insurance europe

BREXIT KEY MESSAGES: DATA FLOWS

Consequences of Brexit on flows of personal data after Brexit

Executive summary

Post-Brexit, the UK will become a third country in relation to the EU and thus, transfers of personal data from the EU/EEA to the UK will no longer be allowed.

In order to avoid disruption for insurers and policyholders, **Insurance Europe calls for maintaining the free flow of personal data from the EU/EEA to the UK post-Brexit by adopting an "adequacy decision" under the General Data Protection Regulation (GDPR)**.

An "adequacy decision" provides the highest level of legal certainty and the most comprehensive solution. In contrast, the other possible solutions provided by the GDPR are limited in their application and do not provide a high level of legal certainty and thus, they are not an appropriate solution.

Insurance Europe also calls the UK to recognise the EU's data protection framework as adequate for data flows from the UK to the EU/EEA.

Insurance Europe urges the EU/EEA and the UK authorities to put in place these solutions as early as possible ahead of the Brexit date.

In case this is not achieved in time, a bridging interim measure must be put in place.

1 Introduction

When carrying out business, insurers may transfer personal data across borders, including from the UK to the EU/EEA and vice-versa. Transfer of the personal data of policyholders or employees could take place in different forms: (1) within a group of undertakings across multiple jurisdictions, (2) when outsourcing functions of their business, such as claims management to operators in another country (3) when the transfer is part of reinsurance arrangements or (4) data processing between insurance companies and intermediaries

The protection of personal data in the UK falls currently under the Data Protection Act, which is in line with the EU Data Protection Directive of 1995. On 25 May 2018, these rules will be replaced by the GDPR, which will become directly applicable in all EU member states including the UK which will still be part of the EU at that time.

However, after Brexit, transfers of personal data from the EU/EEA to the UK would no longer be allowed unless one of the options foreseen in Chapter V "*Transfers of personal data to third countries or international organisations*" of the GDPR is implemented.

Similarly, transfers from the UK to EU/EEA would also need to be allowed.

2 Consequences of uncertainty for cross border data flows in insurance after Brexit

Legal certainty for the transfer of personal data across borders is essential to the functioning of international insurance markets. In the absence of a solution maintaining the free flow of personal data between the EU/EEA and the UK, European consumers will experience significant adverse effects, in addition to the economic consequences of a disrupted international market.

For instance, EU citizens involved in a motoring accident with UK travellers will receive the payment they are entitled to only if the holidaymakers' insurer based in the UK is able to process their personal data to handle the claim.

Conversely, if the UK does not recognise the adequacy of the European data protection regime, it will likely be significantly more complex and expensive for EU holidaymakers to obtain travel insurance when they visit the UK.

3 Possible solutions under the GDPR

The GDPR foresees specific legal bases for the transfer of personal data from the EU/EEA to third countries. However, each of these tools addresses different situations and needs, and has different advantages and disadvantages, which make them more or less suitable to the challenges raised by Brexit.

One of those tools is an "adequacy decision" (Art. 45 GDPR) which identifies that a third country has an adequate and essentially equivalent to the EU data protection standards, level of protection. The "adequacy decision" is issued by the European Commission, allowing personal data to flow from the EU and EEA member countries to a third country without any further safeguards. It is the tool that provides the highest level of legal certainty and the most comprehensive solution, as it is not company-specific.

Alternatively, the GDPR includes specific appropriate safeguards (Art. 46 GDPR) – listed in the annex – that allow individual companies or groups of undertakings to legally transfer personal data internationally. These safeguards are designed to ensure that the recipients of personal data who are outside the EU are bound to continue to protect the personal data similarly to EU standards. However, they are limited in their application and do not provide a high level of legal certainty as they are more likely to be subject to legal challenge. Moreover, they are costly for businesses and especially for Small and Medium Enterprises (SMEs) to implement. The Information Commissioner Officer (ICO), that serves as the UK data protection authority, pointed out that "these safeguards are not as broad, all-encompassing and clear as an adequacy agreement", giving a clear indication that these safeguards are not an appropriate solution.

Insurance Europe recommendations

Insurance Europe calls on the European Commission and the UK to mutually recognise each other's data protection frameworks as adequate to allow free flows of personal data between the EU/EEA and the UK.

To this effect, the adoption of an "adequacy decision" under the GDPR is the most legally sound option for allowing the transfer of personal data from the EU/EEA to the UK post-Brexit as it provides a comprehensive solution that ensures an adequate protection of personal data. To allow for an "adequacy decision", the UK should ensure that it meets the conditions for the European Commission to issue such a decision, for instance by ensuring that its national legislation and binding international commitments that have an impact on data protection, are in line with the GDPR. Similarly, the UK shall recognise the EU's data protection framework as an adequate basis for personal data transfers from the UK to the EU/EEA.

In light of the above, Insurance Europe calls the Task Force 50 and the UK authorities to launch their adequacy assessment processes at the earliest, since legal certainty about personal data transfer is necessary well ahead of the Brexit date to avoid business disruption as well as unnecessary expenses and efforts by companies in contingency planning.

Should the EC and the UK "adequacy decisions" not be feasible on the Brexit date, there would be a need for an interim solution allowing continuity of personal data transfers between the EU and the UK until the European Commission and the UK adopt their "adequacy decisions".

ANNEX: Appropriate safeguards under Art. 46 of the GDPR

The appropriate safeguards may be provided by:

- **Binding Corporate Rules (BCRs) (Art.47/Art.46(2(b)))**: BCRs are approved by the competent supervisory authority. They are an appropriate option only for multinational companies wishing to transfer personal data within the group. Thus, companies wishing to transfer personal data outside the group would need another legal basis. Moreover, based on existing experience, the approval of BCRs by supervisory authorities is a lengthy process that could take up to two years to be completed.

- **Standard Contractual Clauses (SCCs) (Art.46(2(c-d))/Art.93(2))**: SCCs are adopted either by the European Commission or by a national supervisory authority and then approved by the EC. They can be used by companies wishing to transfer data in a company outside the EU and they do not cover intra-group data transfer. SCCs templates are inflexible and may not be adapted to a given company's needs. Furthermore, the EC's SCCs are soon to be updated. Finally, following a referral from the Irish High Court to the CJEU, the CJEU will issue a ruling on the validity of SCCs. Thus, due to the forthcoming legal challenge, SCCs shall not be deemed to provide legal certainty for cross-border transfers of personal data.

- **Codes of Conduct (Art. 40/Art.46(2(e)) or certification mechanisms (Art.42/Art. 46(2(f)))**: These options have not been tested yet for transferring personal data to third countries. Moreover, any code of conduct has to be approved by the competent supervisory authority and an implementing act shall be issued by the European Commission to grant general validity to the code. Such a process is likely to take time and would not allow the code to be ready on the Brexit date. Finally, codes of conduct and certification mechanisms are insufficient by themselves since the controller or processor in the third country shall make binding and enforceable commitments, via contractual or other legally binding instruments to apply those appropriate safeguards.

- **Derogations (Art.49)**: In the absence of the above legal tools, specific derogations could apply for transferring personal data to third countries. The derogations listed on Art. 49, are only for very specific and urgent situations, which concern a small number of data subjects, and for which there is no alternative solution. A derogation is an exemption from the prohibition of transferring personal data outside the EEA and the criteria are strict and narrowly interpreted. Thus, these derogations could be used as a last resort and not as the principal legal basis for processing personal data.

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Insurance Europe is the European insurance and reinsurance federation. Through its 35 member bodies — the national insurance associations — it represents insurance and reinsurance undertakings that account for around 95% of total European premium income.

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