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ANNEX 6

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to the

**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT, THE EUROPEAN COUNCIL, THE COUNCIL, THE EUROPEAN
CENTRAL BANK, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE,
THE COMMITTEE OF THE REGIONS AND THE EUROPEAN INVESTMENT
BANK**

**Addressing the impact of a withdrawal of the United Kingdom from the Union without
an agreement: the Union's coordinated approach**

Data protection:

**Coordinated approach in case of a withdrawal of the United Kingdom from the Union
without a deal**

1. INTRODUCTION

On 29 March 2017, the United Kingdom notified its intention to withdraw from the Union. The Commission continues to consider that an orderly withdrawal of the United Kingdom from the Union on the basis of the Withdrawal Agreement, which has been agreed by the United Kingdom Government and which the European Council (Article 50) endorsed on 25 November 2018, is the best outcome. The Commission continues to focus its efforts on that goal. However, two days before the deadline of 12 April 2019, as extended by the European Council¹, the likelihood of a disorderly withdrawal of the United Kingdom from the Union has significantly increased.

2. DATA TRANSFERS TO THE UNITED KINGDOM IN A NO-DEAL WITHDRAWAL

The Union has a comprehensive set of rules governing the transfer of personal data to third countries, and this is the basis on which transfers will take place with the United Kingdom in case of a no-deal scenario. These rules include in particular the General Data Protection Regulation (GDPR)² and the Law Enforcement Directive³. This note focuses mainly on the tools of the GDPR.

As stated in the Commission's Brexit preparedness Communication of 13 November 2018, the Commission considers that the existing tools for data exchange are sufficient to cater for the immediate needs of data transfers to the United Kingdom in a no deal scenario. These tools are already being used for data transfers to all countries in the world, except for the thirteen third countries or territories which are (partially) covered by an adequacy decision⁴. Against this background, the Commission has not adopted a contingency measure in this area, and does not at this stage plan to adopt an adequacy decision with regard to the United Kingdom.

The provisions in Chapter V of the GDPR provide a broad toolbox for data transfers to third countries for both private entities and public authorities, such as:

- **Standard Contractual Clauses:** The Commission has approved three sets of Standard Contractual Clauses on which business operators can directly rely for their

¹ European Council Decision 2019/476 taken in agreement with the United Kingdom of 22 March 2019 extending the period under Article 50(3) TEU, OJ L 80I, 22.3.2019, p. 1.

² Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1.

³ Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ L 119, 4.5.2016, p. 89.

⁴ These countries and territories are Andorra, Argentina, Canada (only commercial organisations), Faroe Islands, Guernsey, Israel, Isle of Man, Japan, Jersey, New Zealand, Switzerland, Uruguay and the United States (limited to the Privacy Shield framework).

transfers to third countries. These standard clauses can be found on the Commission's webpage⁵.

- **Binding Corporate Rules:** Legally binding data protection rules, approved by the competent data protection authority, can apply within a corporate group;
- **Codes of conduct and certification mechanisms:** These tools can offer appropriate safeguards for transfers of personal data if they contain binding and enforceable commitments by the organisation in the third country, including as regards the rights of individuals.
- **Derogations**, that is 'statutory grounds' for transfers such as e.g. consent, performance of a contract, exercise of legal claims or important reasons of public interest (see section 3 for further information on derogations).

For further information, please see the Brexit preparedness notice on data protection⁶ and the info note issued by the European Data Protection Board (EDPB) on data transfers under the GDPR in the event of a no deal Brexit⁷.

3. PRACTICAL STEPS TO BE TAKEN BY EU DATA EXPORTERS (COMPANIES AND AUTHORITIES) TO ENSURE CONTINUED COMPLIANCE WITH EU RULES

Data exporters should use the tools, which they consider most appropriate with regard to the individual data transfer to the United Kingdom.

Prior to transferring data to the United Kingdom, they should:

1. identify what processing activities will imply a personal data transfer to the United Kingdom;
2. determine the appropriate data transfer instrument for the situation;
3. implement the chosen data transfer instrument to be ready for the withdrawal date;
4. indicate in the internal documentation that transfers will be made to the United Kingdom; and
5. if relevant, update the privacy notice accordingly to inform individuals.

Data transfers based on derogations

As regards data transfers to the United Kingdom based on derogations⁸, data controllers should be aware that these derogations are exceptions to the rule of having to put in place

⁵ https://ec.europa.eu/info/law/law-topic/data-protection/data-transfers-outside-eu/model-contracts-transfer-personal-data-third-countries_en

⁶ https://ec.europa.eu/info/sites/info/files/file_import/data_protection_en.pdf

⁷ https://edpb.europa.eu/our-work-tools/our-documents/other/information-note-data-transfers-under-gdpr-event-no-deal-brexid_en

⁸ Under Article 49 of the GDPR.

appropriate safeguards. They must therefore be interpreted restrictively and mainly relate to processing activities that are occasional and non-repetitive.

These derogations include, *inter alia*, the following situations:

- where an individual has explicitly consented to the proposed transfer after having been provided with all necessary information about the risks associated with the transfer;
- where the transfer is necessary for the performance or the conclusion of a contract between the individual and the controller or the contract is concluded in the interest of the individual;
- where the data transfer is necessary for important reasons of public interest: An example of data transfers for important reasons of public interest can be international data exchanges between services competent for social security matters⁹;
- where the data transfer is necessary for the purposes of compelling legitimate interests of the organisation, which are not overridden by the interests of the individual. When relying on this derogation, the organisation must provide suitable safeguards with regard to the protection of personal data.

Further guidance and explanations with regard to derogations and how to apply them can be found in the guidelines of the European Data Protection Board on derogations under Article 49¹⁰.

Instruments exclusively available to public authorities or bodies

Member States' authorities can also use non-legally binding administrative arrangements, such as Memoranda of Understanding¹¹. Such administrative arrangements are subject to an authorisation by the competent national data protection authority, following an opinion of the European Data Protection Board.

Under the Law Enforcement Directive, criminal law enforcement authorities (e.g. the police, prosecutors) may transfer personal data to UK authorities if they conclude, on the basis of their own assessment of the circumstances surrounding the transfer, that appropriate data protection safeguards exist¹². The Europol Regulation¹³ and the

⁹ Recital 112 of the GDPR.

¹⁰ https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-22018-derogations-article-49-under-regulation_en

¹¹ Article 46(3)(b) of the GDPR. A recent example of such an arrangement that has received a positive opinion from the European Data Protection Board (EDPB) is the administrative arrangement for the transfer of personal data between the European Economic Area (EEA) Financial Supervisory Authorities and non-EEA Financial Supervisory Authorities. The text of the arrangement is available on the EDPB website: https://edpb.europa.eu/our-work-tools/our-documents/other/draft-administrative-arrangement-transfer-personal-data-between_en

¹² Article 37(1)(b) of Directive (EU) 2016/680.

¹³ Article 25 of Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol), OJ L 135, 24.5.2016, p. 53.

Directive on Passenger Name Records¹⁴ include specific provisions on the transfer of personal data to third countries' authorities from Europol and the responsible authorities of the Member States, respectively.

Transfer of data to the United Kingdom by commercial operators

The tools available for the transfer of data to third countries by private companies should be well known to business operators in the Member States and in the United Kingdom as they are already used today for the transfer of personal data to third countries. Information on the use of such transfer tools has also recently been provided to stakeholders in the context of the entry into application of the new data protection legislation in May 2018. Member States are however encouraged to ensure that companies who are not familiar with data transfers to third countries, e.g. small and medium-sized enterprises that in the past were only dealing with Member States, are made aware of these tools.

Continued support to Member States

The Commission, and in particular its Directorate-General for Justice and Consumers, is working with interested parties and data protection authorities to make the best use of the GDPR transfer toolbox and stands ready to support Member States with regard to the application of the available tools. Moreover, the Commission has set up a stakeholder expert group comprised of industry, civil society and academics, to support the application of the GDPR. Finally, interested parties can turn to their national data protection authorities to receive more specific information with respect to the use of data transfer tools.

4. ADDITIONAL INFORMATION

Public authorities and stakeholders can find further information on the impact of the United Kingdom's disorderly withdrawal on data protection on the following website of the Commission:

https://ec.europa.eu/info/brexit/brexit-preparedness/preparedness-notice_en

¹⁴ Article 11 of Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, OJ L 119, 4.5.2016, p. 132.