

## Updated BCR communication following the EU-UK Trade and Co-operation Agreement (TCA)

In November 2020, ICO issued an Information Note setting out its expectations for existing EU BCR Holders requiring a UK BCR post 1 January 2021.

The UK and EU have now successfully negotiated a Trade & Co-operation Agreement ("**TCA**") and as part of the joint declaration, the EU is currently considering the UK's adequacy position for the purpose of data transfers. With effect from 1 January 2021 and whilst the EU considers the UK's adequacy, an adequacy bridge is in place. This period (the "**Specified Period**") is initially in place for four months<sup>1</sup>. During this time, the UK will not be deemed to be a "third country" for the purpose of data transfers from the EEA to the UK allowing data to continue to flow from the EEA to the UK without the need for an alternative transfer tool to be put in place.

The UK government has already determined that it considers all EU 27 and EEA member states to be adequate for the purposes of data protection, ensuring that data flows from the UK to the EU/EEA remain unaffected. Further, the UK has agreed to continue to align with the EU on existing adequacy decisions.

This bridge only concerns data transfers from the EEA to the UK meaning that any transfers from the UK to any other third country will still require a valid transfer tool before such transfers can take place (such as an adequacy decision, SCCs, UK BCRs etc). We would also refer organisations to the recent EDPB publications dated 13 January 2021, which can be found at:

[edpb informationnote 20201215 transferstoukaftertransitionperiod updated20210113 en.pdf \(europa.eu\)](https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_statement_20201215_brexit_updated20210113_en.pdf)

[https://edpb.europa.eu/sites/edpb/files/files/file1/edpb\\_statement\\_20201215\\_brexit\\_updated20210113\\_en.pdf](https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_statement_20201215_brexit_updated20210113_en.pdf)

Whilst we wait for an adequacy decision, for the bridge to continue any new UK adequacy regulations, standard contractual clauses or ICO approvals of international transfer mechanisms, must be put before the TCA's oversight mechanisms.

The position regarding existing EU BCR Holders (seeking a UK BCR) remains unchanged and unaffected by the adequacy bridge and remains as set out in our Information Note dated November 2020. This update provides further

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<sup>1</sup> The Specified Period may be extended by a further maximum two months

clarification on how ICO will be handling UK BCR applications during the Specified Period.

## EU Binding Corporate Rules authorised under Article 26(2) of Directive 95/46/EC where ICO was the lead supervisory authority.

### **Pre TCA position**

Holders of EU BCRs where ICO was the lead supervisory authority who wanted to continue with their EU BCR were required to identify an EEA supervisory authority to act as their new lead for their EU BCRs post end of the transition period. The EDPB information note dated July 2020 explained the measures to be taken. The note advised that if this was not done, the EU BCR would no longer be valid under EU law.

### **TCA bridge position**

ICO is no longer a competent supervisory authority for the purpose of the EU BCR. Organisations that have not completed the transition are urged to make contact with their new proposed lead to ascertain the status of their EU BCR. If the proposed lead supervisory authority accepts that the EU BCRs are valid then those EU BCRs will continue to be a valid tool for transferring data from the EEA to the UK.

Any organisation falling into this category may also need to take the steps set out below.

### Continuing transfers from the UK:

## EU Binding Corporate Rules authorised under Article 26(2) of Directive 95/46/EC where the Information Commissioner issued an authorisation. (This includes those where ICO was the lead supervisory authority and some where ICO was not the lead but still issued an authorisation).

### **Pre TCA position**

Holders of EU BCRs for which the Information Commissioner issued an authorisation under Directive 95/46/EC are eligible for a UK BCR under paragraph 9, Part 3, Schedule 21 to the DPA 2018 (as amended from 1 January 2021). Though eligible, certain steps must still be completed.

Each such BCR holder needed to produce a UK version of their BCRs by 1 January 2021 to incorporate the changes described in the specified

paragraph of Schedule 21 DPA. The UK version of the BCRs must be provided to ICO on or before the next annual update due date.

ICO requires each relevant organisation to produce a separate UK BCR each for Controllers and for Processors if their current EU BCR is a dual BCR document. ICO also requires each relevant organisation to tell us:

- they want a UK BCR;
- they have produced the necessary documentation; and
- confirm when we can expect to receive their complete UK BCR pack.

If the amended documentation is not provided to ICO's satisfaction, the Information Commissioner may revoke the UK BCR authorisation.

### **TCA bridge position**

The requirement for a valid transfer tool (e.g. a UK BCR) is unaffected by the adequacy bridge. The UK GDPR and UK DPA 2018 as amended by the Privacy and Electronic Communications 2019 and 2020 are now in force from 1 January 2021. ICO therefore still requires any organisation described above that is eligible for a UK BCR to complete the necessary steps, prepare their documentation and contact us. ICO will not be required to obtain any input or further approval from the Partnership Council in order to confirm UK BCR status as this falls within Art FINPROV 10A.6 TCA.

**EU Binding Corporate Rules authorised under Article 26(2) of Directive 95/46/EC where the ICO was not the lead supervisory authority and did not issue an authorisation.**

### **Pre TCA position**

Holders of EU BCRs for which ICO did not act as lead and did not issue an authorisation are also eligible for a UK BCR. However certain conditions must be met.

These conditions are:

- their entity established in the UK must notify ICO that they have an EU BCR and wish to have a UK BCR;
- they must provide the name and contact details of their DPO or other relevant contact; and
- they must supply such additional information ICO reasonably requires.

The additional information ICO expects to receive includes a UK version of the BCRs incorporating the changes described in paragraph 9, Part 3, Schedule 21, the DPA 2018 (as amended from 1 January 2021) which are more clearly set out in the requirements table published by ICO in November

2020. ICO requires separate documentation for BCRs for Controllers and for Processors. The conditions should be satisfied as soon as possible and, in any event, before 30 June 2021, as no confirmation of UK BCR will be issued by Information Commissioner until they are. These BCR holders have until 30 June 2021 at the latest to provide this information to ICO's satisfaction or they will lose their eligibility for a UK BCR.

Please contact [BCR@ico.org.uk](mailto:BCR@ico.org.uk).

### **TCA bridge position**

The conditions that must be satisfied are unaffected by the adequacy bridge.

The UK GDPR and UK DPA 2018 as amended by the Privacy and Electronic Communications 2019 and 2020 are now in force from 1 January 2021. ICO will be assessing the documentation provided to us and will approve UK BCRs to this group of organisations upon receipt of satisfactory requested documentation by 30 June 2021. ICO will not be required to obtain any input or further approval from the Partnership Council in order to approve a UK BCR in these cases as this falls within Art FINPROV 10A.6 TCA and 7(a) TCA.

In the meantime, and pending approval, ICO reminds these organisations to ensure they have a valid transfer tool in place prior to making any international transfers.

## **EU Binding Corporate Rules approved under EU GDPR where the ICO was not the lead supervisory authority**

### **Pre TCA position:**

These BCRs are not covered by paragraph 9, Part 3, Schedule 21 to the DPA 2018 (as amended from 1 January 2021). Holders of these EU BCRs must contact ICO as soon as possible if they require a UK BCR to discuss the process and ICO's requirements. Please contact [BCR@ico.org.uk](mailto:BCR@ico.org.uk).

### **TCA interim position:**

As part of the negotiations, the UK Government has agreed with the Commission that this category of EU BCR holders can be considered for a UK BCR also without triggering the involvement of the Partnership Council. Again this is on the basis that these approvals fall within the alignment provision pursuant to Art.FINPROV 10A.6 and 7(a) & (b) TCA respectively.

## What this means for new BCR applications:

### Organisations seeking a new UK BCR

For organisations who have not been relying on a previously approved EU BCR, including those that are currently in the application process for EU BCRs, and that may now need a UK BCR.

ICO have recently published updated UK BCR application forms and corresponding referential tables that set out the detail on what documents you will need to provide. Upon receipt ICO will review your application and liaise with you if any further information is required prior to approval.

When ICO is satisfied with the requested documentation, and assuming the Bridge is still in place, ICO will engage with the Partnership Counsel pursuant to ART.FINPROV 10A.9 prior to issuing any approval of the UK BCR.

Useful Links:

<https://ico.org.uk/media/for-organisations/binding-corporate-rules/2618937/final-uk-bcr-c-application-v10.docx>

<https://ico.org.uk/media/for-organisations/binding-corporate-rules/2618938/final-uk-bcr-c-referential-table-v10.docx>

<https://ico.org.uk/media/for-organisations/binding-corporate-rules/2618939/final-uk-bcr-p-application-v10.docx>

<https://ico.org.uk/media/for-organisations/binding-corporate-rules/2618940/final-uk-bcr-p-referential-table-v10.docx>

<https://ico.org.uk/media/for-organisations/documents/2618639/binding-corporate-rules-at-the-end-of-the-transition-period-final-131120.pdf>

<https://ico.org.uk/media/for-organisations/documents/2618638/uk-bcr-requirements-to-transition-table-final.docx>