THE FUTURE FOR DATA TRANSFERS POST-BREXIT

Q&A

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The future for data transfers post-Brexit

Transferring personal data from the UK to the EEA, and vice versa, will be affected by Brexit because after 31 December, the UK officially becomes a 'third country' in respect of the General Data Protection Regulation (GDPR) which governs transfers across Europe.

How will Brexit affect data transfers between the UK and EEA/EU?

The UK has requested an adequacy decision from the EU, which would indicate that the EU accepts our data protection regime as robust enough. But such a decision relates to third countries (so we may well have to wait until after 31 December for the EU to issue their decision once the UK has formally 'Brexited' and is a 'third country').

If this ruling is made, it will allow personal data transfers to continue between the EEA and the UK based on the existing arrangements (requiring data processing agreements, but not standard contractual clauses or binding corporate rules).

How will data transfers be affected if there is no adequacy decision?

This depends on which way the personal data will flow. From the UK's perspective (at the time of writing), personal data can continue to be transferred from the UK to an EEA state, as the UK acknowledges that the GDPR will satisfy the requirements of the Data Protection Act 2018.

Personal data transferring from an EEA controller to a UK processor will have to be transferred under one of the additional measures to safeguard the security of the data. In practice, based on the current laws in place in the UK, this requires the data controller involved to rely on the Standard Contractual Clauses or to put in place Binding Corporate Rules between the international companies in their own group.

Will the UK's data strategy change after Brexit?

Any plans to deregulate personal data to allow it to flow uninhibited – much more in line with the current US policy - will have an effect and the EU have already flagged up concerns over any potential surveillance of personal data and the potential "onward flow" to countries such as the US. It is not clear at this point whether there will be a change in this way.

Who will still have to abide by the GDPR after Brexit?

UK businesses who process EEA customers' personal data will still need to comply with the General Data Protection Regulation (GDPR), even after the end of the transition period.

In order to collect and process such personal data, the UK based business will need either to have a subsidiary established in the EEA or to appoint a 'representative' in accordance with article 27 of the GDPR. The purpose of this is simple: it ensures that EEA citizens will be able to contact the controllers and processors based outside Europe who hold their personal data, with relative ease, and to ensure that individuals' rights can be protected.

Are there exceptions?

This will apply to all sorts of UK based businesses – the few exceptions may apply to public authorities and bodies, and to data processing by companies "which is occasional, does not include, on a large scale, processing of special categories of data" and "is unlikely to result in a risk to the rights and freedoms of natural persons, taking into account the nature, context, scope and purposes of the processing."

Does this apply to even a single data transfer?

For exceptional, one-off orders placed by customers located in the EEA, a UK based business can rely on the exception of processing the personal data on the basis that it is "essential for performance of a contract"; however, this cannot be relied on for regular sales into the EEA.

Alternatively, the UK based business could obtain the individual customer's explicit consent to the processing of their personal data for the purposes of the order – but this again will be cumbersome if such transactions are regular.

What kind of representative is needed and what do they need to do?

It seems likely that it may be easiest for UK businesses to appoint a representative (rather than establish a new EEA based seat of business); this representative must be mandated by the UK based business (whether data controller or processor) as a contact for the business for "all issues related to personal data processing". Effectively, a representative acquires legal standing as the local point of contact for matters of data protection and privacy, and receives communications from data protection supervisory authorities in official proceedings, as well as data subject access requests.

The UK business will also need to retain a privacy policy that reflects the GDPR requirements and provide in it the contact details of the representative. The representative then also keeps the UK businesses' personal data processing records, and in the event of an investigation by a supervisory authority, the representative must cooperate with them and disclose the relevant documentation.

Only one representative is (so far) legally required for all the EEA territories; this may be revised to better serve the protection of personal data.

Who will have to change how they handle data transfers after Brexit?

If you are an EEA-based data controller who has appointed a UK-based processor to process personal data under the GDPR, you will now need to review your processes.

If you are a UK based company who regularly trades with EEA customers, clients or suppliers, you will need to consider how you can comply with the GDPR "establishment" or "representative" requirement.

How can we continue to transfer personal data to the UK processor?

If the adequacy decision for the UK is made, nothing needs to change. If it is delayed, or even refused, personal data transfers of EEA personal data will be restricted.

This does not mean that they cannot happen at all, but if personal data is transferred from the EEA, it must be transferred subject to certain safeguards set out in the GDPR. In this case, those are likely to be either Standard Contractual Clauses or Binding Corporate Rules, both of which are explained below:

What are Standard Contractual Clauses (SCCs)?

These are clauses approved by the European Commission to include the contractual provisions required to match the GDPR. The EEA-based data controller would enter into these SCCs (in addition to whichever other contract they may enter into) with the UK-based data processor. Providing these SCCs are signed and the parties abide by them, the data transfer can continue to take place as before.

What are Binding Corporate Rules (BCRs)?

If the EEA-based data-controller and the UK based data-processor are members of the same international group of companies, it may be convenient for the group to rely on BCRs as an alternative to SCCs, but the function and effect are similar.

Will consent and contract requirements operate in this case too?

The EEA-based data-controller may also make the transfer to a UK based processor relying on the explicit consent of the individual data subject to the transfer; such explicit consent must be obtained before the transfer.

If the transfer of the personal data is essential to the performance of a one-off contract entered into by the data subject, it can take place without the explicit consent of the individual data subject. For example, if an individual books a holiday in the UK through a Belgian travel agent (who is the data controller), the travel agent will have to pass that person's data to, say, the hotel in the UK, and this is permitted.

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