

Brexit alert

UK proposals for shared approach on data protection

On 24 August 2017, the UK published the last of its recent series of proposals for its partnership with the EU following Brexit. The final paper calls for a new UK-EU model for exchanging and protecting personal data. The cross-border movement of data (both customer and employee) has become a key issue for global operations and businesses throughout the EU will be pleased to note the recognition in paper that any disruption in cross-border data flows would be extremely costly.

The position paper notes that the UK will be compliant with EU data protection law by the time the UK leaves the EU and makes no reference to any potential areas of concern that might need to be addressed in reaching an agreement. Instead it calls for, effectively, transitional arrangements on exit, until new and more permanent arrangements are put in place.

The UK's domestic legislation on personal data protection is to be strengthened by the Data Protection Bill, announced in the recent Queen's Speech. That Bill will incorporate into UK law the EU's data protection framework in the form of the new General Data Protection Regulation (GDPR) and the separate Data Protection Directive (DPD). There will be a number of UK derogations as announced at the beginning of August. It is worth remembering that this new framework must come into force by May 2018 and that it will therefore be in place before the UK leaves the EU.

It seems that the UK wants to build on the existing 'adequacy' model which allows the European Commission to formally recognise that a third country provides an 'adequate' level of data protection under EU law. Adequacy decisions allow businesses and public authorities to continue to transfer data from the EEA to respective third countries without having to satisfy themselves that adequate safeguards are in place for each transfer. However, given potential timing issues with the adequacy decision process, the UK Government is suggesting that an early step should be to agree to mutually recognise each other's data protection frameworks at the point of exit, as well as setting a negotiating timeline for longer-term arrangements.

It will be interesting to see what points the EU makes when it publishes its response.

Background to the debate

Personal data flows are critical to trade in both the UK and EU and to the management and operation of multinational businesses (covering both employee and customer data). Data flows also fulfil a crucial role in supporting security and law enforcement. Placing restrictions on the flow of data risks harming not only the economies directly involved but others more globally. However, at the same time, effective protections are needed to ensure that data relating to individuals (personal data) is handled appropriately and protected against misuse. The issues associated in achieving the desired level of protection of data are highlighted where the data is transferred to a third country with different regulations.

All European Economic Area (EEA) countries will be directly party to the GDPR from May 2018. Data can be freely transferred between EEA states. Although the UK will be aligned with the EU/EEA at the point it leaves the EU, it will need to put in place new arrangements to facilitate the free flow of data to and from the EU/EEA after that point.

Options

As noted above, one option is for the European Commission to make an 'adequacy decision' so that personal data can flow from EU/EEA member states to third countries (or one or more specific sectors in those countries). An adequacy decision is a formal, legislative decision of the EU and concerns have been raised as the timeframe for the decision process. All 12 existing adequacy decisions are subject to routine review.

The new EU data protection framework sets out a number of legal bases other than adequacy for transferring personal data to countries outside the EEA and these are set out in an appendix to the position paper. However, the UK is clear that simply extending these provisions or establishing new ones to cover personal data transfers between the UK and the EU would be more burdensome for businesses and public authorities in both the UK and the EU than the partnership it is seeking.

Benefits

The position paper highlights two key respects in which a partnership between the UK and the EU could build on the existing adequacy model:

- ▶ **Regulatory co-operation:** The UK seeks an ongoing role for the UK's Information Commissioner's Office in future regulatory dialogue. This would be as part of a cooperation mechanism. The UK Government would continue to have responsibility for the content and direction of data protection rules in the UK.
- ▶ **Certainty and stability:** The UK proposes that a UK-EU model could give greater ongoing certainty to business and citizens, particularly minimising uncertainty, unnecessary expense and disruption around the time of the UK's exit from the EU. Adequacy decisions are made in respect of third countries, opening up a potential time gap if such a decision cannot be made in respect of the UK until it leaves the UK. This is why the UK is calling for early agreement to the proposal for mutual recognition of the respective data protection frameworks, until such time as new and more permanent arrangements come into force.

Investigatory Powers Act: Potential fly in the ointment?

In considering 'adequacy' the European Commission can take into account not just data protection legislation but legislation on use of information such as surveillance powers. The European Parliament and the Council may also request the Commission to maintain, amend or withdraw its adequacy decision and it is possible that interests here may be concerned to review the UK's surveillance powers.

The key legislation for these purposes is the Investigatory Powers Act 2016. The Act contains provisions for the interception of communications and the acquisition and retention of communications data. Although it establishes a role for a Judicial Commissioner in the exercise of these powers, there may be questions to be asked in the upcoming negotiations as to the limitations and safeguards on these powers.

The next steps

It is important for UK organisations, and organisations with a UK presence, to continue their preparations for GDPR readiness. This will come into place by May 2018 and will therefore apply well before the UK leaves the EU.

At the same time businesses may need to review their own operating and contracting arrangements to reflect any the transposition of GDPR into UK legislation and ultimately the separation of UK legislation from EU legislation - how ever close the UK Government expects the two regimes to be in the future.

How we can help

At this time of economic, political, legislative, regulatory and trade change, business decisions are increasingly important and difficult. It is therefore key that businesses are more adaptable, strategic and visionary than ever before and review their methodologies and assumptions. Business leaders must lead more than just business.

Leading through disruption requires access to knowledge and information, collaborative management and decision making to allow new ideas and business models to come to the fore. Our International Trade, Economics and Policy unit (ITEP) delivers powerful business insights that can help you better understand the changing landscape and identify growth opportunities. Bringing together a team spanning economics, policy, trade and regulation, ITEP helps businesses, Government and industry bodies to answer the most challenging questions and forge a successful future for the UK in the global economy.

Further information

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