



## **DATA EXPORT AND SHARING**

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## Introduction

Part 4 of the [Data Protection Law, DIFC Law No. 5 of 2020](#) (the “DP Law”) and Section 5 of the [Data Protection Regulations 2020](#) (the “Regulations”) cover the topic of Data Export and Sharing, which effectively is regarding transfers of Personal Data outside of the DIFC.

Personal Data is defined in the DIFC DP Law as, “Any Data referring to an Identifiable Natural Person” and Special Category Data is defined as, “Personal Data revealing or concerning (directly or indirectly) racial or ethnic origin, communal origin, political affiliations or opinions, religious or philosophical beliefs, criminal record, trade-union membership and health or sex life and including genetic data and biometric data where it is used for the purpose of uniquely identifying a natural person.” Such data includes but is not limited to name, address, business or personal email address, business or personal phone numbers, geolocations, job title or other employee data, health and biometric data, religious affiliations or criminal history.

In sum, Personal Data generally can be any information that when viewed together (or in some cases is so unique) it clearly identifies a living individual. It could be data about clients, employees, suppliers, or family members, to name a few categories of Personal Data. Many if not all organizations process Personal Data as a result, and will in many cases have to transfer such data outside the DIFC at some point in a transaction. Even the UAE, because it is separate from the DIFC as a legal jurisdiction and at this time does not have a national data protection law, must be viewed as a Third Country under the DIFC DP Law 2020 to which data export considerations must apply

The defined terms used herein have the same meaning as the defined terms in the DP Law.

If you require further information or clarification about anything provided in this guidance document or any other guidance referenced herein, please contact the Commissioner either via the DIFC switchboard, via email at [commissioner@dp.difc.ae](mailto:commissioner@dp.difc.ae) or via regular mail sent to the DIFC main office. Also, you may wish to refer to the [DIFC Online Data Protection Policy](#).

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## Checklist for Data Export to a non-DIFC jurisdiction:

Before making any transfers of Personal Data outside the DIFC, please consider the following checklist:

### **1. Is a transfer of Personal Data outside of the DIFC being made?**

If no, you can make the transfer. If yes go to Q2

### **2. Has the DIFC recognised the country or territory where the recipient is located as having an adequate data protection law or regime in place, in accordance with Article 26(1)(a)?**

If yes, you can make the transfer. If no go to Q3

### **3. Is one of the appropriate safeguards referred to in the DIFC DP Law 2020 in place, in accordance with Article 27(2)?**

If yes, you can make the transfer. If no go to Q4

### **4. Do any of the derogations listed in Article 27(3) apply?**

If yes, you can make the transfer. If no go to Q5

### **5. Does one of the limited circumstances provided for in Article 27(4) the DP Law 2020 apply?**

If yes, you can make the transfer. If no you cannot make the transfer in accordance with the DP Law 2020

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## Data Export in Detail:

### 1) Is a transfer of Personal Data outside of the DIFC being made?

The DP Law 2020 refers to jurisdictions outside of the DIFC as Third Countries or International Organisations. Please note that the UAE is considered a Third Country as well.

Under Article 26(1) of DP Law 2020:

Processing of Personal Data that involves the transfer of Personal Data from the DIFC to a Third Country or to an International Organisation may take place only if:

- (a) an adequate level of protection for that Personal Data is ensured by Applicable Law, as set out in Articles 26(2) and (3), including with respect to onward transfers of Personal Data; or
- (b) it takes place in accordance with Article 27.

Any other transfers are “restricted”, in that they cannot take place. If they do, it will violate DP Law 2020. In other words, you are making a “restricted transfer” if:

- the DP Law 2020 applies to your processing of the Personal Data you are transferring. In general, the DP Law 2020 applies if you are processing Personal Data in the DIFC, and may apply in specific circumstances if you are outside the DIFC and processing DIFC-related Personal Data. The DIFC DP Commissioner’s Office has produced a [tool](#) to assess whether DP Law 2020 applies to the processing in question.
- you are sending Personal Data, or making it accessible, to a recipient to which the DP Law 2020 does not apply, i.e., if the recipient is not registered in the DIFC; and
- the recipient is a separate organisation or individual. This includes transfers to another company within the same corporate group. However, if you are sending Personal Data to someone employed by you or by your company, this is not a restricted transfer. The transfer restrictions only apply if you are sending Personal Data outside your organisation.

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Generally, all transfers within the DIFC are not in scope for this guidance because they are always permitted. It is worth considering, however, whether there will be any onward transfers from the third party entity with which you shared the Personal Data that may be considered restricted.

“Transfer” and “transit” are not the same thing. If Personal Data is electronically routed through a non-DIFC jurisdiction but the jurisdiction is one recognized as adequate by the Commissioner’s Office, then it is not a restricted transfer.

Putting Personal Data on to a website, for example, will often be considered a restricted transfer under DP Law 2020 because someone outside the DIFC may access that Personal Data via the website.

If you load Personal Data onto a DIFC server which is then available through a website, and you plan or anticipate that the website may be accessed from outside the DIFC, you should treat this as a restricted transfer.

2) Has the DIFC recognised the country or territory where the recipient is located as having an adequate data protection law or regime in place, in accordance with Article 26(1)(a)?

Adequacy recognition is a finding by the Commissioner and set out in the Data Protection Regulations that the legal framework in place in the Third Country International Organisation provides similar or equivalent protections and controls for individuals’ rights regarding their Personal Data.

If the restricted transfer is covered by an adequacy decision, you may go ahead with the restricted transfer. Of course, you must still comply with the rest of the DP Law 2020.

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### 3) Is one of the appropriate safeguards referred to in the DIFC DP Law 2020 in place, in accordance with Article 27(2)?

If the Regulations do not specify the Third Country or international Organisation as adequate, you should then find out whether you can make the transfer subject to 'appropriate safeguards', which are listed in the DP Law 2020.

These appropriate safeguards ensure that both you and the recipient of the transfer are legally required to protect individuals' rights and freedoms for their Personal Data.

If it is covered by an appropriate safeguards, you may go ahead with the restricted transfer. Of course, you must still comply with the rest of the DP Law 2020.

Article 27(2) lists the appropriate safeguards that may be applied to restricted transfers. The primary, commonly used appropriate safeguard are set out below:

#### **A. a legally binding instrument between public authorities**

You can make a restricted transfer using a legal instrument between public authorities provided that the legal instrument provides 'appropriate safeguards' for the rights of the individuals whose Personal Data is being transferred and it is legally binding and enforceable. The 'appropriate safeguards' must include enforceable rights and effective remedies for the individuals whose Personal Data is transferred.

#### **B. Binding corporate rules**

You can make a restricted transfer if both you and the recipient have signed up to a group document called binding corporate rules (BCRs).

BCRs are an internal code of conduct operating within a multinational group, which applies to restricted transfers of Personal Data from the group's EEA entities to non-EEA group entities.

This may be a corporate group or a group of undertakings or enterprises engaged in a joint economic activity, such as franchises or joint ventures.

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You must submit BCRs for review by the Commissioner before the transfer goes ahead.

### **C. Standard data protection clauses adopted by the Commissioner and set out in the Regulations**

You can make a restricted transfer if you and the recipient have entered into a contract incorporating standard data protection clauses adopted by the Commissioner. They must be entered into by the data exporter (based in the DIFC) and the data importer (outside the DIFC).

The clauses contain contractual obligations on the data exporter and the data importer, and rights for the individuals whose Personal Data is transferred. Individuals can directly enforce those rights against the data importer and the data exporter.

There are standard contractual clauses for restricted transfers between a controller and controller, and there is a set for restricted transfers between a controller and processor. They are based on the sets of model clauses adopted by the European Commission for ease of compliance with already existing clauses that may be used by a parent entity in another jurisdiction or similar.

The European Commission plans to update the existing standard contractual clauses, which may result in changes in those set out by the Regulations. Please keep checking the DIFC DP website for updates.

Please note that the Court of Justice of the European Union (the Court) recently clarified in the "Schrems II" decision that enhanced due diligence should be done on the data protection regime of the destination country or organisation prior to making the restricted transfer. Finally, in the same decision, the Court invalidated a transfer mechanism called Privacy Shield<sup>1</sup>.

As DIFC has not permitted this transfer option previously, hopefully the impact on DIFC entities will be low. However, if your entity is part of a multi-national or large group business that does use Privacy Shield for certain transfers / onward transfers to the United States, please consider reviewing any transfers made by your entity outside of the DIFC to affiliates in the EU to ensure they are compliant with Article 27 of the DIFC DP Law 2020. For further assistance, please review the Commissioner's comprehensive [guidance](#) on DP Law 2020 as

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<sup>1</sup> Schrems II [decision](#) and [press release](#):

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well as the [Data Export assessment tool](#). Please note that any such guidance is for informational purposes only and should not be construed as legal advice provided by the Commissioner's Office.

Existing contracts incorporating standard contractual clauses can continue to be used for restricted transfers.

If you are entering into a new contract, you must use the approved standard contractual clauses **in their entirety and without amendment**. You can include additional clauses on business related issues, provided that they do not contradict the standard contractual clauses. You can also add parties (i.e. additional data importers or exporters) provided they are also bound by the standard contractual clauses.

If you are making a restricted transfer from a controller to a processor, please apply the requirements of Articles 23 and 24 of DP Law 2020.

#### 4) Do any of the derogations listed in Article 27(3) apply?

Derogations are circumstances that allow for the restricted transfer to take place. If it is covered by a derogation, you may go ahead with the restricted transfer. Of course, you must still comply with the rest of the DP Law 2020.

Article 27(2) lists the appropriate safeguards that may be applied to restricted transfers. The primary, commonly used derogations are set out below, where the restricted transfer is:

- A. made with the explicit consent of the Data Subject
- B. necessary for the performance of a contract between a Data Subject and Controller
- C. necessary for reasons of Substantial Public Interest
- D. necessary for the establishment, exercise or defence of a legal claim
- E. necessary to comply with applicable anti-money laundering or counterterrorist financing obligations that apply to a Controller or Processor or for the prevention or detection of a crime

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## 5) Is the restricted transfer covered by one of the limited circumstances set out in Article 27(4) of DP Law 2020?

If you are making a restricted transfer that is not covered by an adequacy decision, nor an appropriate safeguard or derogation, then you can only make that transfer if it is covered by one of the limited circumstances set out in Article 27(4) of the DP Law 2020.

You should only use these as true exceptions from the general rule that you should not make a restricted transfer unless it is covered by an adequacy decision, appropriate safeguards, or a derogation is in place.

If it is covered by such a limited circumstance exception, you may go ahead with the restricted transfer. Please continue to evaluate all such use and seek feedback from the Commissioner through prior consultation or other similar recourse if in doubt. Of course, as always, you must still comply with the rest of the DP Law 2020.

## Conclusion

International data export and transfers can be a complex area of data protection law, and will often require professional feedback. If you have questions or require clarity, please feel free to contact the Commissioner's Office.

**NOTE:** The Commissioner does not make any warranty or assume any legal liability for the accuracy or completeness of the information herein as it may apply to the particular circumstances of an individual or a DIFC entity. The information, which may be amended from time to time, does not constitute legal or any other type of advice and it is provided for information purposes only.

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