

## Lawyer Insights

### The draft UK SCCs for international transfers

Information Law analysis: Bridget Treacy, partner, and James Henderson, associate, at Hunton Andrews Kurth discuss the draft UK Standard Contractual Clauses (SCCs) for international transfers under the UK's General Data Protection Regulation, Retained Regulation (EU) 2016/679 (UK GDPR) recently published by the Information Commissioner's Office (ICO). They examine key differences between the UK draft SCCs and the EU SCCs adopted in June 2021 (the 2021 EU SCCs) under the EU General Data Protection Regulation, Regulation (EU) 2016/679 (EU GDPR) and how organisations that transfer data under both UK and EU GDPR are likely to approach using the draft UK SCCs and the 2021 EU SCCs in practice. They also address potential concerns organisations may have when using the draft UK SCCs and the next steps for adopting them.



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#### What are the key differences between the draft UK SCCs and those SCCs currently recognised under the UK GDPR?

The draft UK SCCs (which the ICO calls the international data transfer agreement (IDTA)) have clearly been designed to reflect the complex data processing and transfer arrangements relied on by businesses today. Unlike the existing SCCs available for use under the UK GDPR (which cover only controller-controller and controller-processor data transfers), the draft UK SCCs can be used in a wide range of data transfer scenarios, including processor-controller, processor-sub-processor and sub-processor-sub-processor data transfers. Substantively, the draft UK SCCs cover much of the same material as the existing SCCs, but also include additional language to:

- address the parties' obligations in relation to the ruling in *Data Protection Commissioner v Facebook Ireland Ltd, Maximilian Schrems (Schrems II)*, Case C-311/18 and the ICO's (draft) regulatory guidance on that topic
- impose additional obligations on the parties in relation to the handling of requests for access to or disclosure of transferred personal data by foreign government authorities, and
- address obligations under the UK GDPR that did not exist at the time the existing SCCs were adopted (eg the obligation to notify personal data breaches under Articles 33 and 34 of the UK GDPR)

#### In what ways do the draft UK SCCs differ from the 2021 EU SCCs?

The draft UK SCCs have a 'tabular' structure and vary significantly from the language of the 2021 EU SCCs.

In practice, however, there is a high degree of similarity between the content of the draft UK SCCs and the 2021 EU SCCs. Both cover a wider range of data transfer scenarios (see above in relation to the draft

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UK SCCs), both require a significantly greater degree of information to be completed by the parties, and both include additional and onerous obligations in relation to the handling of requests for access to or disclosure of the transferred personal data.

Unlike the 2021 EU SCCs, the draft UK SCCs would not require the parties to split out a relevant 'module' before they can use the SCCs and they can be executed without substantial

reformatting. Overall, the draft UK SCCs generally appear to be simpler, clearer, more flexible and easier to use than the 2021 EU SCCs.

Given that the ICO has also published a short separate addendum that makes superficial changes to the 2021 EU SCCs to enable their use by UK exporters, it seems likely that the ICO regards the 2021 EU SCCs as providing a very similar level of protection to that of the draft UK SCCs.

One significant difference is that the 2021 EU SCCs are not intended to be used for transfers to importers that are located outside the EEA but that are nevertheless subject to the EU GDPR. The ICO has not yet adopted a final position on this issue, but it is envisaged that the draft UK SCCs will be available whenever personal data is transferred to an importer that is (i) not subject to the UK GDPR, or (ii) located in a country outside the UK. Depending on the ICO's final position here, there may be a divergence between UK and EU law, if the draft UK SCCs may be used whenever the importer is located outside the UK.

### **What is good about the draft UK SCCs?**

As noted above, the draft UK SCCs are significantly more flexible than the existing SCCs and may be used in relation to a number of different data transfer scenarios. Furthermore, the ICO has adopted a more flexible approach with regard to incorporating certain parts of the SCCs into other agreements (eg Data Processing Addenda), and explicitly permits the mandatory elements of the draft UK SCCs to be modified so that they operate in a multi-party agreement. This provides a greater degree of flexibility compared to the current SCCs.

While the additional obligations imposed to address issues resulting from the *Schrems II* decision are onerous, the draft UK SCCs at least provide a clear pathway and framework for organisations relying on them to ensure adequate transfer impact/risk assessments are carried out, and appropriate additional protections are included in the SCCs as a result of that assessment.

### **What areas of concerns will organisations have?**

Compared to the existing SCCs, the draft UK SCCs require a significantly greater volume of information about the data transfers taking place under the SCCs to be provided. This includes information about the status of the parties, the nature of the data transferred, and detailed information about any additional technical, organisational or contractual protections that will be implemented. The draft UK SCCs also include a specific statement that the parties will review the agreement at least once every specified period, up to a maximum of one year. In practice, these changes mean that organisations will be required to carry out a more significant diligence exercise prior to entering into the SCCs, and will need to regularly review their data transfer activities on an ongoing basis.

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Importers, in particular, will be concerned by the provision that requires each part to ‘comply with any reasonable requests made by the ICO’ in relation to the transferred personal data.

More generally, there is a large degree of uncertainty as to what constitutes a ‘restricted transfer’ under the UK GDPR, and consequently the scenarios in which the draft UK SCCs may be used. For example, the ICO is specifically consulting on whether a transfer should be restricted (and so SCCs must be implemented) when (i) the importer is subject to the UK GDPR, or alternatively, the importer is located outside of the UK, or (ii) the transfer is made between the same legal entity.

### **How are organisations that transfer personal data that is subject to both the EU GDPR and UK GDPR to third countries (eg the USA) likely to approach using both the 2021 EU SCCs and new UK SCCs in practice?**

The 2021 EU SCCs will not be valid for data transfers from the UK under the UK GDPR, and the new UK SCCs will not be valid for data transfers from the EEA under the EU GDPR.

Organisations that are subject to both the UK GDPR and EU GDPR are therefore in a challenging position, and in principle need to enter into both the EU SCCs and the new UK SCCs in relation to each data transfer.

The ICO has, however, published a draft Addendum to the 2021 EU SCCs that will permit UK exporters to rely on the 2021 EU SCCs provided the addendum is incorporated and validly executed. In practice, most organisations subject to both regimes or with pan-European operations are likely to seek to rely on the 2021 EU SCCs and the UK Addendum, rather than entering into both the draft UK SCCs and the 2021 EU SCCs for legal consistency and to simplify their compliance operations.

### **What are the next steps and likely timelines?**

The ICO is currently soliciting comments on the draft UK SCCs (and other data transfer materials published at the same time) until 7 October 2021 (see: LNB News 12/08/2021 6). Once the consultation is closed and the ICO has developed a final version of the draft UK SCCs, they will need to be adopted by the Secretary of State by regulations. It is not currently known when the final version of the draft UK SCCs will be available to use, but this is expected to be around the end of 2021.

The ICO proposes that (assuming there are no Parliamentary objections to the draft UK SCCs) the existing SCCs would be disapplied as follows starting from a date 40 days after the finalised UK SCCs are laid before Parliament:

- at the end of three months for new contracts, and
- at the end of a further 21 months for SCCs in existing contracts—meaning all SCCs must have been updated within 24 months

*Interviewed by Vinothini Samugamathan*

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