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Brexit and the GDPR – transfers to third countries

The great Irish author, Flann O'Brien, summarised his vision of hell in his surreal book, The Third Policeman, as *"the beginning of the unfinished, the re-discovery of the familiar, the re-experience of the already suffered, the fresh forgetting of the unremembered. Hell goes round and round. In shape it is circular and by nature it is interminable, repetitive and very nearly unbearable".*

I confess that the quote could substitute "Brexit" and "GDPR" for "hell", particularly when considered in combination. That combination is what the European Commission has recently done in a notice to "all stakeholders" published on 9 January 2018. Its purpose is to warn that, in the absence of a withdrawal agreement, the UK will become a "third country" for the purposes of the GDPR and the adequacy of its protection of personal data may not be presumed by EU member states. If that becomes the case, organisations within the EU transferring personal data to the UK will have to take specific steps to ensure that adequacy.

Under the GDPR (with a similar provision in the DPA), a country is presumed to have adequate protection if it is included in a list of countries compiled by the European Commission. Such inclusion allows the free flow of personal data to those countries, obviating the need to implement any additional safeguards.

In order to transfer personal data to those countries not on the list, EU member states will have to make additional safeguards, which include:

- Model contractual clauses, which the European Commission has adopted
- Binding corporate rules, which include rights for data subjects and which apply to group companies and are approved by the competent data protection authority;
- Approved codes of conduct to ensure the proper application of the GDPR, including binding commitments of the controller (university) or processor (agent) in the third country (i.e. the UK);
- Approved certification mechanisms together with binding and enforceable commitments of the controller or processor in the third country (UK).

Without the additional safeguards, personal data may be transferred on the basis of prescribed "derogations" i.e. where the transfer is based on consent; it is necessary for the performance of a contract (e.g. for a year abroad as a mandatory part of a programme); for the exercise of legal claims; or for reasons of public interest.

Because the Data Protection Bill incorporates the GDPR into domestic legislation to ensure its application post-Brexit, it is hoped that, in the absence of a withdrawal agreement, the UK would be regarded as providing adequate protection for personal data. Complacency should not, however, be counselled and it would be prudent now to identify all arrangements with European partners or collaborators which require the transfer of personal data to the UK. Being forewarned is forearming oneself to meet the new adequacy requirements that may in time apply.

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Keep calm and Cari(lli)on

The collapse into liquidation of Carillion highlights a number of issues for procurement and finance teams. Beyond the recriminations towards the contractor's management board, its auditors, its bankers and government policy, there are lessons which will apply to all procurement professionals. The procurement rules provide a number of detailed rules linked to processes to ensure delivery of operations and projects. These processes can sometimes be used as a substitute for really considering the risk profile of a particular contract and making the decision to let a contract to a particular contractor. In addition, timescales and commercial pressures can lead to decisions which, while appearing superficially to provide best value, might nevertheless prove to be costly.

Pre-procurement risk assessment

The first stage is to consider how business-critical the object of the contract is, and how important the solvency and continuity of the contractor is to the delivery of that contract. This will be shaped by whether the contract is for the delivery of a major capital project, or one for running ongoing services. Facilities management services typically require the management of staff who will transfer to a replacement contractor (or in-house). Infrastructure projects – such as IT projects as well as construction projects - may, on the other hand, require an extended period of development before any tangible benefit can be delivered to the client. The work that is done in that period might not be easily substitutable without additional cost. This risk assessment should inform and shape the procurement process and contract development.

Economic and financial standing of the bidders

The procurement process will typically permit the selection of bidders based on an assessment of the bidder's financial and economic standing. As the assessment of the economic standing of a business can require specialist technical input and, additionally, can be treated as a restriction on business, contracting authorities can overlook the importance of tailoring the economic criteria and evidence to a particular project.

As economic criteria can be considered as a restriction on business, the procurement rules and policy guidance from the UK government have historically moved towards removing the discretion open to a contracting authority by adopting "one-size-fits-all" standard position: the bidder should not impose an annual turnover requirement of more than twice the contract value. The turnover measure is, of course, a red herring: firstly, any accounts detailing the turnover can potentially be almost 18 months out of date; and any turnover figure might not reflect the underlying health of the business, which is profit. The UK government does not provide advice or guidance on the use of debt ratios or on the use of credit rating which is commercially standard in the world of private sector procurement.

Unrealistic pricing?

Success in procurement is often measured by reference to short-term savings; while success for contractors is often measured in short-term sales. It is not hard to see why there is pressure to win business by submitting the lowest bid. The contracting authority should be careful to understand the pricing assumptions made in order to ensure that the bid is sustainable and even, in the extreme case, rejecting a bid which is abnormally low.

Contractual protections

We assist clients in providing suites of standard procurement contracts. Again, for reasons of efficiency of the contracting and procurement process, these will be drafted in order to strike a balance between ensuring protection for the contracting authority while not being so onerous as to be unworkable or to transfer risks that would make a bidder either add a heavy risk premium or refuse to tender.

An assessment of the project risks can inform the contract development, in order to mitigate those risks. This can include, for instance, obligations to ensure payment for sub-contractors which can include imposing payment terms for sub-contractors or setting up project accounts to ensure that the supply chain members can be paid on completion of delivery milestones.

Understanding the financial situation of the contractor

Even with the best preparation and management of the procurement process, there is no substitute for effective managerial oversight of the contractor. This would typically be used to ensure delivery of the project and to mitigate the risks of late completion and rising costs for the contractor. Following reported difficulties at Balfour Beatty in 2014-15 and now the collapse of Carillion, it may be worth investing in understanding the bigger picture by requiring oversight of the financial situation of the contractor as well.

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Revised procurement thresholds

The procurement rules require contract values above a certain value threshold to be advertised in the Supplement to the Official Journal of the EU (or OJEU). Every two years those contract value thresholds are revalorised. The new thresholds for education sector clients caught by the regulated procurement regime are:

- Supplies & Services contracts: £181,302
- Works contracts: £4,551,413

Small lots

- Supplies and services: £65,630
- Works: £820,370
- Light Touch Regime for Services: £615,278
- Concession contracts: £4,551,413

You can find out more at the following website:

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The new Telecoms Code is (finally) here

The long-awaited New Electronic Communications Code ("the New Code") came into force on 28 December 2017. As substantial investors in land and property in the UK, it is important for universities to understand the key changes being introduced by the New Code so that they can consider their portfolios and plan ahead with confidence.

Ofcom have produced a Code of Practice that sits alongside the New Code. It provides guidance to landowners and operators during transactions, including setting out the principles and expectations of party-to-party conduct, examples of notices to be served under the New Code and standard terms for telecoms agreements. The New Code will affect all telecommunications agreements including those that were in existence before it came into force.

The key changes being introduced

- Valuation of rent

There is a new statutory assessment of the rent to be paid by an operator to the landowner for their use and occupation of a site. It is widely expected that this will reduce the rent to be paid by an operator. This is because the valuation is to be carried out on a "no-scheme basis", which will ultimately disregard the value of that site to the operator for the benefit of its network and the telecoms use.

- Unlimited mast sharing, assignment and upgrading

Any new agreements entered into after the New Code came into force cannot limit operators from sharing, assigning or upgrading apparatus. However, any existing agreements which contain provisions restricting mast sharing, assignment or upgrading will remain unaffected.

Terminating telecoms agreements

The New Code requires you to serve an 18-month notice upon an operator to terminate an existing telecoms agreement on your land upon expiry (or sooner determination). This is much longer than the notice period under the previous code which was only 28 days. You will also be required to rely on a ground such as substantial breaches of an operator's obligations under the agreement, delays to the payment of rent or redevelopment.

Enforcement

If the operator does not vacate following you successfully obtaining an Order terminating the lease, there is a further enforcement process that must be completed. You will need to serve additional notices enforcing the removal of the apparatus and return to the court for an Order on that basis if required.

What you should be doing now

It is clear that the New Code makes it more difficult for you as a landowner to obtain vacant possession of a site. Now is the time for you to consider your existing arrangements and rights pursuant to the New Code and to engage in negotiations to formulate creative solutions when seeking to reach agreement with operators.

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Surveillance cameras in University lecture theatre are a breach of Article 8 ECHR

It has long been recognised that the scope of Article 8 (right to respect for private and family life) of the European Convention on Human Rights (ECHR) covers activities in the business and professional spheres. On the 28 November 2017 the European Court of Human Rights (ECtHR), in Antović and Mirković v Montenegro [ECHR 365 (2017)], handed down a judgment in which it found that the installation of surveillance cameras in lecture theatres of the University of Montenegro breached Article 8 of the ECHR.

Facts

On 1 February 2011 the Dean of the University of Montenegro informed the professors lecturing there that video surveillance had been introduced. The purpose of the surveillance was said to be "the safety of property and people, including students, and the surveillance of teaching".

Access to the video data collected was only possible through codes, which only the Dean knew, and it transpired that the data would automatically be "erased" by the system after 30 days.

On 14 March 2011 Antović and Mirković (the Applicants) made a complaint to Montenegro's Personal Data Protection Agency (the Agency) informing them of the installation of cameras without their consent and requesting their removal. After the incident was investigated by the Agency, the Agency's Council ultimately issued a decision ordering the University to remove the cameras as there was no evidence that the safety of people or property was in danger or that they were needed for the protection of confidential data. Consequently, there was no legitimate ground, under the domestic law of Montenegro, for the video surveillance. The surveillance of teaching, the remaining reason given for surveillance, was not a lawful ground under domestic law (which is not based on the EU Data Protection Directive). The University subsequently removed the cameras in January 2012.

On 19 January 2012, the Applicants brought a compensation claim against the University, the Agency and the State of Montenegro for violation of their right to a private life through the unauthorised collection and processing of their personal data. The Court of First Instance and, upon appeal thereafter the High Court, rejected their claim and ruled that no violation of the Applicants' right to privacy had occurred as the lecture theatres were a public place and a working area where professors were never alone. Thus, no rights of privacy could be invoked and the data collected via the cameras could not constitute personal data.

The Applicants brought a claim before the ECtHR which stated that Article 8 of the ECHR had been violated due the alleged unlawful installation and use of video surveillance equipment in the University's lecture theatres.

Decision

The ECtHR dismissed the Montenegro government's submission that the surveillance cameras did not violate privacy because the activity took place in a public place, was not disclosed to others and pursued a legitimate aim. It viewed surveillance of an employee in the workplace as a "considerable intrusion into the employee's private life" which can only be justified if such interference is in accordance with the law, pursues one or more legitimate aims and is necessary in a democratic society to achieve the said aims. The ECtHR acknowledged the findings of the Agency and also noted that one of the justifications adduced by the University for the installation of video surveillance, i.e. the monitoring of teaching, was not a legitimate ground for processing personal data under Montenegro's domestic data protection law. The ECtHR concluded by a majority of four votes to three that the installation of the surveillance cameras by the University breached the individuals' right to a private life – it was not in pursuit of a legitimate aim and not in accordance with the law.

Commentary

This case serves as a reminder to universities that staff have a reasonable expectation of privacy in the workplace. The right to privacy is not absolute, but any measures that interfere with that right (e.g. the right to develop and establish relationships) must be for the purposes of pursuing a legitimate aim, be provided for by law (the institution's and/or the law of the state, the latter being a significant element in the ECtHR's decision) and there must be no other, less intrusive means of achieving the aim in question. The case did not expressly deal with lecture capture, as the surveillance was ostensibly for security reasons and to monitor teaching. It should not therefore be construed as a prohibition on the practice of lecture capture. It does however underscore the need to comply with the law, in particular with intellectual property rights, which means obtaining all relevant consents before filming.

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