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DATA PROTECTION, BREXIT, AND RECENT EUROPEAN COURT DECISIONS

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Scope of paper

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- How will Brexit affect UK data protection (DP) law?
- What will happen to DP law in the UK, if the UK leaves the EU without a deal?
- What if the UK leaves on the basis of the current proposed Withdrawal Agreement (WA) and Political Declaration (PD)?
- Meanwhile, what is the latest word on DP issues from the CJEU and the ECtHR?

The current UK law position

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- Law is based on GDPR Reg. 2016/679, Law Enforcement Directive 2016/680 (LED), and Data Protection Act 2018 (DPA 2018)

- Effectively there are 4 different regimes in UK law:

- The GDPR regime: see GDPR + DPA 2018 Pt 2 Chapter 2
- The “applied GDPR” regime: see DPA 2018 Pt 2 Chapter 3
- The law enforcement regime: see DPA 2018 Pt 3, giving effect to LED
- The national security regime: see DPA 2018 Pt 4

These regimes will remain unaltered until (unless?) UK leaves EU – whether on 29th March 2019 or on some later date

Possibilities when UK leaves the EU

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- Two main possibilities: UK leaves without a deal; or UK leaves on basis of current proposed Withdrawal Agreement (WA) and Political Declaration (PD)
- Any modifications to WA/PD from current negotiations are unlikely to affect DP issues
- Any possibility of the UK leaving the EU on some radically different basis is outside the scope of this paper
- Hence, whether the UK leaves on 29th March 2019 or later, this paper assumes either a no deal Brexit or a WA/PD Brexit

Practical effect of Brexit: a summary

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- In a **No Deal Brexit**, the GDPR will be incorporated into UK law on exit
- GDPR will at that point be modified by UK Regulations to ensure that it can continue to operate effectively following a No Deal Brexit
- Practical difficulties in relation to data flows between the UK and the EU, and perhaps b/w UK and other third countries
- In a **WA/PD Brexit**, EU law will continue to apply during transition period
- Position thereafter depends on whether by end of transition there has been an EU finding of adequacy in relation to UK DP law

DP under a No Deal Brexit

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- On exit, UK becomes a third country as far as EU law is concerned
- But GDPR continues to apply in relation to UK, as part of UK domestic law: see EU (Withdrawal) Act 2018, section 3. DPA 2018 still applies.
- In various respects GDPR will require modification in order for it to operate effectively
- See draft Regulations published before Christmas: *The Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019*

International data transfers after a No Deal Brexit

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- **Transfers from the EU to the UK**. UK will transitionally recognise all EEA states, EU and EEA institutions, and Gibraltar as providing an adequate level of protection for personal data. See DCMS No Deal guidance. So these data transfers can continue.

- Urgent adequacy finding by EU as regards UK DP law is unlikely

- Hence **transfers from EU to UK** will no longer be straightforward

- **Transfers from the UK to third countries**: will the UK be able to rely on EU/US Privacy Shield? If not, what will be the basis for data transfers from UK to US?

Bases for EU/UK transfers after No Deal

- See EDPB paper (12th February 2019) for possible bases for data transfers from EU to UK following a No Deal Brexit

- Paper lists the following options

- Standard or ad hoc DP clauses

- Binding Corporate Rules

- Codes of Conduct and Certification Mechanisms

- Derogation

Data Protection under a WA/PD Brexit

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- Transition period: EU law continues to operate. See WA, Art 126/127
- Strong indication in PD of desire for continuing EU/UK convergence re DP law. See PD Articles 8-10
- What happens after transition agreement? Specific provision for limited continued application of EU DP law in UK: WA, Art 71
- Will there be a finding of adequacy? See PD Art 9: but no guarantee.
- If no finding of adequacy, then issues arising after transition are similar to those arising after a No Deal Brexit.

Sergeis Buivids (Case C-345/17)

- **CJEU decision** under the old DP law (Directive 95/46/EC)
- Reference from Latvia
- Individual took video footage of his police questioning, and uploaded it online
- This constituted processing of personal data
- Household DP exemption didn't apply
- Q of whether this was journalistic processing was for national Court

Google v CNIL (Case C-507/17)

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- **CJEU** has published the AG's Opinion in Google v CNIL

- AG Maciej Szpunar: 'right to be forgotten' doesn't mean that search providers should have to de-list search results on a worldwide basis.

- *[T]here is a danger that the Union will prevent people in third countries from accessing information. If an authority within the Union could order a global deference, a fatal signal would be sent to third countries, which could also order a dereferencing under their own laws. …. There is a real risk of reducing freedom of expression to the lowest common denominator across Europe and the world*.

Magyar Jeti ZRT v Hungary (Case No 11257/16)

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- **ECtHR** considered liability in relation to hyperlinks
- In 2013, a Hungarian politician drew a link between racist assaults by football fans and Jobbik, a right-wing Hungarian political party.
- News company included a hyperlink to a recording of these remarks on You Tube, without repeating the defamatory content in the body of their article. Jobbik sued successfully for defamation against (inter alia) the politician and the applicant company.
- ECtHR rejected imposition of strict liability on company for hyperlinks