

### EU SCCs vs IDTA

This document sets out a comparison between key features of the UK IDTA and the EU SCCs with a focus on differences of approach. An earlier version of this accompanied our blog - [The ICO consults on international data transfers post-Brexit](#).

Issue	UK IDTA	EU SCCs	Comment
<b>Structure and Layout</b>			
<b>Language/Style</b>	The IDTA adopts a "plain English" approach, which is similar in approach to most ICO guidance and the amendments that the ICO made to the old SCCs post-Brexit.	The EU SCCs use language that is similar in tone to other EU instruments, as well as the previous SCCs.	Given that both the EU and UK SCCs are not consumer-facing documents, realistically will only be used by legal/privacy teams, nonetheless the attempt at "plain English" is admirable and SMEs that do deal with cross border data flows would find this helpful.

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<p><b>Structure</b></p>	<p>The UK SCCs adopt a structure which involves four parts:</p> <ul style="list-style-type: none"> <li>• Part one: "Tables", including parties and signatures and transfer details.</li> <li>• Part two: extra protection clauses (Schrems issues – if necessary)</li> <li>• Part three: commercial clauses (optional)</li> <li>• Part four: mandatory clauses</li> </ul> <p>The ICO has made it clear that some clauses (very few) are stated to apply only in certain circumstances.</p>	<p>The EU SCCs have adopted a modular approach.</p>	<p>The UK's tabular format is arguably easier to use and/or follow.</p> <p>This does make for a nicer "read".</p>
<p><b>Use in practice and Execution</b></p>			
<p><b>Flexibility to change format</b></p>	<p>The IDTA explicitly states that it is possible to delete clauses that do not apply.</p> <p>It also states that the 'tables' format in part 1,2 and 3 is only a template and the parties do not have to adopt such a format, so long as they ensure all of the clauses are correctly tracked over and cross-referenced and do not reduce the appropriate safeguards.</p>	<p>Under the EU SCCs, unnecessary modules can be deleted if so desired.</p> <p>The EU flexibility is minimal and the four modules are now available in standalone.</p>	<p>Deleting clauses in the UK format may prove to be a costly and timely endeavour, as is changing the format. The EU SCCs are not particularly flexible with regard to the format, but it does mean that the parties can easily cross-check copies.</p>

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<b>Wrong description of parties</b>	The IDTA expressly states that if the parties choose the wrong description of controller/processor/etc., or as to whether the Importer is subject to UK GDPR is wrong, that wrong choice is ignored and the facts will apply.	Parties are to set out their respective roles in Annex I (Part A), but whether or not the parties have been incorrectly described is not covered.	This is a useful clarification from the ICO, absent in the EU document, albeit a rather technical point.
<b>Linked Agreements</b>	The UK IDTA have adopted the concept of "Linked Agreements", to describe the associated data processing/data sharing and commercial agreements.	The EU SCCs recognise the possibility of additional clauses. The EU SCCs do not go into a significant amount of detail about this concept.	It is useful to recognise this commercial reality of this agreement.
<b>Article 28</b>	The UK IDTA do not attempt at dealing with Article 28 requirement when the importer is a processor.	The EU SCCs have some (but, strangely, not all) of the Article 28 requirements.	The UK approach does seem cleaner and less likely to result in conflicts between the transfer tool and any accompanying Data Protection Agreement (i.e. a Linked Agreement).
<b>Details of transfer</b>	In Tables at the front. The ICO will not require parties to adopt the use of these tables, especially where the information is set out elsewhere.	As under the previous SCCs, details of the transfers are found in annexes towards the end of the SCCs.	It is useful that the ICO is flexible in approach here, as practice may well follow the tried and tested EU SCCs formation.

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<b>Execution</b>	Template signature blocks are provided but (in common with other Tables) are "optional".	Signature blocks are provided in a similar structure and format to the previous SCCs.	Whilst in the final IDTA draft there is no express recognition (as it was the case in the FAQs in the Consultation draft) that documents do not need to be "signed" to be binding, this point will hopefully be confirmed in the upcoming guidance from the ICO. It would be useful for the ICO to explicitly recognise that incorporation by "other methods" e.g. by reference or click-through will suffice.
<b>Onward Transfers/(sub-)processors</b>			
<b>Flow-down</b>	The "same level of protection" is to be flowed down.	Differs from module to module, but broadly – the "same level of protection" to be applied (if not covered by adequacy).	Broadly the same position is adopted.
<b>Sub-processors</b>	The UK IDTA make no distinction between "onward transfers" and appointment of sub-processors (which could be in the same country). The table allows a general permission to so transfer – and doesn't seek to replicate Article 28.	The EU SCCs have complex and interacting provisions dealing with transfers to other countries and with sub-processors; the latter reflecting Article 28.	The UK's approach here does seem simpler to navigate, but of course Article 28 of GDPR will still always need to be satisfied, so there is no real substantial difference.

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<b>Informing controllers</b>	Not if a sub-processor.	An unrealistic requirement for a sub-processor importer in Module 3 to inform the ultimate controller of any further sub-sub-processors.	UK version clearly more realistic.
<b>Law enforcement requests/Schrems</b>			
<b>Terminology</b>	Transfer Risk Assessment – TRA – for the <i>Schrems II</i> inspired assessment.	No defined term, but Transfer Impact Assessment has become the norm.	The same concept; different terms.
<b>Undertaking a TIA/TRA assessment</b>	Exporter undertakes TRA. Exporter to provide copy to Importer on request.	Each party undertakes a TIA.	Exporters won't like having to provide these to importers.
<b>Formal Review</b>	A review of the IDTA (including the Security Requirements and Extra Protection Clauses and the Importer Information) is still mandated but the parties can now choose review periods less frequent than once a year or instead commit to reviewing the IDTA ' <i>each time there is a change to the Transferred Data, Purposes, Importer Information, TRA or risk assessment</i> '. <i>Information, TRA or risk assessment</i> '.	No formal review mandated.	The EU's more informal approach of just being aware of changes (without mandating a formal review) will be more attractive.

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<b>Other points</b>			
<b>Exceptions to subject rights</b>	The IDTA expressly states that when an individual makes a request, the UK Data Protection Act 2018 (UK DPA) exemptions will apply.	If "allowed" under local law, provided that the local law meets European standards.	The UK DPA exceptions provide a clear list of exceptions, whereby the position under the EU SCCs will need to be specified as it relies on local law. This perhaps makes the IDTA more user-friendly.
<b>Breach Notification: Sub-processor to controllers?</b>	On a personal data breach, the importer (who is a sub-processor) has to assist any ultimate controller in breach notification.	Sub-processor to notify the ultimate data controller directly "where appropriate and feasible".	A more realistic balance seems to be struck in the UK.
<b>Audit</b>	The Importer does not have automatic right to audit under this document as long as the Linked Agreement has one.	Under the relevant module(s), the right of audit is set out.	Given that the right of audit can often be heavily negotiated, the ICO's recognition of the audit right under the Linked Agreement is a useful clarification, which should please contracting parties.
<b>Supervisory authority to enforce the IDTA</b>	The ICO is entitled to bring <i>contractual</i> claims against the exporter or importer for breaches of certain provisions of the IDTA.	-----	This provision under the IDTA seems novel and somewhat unnecessary. It introduces a new angle of regulatory enforcement for such breaches.

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<b>Limitation of liability</b>	The IDTA states that nothing in the Linked Agreement can limit or exclude liability to data subjects and the ICO; implying that the parties can limit (or exclude) liability amongst themselves under the IDTA.		The implication that the parties can limit liability under the document is helpful even if not as explicit.
<b>Transfers to importers who are subject to the UK GDPR</b>	The IDTA expressly permits transfers to importers in non-adequate third countries who are subject to the UK GDPR due to its extraterritorial application.	The current EU SCCs modules are not suitable for transfers to entities in third countries which are already subject to the GDPR (see our blog <a href="#">The updated standard contractual clauses — A new hope?   Fieldfisher</a> under the heading "What about transfers to importers that are already subject to the GDPR?").	This is likely to be only a temporary difference as the European Commission and the EDPB are working on a new module of EU SCCs to cover transfers of data to importers subject to the long-arm jurisdiction of the GDPR.