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Information Commissioner's Office
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11 October 2021

Dear Sir, dear Madam,

Re: ICO Consultation on International Transfers under UK GDPR

We welcome the opportunity to provide input to the ICO on the draft International Data Transfer Agreement (IDTA) and Guidance.

The EMA is the EU trade body of FinTech and BigTech firms engaging in the provision of alternative payment services and the issuance of electronic money. Our members include leading payments and e-commerce businesses providing online/mobile payments, card-based products, electronic vouchers, virtual currency exchanges, electronic marketplaces, merchant acquiring services and a range of other innovative payment services. Most members operate across the European Union ("EU") and globally on a cross border basis. A list of current EMA members is provided at the end of this document.

Our response addresses a subset of the questions in the consultation paper, and is set out in the Appendix to this letter. We would be grateful if you could take into consideration the issues raised in our response.

Yours faithfully,

Dr Thaer Sabri
Chief Executive Officer
Electronic Money Association

Appendix I: EMA response

B Interpretation of Chapter V UK GDPR

Proposal 1: In order for a “restricted transfer” (a transfer falling within Article 44 UK GDPR) to take place, there must be a transfer from one legal entity to another.

Q4. Please provide us with your views on this proposal. Please highlight any relevant privacy rights, legal, economic or policy considerations and implications.

The EMA considers this proposal to be helpful; transfers within one legal entity but between branches should not necessarily have to meet the requirements of restricted transfers, as they involve transfers within one legal entity.

However, we wish to emphasise the importance of avoiding any significant departure from the EU GDPR provisions, including the GDPR principle that Inter-company Agreements should not be regarded as the sole sufficient method of protection for international data transfers. We are concerned that the UK’s alternative approach could have a possible impact on the Adequacy decision, and would urge the ICO to take this into consideration when making a decision. Many EMA members operate in both the EU and the UK, and will be transferring data between the legal entities in both jurisdictions, so the data adequacy decision is essential for the operation of these businesses.

Proposal 2: A UK GDPR processor with a non-UK GDPR controller, will only make a restricted transfer to its own overseas sub-processors.

Q5. Please provide us with your views on this proposal. Please highlight any relevant privacy rights, legal, economic or policy considerations and implications.

We agree with this proposal. If the information has come from overseas, is only processed in the UK, and sent back to the controller outside the UK, it should not be covered. The objective of UK GDPR is to protect UK data and the data of UK customers.

Proposal 3: Whether processing by the importer must not be governed by UK GDPR.

Option 1: The ICO maintains our current guidance.

Option 2: The ICO updates our guidance.

Q6. The ICO’s current intention is to follow Option 2 but there are valid points in favour of both options.

We agree with the ICO’s approach.

Q7. Please provide your views on the current ICO guidance about Article 49 derogations, in particular:

- **Should exporters first try to put an appropriate safeguard in place before relying on a derogation?**

- **Should the requirements for those derogations to be “necessary” be interpreted as “strictly necessary”.**
- **To what extent may the derogations be relied on for repetitive transfers, regular and predictable transfers and systematic transfers?**

We agree that exporters should first try to put appropriate safeguards in place prior to relying on derogations, as Article 49 was not intended to be the preferred method of use, especially for regular international data transfers. This is in line with the European approach, where consent cannot be relied upon on its own, as this shifts the burden onto end users. Instead, the emphasis should be on companies having the appropriate measures and security controls in place to send data, and taking responsibility for the management of data transfers in a compliant manner.

Q9. Please provide us with your views on the draft Transfer Risk Assessment (TRA) tool, in particular:

- **Do you consider it practical? Do you have any suggestions about how we could make it more helpful?**
- **Do you agree with the underlying decision tree and our approach to risk?**
- **Do you agree that the IDTA may be used where the risk of harm to data subjects is low?**

The TRA tool is welcomed and practical, as it can assist firms in determining, based on the facts of the case, when to conduct a TRA, and the appropriate mechanism(s) to put in place for the data transfer.

We would however note, as above, our concerns about any significant departure from the EU position on data transfers and GDPR. The UK position appears different to the European position. For example, the EU approach to determining when risk assessment is needed does not permit the taking into account of ‘subjective considerations’ such as considering the likelihood of public authorities’ access to data imported into the destination country (European Data Protection Board, ‘Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data’, Adopted on 10 November 2020, paragraph 42).

This is in contrast to the UK approach, which includes such a subjective consideration in Step Three of the proposed TRA tool. The fact that public authorities of the destination country have accessed similar data held by the importer in the past is listed as one of the factors that suggest third party access or surveillance may occur, undermining the safeguarding of data subjects’ rights (ICO, ‘Draft International transfer risk assessment and tool’, August 2021, Table E). Whilst this may be considered to provide additional protection to that provided by GDPR, we encourage the ICO to consider the potential impact on the data adequacy agreement.

Q11. Please provide us with your views on the draft International Data Transfer Agreement (IDTA):

Upon initial review, the IDTA appears to play a similar role to that of contractual clauses, in that the contract is used as the safeguarding method of data subjects.

However we would like to highlight that European guidance, as well as the Schrems II decision, clarified that contractual clauses are not sufficient on their own, and supplementary security measures are also required. If the IDTA is adopted as the sole method of safeguarding data subject rights for international data transfers, this could put the Adequacy decision at risk.

As an example, attached at Annex 3 is a UK GDPR addendum to the European Commission SCCs. The addendum amends the European Commission SCCs to work in the context of UK data transfers.

Q14. Please provide your views on the addendum to the European Commission SCCs.

As above, we are concerned that if the IDTA is adopted as the sole method of safeguarding data subject rights for international data transfers, this could put the Adequacy decision at risk.

Due to the nature of the payments industry, many EMA members operate on a cross-border basis, and have set up legal entities within the EU to continue to access the EU market. As such, it is of great importance for the EMA that the Adequacy decision is not revoked as this would negatively impact our members' businesses and the payments industry as a whole.

List of EMA members as of October 2021

[AAVE LIMITED](#)
[Account Technologies](#)
[Airbnb Inc](#)
[Airwallex \(UK\) Limited](#)
[Allegro Group](#)
[American Express](#)
[ArcaPay Ltd](#)
[Azimo Limited](#)
[Bitpanda Payments GmbH](#)
[Bitstamp](#)
[BlaBla Connect UK Ltd](#)
[Blackhawk Network Ltd](#)
[Boku Inc](#)
[CashFlows](#)
[Circle](#)
[Citadel Commerce UK Ltd](#)
[Contis](#)
[Corner Banca SA](#)
[Crosscard S.A.](#)
[Crypto.com](#)
[Curve](#)
[eBay Sarl](#)
[ECOMMPAY Limited](#)
[Em@ney Plc](#)
[emerchantpay Group Ltd](#)
[ePayments Systems Limited](#)
[Euronet Worldwide Inc](#)
[Facebook Payments International Ltd](#)
[Financial House Limited](#)
[First Rate Exchange Services](#)
[FIS](#)
[Flex-e-card](#)
[Flywire](#)
[Gemini](#)
[Globepay Limited](#)
[GoCardless Ltd](#)
[Google Payment Ltd](#)
[HUBUC](#)
[IDT Financial Services Limited](#)
[Imagor SA](#)
[Ixaris Systems Ltd](#)
[Modulr FS Europe Limited](#)
[MONAVATE](#)
[Moneyhub Financial Technology Ltd](#)
[Moorwand](#)
[MuchBetter](#)
[myPOS Europe Limited](#)
[OFX](#)
[OKTO](#)
[One Money Mail Ltd](#)
[OpenPayd](#)
[Own.Solutions](#)
[Oxygen](#)
[Park Card Services Limited](#)
[Paydoo Payments UAB](#)
[Paymentsense Limited](#)
[Payoneer](#)
[PayPal Europe Ltd](#)
[Paysafe Group](#)
[Plaid](#)
[PPRO Financial Ltd](#)
[PPS](#)
[Remitly](#)
[Revolut](#)
[SafeCharge UK Limited](#)
[Securiclick Limited](#)
[Skrill Limited](#)
[Snowy Pay Ltd.](#)
[Soldo Financial Services Ireland DAC](#)
[Square](#)
[Stripe](#)
[SumUp Limited](#)
[Syspay Ltd](#)
[Transact Payments Limited](#)
[TransferMate Global Payments](#)
[TrueLayer Limited](#)
[Trustly Group AB](#)
[Uber BV](#)
[Vitesse PSP Ltd](#)
[Viva Payments SA](#)
[Vivid Money Limited](#)
[Weavr Limited](#)
[WEX Europe UK Limited](#)
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[Wise](#)
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