



Brexit does not spell the end of the GDPR

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The General Data Protection Regulation (the GDPR) is due to become law on 25 May 2018. As this will be before “Brexit” (Britain’s exit from the EU) takes effect, the GDPR will apply in the UK from that date.

Whether or not the GDPR will remain a part of UK law will depend on the path of the Brexit negotiations. A post-Brexit UK government may wish to avoid implementing some of the more onerous parts of the GDPR, if possible. However, at this stage, it appears that the most likely outcome is that UK data protection law will remain closely aligned with European laws for the following reasons:

1. Dealing with the data of EU data subjects

The GDPR will apply to any company offering goods or services in the EU (or monitoring the behaviour of data subjects in the EU). As most organisations will prefer to have consistent practices across their groups, this may result in companies that have a significant Europe-facing operation adopting the European standard as the default.

2. International data transfers from within the EU

International data transfers from EU countries will be subject to a similar regime as at present. This means that, in the absence of an explicit consent from the data subject, transfers of personal data to the UK will generally only be permitted if the UK provides “adequate” safeguards for the protection of

the data. It would be reasonable to expect that the UK will apply to get a “white listed” status from the European Commission for international data transfers (in the same way territories like Canada, Israel, Jersey and Guernsey have already done). In order to get this status, the UK would need to show that its laws were equivalent to EU standards. Personal data can flow from EU countries to these “white listed” territories relatively freely but if “white listed” status is not achieved, UK companies are likely to have the extra burden of having to enter into a web of “model clauses” arrangements.

The UK might try to negotiate a system similar to the “Privacy Shield” arrangement with the US. The Privacy Shield negotiations demonstrated that this is not a straightforward process. To satisfy these requirements, the UK might need to reflect much of the GDPR in its own laws.

3. Increased data regulation is a global trend

There is a general global trend towards more control and regulation over data, particularly given the growth of “big data”. And the GDPR, like most data protection regimes, is very much pro-consumer in its approach. Being

Any comments or queries?

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seen as a “weak” regime in an increasingly regulated data environment might not be seen as a commercially attractive prospect for customer confidence or for inward investment.

4. UK courts may reflect European approach

If the UK retains the GDPR post-Brexit, the UK courts will be able to apply it without regard to decisions of the Court of Justice of the European Union (the CJEU) (and CJEU decisions are currently binding in UK law). This may result in a gradual divergence from the approach taken in the UK compared with the approach taken by the EU member states. However, the UK courts are likely to be influenced by the CJEU in any event, either because they are conscious of the “adequacy” issue (with regard to international data transfers) or because the CJEU’s approach closely chimes with a modern, universal approach to data privacy.

The ICO’s opinion

Recent announcements from the Information Commissioner’s Office (ICO) show that it believes that the GDPR is still relevant for the UK, especially for UK companies that operate internationally.

The ICO also believes that it will still have to work closely with regulators in other countries because international consistency around data protection laws is crucial both to businesses and organisations, and to consumers and citizens.

What does this mean for me, as a data controller?

The GDPR will bring about significant change in data protection regulation. Most organisations (especially those with an international focus) will still be affected by these changes, even in light of Brexit.

Organisations should therefore continue preparations to comply with the GDPR because the UK is unlikely to stray too far from its provisions, especially in the near future.

Whatever happens along the Brexit path, broad compliance with the GDPR is likely to be needed to satisfy any future UK data protection regime.

A longer version of this article first appeared in Bloomberg BNA’s *“World Data Protection Report”* (Vol 16, August 2016).

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