

Expert comment

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The annual summer holiday lull in August usually provides an opportunity to catch up on the year, and plan ahead for Autumn, when regulators return refreshed from holidays, and businesses settle into a period of sustained activity in the run up to the year end. This year, however, the holiday lull felt different. Perhaps this was more of a UK-centric vibe, as we took stock of the political turmoil of the past few months and realised that the post-Brexit uncertainty shows no real sign of abating. But there are other forces at work here as well: a sense of broader political unease in Europe, and the looming US presidential election which is slowing decision-making in the US. General business activity levels have been slower this year, and that sense of uncertainty, perhaps of unease, may continue to percolate into the Autumn.

Within the data protection community, however, the position is different. Despite the summer lull, there is a noticeable sense of purpose. Notwithstanding the Brexit vote, organisations have been using the Summer to begin to get to grips with the detail of the General Data Protection Regulation ('GDPR'), and what it means at a practical level. The level of interest is sophisticated and well-informed, and far from the more generic ponderings of a year ago. There is hunger for substantive GDPR guidance from Data Protection Authorities but, unlike this time last year, organisations are no longer holding back, waiting to see what the final text of GDPR might look like before engaging in internal GDPR planning and strategising.

This approach to the GDPR is surely the correct one: as commentators have pointed out, the UK is frequently a conduit for personal data entering and leaving Europe, and UK based service providers (among others) will be keen to see the UK maintain an 'adequate' data protection regime. There is also the practical issue that GDPR is likely to take effect in the UK before the Brexit negotiations are complete.

For some organisations, the initial focus of preparatory efforts has been on taking stock of existing data assets and data flows. Others are further ahead, and have been analysing how to address the impact of very specific GDPR obligations on their business, and planning to modify processes and policies. Substantive interest and engagement in the GDPR seems to have spread beyond data protection and privacy departments, and within many organisations the GDPR now has the attention of

broader business including senior executives.

This practical focus on the GDPR is prompting a wider debate as organisations grapple with requirements that, on closer examination, are described in somewhat vague language in the legislative text. One example concerns the extra-territorial application of the GDPR. We are familiar with the theory: the data processing activities of a controller or processor established within the EU are subject to the GDPR, as is the processing of personal data of European data subjects which takes place outside of the Union in the context of offering goods and services to individuals within the Union.

But grappling with the practicalities of Article 3, using actual scenarios, immediately raises challenges. What happens where a non-EU processor is engaged by an EU controller? The non-EU processor might not be offering services directly to an individual in the EU, but may well be processing personal data 'in the context of the activities' of the EU controller, and therefore be subject to GDPR.

The Privacy Shield has been another area of focus for organisations over the Summer. The US Department of Commerce began accepting certifications for the Safe Harbor replacement on 1st August 2016. Some 90 companies submitted certifications within the first four weeks of the new regime. Although most certifications have come from smaller sized (or niche) organisations, Microsoft, Salesforce and Workday are already on the published list, and other large organisations are rumoured to be in the pipeline, preparing their certification documents, and updating existing policies and procedures to ensure compliance with the more stringent requirements of the Privacy Shield. This is one area where we will see continued activity into the Autumn and beyond.

For those Privacy Officers who have managed to take a break over the Summer, the proposed review of the e-Privacy Directive, and the implementation of the NIS Directive are likely to be additional issues on the list of things to watch on their return to the office. Brexit or not, there is a great deal to be getting on with.

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Bridget is Chairing the 15th Annual Data Protection Compliance Conference, taking place in London on 13th and 14th October 2016.

See the website www.pdpconferences.com for information and to make a booking.