

DATA PROTECTION POST BREXIT



A joint Anti Copying in Design Webinar with Howard Kennedy legal affiliate Robert Lands

DATA PROTECTION POST BREXIT

Introduction

- Data protection introduction, GDPR myths.
- Brexit – What just happened? What's next?
- What's a Schrems?



DATA PROTECTION POST BREXIT

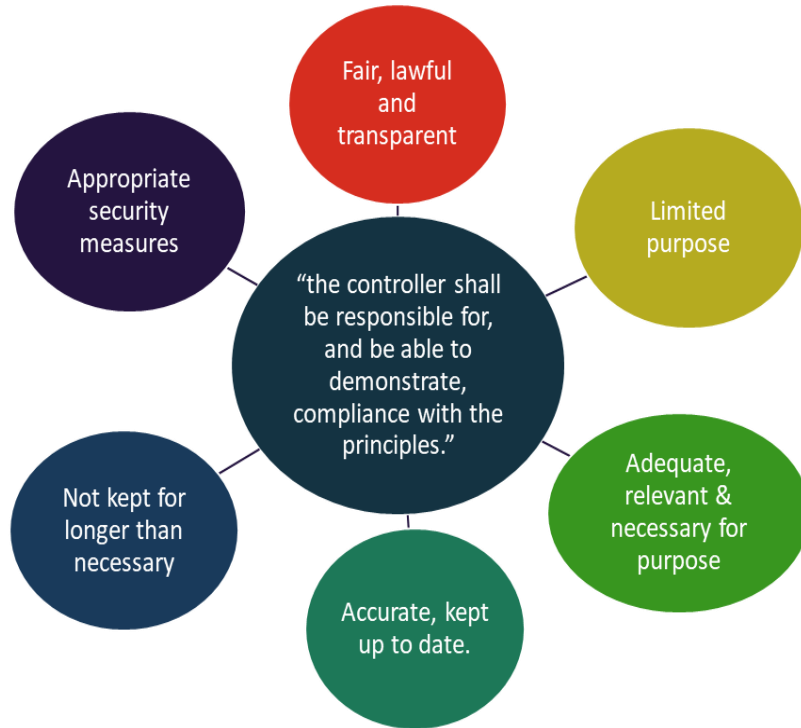


GDPR MYTHS

- It's all about getting consent (it isn't)
- It's about direct marketing (it's not).
- It's gone away now that we have left the EU (nope!)



GDPR PRINCIPLES OF DATA PROTECTION



BREXIT GDPR : BEFORE 2021

- The EU General Data Protection Regulation (“**GDPR**”)
- National law- The UK Data Protection Act 2018 (“**DPA 2018**”)
- Privacy and Electronic Communications Regulations 2003 (“**PECR**”)
- UK left the EU on 31 Jan 2020 -> The Transition Period



BREXIT GDPR : NOW

THREE **GDPRs**:

- EU GDPR
- UK GDPR
- *FROZEN* GDPR

PLUS PECR and DPA 2018

Update your documentation,
agreements and privacy policy



BOUND BY UK AND EU GDPR?



- Establishment in the EU; OR the processing activities are related to:
 - offering goods or services to data subjects in the Union; or
 - the monitoring of their behaviour as far as their behaviour takes place within the Union.
- **May be investigated and fined by multiple Supervisory Authorities.**



UK AND EU/UK REPRESENTATIVES



- If EU GDPR applies and you have no EU establishment, you will need an EU Rep.
- EU Rep should usually be located in the country where most of your EU customers are.
- Must have **written agreement** with EU Rep and **must identify them in Privacy Notices**.
- Exceptions for occasional, low risk processing.



ROLE OF EU/UK REPRESENTATIVES



- Maintains local records of processing (responsibility to create is still Controller's)
- Facilitate the organisations communications with lead supervisory authorities and data subjects
- Must be able to efficiently communicate with the data subjects, ideally in their own language



BREXIT : DATA TRANFER

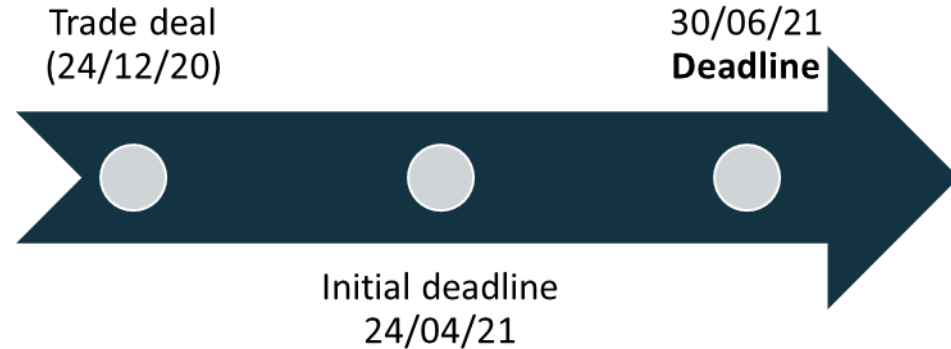
- EU General Data Protection Regulation contains restrictions on the transfer of personal data to third countries. NOW = UK!
- Best solution would have been for the EU to find that the UK has adequate data protection laws -> Adequacy Decision.



FEELINGS OF INADEQUACY

Adequacy Decisions (By EU & UK)

- UK considers EEA Adequate.
- Andorra, Argentina, Guernsey, Isle of Man, Israel, Jersey, New Zealand, Switzerland, Uruguay.
- Japan, Canada – only to commercial organisations.



Route to Adequacy

- Not automatic.
- But draft decision issued 19th February!
- EDPB to consider and give an opinion to the European Commission and representatives from the EU member states.

”

“an important milestone in securing the continued frictionless data transfers from the EU to the UK... I welcome the progress that has been made”.

ELIZABETH DENHAM, UK
INFORMATION
COMMISSIONER, 19TH FEB.

SCHREMS II - Background

*Data Protection Commissioner v
Facebook Ireland Ltd & Schrems*

- Facebook user data -> transfer to USA using **SCCs** and **Privacy Shield**.
 - Problem of laws permitting US security agencies to access personal data. Snowden revelations.
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Max Schrems (2016)
Photo Manfred Werner-Tsui (cc)

SCHREMS II – Decision (July 2020)

- Privacy Shield invalid
- SCCs survive, but can't protect against the State so should not be used without "Additional measures".
- No grace period.
- If no adequacy decision given to UK, Schrems II applies to EU -> UK transfers. Would "additional measures" be needed for UK?




SCHREMS II – EDPB Draft Guidance

- Assess if power granted to authorities in the recipient country to access the transferred data goes beyond what is necessary and proportionate in a democratic society.
- Adopt supplementary measures (technical, contractual and/or organisational) to bring the level of protection up to the EU standard of “essential equivalence”.
- If no supplementary measure can ensure an essentially equivalent level of protection for a specific transfer, the transfer should be avoided or terminated.



SCHREMS II – Consequences

- Transfers to US harder.
- Check if any Article 49 derogations apply 
- If not: Must assess circumstances of transfer and any supplementary measures (in addition to SCCs or BCRs).
- Nov 2020: New draft SCCs

Article 49 derogations include:

- ☐ Explicit consent
- ☐ Performance of a contract
(occasional transfers only)
- ☐ Reasons of public interest
- ☐ Exercise of legal claims
- ☐ Compelling legitimate interests*

*T&Cs apply!

ICO's Reaction

We are reviewing the recommendations and will consider whether we need to publish our own guidance in due course.

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We continue to apply a risk-based and proportionate approach to our oversight of international transfers

ICO STATEMENT 13TH NOV 2020

Q & A (QUESTIONS AND ABUSE!)



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