

Legal Update

Brexit: How will it affect my business? The implications for data privacy, intellectual property and information technology matters

Introduction

On the 9th January 2020, the UK Parliament voted - by a majority of 99 - in favour of UK Prime Minister Boris Johnson's Withdrawal Agreement Bill, effectively paving the way for the United Kingdom to leave the European Union ("EU") on the 31st January 2020 ("Brexit").

Almost four years on from the 2016 referendum, the United Kingdom now has a clearer picture as to what its future relationship with the EU might look like. This briefing is designed to provide legal counsel, senior management and other stakeholders with an insight into what happens next, including the potential impact that the withdrawal agreement and subsequent arrangements may have on data privacy, intellectual property rights and technology related matters in the United Kingdom. We will also provide practical guidance on how organisations can prepare for the developments that may arise as a result of Brexit, over the coming year and beyond.

What Happens Next?

Assuming that the Withdrawal Agreement Bill continues to pass through the UK Parliament without issue, the withdrawal agreement itself will then need to be ratified by the European Parliament. If both of these steps are completed in time, then the UK will formally leave the EU on the 31st January 2020.

The UK will then enter a period, known as the transition. The transition period is scheduled to last until 31st December 2020. During this time, the UK will continue to abide by the EU laws, be subject to the rulings of EU courts, and contribute to the EU budget. The aim of the transition period is to provide enough time for the final wave of negotiations between the UK and EU to take place - negotiations that both sides hope will pave the way for a productive future relationship.

How will Brexit affect my organisation?

Data Protection and Privacy

According to guidance issued by the UK Information Commissioner's Office ("ICO"), the UK government is committed to maintaining the high data protection standards established by the General Data Protection Regulation ("GDPR"), and plans to incorporate the regulation into UK law after Brexit has taken place. The UK also has the Data Protection Act 2018 ("DPA"), which supplements the level of protection provided by the GDPR.

The major changes from a data protection point of view will relate to data transfers between the UK and the European Economic Area ("EEA"). The UK government has stated that it does not intend to

impose additional requirements on data transfers from the UK to the EEA, meaning that businesses will be able to freely transfer data from the UK to offices and/or clients in the EEA. However, it is very likely that the EU will place a restriction on data transfers from the EEA into the UK. This could have an impact on UK businesses that have operations or clients in the EEA, especially those within the - data rich - service economy. One way of potentially addressing this would be for the UK to apply to the EU Commission to recognise it as a country that offers adequate levels of data protection, and issue it with an 'adequacy decision'. This would allow the free transfer of data between the UK and EEA to continue. However, the EU has previously expressed some concerns about data protection in UK legislation, including the potential incompatibility of the UK's Investigatory Powers Act 2016 with EU law, and the UK's membership of the Five Eyes intelligence and data sharing alliance. As such, an adequacy decision is far from guaranteed, and in any event, would take a while to be implemented.

What should organisations do now?

- It is highly likely that the GDPR (or at least a UK incorporated version of it) will remain the standard for data protection in both the UK and the EU. As such, organisations should ensure that they remain fully compliant with its provisions.
- UK organisations that either have a branch/ office in the EU, or offer goods and services for sale within the EEA (and thus are processing the data of EEA citizens) will have to ensure that they appoint a representative within the EEA. This representative will need to be based in an EU or EEA state where some of the individuals whose personal data is being processed are located. The representative will need to have written authorisation to act on behalf of the organisation in respect of GDPR compliance, and will be expected to deal with supervisory authorities or data subjects within the EEA.
- Organisations will also need to be wary of potential difficulties that they may face with inward data transfer from the EU to the UK. They should be prepared for the fact that the UK may not immediately be granted an adequacy decision, and should look to begin exploring alternative transfer mechanisms. Further information can be found [here](#)

Intellectual Property Rights

Intellectual property ("IP") rights can be a valuable asset for organisations, and most businesses will want to maintain protection of these rights post-Brexit. Thankfully, some European-wide IP rights are part of UK law as a result of treaties, rather than EU law, meaning that they will remain in place following Brexit. Where this is not the case, the UK government has sought to plug the gap by creating UK IP rights to replace those that are currently recognised by the EU.

Copyright

Due to the UK's participation in international copyright treaties, the vast majority of UK and European copyrights will continue to apply post-Brexit. Artist's resale rights will also continue to apply, on a reciprocal basis both with EU member states and other countries.

Trade marks

After Brexit, EU trade marks ("EUTM") will no longer protect trade marks in the UK. However, according to guidance issued by the UK government, upon Brexit, the UK Intellectual Property Office ("IPO") will create a comparable UK trade mark for every registered EUTM. These will be recorded on the UK trade mark filing register, and have the same legal status as if they had been registered under UK law.

Designs

The UK government have advised that, following Brexit, registered Community designs ("RCDs"), unregistered Community designs ("UDCs") and protected international trade mark and design registrations designating the EU will no longer be valid in the UK. Similarly to with trade marks though, these rights will automatically be replaced by UK rights on Brexit day.

Patents

Following Brexit, the UK will continue to be a participating state in the European Patent Convention ("EPC"), and organisations will be able to continue to apply to the European Patent Office ("EPO") for patent protection that will cover the UK. Existing EPO patents will also be unaffected by Brexit.

Information Technology Transactions

Whilst uncertainty remains about the type of future relationship that the UK and the EU may have, the risk to commercial contracts (including those relating to information technology) cannot be ruled out. Depending upon that future relationship, and how contracts are drafted, Brexit may lead to the UK being removed from the territorial scope of software licences, service agreements, distribution agreements and other agreements. Under which organisations are entitled to use goods and services or exploit data, software, materials and the intellectual property rights in them and/ or appoint third parties to do so. Furthermore, the use of change control procedures to agree and implement necessary changes as a result of Brexit may result in additional costs being incurred by the parties.

What should organisations do now?

- All organisations should review their current contracts, to understand if Brexit is likely to lead to any issues, particularly to take account of the fact that the UK will no longer be part of the EU, and/or the EEA when determining the scope of goods or services to be provided or received under those arrangements.
- Organisations that are currently in the process of negotiating new contracts should consider whether provisions need to be included to build in contingencies for the different possible Brexit scenarios.

As the Unified Patent System and Unified Patent Court are yet to be ratified, it seems highly unlikely that the UK will become a member. However, there has, as of yet, been no indication from the UK government on its intentions regarding this.

Exhaustion Rights and Parallel Trade

Whilst the UK government that have stated that the UK will continue to recognise the EEA regional exhaustion scheme after Brexit, goods sold in the UK by, or with the consent of, the rights holder may no longer be considered exhausted after Brexit. Practically, this means that organisations that are exporting IP-protected goods from the UK to the EEA may need the rights holders permission following Brexit. However, this has not yet been confirmed, and it is likely that the final position will depend on the nature of the future relationship between the UK and the EU.

What should organisations do now?

- Even though most IP rights will either remain in force after Brexit, or will automatically be transferred into UK rights, organisations should review the IP rights which are relevant to their business. This will enable businesses to quickly and efficiently check whether additional steps will be necessary to maintain those rights post-Brexit.
- In addition to this, organisations should consider whether planned future investment in IP rights could be affected by the changes that are likely to take place, most significantly Brexit might influence the geographic location of any development of IP rights, particularly if these rights are to be protected through the patent or designs systems.
- Organisations that export goods from the UK to the EEA will need to consider whether or not they will need to get the permission of the rights holder to continue doing this after Brexit.

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