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New UK Data Transfer Tools: Upcoming deadline

February 2022

Data Transfer Agreements – action needed

On 28 January 2022, the Secretary of State for the Department for Digital, Culture, Media & Sport laid before Parliament the final versions of the UK's new tools for transferring personal data to a third country or to an international organisation (a "**Transfer**"). The tools are:

- the international data transfer agreement ("**IDTA**")
- the international data transfer addendum to the European Commission's Standard Contractual Clauses (the "**New SCCs**") for international data transfers (the "**Addendum**")
- transitional provisions that explain the deadlines for implementation (together, the "**Tools**").

All agreements involving a Transfer ("**Agreements**") relying on the Data Protection Directive 95/46 SCCs (the "**Old SCCs**") **will need to be remediated**.

Updating your SCCs – countdown timeline

21 March 2022	21 September 2022	27 December 2022	21 March 2024
<ul style="list-style-type: none">• Organisations may remediate Agreements that use the Old SCCs for UK Transfers, but it is not mandatory¹.• Organisations should continue to remediate Agreements that use the Old SCCs for EU Transfers, which is already mandatory.• Transfer impact/transfer risk assessments should already be undertaken for all EU and UK Transfers. <p>Data exporters subject to the UK GDPR can use the IDTA or SCCs with the UK Addendum for Transfers.</p>	<ul style="list-style-type: none">• The IDTA and UK Addendum are available to use for UK Transfers.• Organisations still using the Old SCCs for UK Transfers or EU Transfers must not change the subject matter of the Agreement and must ensure ongoing Schrems II compliance².	<ul style="list-style-type: none">• Organisations still using the Old SCCs for UK Transfers must not change the subject matter of the Agreement and must ensure that additional safeguards are put in place alongside the Old SCCs, where necessary to ensure ongoing Schrems II compliance².• For companies looking to synchronise their UK Transfer remediation with their EU Transfer remediation, this is the final window to remediate Agreements.	<ul style="list-style-type: none">• EU Transfer remediation should now be complete, and the Old SCCs may no longer be used for any EU Transfers.• Organisations still using the Old SCCs for UK Transfers must not change the subject matter of the Agreement and must ensure ongoing Schrems II compliance².• Final window to complete remediation of their Agreements involving UK Transfers, whether by using the New SCCs plus the UK Addendum, or the UK IDTA.

¹The ICO [website](#) says that the IDTA and UK Addendum may be used "immediately" (i.e. prior to 21 March 2022), although there is a risk of Parliamentary objection.

²Following Schrems II (Data Protection Commissioner v Facebook Ireland Limited & Maximillian Schrems (Case C3-11/18)), certain additional safeguards are put in place alongside the Old SCCs, where necessary, to ensure that the transferred data has essentially equivalent protection to that in the UK. This should be determined using transfer impact assessments.

The documents

Key changes

In our [deep dive](#) on the subject, we explained the key obligations of the importer and exporter under the draft IDTA and the UK Addendum, [published](#) for consultation in 2021. There are a few key differences between the draft and final versions of the IDTA and the UK Addendum:

The IDTA

Article 46 of the UK GDPR requires appropriate safeguards to be provided by a controller or processor to be put in place for any Transfer. A third country for UK purposes refers to a country that does not benefit from an adequacy regulation³. The IDTA is intended to be such a safeguard, under Article 46 UK GDPR. It replaces the Old SCCs and may be used by controllers and processors.

IDTA: draft vs final version

- There is a new section regarding how the IDTA may be ended when the approved IDTA changes. The IDTA explains that from time to time a revised IDTA may be published, or if for example, there are changes to UK Data Protection Laws⁴.
- The IDTA may only be reviewed by the parties to amend its security arrangements, rather than in full. The triggers for review are once a certain period of time has elapsed or where there is a change to any of the data, purposes, or information regarding the importer or transfer risk assessment.
- The importer still has to provide the exporter with relevant information relating to local laws and practices, along with protections and risks, relevant to the personal data transferred. However, the importer no longer needs to confirm that information is complete and accurate.
- If the IDTA is found to no longer provide appropriate safeguards, and the parties pause the Transfer, the importer must still ensure it continues to maintain any required safeguards.
- The importer is now under specific reporting obligations to the exporter, which mirror the information provided to the supervisory authority by the ultimate data controller.
- If the importer is a controller, it must provide data subjects with details of the importer, the purposes of the Transfer and any recipients of the transferred data. This is unless it is impossible to do so or it would involve disproportionate effort, in which case, the importer must make that information available through a public notice.
- Finally, either the importer or exporter can end the agreement if changes to the IDTA have a substantial, disproportionate and demonstrable increase in direct costs to comply with the IDTA or the level of risk involved in complying with the IDTA. To avail themselves of this, the relevant party must have taken reasonable steps to reduce the cost or risk. This may be particularly relevant if the importer is based in a country with particularly unsophisticated data protection regulations and the IDTA becomes more demanding of importers.

UK Addendum

The UK Addendum is designed to be used alongside the New SCCs, allowing them to be used for Transfers made under the UK GDPR instead of using the IDTA. The UK Addendum makes some amendments to the New SCCs, which are limited to make the New SCCs work in the context of the UK, rather than the EU, GDPR. The Addendum will be helpful for organisations that are subject to both the EU and UK GDPR and wish to streamline their remediation process so that the New SCCs (plus the UK Addendum) are the main safeguard relied on, rather than the New SCCs plus the IDTA.

UK Addendum: draft vs final version

- The ICO may issue a revised version of the UK Addendum, making reasonable and proportionate changes, provided that this reflects changes in Data Protection Laws.
- In the same way as for the IDTA, the UK Addendum permits the exporter or importer to end the Agreement in circumstances of substantial, disproportionate and demonstrable increase in: direct costs to comply with the IDTA: or the level of risk involved in complying with the IDTA.
- The UK Addendum contains wording allowing the bulk of its detailed amendments to the New SCCs to be incorporated by reference, which would cut down on its length but also involve automatically accepting any future changes to the IDTA's amendments to the New SCCs.



³The UK has adequacy regulations in relation to a similar, but not identical, list of countries and territories to the EU and a list can be found [here](#). There may be changes to this list in the future, in particular following the UK's [consultation](#) on changes to its data protection framework.

⁴Given the [consultation](#) on reform to the UK's data protection scheme, this may help future proof any amendment to the Data Protection Laws.

New ICO Guidance: what is a Restricted Transfer?

The ICO has updated its **guidance** on what constitutes a Transfer to align with the EU **guidance** on the same subject. In the ICO's updated guidance, if a receiver is in a country outside of the UK without an adequacy decision, and is a different legal entity to the exporter, then this will be a "restricted transfer" as the ICO calls it. A Transfer will be a restricted transfer **even if** the recipient is already subject to the UK GDPR by virtue of its extraterritorial reach.

This is a change from the ICO's previous position, which suggested that Transfers **to a recipient that was itself subject to UK GDPR** may not require additional transfer safeguards. The consistency with the EU position is welcome, as it should make it more straightforward for organisations subject to both EU and UK GDPR to assess which Transfers will need additional safeguards.

Is a second UK Addendum on the way?

The new ICO position on what constitutes a restricted transfer could potentially open the way to a **second** UK Addendum in due course. The EU Guidelines on this subject explained that a **new set** of EU SCCs would be developed for EU Transfers where the importer was already subject to the EU GDPR via Article 3(2), which will presumably contain a light touch set of obligations. It's possible that the ICO may issue a new **UK Addendum** for such situations, to align with the EU position (although it has not yet indicated that it will do this). Organisations updating their Transfer safeguards should however take into account in their rollout that in the near future there may be alternative EU Transfer safeguards available where an importer is already subject to the GDPR by virtue of its extra-territorial effect. In addition, there may be different UK Addenda for other countries' Transfer safeguards forthcoming and we will update on this in due course.

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