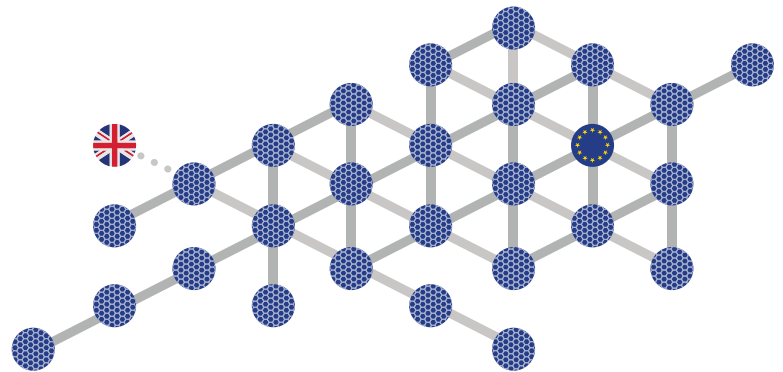




Brexit and GDPR: what you need to know

Brexit Briefing Note



On Friday 20 December, the UK Government's European Union (Withdrawal Agreement) Bill 2019-20 passed its second reading in the House of Commons with a strong majority. The Withdrawal Agreement provides for an exit day of 31 January 2020. From that day the UK will cease to be a Member State of the European Union and will instead become a third country for the purposes of data protection.

That date will also mark the beginning of a transition period until 31 December 2020 during which the UK will continue to align its laws with those of the EU and will continue to trade within the EU as if it remained a Member State. During this period the UK and EU will negotiate a future trade agreement.

WHAT DOES BREXIT MEAN FOR DATA PROTECTION AND TRANSFERRING PERSONAL DATA BETWEEN THE UK AND EU?

At the end of the transition period, the UK will no longer be subject to the General Data Protection Regulation (GDPR) or the Privacy and Electronic Communications Regulations (PECR). The UK has already indicated that it will continue to apply the GDPR (and PECR) in the UK. The Data Protection Act 2018 includes a mechanism whereby, at the end of the transition period, the GDPR will still be deemed to apply to processing of personal data in the UK.

Organisations operating in the EU and the UK will have dual GDPR obligations under the UK GDPR and EU GDPR. These may diverge over time in their approach to transferring personal data. It will be important to identify which operations are subject to either UK GDPR, EU GDPR, or both. The big issue, however, is how personal data can be transferred between the UK and the EU.

RESTRICTIONS ON DATA TRANSFERS TO AND FROM THE UK

The GDPR's approach to data transfers is that they can take place freely within the European Economic Area (EEA) but, outside those countries, other arrangements need to be made.

The UK Government has indicated its intention to enable data to flow from the UK to EEA countries after the transition period by deeming EEA countries 'adequate' without any further investigation. Having an established adequacy decision is one of the existing mechanisms under the GDPR for allowing transfers outside the EEA to occur. Similarly, the UK has indicated it will endorse existing third country adequacy decisions of the EU.

The bigger issue that remains is how businesses in the UK can continue to receive personal data from remaining EEA countries after the end of the transition period. Until the UK has left the EU it cannot apply for an adequacy decision, which is likely to be a protracted process. Presently, there is no suggestion from the EU that it will put an interim measure in place.

Until the UK achieves an adequacy decision, alternative mechanisms for transfers need to be established. The most widely-used mechanism (and the only realistic option within a 12-month period) is to use Standard Contractual Clauses (SCCs) approved by the European Commission that offer an effective basis for data transfers. There are currently two types of approved SCCs – controller-to-controller (two versions) and controller-to-processor. While they do not reflect all business models, hopefully, over time, further sets of SCCs may be agreed.

Except where specific details need to be provided or options chosen, the SCCs must remain as drafted or their



benefit as an approved mechanism is lost. Where they do not exactly fit a particular business model, we can advise on how these SCCs can be best used to fit clients' operations.

Post-Brexit, UK-based controllers and processors will also need to consider appointing an EU Representative. The EU Representative's role is principally to communicate with EU supervisory authorities and data subjects, and the GDPR requires that those processing personal data in EEA territories or targeting EEA citizens need to have such a representative in place. Shepherd and Wedderburn has established an Irish affiliate that is able to provide EU Representative services, and we would be happy to discuss this with clients who need to appoint such a representative.



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