

Deal or No Deal - UK Government issues technical notice on data protection

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Summary

On 13 September, the Government published its technical notice on data privacy if there is no Brexit deal. The provisions of the GDPR that have had the most focus in the context of Brexit are those relating to transfers of personal data outside the EEA. This is the sole topic covered by the Technical Note. Whilst the Technical Note is useful, far more questions are outstanding than are answered.

The EU General Data Protection Regulation (GDPR) will be brought into the UK statute book on Brexit via the EU Withdrawal Act. In broad terms, organisations established in the UK or offering goods or services to individuals in the UK or otherwise monitoring the behaviour of individuals in the UK will continue to be subject to the same data privacy regime as currently.

Transfers from the UK to the EEA (and elsewhere) would therefore be subject to the equivalent regime as applies now for transfers of personal data outside of the EEA.

The Technical Notice only comments on international transfers. Brexit has wider implications for data privacy than this and for a discussion on the impacted areas, see our publication [Brexit Essentials: an update on data protection and privacy](#).

Transfers UK → EEA

As had been hoped, the UK Government announced that in the case of a no deal Brexit it would, at least for a temporary period, treat the EEA as providing an adequate level of

protection for personal data. This allows organisations to continue to transfer personal data from the UK to the EEA without the need for any additional analysis or measures as a result of Brexit.

This is helpful as it wasn't clear the UK Government would at this stage show its hand given that a reciprocal adequacy decision (absent a bespoke UK-EU data protection agreement) is sought from the EU.

Transfers EEA → UK

There is no further clarity from the European Commission as to personal data transfers from the EEA to the UK in the event of a "no deal" situation.

The European Commission has not provided a timetable as to when it would be prepared to start discussions with the UK. It has also said it isn't possible to make a decision on whether the UK could be considered as providing adequate protection of personal data before the UK leaves the EU. If there was a no deal Brexit, this begs

the question of what the position would be immediately post Brexit.

The fall-back position for many organisations would be to enter into the EU approved standard contractual clauses. However, this will often be a lengthy and resource intensive process due to the number of counterparties that would need to be involved. Such a process would be unwelcome for EU as well as UK organisations, particularly as organisations have only recently updated their contracts to include the mandatory processor clauses required by the GDPR.

Given organisations are unlikely to start on this process until it's clear it's absolutely necessary, it's not realistic to think that all necessary contractual terms would be in place immediately post Brexit.

A grace period would therefore be needed post Brexit to allow organisations the time to enter into the relevant contractual clauses. There is precedent for this approach amongst the various European data protection authorities, in particular when the European Court of Justice declared the US Safe Harbour was not a valid basis for international transfers to the US. There is however no information from the EU on this yet.

For details of other options for international transfers, see our publication [Brexit Essentials: an update on data protection and privacy](#).

Transfers UK to non-EEA jurisdictions

Existing adequacy decisions

The EU Commission has made 12 adequacy, or partial adequacy, decisions in respect of overseas countries to date and is in the process of adopting an adequacy decision in favour of Japan. These include Switzerland, New Zealand, the Privacy Shield in respect of the US and the partial adequacy decision in respect of Canada. For organisations in the UK to maintain their data

flows to these jurisdictions without needing to take further steps, the UK Government would need to adopt the same decisions.

In the case of the US, it isn't simply a matter of the UK adopting the existing Privacy Shield decision as, due to the nature of those arrangements, agreement will also be needed from the US. The UK would then have a parallel UK-US Privacy Shield as is the case with the Switzerland-US Privacy Shield.

The Technical Notice does not mention any plans for these adequacy decisions. This is not surprising as transfers to these jurisdictions need to be dealt with even if there is a deal with the EU in the form that the UK Government is seeking. Discussion of the approach to these is therefore outside the scope of the Technical Notice.

Omission of this topic should not be taken as a sign that transfers to and from these jurisdictions will not be possible post Brexit. We know that this is on the UK Government's radar and so we expect to be updated on the approach to these jurisdictions at a later date.

Standard contractual clauses

In many cases the EU approved standard contractual clauses will have been used as the basis for international transfers where there is no adequacy decision. However, post Brexit, for transfers from the UK to non-EEA countries the UK will need to adopt its own versions of these clauses.

We assume there'll be transitional provisions so it wouldn't be immediately necessary to adopt the new clauses where the EU approved versions are currently in place. However, the Technical Notice does not comment on this, or on when the UK version of these clauses will be available.

Again, this isn't surprising as it is a challenge of Brexit more generally, unrelated to whether or

not there is a deal with the EU. Greater clarity on the approach to this from the UK Government would, however, be helpful.

Conclusion

Whilst the Technical Note is reassuring on the position post Brexit of transfers from the UK to

the EEA, the lack of information on transfers in the reverse direction, and those from the UK to other jurisdictions, makes it almost impossible for organisations to plan for Brexit. We can but hope that there will be a breakthrough in negotiations with the EU which would allow for greater clarity, and free up some of the Government's time to deal with transfers to other jurisdictions.

Slaughter and May advises on all aspects of data protection and privacy, including data breaches, ICO investigations, contractual arrangements for the sharing of data, subject access requests and individuals' rights and all areas of GDPR compliance. If you would like further information, please contact Rebecca Cousin, Rob Sumroy or your usual Slaughter and May advisor. Further publications are available on our [website](#).



Rebecca Cousin
T +44 (0)20 7090 3049
E rebecca.cousin@slaughterandmay.com



Rob Sumroy
T +44 (0)20 7090 4032
E rob.sumroy@slaughterandmay.com

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