Our current Brexit options and the consequences for UK data protection law

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Timeline

Yesterday (9 April 2019)

Theresa May in Berlin for talks (Objective: delay Brexit to 30 June 2019)

Today (10 April 2019)

Emergency EU Summit

Friday (12 April 2019)

Brexit Day (deal or no deal)

The legal position

Option A:

There's a vote on the deal and we don't leave (unlikely)

Law remains the same

- GDPR (Reg. 2016/679)
- Law Enforcement Directive (2016/680)
- Data Protection Act (DPA 2018)

With the existing regimes:
1. GDPR regime (direct effect)
2. Applied GDPR regime (DPA applying parts of the GDPR)
3. Law Enforcement regime
4. National Security regime

Option B:

UK leaves EU with (a version of) the Withdrawal Agreement (WA) and Political Declaration

EU law will apply during the transition (WA, Art 126/127)

Post-transition: continued application of EU DP law in UK (WA, Art 71)

Strong indication of convergence re: DP law

Finding of adequacy

Yes → Law will largely operate as it does now

No → Similar position to a No Deal Brexit

Option C:

UK leaves EU with no deal

GDPR will be modified by UK Regulations and incorporated into UK law

GDPR continues to apply as part of domestic law in accordance with the EU (Withdrawal) Act 2018, Section 3

DPA 2018 still applies

UK will transitionally recognise all EEA states, EU and EEA institutions and Gibraltar as "adequate"

EU will need to consider making a finding of adequacy in respect of the UK

Practical Impact

Transfers of data into and out of the UK will not be straightforward

Adequacy Decision:

An adequacy decision is a decision adopted by the European Commission on the basis of article 45 GDPR. Previous adequacy decisions have been adopted in respect of "third countries" for example: Japan, Argentina, New Zealand and Israel. Post-Brexit, the UK would effectively become a third country. It is unlikely that there would be any immediate adequacy decision in respect of UK following Brexit.

Available transfer instruments:
- Standard and ad hoc Data Protection Clauses (to provide additional safeguards to data)
- Approved Binding Corporate Rules (BCRS) (similar to any created in respect of processing under GDPR and which will also require amendment post-Brexit
- Codes of conduct and certification mechanisms (which must be binding and enforceable – EDPB is working on guidance for these)
- Derogations (in accordance with article 49 GDPR e.g. if the data transfer is necessary for important reasons of public interest or compelling legitimate interests of an organisation)

When transferring data into the UK from EU states see: European Data Protection Board (EDPB): Information Note: 12 February 2019

1. Identify what processing activities will be affected
2. Determine the appropriate data transfer instrument
3. Implement the data transfer instrument (to be ready for "Brexit Day")
4. Amend internal records to reflect the fact that transfers will be made to the UK
5. Update your privacy notice to inform individuals

US companies will need to establish a basis for transfers into the UK

UK will need to establish basis for transfers out of UK

Can the UK still rely on EU/US privacy shield?

See: The Data Protection, Privacy and Electronic Communications (Amendments ETC) (No.2) Regulations 2019 which is designed to address the legal deficiencies arising from Brexit in preserving the Privacy Shield Framework during transition and post-Brexit.