Elements of this guidance have been superseded by the new CLC guidance. Businesses should refer to both documents.

# EU Exit Business Readiness: Data Protection and GDPR – what should you be doing now?

18 September 2020
*(Updated 11 March 2021)*

## 1. COMPLIANCE WITH GDPR

The General Data Protection Regulation (GDPR) applies to all companies based in the EU and those with EU citizens as customers. It has an extraterritorial effect, so non-EU based companies that operate in the EU must also comply with the GDPR.

Even though the UK has left the EU and is in a transition period, UK companies will still need to comply with the GDPR because it is likely that they offer goods or services or monitor individuals in the EU. They must also comply with whatever UK version of the GDPR is implemented. This is likely to be similar to current legislation (Data Protection Act 2018) but UK law could diverge in the future.

There are actions that UK organisations could and should employ right now to ensure compliance and readiness.

ACTIONS:

- Use Brexit as an opportunity to review and update your data inventories also known as Records of Processing Activities (RoPA)
- Consider your relationships and agreements with third party processors
- Review government guidance here: https://www.gov.uk/guidance/using-personal-data-after-brexit

## 2. TRANSFERS OF PERSONAL DATA BETWEEN THE UK AND THE EU

The current political deal provides that data transfers between the EU and UK can continue to be made without further measures during the transition period, during which the UK will seek an '***adequacy decision***' from the EU, allowing transfers to continue going forwards. The transition period is due to end on 31/12/20. The UK Government has indicated that personal data can freely flow from the UK to the EU in the event of a no-deal Brexit but safeguards will need to be in place for personal data flowing from the EU to the UK.

There is growing uncertainty as to whether the adequacy decision will be in place by 31/12/20. In the absence of an adequacy decision, organisations will need to put in place other safeguards for data transfers from the EU to the UK; the most likely mechanism being ***Standard Contractual Clauses (SCCs***) which can be built into contracts and data processing agreements. The UK Supervisory Authority (ICO) provides advice and interactive tools to help keep data flowing from the EU to the UK.

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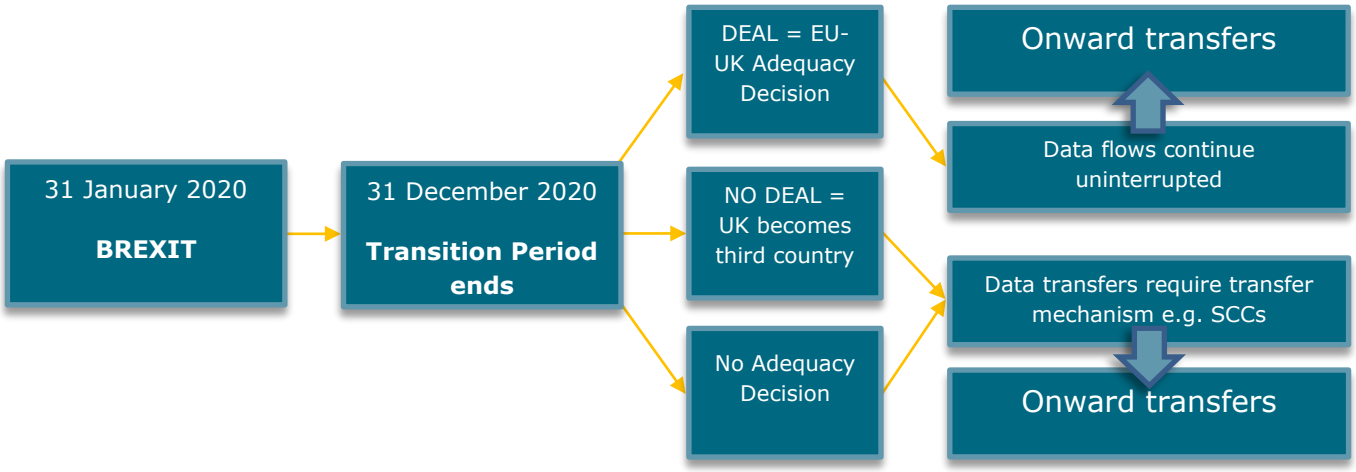


ACTIONS:

- Review data transfers in/out of the UK to EU and non-EU countries (also known as third countries)
- Review safeguards for data transfers in contracts
- Consider adding SCCs to your contracts
- Review ICO guidance here: https://ico.org.uk/for-organisations/data-protection-at-the-end-of-the-transition-period/

## 3. EU REPRESENTATIVE

From 31.12.20, where a UK based controller or processor doesn't have an office, branch or other establishment (e.g. employee) within the EU but is offering goods and services to data subjects in the EU or monitoring the behaviour of data subjects in the EU they will need to appoint a 'representative' within the EU.

This applies to UK registered entities which will no longer be EU-based controllers and processors after Brexit but do operate within the EU, for example by contracting with EU clients. The ICO provides further guidance to companies.

ACTIONS:

- Review the need to appoint an EU representative
- Review ICO guidance here: https://ico.org.uk/for-organisations/data-protection-at-the-end-of-the-transition-period/

## 4. EU REGULATORY OVERSIGHT

If you are a UK-based controller or processor currently carrying out cross-border processing of personal data across EU member state borders and will continue to do so post Brexit, you will need to review the guidance provided by the

European Data Protection Board (EDPB) to consider whether you must comply with a new lead Supervisory Authority in the EU / EEA.

The UK's Supervisory Authority (ICO) will still regulate data protection in the UK but it will no longer be part of the EDPB. Companies will need to maintain an awareness of EDPB decisions to ensure compliance with the GDPR.

ACTIONS:

- Review EU 'lead authority' if you operate cross-border processing
- Review European Data Protection Board (EDPB) guidance here: https://edpb.europa.eu/edpb_en

## 5. RESOURCES

- Information Commissioner's Office (ICO) https://ico.org.uk/for-organisations/data-protection-at-the-end-of-the-transition-period/

- European Data Protection Board (EDPB) https://edpb.europa.eu/edpb_en

- UK Government guidance https://www.gov.uk/guidance/using-personal-data-after-brexit

Information correct as at 10 September 2020. This publication is for general information only and does not seek to give legal advice or to be an exhaustive statement of the law. Specific advice should always be sought for individual cases.

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## Update – 11 March 2021

The EU-UK Trade and Cooperation Agreement does not contain a data adequacy decision in the UK's favour but it does include a bridging mechanism that permits the continued free flow of personal data from the EU/EEA to the UK, provided that the UK adheres to current data protection laws. This mechanism will expire on 30 June 2021, or when an EU adequacy decision comes into effect.

The European Commission has now published a draft adequacy decision for the UK. This would permit personal data to flow freely from the EU into the UK without the need to put in place additional safeguards (Standard Contractual Clauses or SCCs). The decision only affects the flow of data from the EU to the UK. Under UK legislation, the UK has already determined that the EU provides an adequate level of protection for personal data to flow freely from the UK into the EU. The decision will now be reviewed by the European Data Protection Board (EDPB) and then presented to the EU Member States for formal approval.

An EU adequacy decision is the desired outcome but not guaranteed and the UK will have to follow the same process as other non-EU countries. If there is no adequacy decision by the 30 June, the situation will revert to the 'no deal' status and organisations will need to implement data transfers mechanisms, such as Standard Contractual Clauses (SCCs). Government and ICO advice is for UK businesses to continue to work to put in place these alternative mechanisms during this bridging period to safeguard against any interruption to the free flow of personal data from the EU to the UK and around their organisations.

Organisations should also continue to implement the compliance requirements previously outlined in the CLC guidance, including:

- Putting in place EU and UK Representatives, where appropriate;
- Understanding organisational data flows and what safeguards are in place to protect data transfers;
- Updating documentation with the new law and legal references;
- Reviewing and updating breach procedures if they will involve reporting outside the UK (to other Supervisory Authorities).

Helpful resources:

https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2021/02/ico-statement-in-response-to-the-publication-of-a-draft-adequacy-decision-from-the-european-commission/

https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2020/12/ico-statement-in-response-to-uk-governments-announcement-on-the-extended-period-for-personal-data-flows-that-will-allow-time-to-complete-the-adequacy-process/

https://www.gov.uk/guidance/using-personal-data-in-your-business-or-other-organisation