

Brexit Implications

Nominating a Representative

January 2021

The UK formally left the European Union (EU) on 31 December 2020 however the General Data Protection Regulation (GDPR) still applies in the UK.

From 1 January 2021 UK data protection requirements remain largely but not entirely the same. For more information about what remains the same, what remains the same for the time being and what has changed, please see the BHBIA's '*Data Protection Update – Brexit Implications January 2021*'.

One of the key things that has changed for organisations that offer goods and services to EU citizens or monitor the behaviour of EU citizens but are based outside the EU and don't have an establishment within the EU, is that they must nominate a representative within an EU member state (Article 27).

The interim arrangements set out in the UK-EU trade deal do not relieve businesses in either the UK or the EU of their obligation to appoint a representative.

This update provides more detail upon the requirement to nominate a representative.

Brexit – Nominating a Representative

One of the consequences of Brexit for data protection and business intelligence is that companies that have a UK office *but* don't have a base elsewhere in the EU and carry out work in the EU that involves processing the data of EU citizens will have to nominate a "representative".

The role of a representative is different to that of a Data Protection Officer (DPO). The role of a DPO and a representative are different. A DPO's role is to help controllers and processors to be compliant with the GDPR. Representatives have more of a liaison role.

More precisely, organisations that meet all three of the criteria below must nominate a representative within an EU member state (Article 27):

1. Offer goods and services to EU citizens or monitor the behaviour of EU citizens;
AND
2. Are based outside the EU;
AND
3. Don't have an establishment within the EU;

What is an establishment

The GDPR states (Recital 22) that:

Establishment implies the effective and real exercise of activity through stable arrangements. The legal form of such arrangements, whether through a branch or a subsidiary with a legal personality, is not the determining factor in that respect.

Generally speaking an establishment is a local office or base from which work is carried out.

What is a representative

The GDPR states (Article 4 (17)) that:

'representative' means a natural or legal person established in the Union who, designated by the controller or processor in writing pursuant to Article 27, represents the controller or processor with regard to their respective obligations under this Regulation;

Simply put a representative is another person or organisation that represents you/your organisation if you are based outside the EU, but you monitor or offer services to people in the EU.

A representative:

- Can be a company or an individual, if it's a company, the European Data Protection Board (EDPB) recommends that there is a designated "lead person".
- Must be established in an EU member state where affected data subjects are located (where data processing takes place is irrelevant). The EDPB recommends that the representative is established where most affected data subjects are based.
- Should not be the Data Protection Officer (DPO) as well, DPOs need to be more independent than representatives.
- Should be explicitly appointed in writing and have the authority to act on behalf of the controller or processor in relation to its GDPR obligations.
- Should be identified to data subjects via the controller or processor's privacy policy.
- Key responsibilities include:
 - Facilitating communication between data subjects and the controller or processor;
 - Maintaining a record of processing activities;
 - Co-operating with supervisory authorities.

Representatives should have a good grasp of data protection issues, knowledge of GDPR and relevant local laws but in general they need not be as well qualified as DPOs.

Exceptions

Even if the three conditions on page 1 are met there are some exceptions to when a representative would be required. A representative is *not* required if the data processing is:

- Carried out by a public authority or body or;
- Occasional, does not include large scale processing of special category data, and is unlikely to result in a risk to the rights and freedoms of natural persons.

Given the nature of business intelligence work the exceptions are unlikely to apply.

Advice to BHBIA members

Members meeting the criteria detailed on pages 1 and 2 must:

- a) Appoint an EU representative if they do not have an EU establishment and
- b) Update privacy notices/contracts/agreements so that they include their representative's identity and contact details.

Non-EU and EEA based controllers cannot benefit from the one-stop shop mechanism (the presence of a representative is not equivalent to that of an establishment). This means organisations may have to deal with more than one supervisory Data Protection Authority (DPA): the ICO in the UK and an EU-based DPA.

Subject to change

The BHBIA's guidance is subject to change. We will do our best to keep members up to date but please monitor news from the ICO <https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/whats-new/>

Additional sources of information

Guidelines 3/2018 on the territorial scope of the GDPR (Article 3), November 2018 https://edpb.europa.eu/our-work-tools/public-consultations/2018/guidelines-32018-territorial-scope-gdpr-article-3_en

Market Research Society Brexit Hub <https://www.mrs.org.uk/standards/brexit-hub>
The MRS's '*Brexit and research: What's Next?*' is likely to be of particular interest.

Government Guidance: Using personal data in your business or other organisation during and after the transition period <https://www.gov.uk/guidance/using-personal-data-after-brexit>

Information Commissioner's Office: Data Protection at the end of the transition period <https://ico.org.uk/for-organisations/data-protection-at-the-end-of-the-transition-period/>

The BHBIA's Ethics & Compliance Committee is providing this guidance as general information for its members. It is not legal advice and should not be relied upon as such. Specific legal advice should be taken in relation to any specific legal problems or matters. Whilst every reasonable effort is made to make sure the information is accurate, no responsibility for its accuracy or for any consequences of relying on it is assumed by the BHBIA.

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