Corporate NEWSLETTER

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INTELLECTUAL PROPERTY LAW

All change - UK set to become an importer of data

Selina Clifford, Senior Associate

When Brexit finally happens (if it ever does) then one of the major impacts is likely to be on the ability of European based businesses to transfer personal data into the UK. This does of course depend on the terms that the UK leaves the EU, but it looks set to be a major change which businesses need to prepare for now.

To date, the UK has always been treated as an exporter of data and UK businesses have only really had to be concerned when transferring or exporting data out of the European Economic Area (EEA). Post-Brexit, the tables will be turned and the UK will suddenly become both an importer of data (from the EEA) as well as an exporter of data (to outside of the EEA).

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Editor's Note

Welcome to the Summer 2019 edition of our Corporate Newsletter which contains a variety of articles covering corporate & commercial, property, and intellectual property law.

Brexit still remains a key issue for the UK and we will continue to monitor any developments and legal implications.

If you have any legal issues or concerns that you would like to discuss, please do not hesitate to contact me.

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EdwinCoe LLP

In February this year, the European Data Protection Board (EDPB) (the EU body in charge of the application of the GDPR) produced an **information note** on data transfers under the GDRP in the event of a no-deal Brexit.

As background, the GDPR restricts transfers of personal data outside the EEA unless the rights of the individual in respect of their personal data is protected in another way, or one of a limited number of exceptions applies. In the event of a no-deal Brexit (which is still a likely scenario), the UK would be considered a 'third country' for purposes of the GDPR. This will mean that organisations based in the EEA who wish to transfer personal data to the UK (i.e. a third country outside of the EEA), will need to consider whether it can put in place 'appropriate safeguards' as referred to in the GDPR or if an exception provided for in the GDPR applies.

Appropriate safeguards

In the absence of an adequacy decision made by the Commission in favour of the UK, organisations in the EEA intending to or currently transferring personal data to the UK will have to legitimise the transfer by ensuring appropriate safeguards are in place.

Appropriate safeguards are designed to ensure that individuals do not risk losing the protection of the GDPR if their personal data is transferred outside of the EEA. **A list of these safeguards are contained in Art 46 GDPR**. For private organisations, they are:

- **Contractual agreements which incorporate standard contractual clauses, often referred to as *"model clauses"*, as approved by the Commission.** There are three available sets of model clauses – two sets can be used for transfers of personal data between a Controller based in the EEA and a Controller based outside the EEA, and one set for transfers between a Controller and a Processor (note there are no model clauses for Processor to Processor relationships). Model clauses can be entered as a stand-alone contract, and must be into without amendment in order to be effective. Model clauses may however be incorporated into a written contract (such as a data processing service agreement) and additional clauses added provided nothing in the contract or additional clauses alters the effect of any of the model clauses. This means that the parties are still able to exclude or limit their liability contractually to each other in respect of data protection.
- **Binding Corporate Rules (BCRs).** BCRs are internal documents, drafted for multinational companies to ensure compliance with applicable data protection laws when transferring personal data within their group. In order to be effective, BCRs must receive approval from the Data Protection Authority in each EU member state. Due to the length of time the authorisation process can take, BCRs are not widely adopted. The UK ICO says that they are working on streamlining the process to address this issue.
- **Approved Code of Conduct.** The GDPR specifically permits cross-border data transfers to be made on the basis of a Code of Conduct, giving organisations greater flexibility when selecting a data transfer mechanism and opportunity to comply with GDPR in a practical, transparent and cost-effective way. On 12 February 2019, the EDPB published, for consultation, draft guidelines on developing Codes of Conduct under the GDPR. These guidelines notably do not deal with drafting codes of conduct as a tool for data transfers. We await separate guidance from the EDPB on this. Following approval of EDPB guidelines, the submission process for Code of Conduct approval will open.
- **Approved certification mechanism.** Certification is a new way under the GDPR for an organisation to demonstrate compliance. At this time there are currently no approved certification schemes or accredited certification bodies for issuing GDPR certificates. The EDPB is still in the process of considering responses to guidelines it published for consultation on certification and identifying certification criteria. Final publication of the guidelines is expected this summer. The submission process for certification schemes will open once the EDPB guidelines are finalised.

"Post-Brexit, the tables will be turned and the UK will suddenly become both an importer of data (from the EEA) as well as an exporter of data (to outside of the EEA)."

Exceptions

In certain narrowly-drawn circumstances, a transfer of personal data can be made in the absence of one of the appropriate safeguards listed overleaf. These circumstances are set out in Article 49 GDPR and include, but are not limited to:

- where an organisation has the individual's explicit consent;
- where the transfer is necessary for the performance or conclusion of certain contracts; and
- where the transfer is necessary for important reasons of public interest.

Guidelines published by EDPB on derogations of Article 49 GDPR suggest that the derogations *"must be interpreted restrictively so that the exception does not become the rule"*. As the derogations do not provide adequate protection or appropriate safeguards for the personal data transferred, data exporters are encouraged to seek solutions that provide data subjects with a guarantee that they will continue to benefit from the fundamental rights and safeguards to which they are entitled under the GDPR. In practice this could mean implementing adequate safeguards. Alternatively, it could mean choosing another service provider located within the EEA. UK businesses should therefore take a pro-active approach to data transfers ahead of Brexit by, for example, updating their supply contracts to incorporate model clauses and to accordingly review and amend their privacy notices as it relates to data transfers.

In the event of a no-deal Brexit, the UK Government has confirmed that personal data will continue to flow freely from the UK to the EEA (as is the current practice). The UK Government has also confirmed that it will continue to recognise non-EU countries where the Commission has made an adequacy decision, meaning transfers from UK organisations to the EEA and other adequate third countries will continue uninterrupted. At present, the following countries have been approved by the Commission as adequate third-countries: Andorra, Argentina, Canada (commercial organisations), Faroe Islands, Guernsey, Israel, Isle of Man, Japan, Jersey, New Zealand, Switzerland, Uruguay and the United States of America (limited to the Privacy Shield framework).

It will be interesting to see the development and uptake of Codes of Conduct and Certification once the EDPB finalises its guidance on them. Until then, model clauses remain the most common safeguard relied upon by businesses to transfer data outside of the EEA and which UK businesses should be braced to adopt pending the UK's imminent departure from the EU.

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PROPERTY LAW

Updating the Lease Code

Susan Johnson, Senior Associate

The Lease Code was formally launched in 2007 as a voluntary code to achieve fairness between landlords and tenants in a lease, and greater flexibility in commercial lease terms.

What is the Lease Code?

The recommendations of the 2007 Lease Code break down into three categories, according to the stage of the transaction, as follows:

- **Heads of terms and the conduct of negotiations.**
  Model heads of terms indicate the level of detail envisaged.
- **Terms that might be included in the lease.**
  An example here is the 2007 Lease Code sets out the only pre-conditions that should apply to a tenant break clause
- **Conduct of the parties during the lease.**
  Examples include recommendations that the landlords should handle defaults promptly, and should deal with tenants and any guarantors in an open and constructive way.

Awareness and support of the 2007 Lease Code has not been high, and the Code is now being updated.

What are the key new proposals?

The Royal Institute of Chartered Surveyors (RICS) launched a consultation process for replacing the 2007 Code, and the consultation period will close shortly. The 2007 Code is voluntary, but the proposed new code (the Proposed Code) will become a RICS professional statement, which means that RICS members and registered firms will be required to observe the mandatory requirements of the Proposed Code when negotiating the terms of a new lease. If mandatory requirements are not complied with, there may be legal and/or disciplinary consequences for RICS members for departing from the professional statement. The Proposed Code states that the agreement as to the terms of the lease must be recorded in written heads of terms. Whilst a model form of heads of terms is suggested, it is the content of the heads of terms that will matter. A checklist of mandatory terms includes:

- the extent of the premises
- length of the term
- details of break rights
- rights of renewal under the Landlord and Tenant Act 1954
- details of the rent deposit and guarantees
- rent and rent review
- tenant's right to assign, sublet, charge or share premises
- details of service charge, insurance costs and other outgoings
- repairing obligations of the parties
- permitted use and alterations
- insurance obligations
- energy efficiency information.

The Proposed Code will also contain recommendations on best practice for lease provisions, and will state that these practice statements should only be departed from for *"justifiable good reasons"*. However, what this statement will mean in practice is not clear.

In addition to the mandatory requirements, the Proposed Code will also include an updated occupier's guide which is aimed at tenants and which explains the main factors that a tenant should consider when agreeing a lease.

The general view appears to be that overall the Proposed Code is slightly more landlord friendly than before. It remains to be seen whether the Proposed Code will be fully embraced by landlords and tenants.

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CORPORATE & COMMERCIAL LAW

Inward investment trends in the UK

Alexandre Terrasse,
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The UK continues to distinguish itself from other countries as an attractive prospect for inward investment. The UK was recently ranked first place in the global consultancy firm EY's 2019 annual survey of investment trends to be the world's top investment destination, beating the US for the first time in a decade.

"Over the last decade, the UK ranked second only to the US globally in terms of inward investment projects and has consistently outperformed its European competitors."

Investors have cited the UK's economic strength, transparency in business conduct, lack of corruption and limited bureaucracy as key factors that make it stand out. The UK's political climate since the 2016 UK referendum and its decision to leave the EU has raised concerns among a small number of investors. 7% of investors said that Brexit increased their attraction to the UK while 6% of investors have said it decreased their attraction, offering policymakers a short window to protect and improve the UK's competitiveness. However, Brexit is one of many geopolitical issues to contend with and investors will consider the longer-term projections for the UK and whether it will continue to be a pro-business environment beyond the current climate.

Between 2015 and 2016, the total number of Foreign Direct Investment (FDI) projects in the UK was 2,213. This rose by 2% between 2016 and 2017 to 2,265 projects in the UK. However, between 2017 and 2018, the number of investment projects declined by 9% to 2,072 projects. The strongest areas of growth were outside London, particularly in the South East, East and South West. While the data presents a mixed picture, this is not indicative of a long-term trend.

While there may have been a slight decline, there has not been a drastic fall in investment. Furthermore, the UK has continued to remain the number one destination in Europe for FDI with 18% market share.

The UK has experienced slight variations in the number of FDI projects in certain sectors however, the Financial and Business services sectors continue to be strong and there has been a big boost in Digital and Technology investments, which has cushioned any hit the UK has had to other sectors and contributed to growth.

Over the last decade, the UK ranked second only to the US globally in terms of inward investment projects and has consistently outperformed its European competitors. Data from fDi Markets, sourced from The Financial Times Ltd shows that the UK recorded a 6.7% share of global FDI, ahead of Germany at 5.7% and France at 3.6% between 2015 and 2018. During this period, the UK also recorded over $140 billion in terms of capital investment, more than Germany and France combined.

Investors have attributed the attractiveness of the UK to an array of factors. Primarily, the UK is perceived as a gateway to Europe for businesses looking to expand and move into different markets. The UK's time zone, situated between the Americas and Asia, differentiates it from other countries. Investors also credit the UK for cultivating a pro-business environment, with a transparent regulatory and tax system, a flexible labour market and relatively stable social and political system fostering trust and confidence from businesses and investors to grow in the long term. Its openness to innovation has created a rapidly growing hub for small and medium-sized enterprises (SMEs) which benefit from UK Government incentives. From a tax perspective, the low statutory rate of corporation tax and a transparent tax authority make conducting business in the UK more attractive. Education and training is also cited as making the UK an attractive prospect as multinational companies also hire from the UK talent pool and benefit from the flexibility on visa requirements, which is crucial to companies and talent, especially outside of the EU.

A Deloitte report has proposed three actions that the UK should adopt in order to maintain its competitive differentiators in attracting inward investment. The report suggests that the UK should develop a ready supply of domestic and foreign skills; provide world-class digital infrastructure (an example of this is the Government's commitment to provide the majority of the country with 5g coverage by 2027); and focus on the political climate beyond Brexit and engage with businesses to assist in identifying what the UK needs to do to remain competitive.

If the UK can invest in safeguarding its competitive features that have driven it to its strong position, the UK will continue to be an attractive destination for investors.

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We hope you find this newsletter useful and interesting, and we would welcome your comments. For further information and additional copies please contact the editor: Russel Shear on t: +44 (0)20 7691 4082 e: russel.shear@edwincoe.com

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