Data Protection & Brexit

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Presenter

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Melissa is a barrister specialising in privacy and data protection. She represents individuals, companies, and not-for-profit organisations on both contentious and non-contentious issues. Melissa also writes on topics related to data and privacy on her website www.privacylawbarrister.com and contributes to various publications. She produces two podcast series: 'privacy law barrister' and 'the data optimist', both available on iTunes and Spotify, and also produces podcasts for the International Bar Association's Technology Committee.

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Disclaimer

This webinar is for reference purposes only and is not intended to constitute, or be a source of legal advice. It should not be used as a substitute for professional legal advice.

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Agenda

- GDPR introduction
- What has Brexit changed?
- Data Transfers
- Adequacy
- Schrems II and SCCs
- UK/EU Representatives
- Litigation
- Enforcement
- FAQs

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GDPR introduction

- The General Data Protection Regulation ('GDPR'):
  - Replaced the Data Protection Directive
  - Introduced individual rights
  - Data processor requirements
  - Extra-territorial scope
  - Higher fines
- In the UK:
  - The GDPR had direct effect
  - The Data Protection Act 2018 replaced the Data Protection Act 1998
  - Privacy and Electronic Communications Regulations (PECR)
  - Civil litigation vs regulatory action

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What has Brexit changed?

- What has stayed the same?
  - The GDPR has been largely incorporated intact
  - Data protection principles
  - GDPR requirements: complying with the data protection principles, record keeping, data subject rights, fines etc.
- What has changed?
  - Data transfers
  - Representatives
  - CJEU
  - ICO not part of EDPB
  - Interpretation of law

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Data transfers

Before Brexit

- Personal data can flow between countries in the EU and EEA freely, which included the UK; there was no need for companies in the UK to use a mechanism to receive or send data within EU/EEA.
- Personal data transferred to a country outside the EEA ('a third country' could only occur if a mechanism in GDPR Chapter V is used (Articles 45 and 46). Namely:
  - An adequacy decision
  - Standard Contractual Clauses ('SCCs')
  - Binding Corporate Rules ('BCRs')
  - Binding and enforceable instrument between public authorities or bodies
  - Occasional transfers that satisfy Article 49

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Data transfers cont'd...

- After Brexit

  (i) UK has become a 'third country'.

  (ii) Personal data can only be transferred to the UK from the EU/EEA if a mechanism in GDPR Chapter V is used.

- UK perspective

  (i) For transfers from the UK to other countries there needs to be a mechanism (UK GDPR Chapter V)

  (ii) The UK has adopted the current EU adequacy decisions into law so transfers of personal data from UK to EU/EEA continue as before.

  (iii) Transfers to countries outside EU/EEA will require a mechanism: SCCs, BCRs etc

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Adequacy

- Adequacy means that the country receiving the personal data has been found by the European Commission to provide an adequate level of protection of personal data.
- The UK has applied for an adequacy decision and should receive a decision imminently. The EU-UK Trade and Cooperation Agreement provides a 6-month period of transfers of personal data to continue as 'transmissions' while the application is considered.
- At present, the 'frozen GDPR' applies to so-called legacy data from the EU/EEA until adequacy is decided. If the UK is considered adequate, the UK GDPR will apply to this legacy data. If not, the 'frozen GDPR' will apply.
- Adequacy is reviewed by the European Commission every 4 years.
- The UK has adopted the EU's current adequacy decisions for transfers and has agreed adequacy with Japan. Countries so far that UK can transfer personal data to under an adequacy decision: Andorra, Argentina, Canada (commercial only), Faroe Islands, Guernsey, Isle of Man, Israel, Jersey, New Zealand, Switzerland, Uruguay and Japan.

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Schrems I and II

- The case of Schrems I in the CJEU invalidated the EU-US ‘Safe Harbour’ agreement. The CJEU was critical of the failure to provide non-US individuals the ability to challenge access to their data by US intelligence services. Safe Harbour was replaced by the ‘Privacy Shield’ in 2016.
- The case of Schrems II challenged the use of SCCs. At the same time the CJEU considered the Privacy Shield, which was invalidated for the same reasons as Safe Harbour.
- The CJEU ruled that SCCs must provide an adequate level of protection to data subjects. Controllers and processors must take into account the legal system of the third country and access to data by public authorities and add supplementary measures where required.

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SCCs

- The CJEU case of Schrems II continues to apply post-Brexit, which means that SCCs will need to be reviewed.
- The European Commission has created a draft set of updated SCCs, which once approved will replace the current EU SCCs.
- As the new EU SCCs will come into effect post-Brexit, they will not be adopted in the UK.
- The ICO will publish UK SCCs and is currently planning a consultation. The ICO has created UK versions of the pre-Brexit (old) EU SCCs which should be used in the interim.
- No changes should be made to the SCCs, unless to add protections or clauses on business related issues that don't conflict with the clauses in the SCCs.

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"It was much nicer before people started storing all their personal information in the cloud."

Representatives

For UK organisations

- The GDPR has extra-territorial effect. Those organisations that offer goods and services to individuals in the EU/EEA, or monitor their behaviour, whether or not the processing is in the EU/EEA, must comply with the GDPR.
- UK organisations caught by **Article 3** will need to designate a representative in the EU/EEA.
- Representatives act as points of contact for supervisory authorities.
- No required where there is a branch or office in the EU/EEA country or processing is occasional or low risk.

For non-UK organisations

- The UK GDPR mirrors the GDPR and therefore also has the same requirement. Organisations that offer goods and services to UK individuals, even if not based in the UK, will need to designate a representative in the UK.

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Litigation

- The UK has incorporated the GDPR into law. The European Union (Withdrawal) Act 2018 saves EU law as it applied to the UK at the end of the transition period.
- The GDPR and the Privacy and Electronic Communications Regulations ('PECR') continue to apply in the UK as retained EU law.
- The Data Protection, Privacy and Electronic Communications (Amendments etc)(EU Exit) Regulations 2020 amend the GDPR, the Data Protection Act 2018 and the PECR to enable them to operate as standalone legislation.
- The changes are consolidated into two Keeling Schedules.
- In any data protection proceedings, references should be made to the amended legislation, the GDPR in the UK is now the 'UK GDPR'.

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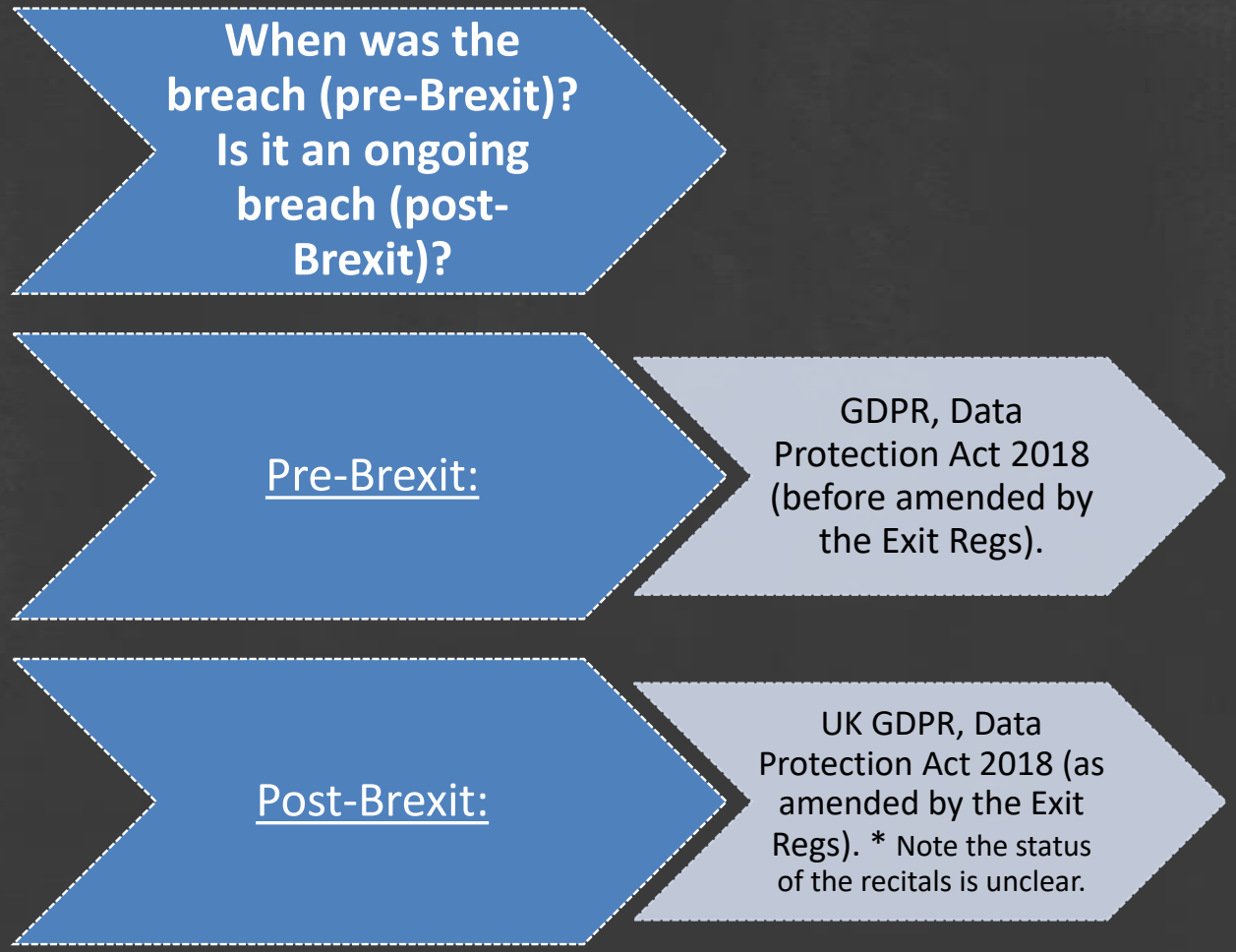
Litigation cont'd…

Data protection litigation – which law should be referred to?



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Litigation cont'd…

Interpretation of law

- According to section 6(3) Withdrawal Act, the interpretation of retained EU law is in accordance with retained EU law, that is, both domestic UK case law and case law from the CJEU up to the date the UK left.
- Lower courts are bound by the CJEU rulings handed down before the UK left the EU.
- The Court of Appeal and the Supreme Court can depart from the CJEU rulings.
- The Charter of Fundamental Rights of the European Union no longer applies. References to the Charter in case law are to be interpreted as if references to corresponding retained rights and principles.
- Note that the European Convention on Human Rights (ECHR) applies by the UK's membership of the Council of Europe and is implemented through the Human Rights Act 1998 and is not affected by Brexit.

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Enforcement

Regulatory

- The ‘One-Stop Shop’ and lead authority mechanism no longer exists. This means that for organisations with international data processing there could be enforcement action by the supervisory authority in the EEA/EU country AND by the ICO.

Civil Proceedings

- Pre-Brexit, it was possible to commence proceedings in the UK to be served on defendants in the EU/EEA in accordance with the Service Regulation. Judgments had direct recognition and enforcement (Recast Brussels Regulation (EU) 1215/2012).
- For claims started pre-Brexit, judgments could be enforced within the EU under the Recast Brussels Regulation.
- The UK has applied to join the 2007 Lugano Convention in its own right, but the EU has not yet consented?
- However, for post-Brexit claims (unless 2007 Lugano Convention later applies), enforcement will depend on the Member State’s laws (or Hague Convention if there is a jurisdictional clause in the agreement).

Useful resources

- EDPB's 'Guidelines 3/2018 on the territorial scope of the GDPR (Article 3).
- EDPB's 'Opinion 15/2021 regarding the European Commission Draft Implementing Decision pursuant to Directive (EU) 2016/680 on the adequate protection of personal data in the United Kingdom'.
- EDPB's 'Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data'.
- ICO Guidance 'International transfers after the UK exit from the EU implementation period'.
- ICO Guidance 'Standard Contractual Clauses (SCCs) after the transition period ends'

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Q&A

I hope to cover as many questions as possible but if I don't get to you, please feel free to email me: **mstock@privacylawbarrister.com** or connect with me on LinkedIn.

Any Questions?

Thanks for watching!

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