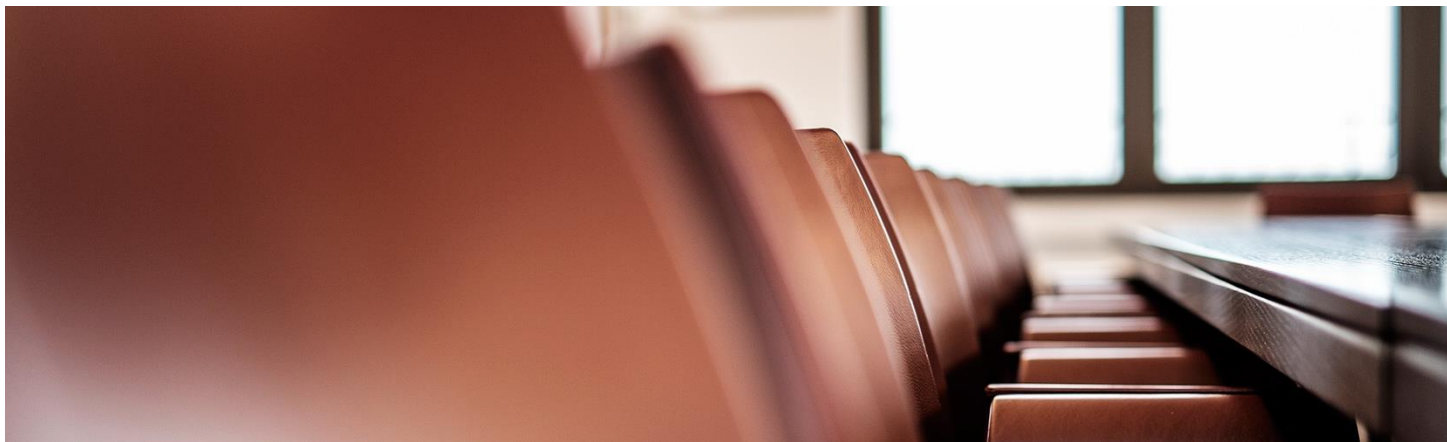


Data transfers to non-EU countries

Some practical aspects – 28 February 2018



Plan

1. Adequacy decisions – Brexit
2. Focus on two types of appropriate safeguards
 - Binding Corporate Rules (BCR)
 - Standard data protection clauses
3. Derogations – Consent
4. Conclusion

Adequacy decisions – Brexit

THE FACTS

- In May, the GDPR will apply in all Member States
- The UK has recently introduced a new Data Protection Bill which, among other, fully complements the GDPR
- The ICO, one of the largest DP authority in the EU, has always been very active in relation to guidance towards data protection compliance (incl. in the 29WP)

THE FUTURE

- Uncertainty on the situation during and after the transition period but the UK committed to maintain high standards of protection for the personal data of people in the EU
- It would be surprising if the UK was not recognised as providing adequate protection and thus granted an adequacy decision by the EU Commission
- However, given the uncertainties, companies dealing with the UK may want to get prepared in case the UK becomes a 'third country' on March 30

NOTES

- The EU Commission itself may revoke adequacy decisions
- The validity of adequacy decisions may be challenged in courts (e.g. Safe Harbour)
- The EU Commission will evaluate existing adequacy decision in light of the GDPR by 2020

Binding Corporate Rules (BCR)

- (Controller and/or Processor) BCR, now enshrined on the GDPR, are rules that:
 - Are legally binding and enforced upon the members of a group of undertakings or (new under the GDPR) of enterprises engaged in a joint economic activity
 - Expressly confer enforceable rights to data subjects
 - Specify a number of practical details, legal principles and procedures.
- BCR are appropriate safeguards for transfer of personal data to non-EEA countries, ideal for multinational companies (around 90 BCR procedures closed to date)
- Although BCR are advantageous, the approval process was quite cumbersome and time consuming since it was required from all DPA throughout the EU, one of them acting as the lead –under the GDPR, the “competent authority” will approve BCR in accordance with the consistency mechanism set to ensure an harmonized application of the GDPR
- Approved BCR will not run out because of Brexit (even if the ICO was the lead authority) but all organisations will need to ensure that their approved BCR and data protection activity comply with the GDPR – a review of the BCR may thus be required

Standard data protection clauses – status quo?

- Sets of clauses preapproved by the EU Commission that constitute appropriate safeguards for transfers to non-EEA countries, to be entered into between the data exporter and the data importer
- Simplified process under the GDPR: no authorisation required from local DPA
- Three sets currently exist, covering transfers:
 - EEA controller to non-EEA controller
 1. Decision **2001/497/EC** (Set I)
 2. Decision **2004/915/EC** (Set II) – more flexible
 - EEA controller to non-EEA processor
 3. Decision **2010/87/EU** (Set II, repealing 2002 Set I)
- The above sets of rules, and transfers previously authorised, remain valid under the GDPR until such authorisation or set of clause is amended, replaced or repealed if necessary

Standard data protection clauses – practical details

- Possibility to adopt *ad hoc* (non standard) clauses, subject then to the authorisation from the competent supervisory authority
- The clauses may exist as stand alone document or be integrated into an existing contract (no modifications to the main body of the clauses shall be made)
- Possibility to determine accession and exit mechanisms in case of plurality of data exporters and/or data importers
- Several scenarios need to be examined with care, such as sub-processing by the controller/processor in/outside the EEA to a controller/processor in/outside the EEA

Derogations – Consent

- Transfers on the basis of consent in the absence of adequacy decision or of appropriate safeguards is an exception and, as much, must be interpreted restrictively
- Consent must be explicit and data subjects must have been informed of the possible risks of the envisaged transfers due to the absence of an adequacy decision and appropriate safeguards
- Valid consent under the GDPR is more difficult to obtain. It must be :
 - Freely given
 - Specific
 - Informed
 - Unambiguous indication of wish resulting from a clear affirmative action
- Data subjects have the right to withdraw consent at any time
- Principle of accountability: consent need to be documented

Conclusion

- In the absence of adequacy decision, the most reliable and convenient tool for transfers under the GDPR is the standard data protection clauses (appropriate safeguards) –the commonly used standard contractual clauses mechanism is currently questioned before courts
- Post-Brexit, the preferred route from a UK perspective would be to be granted an adequacy decision
- If this does not happen (and it's uncertain at the moment, although good arguments exist to say it should happen), standard data protection clauses will also remain the safest route for private entities
- Adequacy decisions, including for the US (Privacy Shield for self-certified businesses), will be reviewed by the EU Commission by 2020

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