Data protection Post Brexit

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The Brexit took place more than half a year ago, but numerous issues remain to be solved after the last-minute deal. One of these questions concerns the applicability of the General Data Protection Regulation (GDPR) compared to UK data protection law in international data transfers. Since the summer of 2020, hence before Brexit and as a kind of preview, the legal framework concerning data transfers between Europe and the USA was disrupted following the Schrems II judgment of the CJEU. In order to avoid such uncertainties with regard to the UK, the European Commission intended to address potential data protection issues with a so-called adequacy decision.

In third countries without an adequate level of data protection, controllers and processors must either provide additional safeguards or stop the transfer of data altogether. It is therefore necessary, six months post Brexit, to set out the appropriate legal basis, because the flow of data did not suddenly stop at the end of 2020. It is essential that legal certainty for all parties involved is also ensured post Brexit. For data transfers from the UK to the EU, nothing has changed, as the GDPR continues to apply territorially and substantially. What is new, however, is that companies are now obliged to appoint a so-called representative pursuant to Art. 27 GDPR.

How does the European legislator react? Initially with skepticism, as the European Parliament had the possibility to approve a proposal for an adequacy decision by the European Commission already at the end of May 2021. Despite similar safeguards to the GDPR, the European Parliament nevertheless rejected the decision. In particular, the exceptions allowed by the UK Data Protection Act for areas such as national security and immigration could not be considered comparable and appropriate. In addition, the access to data by intelligence agencies and law enforcement authorities gave rise to serious concerns. Also, data transfers from the UK to third countries - especially to the US - could lead to loopholes for data transfers from the EU to third countries. Similar problems have led to the invalidity of the EU-US Privacy Shield agreement in Schrems II and were criticized in the opinion of the European Data Protection Board. Furthermore, the UK data protection law is much easier to amend and therefore requires constant monitoring. The European Commission does not have much time left to react to the criticism of the European Parliament and the European Data Protection Board. If no agreement is reached and no adequate level of data protection in the UK is confirmed, companies will have to adapt their contracts accordingly. The transfer of data is then not permitted without additional safeguards (e.g. the conclusion of standard contractual clauses or Binding Corporate Rules).

The aim must be, as the European Parliament rightly emphasizes, to avoid a Schrems III judgment with regards to the data transfer between the EU and the UK.

Update: On 28th June 2021, the EU-Commission adopted two adequacy decisions for the UK under the GDPR and the Law Enforcement Directive 2016/680/EU. At the time of writing of this article, those two decisions were not yet published.