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Brexit Briefing: Impact on Data Protection

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Brexit Briefing: Data Protection

Executive Summary

- Data protection laws across the EU will change with effect from 25 May 2018
- Changes under the new law will be significant and penalties much higher
- You should take steps to make sure you are compliant
- These changes will be introduced into UK law pre-Brexit; it is not clear to what extent the UK Government will introduce new laws following Brexit
- It is likely that any UK data protection laws post-Brexit will not deviate significantly from EU data protection laws

Introduction

We are at an interesting juncture for data protection laws in the EU. The existing EU Data Protection Directive, implemented into national law by each EU Member State, will be replaced from 25 May 2018 by a new General Data Protection Regulation (the “GDPR”), which will be directly applicable across all EU Member States.

The GDPR significantly overhauls data protection laws across the EU and contains onerous new obligations on those who process personal data, and potentially large fines for failure to comply (up to 4% of an organisation’s annual worldwide turnover in the preceding financial year, or €20 million, whichever is higher). As a result, data protection compliance will become increasingly important.



1. Which data protection laws currently apply in the UK?

The processing of personal data (that is, data about identifiable living individuals) is currently regulated at an EU level under the Data Protection Directive 95/46/EC, which was implemented in the UK through the Data Protection Act 1998 (the “DPA”). The DPA will continue to apply in the UK until it is amended or replaced (by the GDPR in May 2018, and then by any subsequent changes made following Brexit). The UK Information Commissioners Office (the “ICO”) remains the responsible regulator for data protection matters in the UK. European Commission decisions will also remain valid and the UK will retain its seat on the EU data protection working party (comprising data protection regulators from the 28 EU Member States) until Brexit.

2. Will the EU-wide reforms to data protection law apply in the UK?

The UK Government recently confirmed that the UK will implement the GDPR when it takes effect across the 28 EU Member States on 25 May 2018. As a result, you should begin preparing now to become compliant with the extensive and wide-reaching changes to data protection law introduced by the GDPR.

It is not clear whether the UK Government will seek to repeal the GDPR from UK law on or after Brexit. It has been widely anticipated that the UK will adopt a data protection law which is broadly similar to the GDPR. This would ensure the UK is considered “adequate” for the purposes of data exports from the EU. In addition, if the UK joins the EEA, it would be required to adopt the GDPR wholesale (with no deviations).

3. What should you be doing now?

The ICO has published guidance on how UK organisations should start preparing for compliance with the GDPR (including a new code of practice on how to draft privacy policies to comply with the new requirements). We recommend that you become familiar with and begin implementing the ICO’s guidance in practice in advance of the 25 May 2018. For further guidance, please see: <https://ico.org.uk/for-organisations/data-protection-reform/>

The GDPR will require significant changes for many organisations, and many of these changes will require substantial time to implement. It is therefore important for organisations to plan ahead as soon as possible in order to avoid facing significant fines. See below for our handy action list to begin assessing gaps in your organisation’s compliance.



Checklist of Key Action Points

- ✓ **Resources and budget** - Appoint an individual (or team) in your organisation to oversee the transition and ensure that sufficient budget has been allocated to introduce the new systems, processes and policies required.
- ✓ **Personal data assessment** - Identify where personal data is stored across your organisation and map your organisation's current personal data flows and how such personal data is used. Consider instructing a third party audit of your information technology and security systems.
- ✓ **Third parties** - Identify the third parties from whom personal data is collected or to whom personal data is transferred. Consider renegotiating contracts with data processors and obtaining enhanced consent from data subjects.
- ✓ **Data Processing** - Review whether data subject consent, internal training, privacy notices and policies and data transfer mechanisms are adequate to meet data processing requirements under the GDPR and update accordingly.
- ✓ **Data Breaches** - Design and implement a data breach response plan to meet the new 72-hour deadline.
- ✓ **Accountability** - Implement additional accountability measures i.e. privacy impact assessments, audits, record keeping, and potentially appoint a data protection officer.
- ✓ **Update Procedures** - Revisit existing procedures and create new procedures to respond to data subject requests, including requests related to subject access, rectification, erasure, data portability, and restrictions regarding certain types of processing.



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