

# Information Note on data transfers under the GDPR in the event of a no-deal Brexit

Adopted on 12 February 2019

## *Introduction*

In the absence of an agreement between the EU and the UK (No-deal Brexit), the UK will become a third country from 00.00 am CET on 30 March 2019. This means that the transfer of personal data to the UK has to be based on one of the following instruments<sup>1</sup> as of 30 March 2019:

- Standard or ad hoc Data Protection Clauses
- Binding Corporate Rules
- Codes of Conduct and Certification Mechanisms
- Derogations<sup>2</sup>

This note provides information to commercial and public organisations on these transfer instruments under the GDPR for the transfer of personal data to the UK in the event of a no-deal Brexit

The EDPB builds upon the guidance provided on this matter by supervisory authorities and by the [European Commission](#). EU organisations may turn, if necessary, to the [national supervisory authorities](#) competent to oversee the related processing activities.

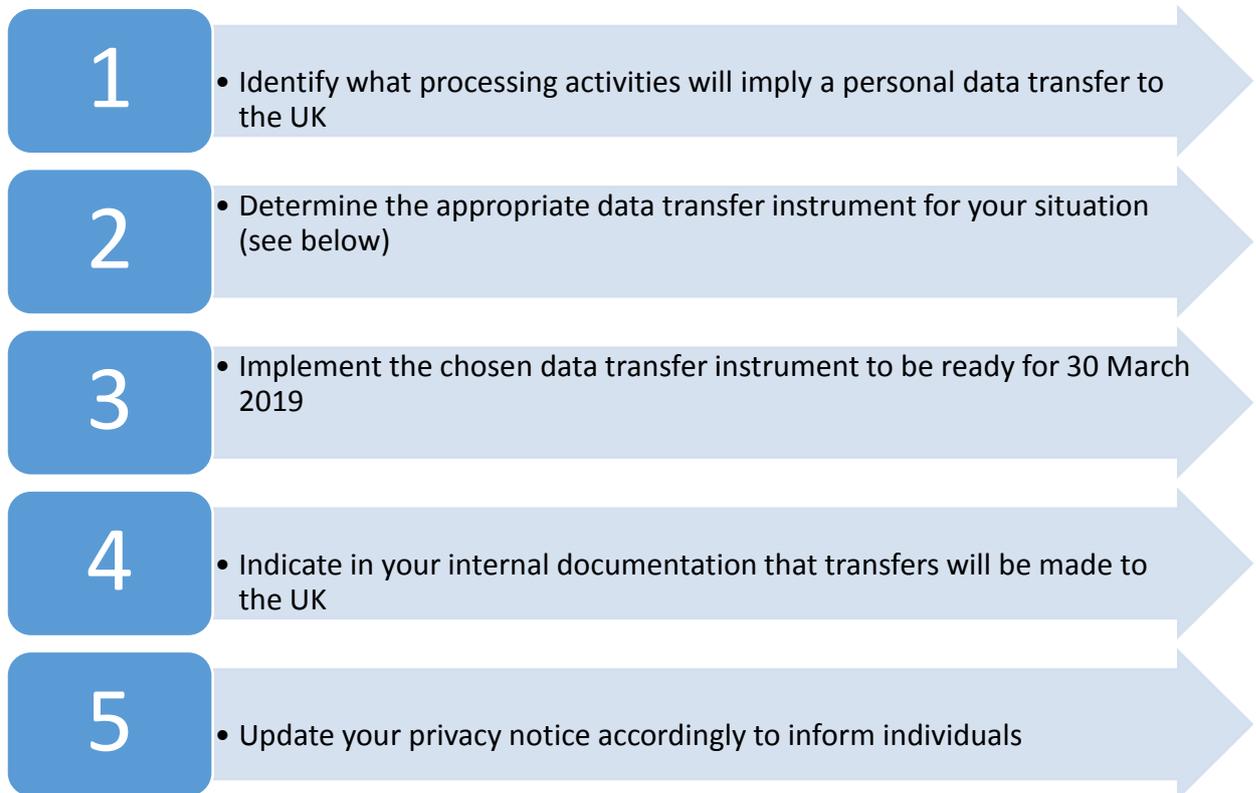
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<sup>1</sup> See Chapter V of GDPR.

<sup>2</sup> These can be used only in the absence of Standard Data Protection Clauses or other alternative appropriate safeguards.

## I. 5 steps organisations should take to prepare for a no-deal Brexit

When transferring data to the UK, you should:



## II. Data transfers from the EU to the UK

### 1. Available transfer instruments

In the absence of an adequacy decision<sup>3</sup> at the time of the Brexit, the following are the available data transfer instruments.

#### a. Standard and ad hoc Data Protection Clauses

You and your UK counterpart may agree on the use of Standard Data Protection Clauses approved by the European Commission. These contracts offer the additional adequate safeguards with respect to data protection that are needed in case of a transfer of personal data to any third country.

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<sup>3</sup> An adequacy decision is a decision adopted by the European Commission on the basis of article 45 of GDPR (for example, the adequacy decision on Japan adopted by the Commission on 23rd January 2019. Previously, the EC had also adopted adequacy decisions on third countries such as Argentina, New Zealand and Israel, amongst others). At the moment, there is no such an adequacy decision in place for the UK.

Three sets of Standard Data Protection Clauses are currently available:

- EU controller to third country (eg. UK) controller: 2 Sets are available:
  - [2001/497/EC](#)
  - [2004/915/EC](#)
- EU controller to third country (eg. UK) processor
  - [2010/87/EC](#)

It is important to note that the Standard Data Protection Clauses may not be modified and must be signed as provided. However, these contracts may be included in a wider contract and additional clauses might be added provided that they do not contradict, directly or indirectly, the Standard Data Protection Clauses adopted by the European Commission. Considering the timeframe before the 30th of March, the EDPB acknowledges that the Standard Data Protection Clauses is a ready-to-use instrument.

Any further modifications to the Standard Data Protection Clauses will imply that this will be considered as ad-hoc contractual clauses. This can provide appropriate safeguards taking into account your particular situation.

Prior to any transfer, these tailored contractual clauses must be authorised by the competent national supervisory authority, following an opinion of the EDPB.

## **b. Binding Corporate Rules**

Binding Corporate Rules are personal data protection policies adhered to by group of undertakings (ie. multinationals) in order to provide appropriate safeguards for transfers of personal data within the group, including outside of the EU.

You may have already in place BCRs or cooperate with processors which make use of BCRs for Processors. Organisations may still rely on these BCRs authorised under the former Directive 95/46/EC which remain valid under the GDPR<sup>4</sup>. These BCRs need however to be updated to be fully in line with the GDPR provisions.

If you do not have BCRs in place, they must be approved by the competent national supervisory authority, following an opinion of the EDPB.

You can find further explanations on the conditions to apply for Binding Corporate Rules on the [EDPB website](#).

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<sup>4</sup> According to Art. 46.5 GDPR. Please note that BCRs authorised under former Directive 95/46/EC remained valid under the GDPR, but need to be updated to be fully in line with GDPR provisions.

### **c. Codes of conduct and certification mechanisms**

A code of conduct or a certification mechanism can offer appropriate safeguards for transfers of personal data if they contain binding and enforceable commitments by the organisation in the third country for the benefit of the individuals.

These tools are new under the GDPR and the EDPB is working on guidelines in order to give more explanations on the harmonized conditions and procedure for using these tools.

## **2. Derogations**

It is important to underline that the derogations allow the data transfers under certain conditions and are exceptions to the rule of having put in place appropriate safeguards (see the above mentioned instruments like BCRs, standard data protection clauses...) or transfer the data on the basis of an adequacy decision. They must therefore be interpreted restrictively and mainly relate to processing activities that are occasional and non-repetitive<sup>5</sup>.

These derogations include amongst others according to article 49 GDPR:

- where an individual has explicitly consented to the proposed transfer after having been provided with all necessary information about the risks associated with the transfer;
- where the transfer is necessary for the performance or the conclusion of a contract between the individual and the controller or the contract is concluded in the interest of the individual;
- if the data transfer is necessary for important reasons of public interest.
- if the data transfer is necessary for the purposes of compelling legitimate interests of the organisation.

You can find further explanations on available derogations and how to apply them in the [EDPB Guidelines on Article 49 of GDPR](#).

## **3. Instruments exclusively available to public authorities or bodies**

Public authorities may consider to use the mechanisms which the GDPR considers more appropriate to their situation.

One option is to use a legally binding and enforceable instrument, such as an administrative agreement, a bilateral or multilateral international agreement. The agreement must be binding and enforceable for the signatories.

The second option is to use administrative arrangements, such as Memoranda of Understanding, which although not legally binding must however provide for enforceable and effective data subject rights. The administrative arrangements are subject to an authorisation by the competent national supervisory authority, following an opinion of the EDPB.

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<sup>5</sup> See recital 113 and article 49.1 GDPR

In addition, the abovementioned derogations are also available for transfers by public authorities, subject to the application of the relevant conditions.

For public authorities exercising criminal law enforcement functions<sup>6</sup>, additional transfer tools are available<sup>7</sup>.

### **III. Data transfers from the UK to EU Members**

According to the UK Government, the current practice, which permits personal data to flow freely from the UK to the EU, will continue in the event of a no-deal Brexit<sup>8</sup>.

To this end, the UK Government's and the ICO's website should be regularly consulted.

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<sup>6</sup> They will fall under the scope of the Law Enforcement Directive.

<sup>7</sup> See Article 37(1)(b) and 38 LED. For instance, transfers may take place when the EU authority concludes that appropriate safeguards exist in the third country following a (self-)assessment of all circumstances surrounding the transfer. Moreover, additional derogations for specific situations may be applicable (see Article 38 LED).

<sup>8</sup> <https://www.gov.uk/government/publications/data-protection-if-theres-no-brex-it-deal/data-protection-if-theres-no-brex-it-deal>