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Law Society of Scotland briefing on the Data Protection Bill and impact of UK withdrawal from the EU

Recognition through adequacy decision

There are a number of problems with relying on an adequacy decision as the basis of transfer of data to companies or other business forms in the UK. It would be preferable to have a specific agreement in place to cover exchange of personal data between the UK and EU following withdrawal. However, if this is not achieved within the timescale of the withdrawal negotiations an adequacy designation could provide a helpful interim solution.

It would therefore be helpful to have some information regarding the point at which the UK intends to see an adequacy designation and the anticipated timescales? Is the Government intending to have a designation in place on the date of withdrawal?

Likelihood of achieving adequacy and associated concerns

It would be helpful to have some more information on whether the Government considers that the UK would achieve an adequacy ruling. There is also the linked question of whether other jurisdictions will be regarded as offering a sufficient level of data security to allow transfers of data out of the UK, to both EU and non-EU countries.

Recital 104 refers to 'an adequate level of protection essentially equivalent to that ensured within the Union'. The Information Commissioner has suggested that UK penalties will not increase greatly under the GDPR. This might contrast with the rest of the EU and impact on adequacy.

A number of specific criteria to be considered in assessing adequacy are set out in GDPR Art 45(2)(a). This includes consideration of any domestic legislation including that “concerning public security, defence national security and criminal law and the access of public authorities to personal data as well as the implementation of such legislation, data protection rules, professional rules and security measures, including rules for the onward transfer of personal data to another third country or international organisation...”

The Investigatory Powers Act 2016

In particular concerns have been raised that problems may arise here with the level of access to personal data by public authorities as determined in the Investigatory Powers Act 2016.[1] We are aware that the Act is not yet fully in force but are also of the view that if tested it is unlikely that certain provisions in the Investigatory Powers Act would be found to be acceptable.

In particular we previously identified concerns regarding the requirement for telecommunications operators to retain communications data.[2] Following on from this, in the joined cases C-203/15 and C-698/15 *Tele2 Sverige AB* v *Post-och telestyrelsen* and *Secretary of State for the Home*

[1] See eg https://www.infosecurity-magazine.com/news/uk-writes-gdpr-into-law-data and http://blogs.lse.ac.uk/mediapolicyproject/2016/12/19/could-the-european-gdpr-undermine-the-uk-investigatory-powers-act/

[2] See https://www.lawscot.org.uk/media/769016/080416-priv-call-for-evidence-on-the-investigatory-powers-bill-response-law-society-of-scotland-2-.pdf

Department v *Tom Watson & Others* (21 December 2016) the CJEU found that Member States could not pass national legislation requiring general and indiscriminate retention of communications data or location data. There is therefore a risk that the Act may be challenged before the UK withdraws from the EU; even absent such a challenge we consider that as it stands the Act might pose a bar to a finding of adequacy.

It is also unclear as to what extent the Government might consider steps to achieve adequacy if this were indeed to prevent an adequacy finding.

CJEU case law

What impact will there be on adequacy if the UK is not bound by or even bound to have regard to CJEU judgements following withdrawal? Clause 6 of the European Union (Withdrawal) Bill[3] states that decisions of the EU Court will cease to bind UK courts and tribunals following withdrawal:

"6(1) A court or tribunal –
(a) is not bound by any principles laid down, or any decisions made, on or after exit day by the European Court, and
(b) cannot refer any matter to the European Court on or after exit day.
(2)A court or tribunal need not have regard to anything done on or after exit day by the European Court, another EU entity or the EU but may do so if it considers it appropriate to do so."

However, any decision of the CJEU relating to the GDPR will determine how it is interpreted in the EU and accordingly influence the parameters or adequacy of third countries. If the UK interpretation of the rules originating in the GDPR were to diverge significantly from that of the EU it could therefore jeopardise an adequacy decision.

Other international arrangements

Once the UK ceases to be a member of the EU, the Privacy Shield scheme for EU-US data transfers would cease to apply. Presumably, the UK will be free to enter into whatever arrangements for data transfers it likes with the US, but how would this sit with the Data Protection Bill incorporating the GDPR into domestic law post Brexit?

Citizens' rights

It will not be possible for the UK to replicate the GDPR's rights for EU citizens to bring actions for annulment of decisions of the EU data protection board before the CJEU (in accordance with Art 263 TFEU): even if the UK sought to adopt and follow Board decisions, UK citizens would not have standing to bring such an action. It is not clear how the UK Government intends to address this.

[3] https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/cbill_2017-20190005_en_2.htm#pb2-l1g6

Importance to UK businesses making use of personal data processing

Data is increasingly important to businesses, for example in driving service or product provision or facilitating targeted advertising. Businesses may also work in partnership on particular projects or for particular purposes so data processing firms or service suppliers may wish to carry out functions which means that they would fall within the definition of joint data controllers under the GDPR, for example where the data transferred/shared may fall within GDPR definition of personal data which includes “identification numbers, or online identifiers”. It is critical to the business to know how to contract with such suppliers who may processing/ transferring outside the UK following Brexit. It is not therefor merely about knowing how the UK will designate “adequacy” of others.

Codes of conduct for particular sectors

A further question is whether the Government intends to encourage specific associations and other bodies to draw up codes of conduct, as specified in Art 40 of the GDPR. If so, to which associations and sectors might this apply? This may well be an important development for some highly regulated sectors where organisations operate in very similar ways and will find GDPR compliance challenging.

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