Briefing: Data Adequacy Agreement

Context

As a member of the European Union, the United Kingdom played a key role in the development of the EU's system for protecting citizens' personal data: the General Data Protection Regulation (GDPR).

This regulation took effect in the UK in 2018 and will remain in effect so long as the UK remains in the Brexit transitional period – i.e. until 31 December 2020.

Even after that final moment of departure GDPR will still, in effect, apply in the UK thanks to two pieces of primary legislation: the European Union (Withdrawal) Act 2020, which transfers it into UK law; and the Data Protection Act 2018, which supplements it by ensuring its application to areas left to individual Member States' domestic law.

The Data Protection, Privacy and Electronic Communications (Amendments, etc.) (EU Exit) Regulations 2019 amended the 2018 Act and merged it with the requirements of GDPR to form a data protection regime intended to work in a UK context after Brexit, including for law enforcement and intelligence purposes.

In practice, there is little material difference between this new 'UK GDPR' and the EU version. Therefore, organisations which process personal data – like advertisers – face little change in data protection requirements until the end of the transitional period.

The Brexit Effect

Now that the UK has left the European Union, it has been reclassified as a 'third country'. Under the EU's GDPR, the transfer of personal data to third countries is only permitted if:

1) the Commission has issued an 'adequacy decision' agreeing that there is a proper level of data protection in the third country;
2) there are appropriate safeguards in place such as binding corporate rules or standard contractual clauses (SCCs); or
3) based on approved codes of conduct, such as the EU-US Privacy Shield.

Article 45 of GDPR, 'Transfers on the basis of an adequacy decision', sets out the criteria for option 1. In order to assess adequacy, the Commission has to take particular account of:

- adherence to the rule of law and standards of human rights;
- the existence and effective functioning of independent supervisory authorities which ensure compliance with data protection rules; and
- any international commitments the third country has entered into in relation to the protection of personal data.

If the Commission agrees to data adequacy, the position is reviewed at least every four years.[1]

There are currently 13 countries which enjoy 'adequate' status, while talks are ongoing with South Korea.[2] The 13 countries include Japan. As an indication of the length of time which data adequacy discussions can take, it is worth noting that the talks between the EU and Japan began in January 2017;[3] were concluded in July 2018[4] (at the same time as the conclusion of the EU-Japan trade agreement);[5] and that the Commission adopted its positive decision in January 2019.[6] This two-year

[1] Intersoft Consulting, General Data Protection Regulation, Art. 45, accessed 12 March 2020.
[2] European Commission, Adequacy decisions, accessed 12 March 2020.
[3] As set out in European Commission, *Exchanging and Protecting Personal Data in a Globalised World*, 10 January 2017.
[4] European Commission, The European Union and Japan agreed to create the world's largest area of safe data flows, 17 July 2018.
[5] European Commission, EU and Japan sign Economic Partnership Agreement, 17 July 2018.
[6] European Commission, European Commission adopts adequacy decision on Japan, creating the world's largest area of safe data flows, 23 January 2019.

process is at least twice as long as the UK Government has allotted for the reaching of an agreement between London and Brussels.

The UK and EU have both said that they wish to reach a conclusion to data adequacy talks during the transitional period and in tandem with the talks on the future relationship. In discussions with industry, civil servants from BEIS and DCMS have been optimistic that, because of the high level of alignment which already exists between UK and EU data protecting rules, a positive decision from Brussels on data adequacy should be relatively easy to achieve. However, no date has been given for the start of the talks on this specific workstream.

On 13 March, the UK Government published a suite of documents which serve to emphasise London's point that the UK and EU data protection rules are in a high degree of alignment. The papers emphasise that protecting personal data "is and will continue to be a priority for the UK", underline the worth of data-enabled exports between the two markets, and set out why the Government believes that the UK already meets the standard of 'essential equivalence'.[7] The clear implication of these documents is the UK's hope that Brussels will make a swift and positive data adequacy decision.

Why is it important?

UK businesses are ever-more reliant on the ability to transfer data about their customers in order to offer goods and services; or to host basic processes such as file storage or cloud-based IT. This is especially true of sectors which are increasingly delivered online – such as advertising, where marketers have followed consumers as they increasingly consume content digitally. According to the Institute for Government, volumes of data entering and leaving the UK increased 28 times between 2005 and 2015, with three-quarters of those transfers being with EU countries. Obviously, any hurdles placed in the way of those data flows would impede trade;[8] for industries such as advertising, they would have a direct impact on operations.

In preparation for a possible 'no deal' Brexit, many advertisers took mitigating steps, including putting in place standard contractual clauses – a burdensome process which requires a written agreement between the company sending data and the company receiving it (and which were subject to challenge the European Court of Justice as recently as December).

To end the uncertainty and to avoid a detrimental impact on advertising as the third largest sector of the UK economy, it is critical that a data adequacy agreement is reached – and that there is no gap between the end of the transitional period and the agreement coming into effect. While the UK Government is confident that a positive decision will be easy to reach, as ever with Europe, 'nothing is agreed until everything is agreed'.

Europe's institutions also do not always share the UK's view of the adequacy of its data protection regime. The European Court of Justice has previously ruled that the UK's data handling is *not* in line with EU law – most notably in the case bought by David Davis against the Investigatory Powers Act 2016, where the Court ruled that data retention by the security services contravened the Charter of Fundamental Rights. The provisions of the Data Protection Act 2018 could also be a point of controversy; they waive data protection rights in areas relating to immigration control, for instance, which could be held to contradict those same fundamental rights.

In summary, at this time, although the UK has expressed its confidence in its regime and in its adherence to European standards, we have no such reassurance from Brussels, no firm timetable for this aspect of the talks, and a potential threat to the smooth operation of one of our most crucial sectors and successful exporters. We support parliamentarians pressing Ministers for clarity on their engagement with their EU counterparts on these issues.

CONTACT: Rob Newman, Head of Public Policy, RobN@isba.org.uk

[7] UK Government, Explanatory Framework for Adequacy Discussions: Section A, 13 March 2020.
[8] Institute for Government, UK-EU future relationship: data adequacy, 25 May 2018.