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PRIVACY LAWS & BUSINESS

DATA PROTECTION & PRIVACY INFORMATION WORLDWIDE

Iceland's position in the EEA: Outside but alongside the EU

Helga Þórisdóttir, Commissioner, Data Protection Authority, Iceland, outlines her country's experience outside the EU but within the EEA. There are parallels with the UK government's latest Brexit policy.

Before I discuss data protection law in the European Economic Area, we must dwell a little on the European Economic Area (EEA) itself, which unites the 28 EU Member States and the three EEA European Free Trade Association (EFTA) States: Iceland, Norway

and Liechtenstein.

The EEA was established by the EEA Agreement, an international agreement which entered into force on 1 January 1994, bringing together the EU Member States and the three

Continued on p.3

Issue 98

July 2018

NEWS

- 1 - Adequacy or other avenues?
- 2 - Comment
A DP arrangement that works

ANALYSIS

- 9 - Tensions between the UK and the GDPR after Brexit
- 11 - "Knock knock... It's the ICO!"

LEGISLATION

- 1 - Iceland's position in the EEA: Outside but alongside the EU
- 7 - The differences between the UK DP Act 2018 and the GDPR

MANAGEMENT

- 14 - DPOs: Internal or external – the benefits and drawbacks
- 17 - Retail and privacy: Future challenges in the connected store
- 18 - Business process and education crucial to GDPR implementation
- 20 - Hitachi Consulting achieves BS DP certification 10012: 2017
- 23 - Events Diary

FREEDOM OF INFORMATION

- 22 - FOI Bill shows scope of future extension to private sector

NEWS IN BRIEF

- 5 - 'No' to UK in the One Stop Shop
- 13 - Facebook faces £500,000 fine
- 16 - ICO sets its action priorities
- 21 - NGOs file complaints over communications data
- 21 - Companies House meets data privacy concerns
- 23 - Director liability for nuisance calls?
- 23 - Jersey appoints Commissioner
- 23 - Home Office loses appeal

Adequacy or other avenues for international transfers?

UK businesses face uncertainty as there is no solution yet for international data transfers after Brexit. **Laura Linkomies** reports from Cambridge.

Will it be adequacy or anarchy? John Bowman, Senior Principal at Promontory asked this question when he opened a session on EU adequacy decisions at the *PL&B* 31st Annual International Conference, 2-4 July. While the UK government

puts forward a case for an agreement or treaty rather than an adequacy application – and this view is supported by the ICO – the European Commission favours the adequacy route.

Continued on p.5

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A DP arrangement that works

The announcement this week of the EU-Japan Free Trade agreement after years of negotiation is a sharp reminder of the lengthy process that could emerge from the UK government keeping to its policy of the UK leaving the European Union, the European Economic Area (EEA) and the Customs Union. The UK's Data Protection Act 2018 would be subject to a critical review to gain an adequacy assessment (p.9) or be subject to negotiations on a legally binding international EU-UK treaty.

Much simpler, from the data protection perspective, would be a decision for the UK to stay in the EEA. Rather than create a complex new arrangement, the EEA/European Free Trade Agreement (EFTA) already exists and works harmoniously alongside the EU.

The EEA is often described as the Norway option but there are three non-EU countries in the EEA, Norway, Iceland and Liechtenstein. Helga Þórisdóttir, the head of Iceland's Data Protection Authority, explains (p.1) how its data protection law works. Iceland's position provides inspiration for how the UK can have: its own Data Protection Act in line with the GDPR (p.7); national derogations; a seat on the European Data Protection Board (EDPB); full involvement in policy and enforcement co-ordination work (p.5); and remain in the One Stop Shop.

The ICO, Europe's largest national DPA, acts as lead for around half of the former Article 29 DP Working Party's and current EDPB's Opinions and working groups, and has approved more Binding Corporate Rules applications than any other DPA (p.1). By the UK staying in the EEA, this work would continue without interruption.

With the trend towards government and Parliament favouring a softer Brexit, and everyone recognising the importance of data protection law as an essential element of international trade and protection of individuals' rights, now is the time to remain inside the EEA.

Meanwhile, we also focus on many aspects of practical implementation, such as preparing for an unannounced ICO inspection (p.11), deciding on whether to appoint an internal or external DPO (p.14), privacy and shopping (p.17), staff training (p.18) and certification (p.20).

Stewart Dresner, Publisher

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Do you wish to contribute to *PL&B UK Report*? Please contact Laura Linkomies, Editor (tel: +44 (0)20 8868 9200 or email: laura.linkomies@privacylaws.com) to discuss your idea, or offer to be interviewed about your organisation's data protection/Freedom of Information work.

Iceland ... from p.1

EEA EFTA States in a single market, referred to as the “internal market”.

The objective of the EEA Agreement is to create a homogenous European Economic Area. All relevant EU legislation in the field of the single market is integrated into the EEA Agreement so that it applies throughout the whole of the EEA, ensuring uniform application of laws relating to the single market.

The EEA Agreement provides for the inclusion of EU legislation in all policy areas of the single market. This covers the four freedoms – free movement of goods, services, persons and capital, as well as competition and state-aid rules. But it also covers the following horizontal policies: consumer protection, company law, environment, social policy and statistics.

In addition, the EEA Agreement provides for cooperation in several policies such as research and technological development, education, training and youth, employment, tourism, culture, civil protection, enterprise, entrepreneurship and small and medium-sized enterprises.

The EEA Agreement guarantees equal rights and obligations within the single market for citizens and economic operators in the EEA. Through Article 6 of the EEA Agreement, the case law of the Court of Justice of the European Union is also of relevance to the EEA Agreement, as the provisions of the EEA Agreement shall be interpreted in

protection law is the same as EU law.

WHAT THE EEA DOES NOT COVER

The EEA does not cover:

- EU Customs Union (towards third countries)
- Common Agricultural and Fisheries Policies – so Iceland still has its own fisheries policy
- EU Regional Policy
- Common Trade Policy
- Economic and Monetary Union
- Justice and Home Affairs – even though Iceland and Norway are part of the Schengen network
- Common Foreign, Security and Defence Policy.

WORKING TOGETHER: THE EU, EEA AND EFTA

The administration and management of the EEA is shared between the EU and the EEA EFTA States in a two-pillar structure. Substantive decisions relating to the EEA Agreement and its operation are a joint venture and are taken by joint EEA bodies, established by the EEA Agreement and consisting of representatives both from the EU side and the EEA EFTA States.

To ensure uniform implementation and application of the common rules in all EEA States, there is a system of monitoring and judicial control, under which the EU institutions are responsible for the EU Member States and the EEA EFTA institutions are responsible for the EEA EFTA States.

In addition, the EFTA Secretariat in Brussels plays an important role in the

EEA Agreement established EEA EFTA bodies to match those on the EU side. The EEA EFTA institutions and EU institutions form the two pillars, whereas the joint EEA bodies are situated in-between. There have been exemptions made here with regard to not matching EFTA bodies to these on the EU side, but they are very few, for example in pharmaceutical legislation – and with GDPR – I will come back to that later.

The two-pillar structure covers firstly the decision-making procedure. In the EEA EFTA pillar all decisions are taken by consensus, as opposed to the EU pillar where decisions related to EEA legislation are normally taken by majority vote. Secondly, the structure encompasses supervision and judicial control and, as parallels to the European Commission and the Court of Justice of the European Union, a surveillance authority and a court were established by the EEA Agreement to ensure the monitoring of the implementation and application of EEA law in the EEA EFTA States.

In order to be applicable in the EEA, EU acts have to be incorporated into the EEA Agreement, more concretely into one of its Annexes or Protocols. These amendments to the EEA Agreement are done by means of Joint Committee Decisions (JCDs). These decisions constitute international agreements and are adopted by agreement by the EU on the one hand and the EEA EFTA States, speaking with one voice on the other.

One of the central features of the EEA Agreement is that its common rules are continuously updated by adding new EU legislation. This aspect is essential given the large output of legislation on the Internal Market. Each month, a number of EEA relevant pieces of legislation are incorporated into the EEA Agreement by decisions of the EEA Joint Committee.

WHERE ARE WE?

The experience so far is that this has been a well-functioning system for 24 years. This is a continuous process; this is not automatic and there is no direct effect of EU law in Iceland, Norway and Liechtenstein.

It should be noted that around 500-600 new acts are incorporated into the

Iceland, together with Norway and Liechtenstein will be full members in the European Data Protection Board, not observers.

conformity with the relevant rulings of the Court given prior to the date of signature (2 May 1992).

Co-operation is to be carried out through common activities of various types, such as EEA EFTA participation in EU programmes.

One of the sectors governed by the EEA Agreement is EU Data Protection law. So, in short, Iceland’s data

coordination and management of the EEA. I am familiar with that role of the EFTA Secretariat since I worked there for two years from 2003.

The EEA EFTA States have not transferred any legislative competences to the joint EEA bodies and they are also unable, constitutionally, to accept decisions made by the EU institutions directly. To cater for this situation, the

EEA Agreement every year and only a handful of acts have had to be negotiated specially. It should also be noted that the EEA agreement has the highest status amongst the agreements that the EU has concluded with third countries. For Iceland, Norway and Liechtenstein, the EEA agreement is a gateway into a market with 500 million citizens.

When it comes to Data Protection in the EEA, under the EU Data Protection Directive 95/46/EC, Iceland was an observer in the Art. 29 DP Working Party, together with Norway and Liechtenstein.

The EEA Agreement does not grant the EEA EFTA States formal access to the decision-making process within the EU Council and the European Parliament. However, the EEA EFTA States can participate in shaping a decision at the early stages of preparing a legislative proposal. The EEA Agreement provides for input from the EEA EFTA side at various stages of the preparation of EEA-relevant legislation:

1. Representatives of the EEA EFTA States have the right to participate in expert groups and committees of the European Commission. They participate extensively in the preparatory work of the Commission and should be consulted in the same manner as EU experts. The Commission may seek advice from the EEA EFTA experts by phone or by correspondence, or in meetings. The experts may also be associated with the preparatory work through regular committee meetings.
2. The EEA EFTA States have the right to submit EEA EFTA comments on upcoming EU legislation on important policy issues. A typical EEA EFTA comment

provides a brief commentary and suggestions regarding Commission initiatives such as green papers or legislative proposals. The comments are endorsed by the Standing Committee and officially noted by the EEA Joint Committee after they have been sent to the relevant services in the Commission, the European Parliament and/or the Council.

THE GDPR

Much work has been undertaken in recent months to ensure timely incorporation of the GDPR into the EEA Agreement. Many meetings of the EFTA Expert Group on Data Protection (Iceland, Norway, Liechtenstein) have taken place starting in the autumn of 2015. And as mentioned previously, all decisions in the EEA EFTA pillar are taken by consensus – and that can take time.

When a way forward has been decided by Iceland, Norway and Liechtenstein, then discussions with the Commission can start. When a text has been settled with the Commission, then the Commission needs approval from the EU Council. Finally, there can be a Joint Committee Decision (JCD).

In order to meet the requirements of the one stop shop and the consistency mechanism, and to ensure homogeneity on the Internal Market, participation for the three EEA EFTA States had to be formalised at a higher level. After months of negotiation, a decision was reached, namely:

- Iceland, together with Norway and Liechtenstein will be **full members in the European Data Protection Board**, not observers.
- **The three countries will not have voting rights** – however their opinions will be recorded separately.

- This secures **full participation** in the one stop shop and the consistency mechanism.

It has to be mentioned that, when the GDPR was implemented into national legislation in Iceland in June, there was some criticism that too much power had been delegated to EU institutions – namely the EDPB. The fact that the EDPB can take binding decisions towards the Icelandic DPA (Persónuvernd) is seen by some as not being in line with the Icelandic Constitution.

So, even though In Iceland we have had a well-functioning system for many years, it might be stretching a little the limits of how much EU cooperation is possible, when not in the EU. It was however the decision of the majority of the Icelandic Parliament that this delegation of powers was within the boundaries of the Constitution – being in a narrow sector and because the decisions of the EDPB are not binding towards individuals, only towards the Supervisory Authority.

AUTHOR

Helga Þórisdóttir is Commissioner at the Data Protection Authority, Iceland.

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- 1 See www.efta.int/EEA/news/General-Data-Protection-Regulation-incorporated-EEA-Agreement-509291
- 2 Law No 90/2018: (in Icelandic: Lög nr. 90/2018 um persónuvernd og vinnslu persónuupplýsinga) www.althingi.is/thingstorf/thingmalalis-tar-efrir-thingum/ferill/?ltg=148&mnr=622

GDPR APPLICABLE IN ICELAND FROM 15 JULY

The GDPR was incorporated into the EEA Agreement on 6 July.

In addition to the adoption of a Joint Committee Decision incorporating the GDPR, national legislation in each EEA EFTA State must be amended in accordance with the GDPR before the act can take effect in the EEA Agreement. Once all three states notify the conclusion of the parliamentary processes (fulfilment of

constitutional requirements), the GDPR becomes applicable throughout the EEA¹.

Until then the Data Protection Directive 95/46/EC remains applicable in the EEA Agreement, thus ensuring that data can continue to flow freely between the EEA EFTA States and the EU Member States.

In addition to the adoption of a JCD incorporating the GDPR into the EEA Agreement, the national parliaments of the

EEA EFTA States need to amend national legislation in accordance with the rules of the GDPR. Once parliamentary approval has been given by all three national Parliaments and the JCD has been incorporated into the EEA Agreement, the GDPR becomes applicable throughout the EEA. The GDPR was implemented into national law in Iceland in June and is applicable from 15 July 2018².

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