

Brexit and data protection law: Personal data can still be transferred freely

THE POST-BREXIT PARTNERSHIP AGREEMENT WITH THE EUROPEAN UNION WHICH PROVISIONALLY CAME INTO FORCE ON 1 JANUARY 2021 ENSURES THE FREE FLOW OF DATA

Executive Summary

- The EU-UK Trade and Cooperation Agreement which provisionally came into force on 1 January 2021 (Partnership Agreement) includes an interim solution for the transfer of data.
- For a transition period which is set to end on 30 June 2021, transfers of personal data to the United Kingdom will not be deemed transfers to a third country.
- It is planned for the EU Commission to reach an adequacy decision before the transition period ends to ensure the continuation of free data flows without further safeguards being required.

I. Background - Transfer of data to a third country

It is generally not possible to avoid exchanging personal data when communicating across borders - whether for business, social or private purposes. Following Brexit, the United Kingdom will be deemed a 'third country' in relations with the EU. With a view to business and financial transactions between the UK with EU member states, it is crucial for both countries to ensure the smooth flow of data between the EU and the United Kingdom even after the UK has left the EU.

As a condition for the transfer of personal data to a country outside the EU/EEA, the General Data Protection Regulation (GDPR) not only requires compliance with the general data transfer regulations stipulated in the GDPR but also compliance with specific requirements stipulated in Art. 44 et seqq. GDPR. This includes, in particular, taking the appropriate contractual or legal safeguards to provide a level of personal data protection that is at least

comparable to that provided in European Union law when data is processed in the third country.

During the first transition phase which ended on 31 December 2020, the transfer of personal data between the EU and the United Kingdom (Great Britain and Northern Ireland) initially continued to be governed by EU law. A new interim solution had to be included in the Partnership Agreement to prevent the GDPR 'third country' rules, which involve more stringent requirements and restrictions placed on data flows, from directly taking effect on 1 January 2021, virtually without an opportunity for anyone to prepsare this situation.

II. Key points of the Partnership Agreement

1. Interim solution for continued free flow of data

The final provisions of the Partnership Agreement include a new interim solution for continued free flow of data between the EU and the United Kingdom. According to Article FINPROV 10A (1), transfers of personal data from the EU to the UK will not be considered transfers to a 'third country' during the transition period which is set to end on 30 April 2021, provided that the UK's data protection law remains the same as it was as of 31 December 2020. This means that it continues to be permitted to transfer data without further safeguards being required. Unless the UK or the EU objects by the end of this transition period, this interim solution will continue to apply for another two months; this means the interim solution is set to expire on 30 June 2021.



2. Contemplated legal situation following expiry of the interim arrangement

The Partnership Agreement also provides for the EU Commission reaching what is referred to as adequacy decision, which is the existence of an adequate level of protection in the United Kingdom in accordance with GDPR principles pursuant to Article 45 (3) GDPR, before the term of the interim solution expires.

With such an adequacy decision, it is recognised by the EU that data protection fully adequate in terms of GDPR is provided in the third country and it thus legitimates the transfer of data to this third country. This means that no specific authorisation is required for the transfer of data to such a third country. The EU Commission has recognised a number of countries or territories, including Argentina, Israel, Switzerland, New Zealand, as providing a fully adequate level of data protection.

3. What if there is no adequacy finding by 30 June 2021?

If no adequacy decision were to be reached by the EU (which is not currently to be assumed), the specific safeguards for the transfer to a third country pursuant to Art. 46 GDPR would have to be ensured as of 30 June 2021, unless a GDPR exemption applies. The following measures may, i.a. be deemed appropriate safeguards:

a) Standard Contractual Clauses

The EU Commission has issued what is referred to as Standard Contractual Clauses (SCC) within the scope of Art. 46 (2) lit. c GDPR. The importer of data in the UK commits itself to compliance with the EU data protection standard by signing such a SCC contract. Once such a contract has been signed, data may be transferred without having to obtain approval from the supervisory authority (subject to the further requirements stipulated in the GDPR). However, the exemption from approval only applies if the standard data protection clauses are used without changes being made.

b) Binding Corporate Rules (BCR)

A company or group of companies may also draw up its own binding corporate data protection rules, which are

referred to as Binding Corporate Rules (BCR), to ensure a high level of data protection. BCRs are explicitly mentioned in the GDPR as an option for providing "appropriate safeguards" for the transfer of data to third countries. BCRs must provide a level of protection that is substantially comparable to that provided by the GDPR. Based on the BCR, it is no longer necessary to obtain approval for each specific transfer of data.

BCRs are subject to a complex and lengthy process of approval by the supervisory authority in charge and therefore rarely occur in practice.

4. Outlook

It is to be expected that the EU Commission will reach the adequacy decision without further ado before the new interim solution expires. This is the intention that has clearly been expressed in the Partnership Agreement and no further conditions have been stipulated.

Unless and until the UK changes its data protection laws, a level of legal protection comparable to GDPR is provided. So it is not likely that the EU Commission will not grant the United Kingdom the status of "data adequacy" unless the UK changes its data protection laws in the months to come. This means that business with the United Kingdom is expected to continue "as usual" as far as data protection is concerned.

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