

Data Protection, the GDPR and Brexit

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Scope



Will consider in broad terms the interaction of:

- The General Data Protection Regulation (25 May 2018)
 - The EU Withdrawal Bill
 - The Data Protection Bill
 - A bite-sized look at how Brexit might work in practice in one area of law.
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Florence Speech of 22 September 2017:



- Theresa May said there would be a Brexit “implementation period” of “around two years”.
- March 2019: UK leaves political institutions but,
 - EU law continues to operate almost as before.
 - UK remains in single market etc.

European Union Withdrawal Bill



- Passed second reading in House of Commons. Now at Committee stage.
- Clause 3(1) provides:

“Direct EU legislation, so far as operative immediately before exit day, forms part of domestic law on and after exit day”
- “Direct EU legislation” includes regulations and any “EU decision”
- As currently drafted it is unclear whether “Direct EU law” will form part of domestic law in the form of primary legislation, as secondary legislation, or as some other sui generis form of legislation.

“Retained EU Law”



- Clause 4 provides that all rights, remedies etc. existing before exit day continue and can be enforced after exit day.
- The law referred to in clauses 3 and 4 that continues its life after exit day is called “retained EU law” (clause 6(7))

Data Protection Law



- The 1995 Data Protection Directive (95/46/EC). This was implemented into UK law by the Data Protection Act 1998. Will be replaced by GDPR
- **General Data Protection Regulation**
- GDPR will be directly applicable throughout EU member states without the need for implementing legislation from 25 May 2018. The GDPR came into force on 24 May 2016. There is a two-year transition period for implementation.
- The UK will not have left the EU by that date, so it will, on “exit day” become part of the “retained EU law”

Some of what the GDPR does



- **'Right To Be Forgotten'**
 - data subjects will be able to request that their personal data is erased by the data controller and no longer processed.

 - **Breaches**
 - As soon as the data controller becomes aware of any significant personal data breach has occurred, must notify the Information Commissioner's Office (ICO) (less than 72 hours)
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Some of What the GDPR Does (2)



- **Consent**
 - Opting in now express, not default, consent to data processing must be informed and freely given:
 - Data controllers must have a legitimate reason for processing personal data.
 - Potential implications for local authorities. Consent processes need to be implemented now in order to comply with May 2018 deadline.
 - New consent provisions tightens up on eg. the use of council tax data for unrelated purposes
 - Data Protection Officers will have to be appointed.
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Data Protection Bill (UK)



- The UK is preparing for the GDPR with the Data Protection Bill
- The Data Protection Bill is on its second reading in the House of Lords
- The Bill in part mirrors the GDPR, so there will be a domestic legislative scheme which seeks to mirror EU law and its operation after Brexit

Data Protection Bill (UK) – Intentions



- Make it simpler to withdraw consent for the use of personal data
- Allow people to ask for their personal data held by companies to be erased
- Enable parents and guardians to give consent for their child's data to be used
- Require 'explicit' consent to be necessary for processing sensitive personal data - have to tick a box to opt in rather than to opt out
- Expand the definition of 'personal data' to include IP addresses, internet cookies and DNA
- Update and strengthen data protection law to reflect the changing nature and scope of the digital economy
- Make it easier and free for individuals to require an organisation to disclose the personal data it holds on them
- Make it easier for customers to move data between service providers

How does Supremacy of EU Law work post-Brexit?

Back to the EU Withdrawal Bill:

Clause 5 provides:

- (1) The principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after exit day.
- (2) Accordingly, the principle of the supremacy of EU law continues to apply on or after exit day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day.
- (3) Subsection (1) does not prevent the principle of the supremacy of EU law from applying to a modification made on or after exit day of any enactment or rule of law passed or made before exit day if the application of the principle is consistent with the intention of the modification.

How does Supremacy of EU Law work post-Brexit?

- **Van Gend en Loos (1963)**- EU Law- A new legal order for the purposes of which member states have curtailed their sovereignty.
- Clauses 5(1) and (2): Supremacy of EU law applies to law that pre-dates exit day.
- What does this mean? There is no EU law after Brexit.
- Applies to “retained EU law”? But that is no longer EU law, it is EU law converted into domestic law.
- What is “supremacy” without jurisdiction of ECJ to enforce it?

EU Withdrawal Bill: Clause 7
Clean up power

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“ Dealing with deficiencies arising from withdrawal

(1) A Minister of the Crown may by regulations make such provision as the Minister considers appropriate to prevent, remedy or mitigate—

- (a) any failure of retained EU law to operate effectively, or
- (b) any other deficiency in retained EU law, arising from the withdrawal of the United Kingdom from the EU.”

- This is a so-called Henry VIII Clause.

EU Withdrawal Bill Clause 7(2)

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- Clause 7(2) provides:

“Deficiencies in retained EU law include (but are not limited to) where the Minister considers that retained EU law— (a) contains anything which has no practical application in relation to the United Kingdom or any part of it or is otherwise redundant or substantially redundant, (b) confers functions on, or in relation to, EU entities which no longer have functions in that respect under EU law in relation to the United Kingdom or any part of it”

Worked Example of Brexit problems The European Data Protection Board



- Currently all European data protection authorities meet under the "Article 29 Working Party", as set up under Article 29 of the Data Protection Directive (Directive 95/46/EC).
 - This body will be replaced by the European Data Protection Board (EDPB), set up under Chapter 7 of the GDPR
 - Composed mainly of representatives from the national data protection authority of each EU Member State (so not UK post Brexit)
 - Integral to operation of GDPR
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The Transition Period (2019-2021)



- If the UK remains in/joins the single market during the floated transition period, then the UK would have to adopt the GDPR in full (just like eg. Norway).
 - Would presumably have no representation on EDPB, but would have to be bound by its decisions.
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After the Transition Period



If the UK wants to obtain personal data from the EU or offer services that require the processing of personal data about data subjects in the EU, that processing **will have** to be consistent with the GDPR (see Article 3(2)).

Controllers subject to A.3(2) have to adopt the GDPR.

UK cannot take sovereign approach to data processing and maintain coherence with GDPR. If it seeks to depart from GDPR then significant data processors may consider it simpler to move outside the UK jurisdiction to the EU.

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Plus ça change, plus c'est la même chose?

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