amendments to operate effectively.

Further divergence on the horizon?

The ICO can only diverge in its interpretation of the UK GDPR (that is, from its previous guidance on EU GDPR) as far as legislation allows. *Data: A new direction* does not make explicit reference to the ICO consultation (or the proposed IDTA or addendum). However, it is clear that the UK Government is open to legislative changes that may result in greater divergence. Nevertheless, the extent to which multinational organisations will embrace such changes remains unclear. Organisations with operations across the EEA and UK may (for operational, commercial, and regulatory reasons) seek to apply the highest common denominator in data protection and privacy standards.