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# HOW WILL A NO-DEAL BREXIT IMPACT DATA PROTECTION?

**The EU and the UK have agreed an extension of the deadline for the UK's leaving the EU until at least 12 April 2019. It is still possible that there will be a No-Deal Brexit on that date. We have set out a summary of the impact of a No-Deal Brexit on data protection, but this is of course subject to continuing negotiations between the UK and EU and how (if at all) the UK will leave the EU is yet to be determined.**

## 1 Compliance with the GDPR

The European Union Withdrawal Act 2018 brings the GDPR into domestic UK law. The draft Data Protection, Privacy and Electronic Communications (Amendments etc.) (EU Exit) Regulations 2019 (the "**DP Exit Regulations**") make some amendments to the GDPR that are necessary for it to operate correctly if and when the UK leaves the EU, and combine it with the Data Protection Act 2018 to create a 'UK GDPR'.

## 2 Transfers from the UK to the EEA

The UK Government has confirmed that it will transitionally recognise all EEA countries as 'adequate' for data transfers from the UK and any countries with an adequacy decision on Brexit day will continue to have adequacy status for transfers from the UK. This is only on a transitional basis until the UK Government (in consultation with the ICO) issues its own adequacy rules. The DP Exit Regulations also state that EU standard contractual clauses and BCRs authorised before Brexit day will continue to be recognised on a transitional basis. The ICO will also be able to issue new standard contractual clauses.

## 3 Transfers from the EEA to the UK

In the event of a No-Deal Brexit the UK would become a third country vis-à-vis the EU after Brexit day and data transfers from the EEA to the UK would have to be legitimised by the EU. However for both the EU and the UK there will be a strong imperative to reach an agreement (at least on a transitional basis) to enable EEA-UK transfers to continue without the need for businesses to enter into model clauses or take other urgent measures. In November 2018 the EU Commission issued a notice confirming that on a No-Deal Brexit data transfers from the EEA to the UK would be an issue but we are yet to see any further communication.

The ICO is taking steps to help small businesses and has created an online tool which helps businesses determine whether they need to put model clauses in place, and helps to generate the contract. https://ico.org.uk/for-organisations/data-protection-and-brexit/standard-contractual-clauses-for-transfers-from-the-eea-to-the-uk-interactive-tool/

## 4 Lead Supervisory Authorities ("LSA")

Organisations may need to revisit their position on LSAs. For example:

i. In the case of a company which currently has its LSA in the UK, the ICO will not be able to act as the LSA post-Brexit. The company would need to consider if an alternative LSA could be identified in an EU Member State where it has an establishment. But if there is no EU establishment, the company cannot artificially choose one and the company would be subject to each relevant supervisory authority.

ii. In the case of a company which currently has its LSA in an EU Member State other than the UK, but has a business operation or processes data of an individual in the UK, the LSA in an EU Member State would continue but the company may also have to deal with the ICO for processing activities concerning the UK.

Organisations may also have to look at multiple sets of guidance for the same processing activities as the EDPB may have a different view to the ICO.

## 5 Data Protection Impact Assessment ("DPIA")

A UK company may not necessarily need a new or separate DPIA, but will need to consider which are the relevant regulators for consultation. It may be necessary to consider both the relevant EU regulators and the ICO.

## 6 Breach Notifications

In the case of a cross-border breach covering the EU and the UK, post-Brexit data controllers may have to inform both the relevant LSA in the EU (if any) and the ICO. If no LSA can be identified based on the facts of the breach it may be necessary to notify each relevant authority.

## 7 UK Privacy and Electronic Communications Regulations ("PECR")

Previously there has been much debate on the interaction between GDPR and PECR. The DP Exit Regulations make a number of clarifications on this issue. In particular, the DP Exit Regulations make it clear that the definition of consent of a user/subscriber under PECR is the same as the GDPR. This helps to clarify questions in the context of direct marketing and cookies which are in PECR.

## 8 Records of Processing

Controllers and processors should consider whether existing records need to be revisited. Sections dealing with recipients in third countries may need to be updated, as companies whose activities are regulated under the GDPR will have to list the UK as a third country together with details of the transfer mechanism relied on. Similarly companies regulated under the UK GDPR will have to list all EU Member States as third countries.

## 9 Privacy Notices

Privacy notices will need to be updated to reflect data transfers to and from the UK as a third country.

*For a more detailed summary on the implications for data protection click here*

## What are the options for Brexit?

**Amended Withdrawal Agreement** — Provides for a transition period until December 2020, during which all EU law would continue to apply. This amended withdrawal agreement is likely to be put again to the House of Commons in the week beginning 25 March 2019. The revised exit date, beginning the transition period, if the agreement passes will be 22 May 2019.

**No Deal** — If the withdrawal agreement does not pass the House of Commons in the week beginning 25 March then the UK will exit on 12 April 2019 with no transition period.

**Extension of Art 50 timeline** — If the withdrawal agreement does not pass the House of Commons then it is possible for the UK and the EU to agree a longer extension to the two current potential leaving dates.

**Revocation of Art 50** — We believe this is less likely but nothing is impossible.