



**tech**<sup>UK</sup>

## **Continued data flows between the UK and Poland**

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**Why is it an issue, why is it important  
and how can it be resolved?**

## What is the problem?

With the UK's withdrawal from the European Union, it will be leaving the EU's data protection framework. EU rules on data protection set out how personal data should be treated and the circumstances in which personal data can be transferred across borders. As EU and EEA countries are governed by the same data protection framework, personal data can flow freely between all EEA countries. As a member of the EU the UK has benefited from these provisions allowing data to flow from the UK to the EU without further restrictions.

Once the UK leaves the EU and the EEA it will no longer benefit from the automatic free flow of data between the UK and EEA. Instead, the UK will be treated as a 'third country' and have to abide by the provisions within EU data protection law for transferring personal data outside of the EEA.

A large number of businesses, from the UK, the EU27 or from outside the EU have relied on the ability to transfer data freely between the UK and the rest of the EU. Many have long standing business practices relying on such transfers. A change in the UK's legal relationship with EEA data protection rules is likely to cause significant uncertainty and additional costs for all businesses who hold personal data.

## Why is this important?

The European data economy is expected to be worth €739 billion by 2020 representing 4 per cent of overall EU GDP<sup>1</sup>. The transfer of personal data is part of the daily activity of businesses of every size and sector. In a modern digital economy data and trade go hand in hand. This is because data flows are not just important to the tech sector. Almost every sector of the economy relies on data flows including financial services, retail, agriculture and many others. There are also significant benefits outside commerce. Crucial medical research and important financial crime detection both rely on data crossing borders. There are also important security related benefits to the free flow of data. Continued data flows between the UK and EU would benefit each EU27 country for various reasons. Poland and the UK have an important trading relationship, with the UK being Poland's second largest export market worth €10.5 billion per year. In an increasingly connected and digitised world data and trade go hand in hand and so the UK and Poland's trading relationship is largely underpinned by free flows of data. For example, there has been a desire to digitise the Polish automotive industry, which employs roughly 180,000 people, and nearly 40 per cent of Polish trade with the UK is from the transport manufacturing sector. Additionally, tourism between Poland and the UK is an important element of the bi-lateral relationship, with over two million UK residents visiting Poland each year. These sorts of transactions rely on seamless transfers of personal data and would be disrupted if that free flow ended.

Data flows are important to the entire global economy. In the last 10 years it is thought that global data flows have increased world GDP by more than 10 percent<sup>2</sup>. However, the UK and the EU have a particularly important relationship when it comes to data flows. The UK accounts for roughly three per cent of global GDP however it accounts for 11.5 per cent of global data flows<sup>3</sup>. Crucially, 75 per cent of those data flows are with the EU, demonstrating why it is so important to ensure the UK and EU ensure the continued free flow of data. This will impact any UK or EU business looking to trade post-Brexit.

<sup>1</sup> <https://ec.europa.eu/digital-single-market/en/policies/building-european-data-economy>

<sup>2</sup> <https://www.mckinsey.com/-/media/McKinsey/Business%20Functions/McKinsey%20Digital/Our%20Insights/Digital%20Globalization%20The%20new%20era%20of%20global%20flows/MGI-Digital-globalization-Full-report.ashx>

<sup>3</sup> <https://www.techuk.org/insights/news/item/10086-the-uk-digital-sectors-after-brexit>

## What options exist to resolve ensure data flows continue freely?

The GDPR sets out a series of mechanisms for transferring data outside the EEU to a third country. Those options are: Adequacy decisions; Binding Corporate Rules; Standard Contractual Clauses; Codes of conduct and Consent. techUK comprehensively assessed, and rejected, these data transfer mechanisms in its joint report with UK Finance 'No Interruptions: options for the future UK EU data sharing relationship'<sup>4</sup>.

It is widely accepted that the most suitable, stable and appropriate option for maintaining data flows between the UK and the EU is through mutual adequacy agreements.

## What is an adequacy decision?

Adequacy decisions are granted by the European Commission following a review of a third countries' data protection framework to check whether the third country has an essentially equivalent level of data protection as the EU. This is to ensure that when European data is processed or stored in a third country there is confidence that the data will be protected to a sufficient level, in line with the EU's approach to data protection.

Once given, adequacy allows data to flow freely from the EU to the third country with no need for additional safeguards to be implemented by businesses. This is one of the biggest benefits of adequacy as it puts compliance at the national level rather than a company level. It also offers the most stable and cost-effective method for businesses to transfer data.

## Why should the UK and the EU agree adequacy?

It is clear that the best way to ensure continued data flows between the UK and EU is through adequacy decisions. We believe there are clear arguments in favour of the EU granting the UK an adequate country. These include:

- The UK and EU have worked closely together on data protection for many years and have a shared approach to data protection.
- The UK has fully implemented the EU General Data Protection Regulation and the new UK Data Protection Act 2018 is now on the statute book. The UK Government has made a clear commitment to maintaining GDPR post-Brexit.
- The UK has a world-leading data protection regulator, the Information Commissioner's Office (ICO), which is well-respected internationally for its enforcement and approach to data protection laws.
- While there are concerns about the UK's national security powers, set out in the Investigatory Powers Act, we welcome the transparency of these measures and believe they should not prevent an adequacy agreement.

The UK and EU's discussions over adequacy will be different to previous adequacy negotiations. No country has ever had the exact same data protection framework as the EU before. The UK does have the same GDPR regime, and therefore will, after Brexit, have to make its own assessment of adequacy of third countries, including the EU. The UK and the EU should therefore seek to agree mutual adequacy decisions as soon as possible.

<sup>4</sup> <https://www.techuk.org/insights/news/item/11824-rapid-action-needed-to-safeguard-uk-eu-businesses-consumers-following-brexit>

## **What has been agreed in negotiations between the UK and EU?**

The UK Government and European Commission have, after nearly two years negotiation, agreed on two important documents: The Withdrawal Agreement and a Political Declaration on the UK and EU's Future Relationship.

The Withdrawal Agreement is a legal document setting out the terms of the UK leaving the EU. Crucially, it also provides a transition period of up to December 2020. During this time, EU law will continue to apply in the UK and while the UK will officially no longer be a member of the EU, the status quo will largely be maintained. During the transition period personal data will still be able to flow freely between the UK and the EU with no additional restrictions.

The Political Declaration on the Future Relationship contains a welcome commitment to the UK and EU agreeing adequacy agreements by the end of the transition period, and to look for opportunities for regulatory cooperation between the UK's Information Commissioner and the European Data Protection Board.

techUK and ZIPSEE recognise the benefits of a continued close relationship between the UK and the EU on data protection and welcome the commitments in both the Withdrawal Agreement and Political Declaration. Continued stability of data flows is in the mutual interest of both the UK and the EU. This is true for all sectors of the economy that rely on data flows on a daily basis. A close relationship would also provide confidence to consumers across Europe that their personal information will continue to be subject to strong data protection rules, with access to redress if necessary.

We would encourage the UK Government and European Commission to continue to engage on the vital issue of continued UK-EU data flows and to begin adequacy negotiations as soon as possible.

## **What if there is no deal between the UK and EU?**

While both the UK and EU would prefer to agree a deal before 29 March 2019, it is not guaranteed they will be able to do so. The default position if the UK and EU fail to agree a deal is a no deal situation. Governments, businesses and regulators must therefore continue to prepare for such a scenario.

The UK Information Commissioner's Office has recently published detailed guidance on the consequences of a no deal Brexit for data transfers, and actions required by businesses, including situations in which Standard Contractual Clauses (SCCs) would be required. Additionally, the UK Government has stated that in the event of No Deal it would not put restrictions of transfers of data from the UK to EU member states, essentially unilaterally declaring the EU as adequate. The European Commission meanwhile has stated that the UK will be treated as a full third country in the event of No Deal and in the absence of an adequacy decision from the Commission, alternative legal safeguards, as stipulated in GDPR, will be required.

Given the importance of this issue, scale of data transfers between the UK and the EU, and the potential cliff edge scenario facing businesses on 29 March 2019, techUK and ZIPSEE would encourage EU27 Data Protection Authorities (DPAs) and the European Data Protection Board (EDPB) to consider what action they could take to provide some legal certainty to European businesses concerned about the implications of a No Deal Brexit. Potential actions could include:

- Providing clarity that transfers from the EU to the UK which take place on the basis of valid Standard Contractual Clauses will not be challenged, and that individual DPAs would proactively engage industry to reinforce this message. Precedent does exist for this course of action, when the then Article 29 Working Party included something similar in its statement of 16 October 2015, in the aftermath of the Maximilian Schrems v Data Protection Commissioner (C-362/14) judgment from the CJEU. At the time, the Article 29 Working Party also stated its members would put in place 'appropriate information campaigns' to ensure appropriate awareness levels. Both actions would help provide comfort to firms currently using SCCs, or who were considering doing so.
- Stating that transfers from the EU to the UK will not be challenged by any of its members, pending a full assessment of whether the UK should be considered adequate. This is also consistent with the Article 29 Working Party's statement of 16 October 2015. The declaration could be conditional on certain criteria, such as the UK's continued implementation of the GDPR, which the UK Government has already committed to, and be time-limited but allow for the possibility of extensions in the event that the full assessment of adequacy has not been completed.

Both of these actions would be proportionate, based on precedent and provide much-needed clarity to European businesses about legal framework surrounding their data transfers.

# tech<sup>UK</sup>

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