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Separation anxiety – UK Government publishes position on the use of data and protection of information obtained or processed in UK prior to Brexit

The UK Government has published a [Technical note: Other Separation Issues](#) reiterating “the joint UK and EU desire to establish a deep and special future partnership” and confirming the UK’s position on technical issues relating to the UK’s separation from the EU where further discussion would be required to reach agreement. These issues, identified in the *Joint Report from the Negotiators of the European Union and the United Kingdom Government*, published in December 2017, are defined as “Other Separation Issues”. Distinct from citizens’ rights, Northern Ireland and the financial settlement, they include goods placed on the market under EU law before withdrawal; ongoing EU judicial proceedings; intellectual property rights; and the use of data and protection of information obtained or processed before withdrawal from the EU.

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A smooth transition to a new legal order

The UK Government believes that, with the exception of a small number of separation issues such as cases pending before the Court of Justice, the future economic and security partnership that the UK and the EU agree to will supersede the individual positions the UK and the EU reach on “Other Separation Issues”. For example, the arrangements the UK and the EU put in place as part of the future partnership for goods will determine whether any “wind down” procedures are required for goods that are already on the market. The UK thinks it unlikely that they will be required. The UK therefore envisages putting in place the substantive arrangements for “a smooth transition to a new legal order” at the point of agreeing on the future relationship, such that the effect of these separation wind-down provisions will be minimal.

Use of data and protection of information obtained or processed before withdrawal

The UK Government emphasises that the exchange and protection of data and information are important for the economies of the UK and the EU, and for wider cooperation, including on law enforcement matters. It says that the UK and EU should agree to continue to provide appropriate protections for data and information exchanged before Brexit and pursuant to the withdrawal agreement. It refers once again to the UK’s “strong domestic standards” and its intent to continue to play “a leading global role” in the development and promotion of high data protection standards and cross-border data flows. In accordance with that vision, UK law will be aligned with EU law at the point of Brexit. The Data Protection Bill will replace the Data Protection Act 1998 so as to give effect to the new EU data protection framework under the GDPR and Law Enforcement Directive.

On this basis, the UK’s objective is to agree early in the process on a basis for the continued free flows of data between the EU, and other EU adequate countries, and the UK from the point of Brexit until such time as new and more permanent arrangements come into force.

Comment

The UK Government is optimistic in this technical note that the substantive arrangements for a smooth transition to a new legal order will obviate the need for wind-down measures which the EU, as the Government acknowledges, is

keen to agree on now, at least provisionally. On the basis that such measures are contingent on the future relationship being agreed upon, the UK's position is that it will only engage substantively on these technical issues on the understanding that any discussion on separation issues is without prejudice to the future relationship and does not detract from the negotiations on the future relationship. On data protection, however, the question of the UK's adequacy status is arguably a matter that can be meaningfully broached now in the light of businesses' need for assurances that cross-border data flows will be maintained on Brexit and in view of the UK's clear attempt in the Data Protection Bill to match GDPR standards in order to ensure a smooth transition when the GDPR ceases to have effect in the UK. The reference in the technical note to the UK's objective to "agree early" on a basis for continued data flows appears to acknowledge that possibility.