



BREXIT: HOW TO TRANSFER PERSONAL DATA TO THE UK AND IMPLICATIONS FOR M&A TRANSACTIONS IN PROGRESS

5 January 2021

Introduction

24 December 2020, following four years of intensive negotiations, the EU-UK Trade and Cooperation Agreement (“the Brexit Agreement”) was finally agreed on between the European Commission and the British government.

The overall purpose of the Brexit Agreement is to regulate the future relationship between EU and the UK, as the UK will fundamentally be considered as a “third country” as of 1 January 2021.

The consequences of the new status of the UK as a third country are still unclear, as this has not been fully regulated in the Brexit Agreement. It is certain, however, that the new status of the UK will affect many legal and corporate issues, one of them being the future transfer or receipt of personal data from the UK.

The Transition Period of six Months for Transfer of Personal Data

In terms of transferring or receiving personal data from the UK, the Brexit Agreement has defined a six-month transition period. This implies that until 1 July 2021, the UK is still to be considered an EU/EEA country in terms of transferring personal data.

Accordingly, companies may continue to transfer personal data to the UK in the same way as they have done until now.

During the transition period, the EU Commission will examine whether it is possible to render an adequacy decision on the future transfer of data to the UK, cf. the General Data Protection Regulation (the “GDPR”) article 45. An adequacy decision generally permits a cross-border data transfer outside of the EU or an onward transfer from or to a party outside of the EU without further authorization from a national supervisory authority, seeing as the jurisdiction dealt with has been considered to have an adequate level of data protection.

What happens after 1 July 2021?

In principle, companies should be prepared to adopt a new legal basis for the continued transfer of personal data to or from the UK after 1 July 2021.

If the EU Commission concludes during the transition period that an adequacy decision in accordance with the GDPR, article 45 may be rendered, the UK would be considered a “secure third country” and companies may continue the transfer of personal data as hitherto.

If, on the other hand, the EU Commission does not decide to render an adequacy decision, any transfer of personal data to the UK will have to be based on other legal foundation as known from other transfers to third countries.

If no adequacy decision is rendered, the transfer of personal data must then be based on (i) Binding Corporate Rules; (ii) the EU Commission’s Standard Contractual Clauses; or (iii) applicability of the specifically narrow exceptions included in the GDPR.

Implications and Preparations

Transfer of personal data will most likely remain highly relevant for many EU based companies, including many Danish companies.

It is expected that the UK government will likely implement data protection legislation such as the GDPR in order to secure such continued transfer. If the UK adopts data protection regulation similar to or identical with the GDPR, it should be easy for the EU Commission to deem the UK as a “secure third country” and render a corresponding adequacy decision.

However, there is no guarantee that the EU Commission will adopt an adequacy decision before the expiration of the transition period, or at all. Therefore, we recommend that any company with crucial or important transfers of personal data to the UK perform internal reviews to ensure that it has a clear and updated overview of all processing activities related to the UK. Based on this overview, the company should prepare to be able to swiftly adjust its activities in the event that the EU Commission decides not to declare the UK a secure third country.

Preparations might include implementing a new legal basis for the transfer of data before the adequacy decision has been made. This can either be done by entering into an agreement based on the EU Commission’s Standard Contractual Clauses or by Binding Corporate Rules (“BCR”) – or in the last instance by using some of the relevant exceptions in the GDPR. In addition, such companies should update their data subject notifications to reflect the post-Brexit situation. Companies should also consider whether they will need to impose similar obligations on key suppliers.

Once the new UK GDPR regime is known, companies should also consider whether this regime calls for further adjustments.

During a Due Diligence Process

The current uncertainty regarding the future transfer of personal data to the UK constitutes a possible uncertainty during due diligence processes.

If an M&A transaction is still in the due diligence process, it should be confirmed that all processing activities related to the UK are identified, and further on which legal basis the transfer of personal data to the UK is based. If such information is known, the company can start preparing a possible adoption of a new regime.

If a target has previously transferred personal data to the UK without further basis, this could – after 1 July 2021 – in principle be a breach of the GDPR. Accordingly, it should be duly confirmed in such a case that the target is able to adapt their processing activities related to the UK to any new requirements.

If you have any questions or require further information regarding any of the above, please do not hesitate to contact us:



Pernille Nørkær
Partner
pernille.noerkaer@moalemweitemeyer.com



Sarah Veje Rasmussen
Associate
sarah.rasmussen@moalemweitemeyer.com

The above does not constitute legal counselling and Moalem Weitemeyer does not warrant the accuracy of the information. With the above text, Moalem Weitemeyer has not assumed responsibility of any kind as a consequence of any reader's use of the above as a basis for decisions or considerations.

This news piece has been produced in the English language only. Are you a client or a prospective client, and should you require a Danish version, please email us at news@moalemweitemeyer.com with a link to the article that you would like to request to receive in Danish, and we will attend to your request without undue delay.