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Perspectives

Legal updates for the world of higher education

Dear Colleague

As exit day draws closer, Brexit continues to dominate the media, with October's "People's Vote" march seeing one of the biggest ever demonstrations in London. The potential impact of Brexit on science and innovation was emphasised in letters signed by 29 Nobel Laureates sent to the Prime Minister and the President of the European Commission. They stressed the importance of science and innovation in meeting shared global challenges and that *"science needs to flourish and that requires the flow of people and ideas across borders to allow the rapid exchange of ideas, expertise and technology"*.

A new phase of the EU Settlement Scheme pilot opened on 1 November for employees and workers at three universities and from 15 November will open to employees and workers at other higher education institutions which are registered as tier 4 sponsors.

I do not therefore expect it will come as a great surprise that this issue of Perspectives focuses on some of the legal nuts and bolts underpinning Brexit. The proposed constitutional framework established by the Government to prepare for Brexit will become the foundation of the future UK legal system.

Much immediate focus is on "Exit Day", which is defined in the European Union (Withdrawal) Act not as a whole day, but as 11pm on 29 March 2019. The draft UK-EU Withdrawal Agreement envisages a transition or implementation period until 31 December 2020. Despite having agreed on many issues, it remains unclear whether the Government will finalise an agreement with the EU over the terms of the UK's withdrawal, or the framework for the UK's future partnership with the EU after Exit Day.

The Government defines "no deal" as "one where the UK leaves the EU and becomes a third country at 11pm GMT on 29 March 2019 without a Withdrawal Agreement and framework for a future relationship in place between the UK and the EU".

Universities are therefore continuing to plan for the potential impact of a "no deal" Brexit. This involves looking at a wide range of variables, including the potential impact on staff and student recruitment and retention, research, legal compliance and other practicalities such as the security of logistics and supply chains.

Over the last few months the Government has published over 100 guidance notes to help individuals and organisations prepare for a potential "no deal" scenario. A range of Mills & Reeve's publications providing further guidance on a wide range of topics, including life sciences and data protection, is available on our Brexit Hub.

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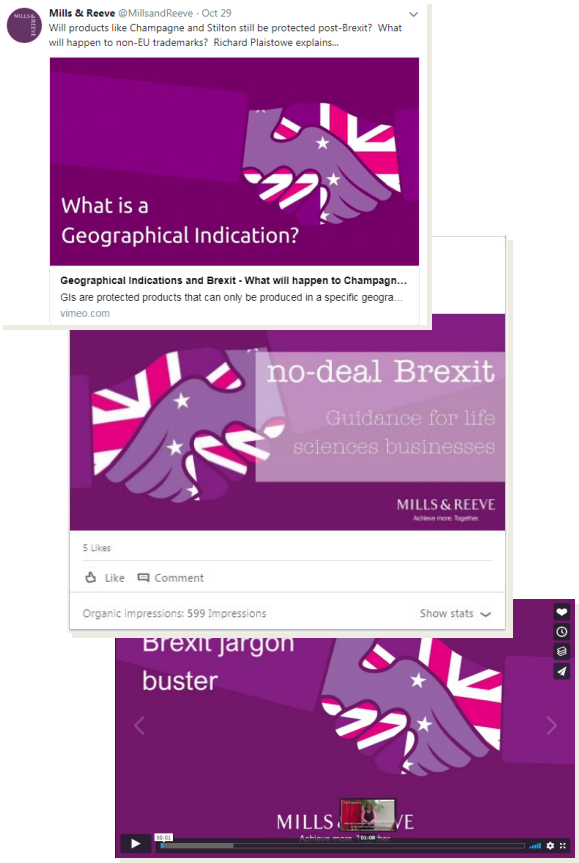
Countdown to Brexit

Mills & Reeve's Brexit Hub has material covering a wide range of different topics and sectors. For example content for the life sciences sector includes analysis of the Government's no deal Brexit guidance for life sciences businesses as well as on patents and "supplementary protection certificates". It also has coverage of the MHRA consultation on proposed legislative changes to the regulation of medicines, clinical trials and medical devices in a "no deal" scenario.



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"EUWA seeks to avoid a legislative cliff edge on exit day through a range of mechanisms intended to ensure the continued functioning of the UK statute book".

Nine key ingredients of the EU Withdrawal Act 2018

The European Union (Withdrawal) Act (or "EUWA"; originally styled the "Great Repeal Bill") passed into law in June 2018 after much parliamentary debate and amendment. EUWA in effect establishes the main underpinning legal framework for the UK's departure from the European Union. Whilst the UK famously does not have a written constitution, EUWA like the European Communities Act before it, has great significance for the UK's constitutional arrangements.

Whilst the UK is set to leave the EU in principle on 29 March 2019, EUWA seeks to avoid a legislative cliff edge on exit day through a range of mechanisms intended to ensure the continued functioning of the UK statute book. Unsurprisingly, this is not a simple exercise.

If the Government successfully negotiates a Withdrawal Agreement which is ratified by Parliament, a further law will be enacted, which is expected to be titled the European Union (Withdrawal Agreement) Act ("the WAA"). The Government has said that the WAA will make amendments to EUWA.

1. Repeal of the European Communities Act

Section 1 reads as follows: "The European Communities Act 1972 is repealed on exit day". The European Communities Act is the principal UK legislation giving effect to EU law in the UK.

EUWA fixes "exit day" not as a whole day, but as 11pm on 29 March 2019. EUWA permits the Government to amend exit day by regulation, subject to Parliamentary approval, in limited circumstances (in effect, where the EU27 and UK agree to extend the Article 50 notice period). In a scenario where a Withdrawal Agreement is reached, it is expected the WAA will keep the effects of the European Communities Act "live" until the end of the transition or implementation period, currently expected to be 31 December 2020.

2. Preservation of "EU-derived domestic legislation"

Subject to minor exceptions, EUWA will preserve after exit day all legislation made under the European Communities Act – ie secondary legislation made (in whole or in part) to implement EU law that does not take direct effect. Otherwise this would all fall away when the ECA is repealed.

The EUWA will also preserve all other legislation made to comply with EU law, even though the powers in the ECA were not used.

A future Parliament would be able to amend this preserved legislation, subject to any provisions in a Withdrawal Agreement or Future Partnership Agreement.

3. A giant cut and paste exercise for direct EU law

Some EU law has "direct effect" in the UK and can, pre-Brexit, be relied on in UK courts without requiring further UK legislation. Examples include EU Regulations, such as the General Data Protection Regulation, and provisions of treaties that have direct effect (for example the right to equal pay between the genders). Broadly speaking, EUWA provides that all direct EU law operative at exit day (except those provisions that need to be changed to accommodate any Brexit deal) will be incorporated into UK law.

Identifying this body of "converted" legislation will not be easy. The explanatory notes published with the Act give a good idea of the provisions of the EU Treaties that the Government currently thinks will be converted into UK law in this way.

4. A new status for EU case law

Decisions of the EU courts prior to exit day will be given the same status as judgments from the UK's Supreme Court. That means that they will be binding on all the nation's lower courts, and only departed from by the Supreme Court in exceptional circumstances. However this body of case law will only continue to be relevant if it concerns the interpretation of "retained EU law" – ie EU law preserved or incorporated into UK law by EUWA.

5. A massive legislative task

Parliament accepted that saving or cutting and pasting would not be sufficient for much of the EU legislation preserved or newly incorporated into domestic law by EUWA. Further

adjustments are required to make it work in its new setting – for example replacing references to EU-wide institutions with the new UK equivalent. Given the volume of EU legislation we are dealing with, these adjustments will need to be made by secondary legislation. The Government has said that over 800 draft statutory instruments will be required under EUWA, with an additional "low hundreds" of statutory instruments also required under other Brexit related legislation, such as that relating to customs and trade. This is a massive legislative task, with special parliamentary procedures intended to speed up the usual process.

6. New rules of interpretation

At present the European Communities Act establishes a clear rule that EU law takes precedence over domestic law. The repeal of the ECA will mean that this will no longer be the case for new legislation, but it will continue to apply to domestic legislation made prior to Brexit. The same principle can also apply where existing domestic legislation is "modified" after Brexit provided such interpretation is consistent with the intention of the modifications.

7. A huge publication job

EUWA stipulates how the body of EU law converted into UK law must be published, to help ensure there is certainty as to which version of EU law applies. It will no longer be possible to rely on the relevant EU websites, since the corpus of EU law by which the UK is currently bound will begin to diverge after Brexit.

8. Complex transitional provisions

EUWA provides some mechanisms to deal with transitional arrangements. For example, it preserves rights which arise under EU directives and are recognised by courts or tribunals in the UK in cases which have begun before exit day but are decided on or after it.

Other aspects of the mechanics of the transitional period may be addressed in the ongoing negotiations between the UK and EU27. The European Court of Justice and the UK courts will also have a role in determining certain aspects of the transitional arrangements.

9. Parliamentary approval of the outcome of negotiations with the EU

Last but not least, EUWA specifies conditions for the ratification of any Withdrawal Agreement. These include a requirement that both the Withdrawal Agreement and a framework for the future relationship must be approved by a resolution of the House of Commons and be debated in the House of Lords. A further condition is that an Act of Parliament must have been passed enabling the Withdrawal Agreement to be implemented, the WAA referred to above.

If the Commons does not approve the outcome of negotiations, within 21 days the Government is required to make a statement on how it intends to proceed in relation to its negotiations with the EU, with provision for further vote by the Commons on the proposal.

If the Prime Minister makes a statement on or before 21 January 2019 that no agreement can be reached in principle on the Withdrawal Agreement and framework for future relationship, a statement of the Government's intention must be made within 14 days, again with provision for a further vote by the Commons on the proposal.

If by the end of 21 January 2019 there is no agreement in principle on the withdrawal agreement and framework for the future relationship, the Government must make a statement as to its intentions within 5 days, with provision for this to be considered by Parliament.

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The Brexit Timetable

November/December 2018 and afterwards:	EU/UK negotiations on the proposed Withdrawal Agreement and framework for future partnership continue. If an agreement is reached in principle by the negotiators, it will need to be ratified by the UK and EU. In the UK this will first require a "meaningful vote" in the House of Commons, where a majority of 650 MPs must vote in favour of the proposal under the EU (Withdrawal) Act 2018. Any Withdrawal Agreement will also have to meet the requirements of the Constitutional Reform and Governance Act 2010 ("CRAG"); provided the Agreement is not resolved against by Parliament under CRAG procedures, the UK may proceed to ratify the agreement. Any Withdrawal Agreement will also need to be supported by UK legislation- the as yet unpublished European Union (Withdrawal Agreement) Bill, which will also need to be approved by Parliament before Exit Day on 29 March. Given the above, the parliamentary timetable looks very tight.
13-14 December 2018:	European Council summit (of EU leaders).
January 2019 and after:	Possible emergency summit of European Council (of EU leaders).
26 January 2019:	Deadline under EU (Withdrawal) Act 2019 for a Government statement to Parliament on its intentions if there is no deal in principle by this date. As Secretaries of State for Exiting the European Union, both David Davis and Dominic Raab have mooted the possibility in a "no deal" scenario of nonetheless reaching bilateral agreements with the EU on specific issues such as aviation and data protection. However the EU Chief Negotiator has commented: *"if there is a no deal there is no more discussion. There is no more negotiation. It is over and each side will take its own unilateral contingency measures and we will take them in areas such as aviation but this does not mean mini deals in the case of a no deal."* Any such bilateral agreements or unilateral action would need to be in place by 11 pm on 29 March if required to mitigate potential adverse consequences of a "no deal". The UK has indicated some of the steps it intends to take unilaterally in the "no deal" guidance notes it has published. Some of the measures described in the notes may require further legislation. For example the UK is publishing over 800 draft statutory instruments under the EU (Withdrawal) Act, which will come into effect on exit day if no Withdrawal Agreement is reached. Similarly, the EU has issued a series of preparedness notices for citizens and organisations in the EU27 Member States.
11-14 March 2019:	Possible date for a vote in the European Parliament to approve the ratification by the EU of any Withdrawal Agreement and the framework for a future EU-UK partnership, which will then also need to be endorsed by at least 20 leaders of EU member states, representing at least 65% of the EU population.
29 March 2019:	"Exit Day"; the UK leaves the EU at 11 pm, subject to any political or legal developments. If a Withdrawal Agreement has been ratified, it will come into effect on this date, including any transition/implementation period provided for in the agreement.
29 March 2019 and after:	EU and UK negotiate detailed arrangements for their future partnership and conclude relevant agreements and treaties to be ratified by the UK, the EU and the individual EU member states, supported by domestic legislation as appropriate.
31 December 2020:	Mooted end of the transition/implementation period if a Withdrawal Agreement is reached, although there have been some suggestions that this period might be extended in the negotiations leading up to Exit Day.

"The main area where Brexit has a potential impact is on the mechanisms for transferring data across borders."

Data protection and a "no deal" Brexit

A review of the current position

This briefing analyses some potential issues relating to data protection and Brexit, particularly with reference to a possible "no deal" scenario. A "no deal" scenario is one where the UK leaves the EU and becomes a "third country" at 11pm GMT on 29 March 2019 without a Withdrawal Agreement and framework for a future relationship in place between the UK and the EU.

11pm on 29 March 2019 is defined as "exit day" under the European Union Withdrawal Act 2019 ("EUWA"). The main focus is on cross border personal data transfers, both transfers from the EU27 to the UK and transfers from the UK to the EU27 and to other jurisdictions.

The situation may change if a withdrawal agreement is implemented before exit day and/or if further legislation is passed by the UK or EU.

Whilst the UK is a member state of the EU, its data protection regime is principally derived from the EU General Data Protection Regulation ("GDPR"), supplemented by the UK's Data Protection Act 2018. When the UK leaves the EU it will become a "third country" under the GDPR. This means that EU data controllers and processors wanting to transfer personal data to the UK would be subject to the GDPR requirements for transferring data to third countries.

The Government's stated current position for a negotiated solution is to use the "adequacy decision" framework as a starting point for transfers from the EU to the UK. In addition it says it will seek a *"clear, transparent framework to facilitate dialogue, minimise the risk of disruption to data flows and support a stable relationship between the UK and the EU to protect the personal data of UK and EU citizens across Europe"*. Further the Government is seeking *"close cooperation and joined up enforcement action between the UK's Information Commissioner's Office (ICO) and EU Data Protection Authorities"*. This arrangement is unlikely to be available on exit day in a "no deal" scenario, as the EU Commission's assessment of whether the UK's data protection regime is "adequate" under GDPR would only commence when the UK has left the EU, and this might take months or years.

Will there be significant changes to data protection law in the UK on exit day if there is no withdrawal agreement in place on exit day?

No. The UK Government guidance confirms that "Before and after leaving the EU, we are committed to the highest standards of data protection and all organisations should continue to comply with their broader obligations under data protection law, including the GDPR (as incorporated into UK law). The Information Commissioner's Office would produce additional guidance outlining the steps organisations would need to take to continue to meet their obligations".

What impact will a "no deal" Brexit have on data protection for UK data controllers?

The main area where Brexit has a potential impact is on the mechanisms for transferring data across borders. Whilst the UK remains a member of the EU, transfers of data between the UK and other member states do not have to meet the provisions of the GDPR that apply to transfers of personal data to "third countries".

In a no deal scenario, the UK will become a third country on exit day and a data controller or processor in the EU wanting to transfer personal data to the UK will be subject to the GDPR provisions controlling the transfer of personal data to third countries.

A further consequence of a "no deal" Brexit is that the UK would potentially no longer benefit from "adequacy decisions" which the EU Commission has made in respect of certain third countries. The Commission has made full findings of adequacy in respect of Andorra, Argentina, Guernsey, Isle of Man, Israel, Jersey, New Zealand, Switzerland and Uruguay. The Commission has also made partial findings of adequacy about Canada and the USA.

The practical consequences are outlined below. This note focuses on the aspects of data protection law that apply to transfers of data into and out of the UK. Data controllers and processors will still need to comply with other aspects of data protection law when processing data, for example the various GDPR data protection principles.

In a "no deal" scenario, what happens to personal data that we want to send from the UK to the EU after exit day?

The UK Government confirms in its guidance that: *"You would continue to be able to send personal data from the UK to the EU. In recognition of the unprecedented degree of alignment between the UK and EU's data protection regimes, the UK would at the point of exit continue to allow the free flow of personal data from the UK to the EU. The UK would keep this under review."*

It is expected that the UK Government will make amendments to the Data Protection Act 2018 in order to implement this post-Brexit regime. The implication of allowing the continued free flow of data would suggest the Government is intending to treat post-Brexit personal data transfers to the EU as "adequate" for UK data protection purposes. This is presumably intended to avoid the need for UK data controllers to implement other mechanisms to allow the transfer of personal data from the UK to the EU, such as standard contractual clauses.

Data controllers and processors will however need to keep their arrangements under review, particularly when the UK government publishes any proposed amendments to the Data Protection Act and when the Information Commissioner's Office issues further guidance.

In a "no deal" scenario, what happens to personal data that we want to receive from the EU after exit day?

Data controllers and processors in the EU will need to consider any guidance that their own national regulators or the European Data Protection Board issues in relation to Brexit.

The UK Government guidance confirms that:

"If the European Commission does not make an adequacy decision regarding the UK at the point of exit and you want to receive personal data from organisations established in the EU (including data centres) then ***you should consider assisting your EU partners in identifying a legal basis for those transfers.***

For the majority of organisations the most relevant alternative legal basis would be standard contractual clauses. *These are model data protection clauses that have been approved by the European Commission and enable the free flow of personal data when embedded in a contract. The clauses contain contractual obligations on you and your EU partner, and rights for the individuals whose personal data is transferred. In certain circumstances, your EU partners may alternatively be able to rely on a derogation to transfer personal data.* ***We recommend that you proactively consider what action you may need to take to ensure the continued free flow of data with EU partners****. Further detail on the availability of each legal basis, and the processes associated with making use of them, is available from the Information Commissioner's website."* (emphasis added)

We can assist our clients in deciding whether such standard contractual clauses are an appropriate solution where they want to receive personal data from EU data controllers or processors. We can also assist in drafting or advising on appropriate agreements and on other potential transfer mechanisms, for example the use of binding corporate rules by groups of undertakings or enterprises engaged in a joint economic activity.

In a "no deal" scenario, what happens to personal data that we want to send to countries outside the EU after exit day?

As mentioned above, certain countries are subject to full or partial "adequacy decisions" by the EU Commission, meaning it considers they have adequate levels of protection that meet GDPR requirements.

Government guidance has not expressly stated whether the UK will seek to adopt these decisions post-Brexit. The EU-US Privacy Shield arrangements are supported by an agreement between the EU and US, and the UK would need to negotiate its own agreement with the US if it wished to adopt the Privacy Shield arrangements.

Data controllers and processors will need to keep their arrangements under review, particularly when the UK government publishes any proposed amendments to the Data Protection Act and when the Information Commissioner's Office issues further guidance.

In a "no deal" scenario, what happens to personal data that we want to receive from countries outside the EU after exit day?

These transfers should not be affected by Brexit, but if data controllers or processors have critical data flows, they may want to check the legal position of the country where the data is being sent from. Mills & Reeve has links with a range of lawyers in other jurisdictions if advice on a particular point is required.

Are there any other implications for personal data in a "no deal" scenario?

It is unclear what appetite regulators would have for strictly enforcing GDPR requirements immediately following exit day in the event of a "no deal", given the close alignment of the UK and EU regimes. Depending on the practicality of implementing safeguards such as standard contractual clauses, controllers and processors may find themselves having to take risk based decisions depending on the nature

and sensitivity of the data involved and the importance of the data flows to their operations. To prepare for this scenario, data controllers and processors may want to check now that they have sufficient details of their existing and planned cross-border data flows in an accessible place. They may already have such information as part of their GDPR compliance and record of processing activity. The position may become clearer as and when UK and EU regulators issue guidance on Brexit.

Some other provisions of the GDPR require records and documentation to include requirements relating to transfers of data to third countries, for example as part of the information to be given to data subjects under GDPR Articles 13 and 14, and the record of processing activities under Article 30. These records should be updated to reflect the post-Brexit regime.

Where a data controller or processor is not established in the EU, the GDPR still applies to their processing activities which are related to either:

- The offering of goods or services to data subjects in the EU, irrespective of whether a payment by the data subject is required; or
- The monitoring of the behaviour of data subjects in the EU, so far as such behaviour takes place in the EU.

These are known as the GDPR's "extra-territorial provisions". In such circumstances the controller or processor is required under GDPR to appoint in writing a "representative" established in one of the EU member states where the relevant data subjects are located. There are limited exceptions to this requirement for public authorities and for "occasional" processing which are beyond the scope of this note. The representative's identity and contact details must be provided in the information given to data subjects under GDPR Articles 13 and 14. The GDPR places direct obligations on the representative in addition to those on the controller (for example, to maintain a record of processing activities, to cooperate with supervisory authorities in the exercise of their functions). A failure by a UK data controller or processor to appoint a representative where this is required under GDPR could lead to a fine or other enforcement action by an EU regulator.

It is also unclear at present whether the UK will implement equivalent extra-territorial provisions into its post-Brexit data protection regime. The position should become clearer once draft legislation to amend the Data Protection Act 2018 has been published.

Another consequence of a no deal Brexit would be to remove the UK from the "one stop shop" mechanism, so that the ICO could no longer act as a "lead supervisory authority". A 'lead supervisory authority' is the authority with the primary responsibility for dealing with a cross-border data processing activity, for example when a data subject makes a complaint about the processing of his or her personal data. "Cross-border" in this context means either the:

"processing of personal data which takes place in the context of the activities of establishments in more than one [EU] Member State of a controller or processor in the [EU] where the controller or processor is established in more than one [EU] Member State; or

processing of personal data which takes place in the context of the activities of a single establishment of a controller or processor in the [EU] but which substantially affects or is likely to substantially affect data subjects in more than one [EU] Member State."

Guidance published by the EU regulators states that if a controller *"does not have an establishment in the EU, the mere presence of a representative in a Member State does not trigger the one-stop-shop system. This means that controllers without any establishment in the EU must deal with local supervisory authorities in every Member State they are active in, through their local representative."*

There may also be practical questions for regulators or data subjects seeking to enforce different aspects of UK data protection law in the EU and vice versa.

Further reading

Mills & Reeve GDPR hub

UK Government Guidance: Data protection if there's no Brexit deal (September 2018)

EU Commission Brexit Preparedness Notice: Data Protection (January 2018)

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About Mills & Reeve

Mills & Reeve offers a deep knowledge of the higher education sector and the commercial strength of one of the UK's leading national law firms.

Our multi-disciplinary team is ranked in tier 1 in the UK legal directories for advising the higher education sector.

We have supported our clients in over 75 jurisdictions through our international network of law firms around the world.

The Sunday Times has recognised us as a Top 100 Best Employer for the last 15 consecutive years; the only UK law firm to have achieved this. We work hard to create a culture where everyone feels that they contribute and can make a difference, delivering outstanding service to our clients.

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