

## Data Privacy and Cybersecurity

# Free Movement of Data Post Brexit – a Possibility?

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Whilst it has disappeared from the top of European news bulletins in light of the COVID-19 pandemic, Brexit remains a key political and economic issue for the European Union and the United Kingdom. On 18 March 2020, the European Commission published the text of its proposed legal agreement for the future relationship between the European Union and United Kingdom (the Draft Agreement).

Unsurprisingly, the document is long (some 440 pages) and covers a broad range of topics. For the purpose of this alert, we focus solely on the parts which deal with data protection.

### What does the Draft Agreement say about data protection in a business context?

The text of the Draft Agreement highlights both parties' commitment to protecting personal data, and envisages cooperation in promoting high standards in this regard.<sup>[1]</sup> However, the Draft Agreement does not seek to fetter the European Union or United Kingdom's ability to define their own laws in relation to data protection.<sup>[2]</sup> As we consider further below, this freedom has the potential to undermine some of the cooperative aims in the Draft Agreement.

Specifically as it relates to the digital economy, the Draft Agreement envisages that neither the European Union nor the United Kingdom will restrict cross-border data flows by requiring data localisation measures to be put in place, requiring the use of specific computing facilities or network elements, or by prohibiting the storage or processing of data in the other party's territory.<sup>[3]</sup>

However, the Draft Agreement goes on to state, as it must in light of Article 44 of the GDPR, that each party may adopt rules for the cross-border transfer of personal data.<sup>[4]</sup> This means that, notwithstanding the wish to facilitate commerce and trade, transfers of personal data to the United Kingdom from the European Union will not be permitted without safeguards recognised by the GDPR. The safeguard that we believe will most effectively facilitate trade and commerce is for the United Kingdom's data protection laws to be deemed "adequate" by the European Commission.

### An adequacy decision for the United Kingdom?

Article 45 of the GDPR permits the European Commission to determine that a recipient country (in this case the United Kingdom) has adequate protections for personal data. Once a so-called adequacy decision has been provided, data can flow freely and without additional protective measures being implemented.

It is therefore critical to the uninterrupted continuance of business between the EEA and the United Kingdom that an adequacy decision is obtained prior to the end of the transition period.<sup>[5]</sup>

### What does the Draft Agreement say about data protection and law enforcement?

Data protection also has an important part in the ongoing cooperation between law enforcement agencies in the European Union and United Kingdom. The Draft Agreement envisages that personal data will only be transferred to the United Kingdom in furtherance of law enforcement cooperation if the European Commission has determined that the United Kingdom, or specified relevant sectors within the United Kingdom, ensure a level of adequate protection for personal data.<sup>[6]</sup> Similarly, passenger record data (in relation to flights between the European Union and United Kingdom) and personal data exchanged in relation to the fight against money laundering and terrorist financing can only be

transferred to the United Kingdom if the European Commission makes an adequacy finding pursuant to Article 45 of the GDPR.<sup>[7]</sup>

Additionally, the Draft Agreement contains a prohibition on United Kingdom law enforcement agencies transferring any personal data received to the authorities in any other country, unless those countries are also determined by the European Commission to provide an adequate level of protection for personal data.<sup>[8]</sup> This is potentially a difficult issue for the United Kingdom in these negotiations. Amongst other effects, it may severely restrict the ability to cooperate with the “Five Eyes” Anglophone intelligence community consisting of Australia, Canada, New Zealand, United Kingdom and United States.

## Conclusion

Data protection and the free flow of information is one of a critical number of issues that needs to be resolved before the United Kingdom can exit the European Union in an orderly manner. How all of the issues will be resolved is yet to be seen. A decision of the European Commission that the United Kingdom’s laws on data protection are adequate for GDPR purposes would be a good outcome for the continuance of cross-border commerce. The next step in the process is for the United Kingdom to present written responses to certain of the areas addressed in the Political Declaration issued by the European Union and the United Kingdom on 12 November 2019.<sup>[9]</sup>

Negotiations are also scheduled to continue, but the timing of the conclusion of these negotiations is uncertain given the restrictions on travel caused by COVID-19.<sup>[10]</sup>

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[1] Article COMPROV.10.

[2] Article GRP.1(3)(h); Article SERVIN.1.1(2); Article DIGIT.3.

[3] Article DIGIT.6.

[4] Article DIGIT.7.

[5] Currently set for 31 December 2020, but this may be postponed in light of the inevitable delays caused by COVID-19.

[6] Pursuant to Article 36 of Directive (EU) 2016/680, which is known colloquially as the Law Enforcement Directive.

[7] Regulation (EU) 2016/679.

[8] The countries that are recognised by the European Commission as adequate pursuant to Article 45 of the GDPR at the date of this alert are Andorra, Argentina, Canada (commercial organisations only), Faroe Islands, Guernsey, Israel, Isle of Man, Japan, Jersey, New Zealand, Switzerland, Uruguay and the United States of America (entities certified under the EU-US Privacy Shield only).

[9] <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AC%3A2019%3A384%3ATOC>

[10] [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_447](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_447)

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