



## DATA PROTECTION & **PRIVACY**

# PERSONAL DATA TRANSFERS ACROSS BORDERS

## **[1]** BACKGROUND

The General Data Protection Regulation (GDPR) restricts transfers of personal data from the EEA to third countries unless:

- The third country has been the subject of an **adequacy** decision. Only 12 countries are currently recognised. India is not yet included;
- The transfer is subject to **Appropriate safeguards** (including Standard Contractual Clauses (**SCCs**));
- **Binding Corporate Rules** (usually for multi-national corporate groups) are in place; or
- One of the following derogations applies to the transfer:
  - **Consent** has been obtained from the data subject(s)
  - The transfer is necessary for the **performance of a contract** in the interest of the data subject(s)
  - Important reasons of **public interest**
  - The establishment, exercise or defence of **legal claims**
  - To protect the **vital interests** of the data subject or of other persons
  - **Public registers**; or
  - Transfers for **compelling legitimate interests with appropriate safeguards** (provided the transfer is not repetitive and concerns limited data subjects).

These derogations are narrowly interpreted, so they will only apply in limited cases.

## [2] APPROPRIATE SAFEGUARDS

The European Data Protection Board (EDPB)'s recent guidance and draft updated SCCs for the international transfers of personal data out of the EEA have provided clarification of the legal requirements for appropriate safeguards. This means that a contract containing those clauses will be needed before a data transfer takes place.

Following the European Court of Justice's "Schrems II" decision in July 2020, it is not enough just to use SCCs alone. A careful assessment of the risks needs to be undertaken and supplementary measures applied where appropriate. Exporters of personal data from the EEA to third countries will need to consider whether the importing country's data protection standards are 'essentially equivalent' to those in the EU and if not, add further technical or contractual protections.

The EDPB's recommendations set out a six-step process on which data exporters must base their assessment:

1. **Know your transfers** by undertaking data mapping for all data transfers.
2. **Identify the GDPR transfer tool** on which your transfer relies.
3. Using the **EU Essential Guarantees** recommendation (see below), assess whether anything in the law/practice of the importer country may impinge on the appropriate safeguards.
4. Identify and adopt **supplementary measures** to bring the level of protection up to the EU standard of essential equivalence.
5. **Document your chosen approach** and seek authorization from the relevant Supervisory Authority, where required; and
6. **Regularly evaluate** your chosen approach, (e.g. by monitoring for changes in protection legislation in the importing country).

## [3] EU ESSENTIAL GUARANTEES' ASSESSMENT FRAMEWORK

The EDPB's EU Essential Guarantees recommendations provide a framework for assessing whether the level of interference with EU privacy rights by surveillance authorities in the transfer's destination country is acceptable:

- Is the processing based on **clear, precise, and accessible rules**?
- Is the processing **necessary and proportionate** to the legitimate objectives pursued?
- Is there is an **independent oversight mechanism**?
- Are there **effective remedies** available to affected data subjects?

## [4] A WORD ON BREXIT...

Following the end of the UK's Brexit transition period on 31 December 2020, the UK will be a 'third country', outside the EU and EEA.

However, the UK has already incorporated GDPR into national law, so 'UK GDPR' will continue to restrict the export of UK data subjects' personal data to countries outside the EEA in the same way.

At present, the UK looks unlikely to receive an immediate adequacy decision from the EU, so exporting personal data from EEA countries to the UK will become subject to tighter restrictions. In many cases, this is likely to entail putting in place the new SCCs and supplementary measures discussed above.

The UK has already granted its own adequacy status to EEA countries, so transfers from the UK into the EEA should not present problems.

As for transfers of personal data from the UK to non-EEA countries, including India, the same menu of options will apply as under the current EU GDPR regime.

For example, the ICO has indicated that the UK intends to recognise the new approved SCCs as an acceptable means of ensuring appropriate safeguards, as well as any Binding Corporate Rules authorised by the EU before the end of the transition period.

Currently, 11 of the 12 third countries deemed adequate by the EU have said that they will maintain unrestricted personal data flows with the UK. However, it will soon be open to the UK government to issue adequacy decisions in respect of other countries independently of the EU.

## MORE INFORMATION



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