

## INFORMATION NOTE ON THE DATA PROTECTION IMPACT OF THE BREXIT BETWEEN THE UNITED KINGDOM AND THE EUROPEAN UNION

On the 1st January 2021, the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, on the one hand, and the United Kingdom and Northern Ireland, on the other hand, entered into force. The existence of a transition period of a maximum of 6 months, while (I) **personal data may continue being transmitted** from the European Union to the United Kingdom without additional safeguards and (II) the **need to assess the requirement of representative in both, the European Union and the United Kingdom of the controller or processor has been the most important outcomes in the privacy field.**

On the 15th December 2020, the European Data Protection Board issued an [information note](#) recalling the end of the transition period agreed for the United Kingdom's exit from the EU on 31st December, remaining the beginning of a new stage in the protection of personal data.

The above-mentioned information note warned the data transfers to entities in the United Kingdom would be equivalent to an international transfer to a third country, subject to the provisions set out in Chapter V of the GDPR from the 1st January 2021.

We make a brief note of this issue under the Spanish Data Protection Agency guidances:

Data Processors and Data Controllers **may carry out international data transfers without authorization** from the Spanish Data Protection Agency provided that the processing of the data complies with the provisions of the RGPD and the following conditions are met:

- 1. If the recipients of the data are located in a country, territory, or one or more specific sectors of that country or international organization that has been declared to have an adequate level of protection by the European Commission.**

The countries and territories declared as adequate by the European Data Protection Board are taxed and the United Kingdom is not among them.

- [Switzerland. Commission Decision](#) 2000/518/EC of 26 July 2000
- [Canada. Commission Decision](#) 2002/2/EC of 20 December 2001 as regards entities subject to the scope of the Canadian Data Protection Act
- [Argentina. Commission Decision](#) 2003/490/EC of 3 June 2003
- [Guernsey. Commission Decision](#) 2003/821/EC of 21 November 2003
- [The Isle of Man. Commission Decision](#) 2004/411/EC of 28 April 2004
- [Jersey. Commission Decision](#) 2008/393/EC of 8 May 2008
- [The Faroe Islands. Commission Decision](#) 2010/146/EU of 5 March 2010
- [Andorra. Commission Decision](#) 2010/625/EU of 19 October 2010
- [Israel. Commission Decision](#) 2011/61/EU of 31 January 2011
- [Uruguay. Commission Decision](#) 2012/484/EU of 21 August 2012
- [New Zealand. Commission Decision](#) 2013/65/EU of 19 December 2012
- The United States. Applicable to entities certified under the EU-US Privacy Shield [Commission Decision \(EU\)](#) 2016/1250 of 12 July 2016 (Decision annulled by the European Court of Justice (ECJ) on 17 July 2020).
- [Japan. The decision](#) of 23 January 2019.

Source: <https://www.aepd.es/es>

Although, on a transitional basis, [under the agreement governing the conditions for the United Kingdom's exit from the European Union](#), a **transition period of a maximum of 6 months** has been agreed in order to cover the Cross-border processings from the European Union to the United Kingdom. While this transition period, the European Commission considers that the United Kingdom's level of protection is adequate **as long as it maintains its current data protection legislation**.

**What are the implications?** Companies can continue to transfer personal data between the EU and the UK without the need to implement additional measures or safeguards pending an adequacy decision by the European Commission applicable to the UK at this time.

## **2. In the absence of a decision on adequacy, if exists almost one of the following guarantees:**

- a) A legally binding instrument enforceable between public authorities or bodies
- b) Binding corporate rules

- c) Standard data protection clauses adopted by the Commission remain valid
- d) Standard data protection clauses adopted by a supervisory authority and approved by the Commission
- e) Codes of conduct, together with binding and enforceable commitments from the controller or processor in the third country to implement appropriate safeguards, including those relating to the rights of data subjects
- f) Certification mechanisms, together with binding and enforceable commitments from the controller or processor in the third country to implement appropriate safeguards, including those relating to the rights of data subjects

**3. In the absence of a decision on adequacy and guarantees, it can only be made if one of the following conditions is met:**

- a) The data subject has explicitly given an informed consent
- b) the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of pre-contractual measures taken at the data subject's request
- c) the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and another natural or legal person
- d) The transfer is necessary for important reasons of public interest
- e) The transfer is necessary for the establishment, exercise, or defense of legal claims
- f) The transfer is necessary in order to protect the vital interests of the data subject or of other persons, where the data subject is physically or legally incapable of giving consent
- g) the transfer is made from a public register which according to Union or Member State law is intended to provide information to the public and which is open to consultation either by the public in general or by any person who can demonstrate a legitimate interest, but only to the extent that the conditions laid down by Union or Member States law for consultation are fulfilled in the particular case

Where a transfer could not be based on these exceptions, a transfer to a third country or an international organization may take place only if the transfer is not repetitive, concerns only a limited number of data subjects, is necessary for the purposes of compelling legitimate interests pursued by the controller which are not overridden by the interests or rights and freedoms of the data subject, and the controller has assessed all the circumstances

surrounding the data transfer and has on the basis of that assessment provided suitable safeguards with regard to the protection of personal data.

In this case, the controller will inform the supervisory authority about the transfer. In addition to the information referred to in Articles 13 and 14 of the GPRS, the data controller will inform the data subject of the transfer and the overriding legitimate interests pursued.

#### **4. The express authorization of the Spanish Data Protection Agency will be required when adequate guarantees are provided by**

- a) contractual clauses between the data controller or processor and the data processor and sub-processor, which have not been adopted by the European Commission; or
- b) provisions to be incorporated in administrative arrangements between public authorities or bodies that include effective and enforceable rights for the data subjects.

#### **5. Binding Corporate Rules (BCR)**

Binding corporate rules are *"personal data protection policies implemented by a controller or processor established in the territory of a Member State for data transfers or a set of data transfers to a controller or processor in one or more third countries, within a group of companies or a joint venture"*.

The competent supervisory authority will adopt binding corporate rules under the consistency mechanism set out in Article 63 of the GDPR.

#### **HOW SHOULD WE PROCEED FROM NOW ON WITH THE DATA TRANSFERS TO THE UNITED KINGDOM?**

- There is a **transition period of a maximum of 6 months**, while the European Commission considers adequate the level of protection in the UK so that during this period personal data can continue being transferred from the EU to the UK without required additional safeguards.
- It will be important to assess **the need for the appointment of an EU representative** of the UK controller or processor and the appointment of an EU representative of the controller or processor in the UK, all before the 6-month transition period.

- These representatives must carry out their duties by the mandate received from the person responsible or the person in charge, including cooperating with the competent supervisory authorities about any measure taken to ensure compliance with this Regulation or with United Kingdom legislation.
- Processors and controllers must also comply with other obligations arising from the GDPR, in particular on the need to **update the registers of processing activities and the privacy notices to mention data transfers to the United Kingdom.**
- Regular consultation of the UK Government website and the ICO website will be necessary to obtain up-to-date information in the light of any changes to privacy and data protection legislation.