



UK data  
protection law:  
upcoming changes and  
Brexit implications

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# UK data protection law: upcoming changes and Brexit implications

## The UK's current data protection rules

EU legislation on data protection has been in place since the 1995 Data Protection Directive ("**DPD**"), which guarantees the protection of citizens' fundamental rights to data protection. Being a "directive", rather than a "regulation", the DPD required EU Member States to implement their own national legislation in order to achieve its goals.

In the UK, the DPD was implemented by the Data Protection Act 1998 ("**DPA**"). Therefore, the current UK data protection rules are governed primarily by the DPA.

## EU General Data Protection Regulation

On 27 April 2016, the EU General Data Protection Regulation (“**GDPR**”) was adopted. Since this legislation is a “regulation”, it automatically applies to all EU Member States without the need for them to enact any national legislation. The GDPR’s changes to EU data protection rules will apply to all EU Member States from 25 May 2018.

## Impact of Brexit

As the exit process and accompanying negotiations are yet to commence, there is still uncertainty about the precise implications of Brexit on data protection. Under Article 50 of the Lisbon Treaty, the UK has to serve notice of its intention to exit the EU and then negotiate its withdrawal over the following two years (although this period may be varied by unanimous agreement of the EU Member States). Accordingly, given that as of 14 July 2016 the UK has yet to give notice under Article 50, it is likely that the UK will not leave the EU until after the GDPR comes into force.

This would mean that the GDPR would apply to the UK from 25 May 2018 up until the date on which the UK leaves the EU. Afterwards, while the GDPR itself will not apply to the UK, it is likely that the UK will enact national legislation that is closely comparable to the GDPR. This would be to promote consistency and data security between the UK and its European neighbours and, critically, to avoid barriers to UK businesses trading with the EU Member States.

## Brexit and non-EEA data transfers

Unless specific circumstances apply, it is currently unlawful for a UK organisation to transfer personal data outside the European Economic Area (EEA) unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data. This principle will broadly remain the same under the GDPR.

However, if the EU Commission has made a “positive finding of adequacy” in respect of a non-EEA territory, the data controller may transfer personal data to that territory without the need to implement additional safeguards for that transfer. Countries that the EU Commission has so far recognised as having adequate data protection laws include Switzerland, Canada and New Zealand.

## After Brexit

If the UK leaves the EU but remains in the EEA, the way that the non-EEA transfer rules apply to UK businesses should not change. This would also be the case if the UK leaves the EU and the EEA but obtains a “positive finding of adequacy” from the EU Commission before or shortly after exit.

If neither of these events occurs, the UK would be treated in the same way as any standard non-EEA country for data protection purposes. EU law would not prevent UK businesses from transferring personal data to a non-EEA territory, but would prevent EU Member State businesses from transferring personal data into the UK unless adequate safeguards (discussed above) are implemented in respect of every transfer. This would be a significant barrier to UK-EU trade: for this reason, avoidance of it is likely to form a significant part of the UK’s Brexit negotiations.

## Conclusion: implications for UK businesses

At present, data protection law is governed primarily by the DPA, and this is likely to remain the case up until 25 May 2018.

From 25 May 2018 (assuming that the two-year Brexit process has not yet completed) the GDPR should apply to the UK.

Around the time the UK leaves the EU, it is anticipated that the UK will enact national legislation which is closely comparable to the GDPR.

Accordingly, for now, businesses should continue to comply with their obligations under the DPA while taking practical steps to prepare for the new GDPR rules that should apply from 25 May 2018.



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