

Data transfer after Brexit

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Since the IAB's [Brexit Breakfast briefing](#) in January there's been a lot of interest in data flows in general post-Brexit, and particularly in Standard Contractual Clauses (SCCs). It is important to develop your post-Brexit contingencies – such as SCCs – whether we leave the EU with a deal or not, and this guide explains some of the key concepts and signposts to some useful resources, although please be aware that it doesn't replace legal advice.

What are SCCs?

Broadly, SCCs are a standard set of contractual terms and conditions for the transfer of personal data which both the data exporter and the data importer enter into. They include contractual obligations that help to protect personal data when it leaves the EU/EEA (European Economic Area), and to ensure compliance with GDPR. SCCs only relate to the transfer of personal data, so they can be incorporated into a wider contract that covers other business terms. One of the key benefits of SCCs is that they come with the European Commission's seal of approval.

Why are data transfers affected by Brexit?

Before delving into more detail on how SCCs work, it is worth explaining why they exist in the first place. Article 45 of the GDPR states:

A transfer of personal data to a third country or an international organisation may take place where the Commission has decided that the third country, a territory or one or more specified sectors within that third country, or the international organisation in question ensures an adequate level of protection. Such a transfer shall not require any specific authorisation.

This basically means that for personal data to flow from the EU/EEA to a 'third country' (i.e. one outside of the EU/EEA), the European Commission needs to assess whether that particular country offers a level of personal data protection equivalent to that provided by EU law. [13 countries](#) (Japan being the latest addition) have been recognised by the European Commission as being adequate or partially adequate. This is important in terms of Brexit, as the UK will become a 'third country' after leaving the EU. The [UK has said it will allow personal data transfers](#) from the UK post-Brexit to the EU/EEA and to countries that have an existing EU adequacy decision. However, the European Commission will still need to make an adequacy decision

about the UK's personal data protection framework and whether personal data can be transferred to the UK. This is despite the fact that GDPR has been adopted in UK law.

What does a deal or no deal mean for data transfers?

If there is a deal, the Withdrawal Agreement provides for current arrangements to continue unchanged during the transition period, meaning personal data can flow freely from the EU/EEA to the UK. The Political Declaration published alongside the Withdrawal Agreement sets out that the European Commission will begin its assessment of the UK as soon as possible after the UK's withdrawal, and will 'endeavour' to adopt an adequacy decision (which would allow the continued free flow of personal data from the EU/EEA to the UK) by the end of the transition period (31 December 2020).

However, if the UK leaves the EU without a deal in place, there will be no transition period, and it is highly unlikely that there will be a data adequacy decision in place on day one. This is likely to cause disruption to personal data transfers from the EU/EEA to the UK.

How SCCs can help?

Article 46 of the GDPR says that in the absence of an adequacy decision, personal data may be transferred to a third country or an international organisation only if the controller or processor has provided appropriate safeguards. There are a number of recognised safeguards, one of which is SCCs, and these are likely to be the most appropriate ones for many businesses (for multinationals based in the UK and operating in one or more EU/EEA States, **Binding Corporate Rules** are appropriate for inter-Group cross border personal data transfers).

The European Commission has issued **SCCs** that cover the transfer of personal data:

- from data controllers in the EU to data controllers established outside the EU/EEA (controller to controller).
- from data controllers in the EU to processors established outside the EU/EEA (controller to processor).

If you need to transfer personal data from an EU/EEA-based processor to your UK-based organisation, there are currently no European Commission-approved SCCs for this scenario. If the processor has a controller also located in the EU/EEA you may be able to use the 'controller-to-controller' SCCs. In any case, the EU/EEA based processor will be subject to certain GDPR provisions that are applicable to data

processors. You may need to seek legal advice on an appropriate mechanism to enable the flow of data.

How do I use SCCs?

The Information Commissioner's Office (ICO) has developed a [tool](#) for small and medium-sized businesses and organisations to help them decide if SCCs are appropriate and to select the right one. You can use the SCCs as standalone contracts or incorporate them into a wider contract but you cannot amend the SCCs themselves, or they will no longer be authorised by the European Commission or relevant Data Protection Authority. See the ICO's [guidance on international data transfers](#) for more details.

What else should I be aware of?

Using SCCs isn't the end to your obligations. If you are a data controller or processor that is subject to the territorial scope of the GDPR (i.e. you are dealing with personal data linked to EU/EEA citizens) but not established in the EU/EEA – as will be the case when the UK leaves the EU – you have an obligation to designate a data representative based in the EU/EEA. This representative will be the go-to person to deal with individuals and DPAs in the EU/EEA.

The ICO has a page dedicated to [Brexit](#) that covers the implications for data protection and data transfers in more detail and its [SCC tool](#) provides template contracts. If you need more information about your obligations and what you need to do to comply, we recommend seeking legal advice.

For more general information about Brexit and how to prepare, visit the IAB's Brexit hub at www.iabuk.com/brexit where you'll find our FAQs and checklist.