

THE IMPACT OF BREXIT ON PERSONAL DATA FLOWS TO THE UK

On 24 December 2020, the United Kingdom ("UK") and the European Union ("EU") announced they had agreed on a post-Brexit "EU-UK Trade and Cooperation" Agreement (the "EU-UK Agreement"), which the EU plans to bring to provisional application on 1 January 2021 before being fully ratified. The EU-UK Agreement reinforces the parties' commitment to privacy and data protection and contains provisions regulating the flow of personal data between the EU and the UK.

IMPACT ON DATA FLOWS

From the end of the transition period on 1 January 2021, the UK and the EU will form two distinct regulatory, legal and customs territories. The UK will therefore become a "third country" no longer bound by EU law, including the EU General Data Protection Regulation ((EU) 2016/679) ("GDPR"). In the absence of an adequacy decision from the European Commission to allow the free-flow of personal data from the EU to the UK, data flows to the UK shall constitute international transfers and shall be subject to appropriate safeguards pursuant to Chapter V of the GDPR.

In this context, the EU-UK Agreement sets out an interim provision pursuant to which the UK will not be deemed a third country for data protection purposes until (i) the adoption of an adequacy decision by the European Commission, or in any case for a duration of 4 months from 1 January 2021 extendable to 6 months in the absence of an objection by the EU or the UK (the "**Interim Period**").

The EU-UK Agreement further prohibits the EU and the UK to implement data localisation requirements, where entities would be required to store, process or use computing facilities in the EU or UK territory to allow the free flow of personal data.

NEXT STEPS

For the duration of the Interim Period, personal data flows from the EU to the UK may continue and be deemed as intra-EU transfers.

However, in light of the uncertainty over the adoption of an adequacy decision by the European Commission at the very end of the Interim Period, EU-based entities transferring personal data to the UK should anticipate at least a gap

Key issues

- On 24 December 2020, the UK and the EU announced they had agreed on a post-Brexit deal.
- Such deal takes the form of a 1,246-pages agreement which notably covers personal data flows between the EU and the UK.
- Until the European Commission adopts an adequacy decision, the UK will be considered as a third country. The EU-UK Agreement includes a "data bridge" provision permitting the continued free movement of personal data from the EU to the UK for a maximum period of 6 months, hoping the European Commission adopts an adequacy decision in the meantime.
- In the meantime, we recommend that EU-based entities intending to transfer data to UK-based entities rely on standard contractual clauses.
- The EU and the UK have agreed on the prohibition on rules mandating data localization.

period and implement the necessary and appropriate transfer tools (i.e., standard contractual clauses adopted by the European Commission, binding corporate rules, codes of conduct or certification mechanisms).

As, the CJEU recently reminded us in its ruling in Case C-311/18 (so called "Schrems II" case), standard contractual clauses cannot be used in all instances and may not be relied upon if the data importer which is situated in a third country is prevented from complying with the provisions of the standard contractual clauses, by virtue of its national law.

In the absence of an adequacy decision and where the above-mentioned transfer tools cannot be used, the reliance on derogations for specific situations under article 49 of the GDPR is conceivable in theory, using for instance the data subject's consent. However, such derogations are exceptional in nature and should be, from a practical perspective, avoided to the maximum extent possible.

It shall further be noted that the EU-UK Agreement provides for an explicit right to suspend the said EU-UK Agreement in the event (*inter alia*) of systemic deficiencies in data protection laws, which demonstrates the importance the EU attaches to data protection.

For further information regarding the EU-UK Agreement, including aspects dealing with other sectors, please refer to Clifford Chance's publication "Relieved? UK and EU agree Post-Brexit Deal".¹

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¹ Available at: <https://www.cliffordchance.com/microsites/brexit-hub/thought-leadership/relieved-uk-and-eu-agree-post-brexit-deal.html>

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