

GDPR Update – Brexit Implications

Nominating a Representative

April 2019

At present if a Brexit deal is agreed the UK will exit the EU on 31 October 2019. However, under EU rules, the UK will have to hold European Parliament elections in May, or face leaving the EU without a deal on 1 June 2019. UK data protection standards will remain the same after exit (either on 1 June or 31 October) because the UK's Data Protection Act 2018 and the EU's Withdrawal Act 2018 incorporate the GDPR into UK law. However if there is no Brexit agreement this will impact inter-country data protection issues.

This update provides more detail upon the requirement to nominate a representative. It complements the April 2019 GDPR Update on Brexit Implications available on the BHBIA website.

Brexit – Nominating a Representative

One of the consequences of a no-deal 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".

More precisely, organisations that meet all three of the criteria below:

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;

must nominate a representative within an EU member state (Article 27) - unless a Brexit agreement is developed that specifies otherwise.

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 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.

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.

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

In the event of the UK leaving the EU with no transition period or agreement in place that allows the continuation of current arrangements, then we advise members meeting the criteria detailed on page 1 to prepare to:

- a) Appoint an EU representative if they do not have an EU establishment and
- b) Update privacy notices 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 source 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

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