



The Bar Council

Data transfers between the UK and the EU/EEA in the event of a no-deal Brexit

Purpose:	To draw Counsel's and Chambers' attention to the need to amend their Contractual Terms to comply with EU/EEA regulations and UK law when dealing with professional data transfers to and from EU Member States.
Scope of application:	Self-employed practising barristers with professional contacts in EU/EEA Member States
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Status and effect:	Please see the notice at end of this document. This is not "guidance" for the purposes of the BSB Handbook I6.4.

Introduction

1. This guidance is intended for all barristers transferring personal data to and receiving personal data from the EU, irrespective of the field of law involved.
2. In the absence of an agreement with the EU, the UK will be a 'third country' under the General Data Protection Regulation from the moment the UK's EU membership ends.
3. This means that:

- Transfers of personal data from the UK to the EU/EEA will be unaffected. They will continue to be governed by the incorporation of the GDPR into domestic law and the Data Protection Act 2018.
 - Transfers of personal data from the EU/EEA to the UK will be affected. You will need to take additional steps set out in this guidance note in order to make such transfers lawful.
4. The additional measures relevant to the self-employed Bar are:
 - Entering into an agreement with the EU data controller which has specified terms governing the transfer of personal data: So-called standard contractual clauses ("SCC").
 - In exceptional circumstances, derogations available under Art.49 GDPR may be applicable to the data transfer.
 5. Please note this guidance is intended for self-employed barristers in independent practice and not for employed barristers or barristers in government service (where the data controller will be the employer, and the options available will be more extensive).
 6. It remains the responsibility of individual barristers (and their counterparties) to determine whether they can properly enter into SCCs in the light of their specific circumstances, or whether Art.49 covers the transfer in question.

Standard Contractual Clauses

7. In most cases, it is best to put in place a contract between you and the EU-based data transferor on EU-approved terms, known as standard contractual clauses (SCCs).
8. The SCCs are approved by the EU Commission. Each SCC is in a standard form which cannot be modified if it is to be legally effective. The SCC can be entered into as a stand-alone contract or as part of your normal terms of business. In either case, it is important to check that your other terms of business are consistent with and do not contradict the terms of the SCC.
9. There are two forms of SCC tailored to different situations. In most circumstances, the controller-to-controller SCC will be appropriate. A template of the SCC (together with ICO commentary) can be downloaded here: <https://ico.org.uk/media/for-organisations/forms/2553982/ico-guidance-controller-to-controller.docx>

10. Alternatively, the ICO provide an online contract builder based on the same template: <https://ico.org.uk/for-organisations/data-protection-and-brexit/build-a-controller-to-controller-contract/>.
11. The SCC is relatively straightforward and the template contains a few options to choose from with guidance on appropriate choices. In effect it aims to provide a similar level of protection for personal data as required under the GDPR using a contractual mechanism and so compliance with its terms ought not to be onerous given the necessity to comply with the existing regime in any event. Two points are noteworthy:
 - a. The ICO's recommendation is that in clause II(h), option (iii) is the most straightforward one and should generally be adopted. Whilst it remains a matter for you to assess any particular application of the SCC, that guidance is generally applicable to the self-employed Bar;
 - b. The permitted options for transfer of personal data (received under the SCC) out of the EEA are more limited than provided under the GDPR generally. You will need to consider carefully whether any onward transfers to non-EEA countries are within the scope of the SCC.

What if I haven't got an SCC in place?

12. The derogations available under Art.49 GDPR may provide an alternative basis for a transfer. However, it is important to appreciate the view of the European Data Protection Board ("EDPB") that the derogations are to be used sparingly and mainly for occasional and non-repetitive transfers. The derogations are to be interpreted and applied restrictively because they are exceptions to the rule of having to put in place appropriate safeguards (such as SCCs). Though the ICO interpretation of the derogations under Art.49 appears in some instances to be more relaxed than that of the EDPB, that is not relevant in this context, because the data transfers under consideration are from an EU-based data controller to a barrister in the UK.
13. The derogations under Art.49 most likely to be relevant are:
 - (a) the data subject has explicitly consented to the proposed transfer, after having been informed of the possible risks of such transfers for the data subject due to the absence of an adequacy decision and appropriate safeguards;
 - (b) the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of pre-contractual measures taken at the data subject's request;

(c) the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and another natural or legal person;

...

(e) the transfer is necessary for the establishment, exercise or defence of legal claims;

(f) the transfer is necessary in order to protect the vital interests of the data subject or of other persons, where the data subject is physically or legally incapable of giving consent;"

14. Guidance on their precise scope (and other derogations in Art.49) can be found at:
https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_2_2018_derogations_en.pdf
15. Note that the scope of Art.49(1)(e) appears to be limited to judicial or regulatory proceedings which are actually extant or reasonably in contemplation. In particular, the EDPB guidance specifically excludes "the transfer of personal data on the grounds of the mere possibility that legal proceedings or formal procedures may be brought in the future." It is therefore unlikely to cover advice about potential claims or about transactions or rights in general. It remains your responsibility to assess or seek advice on the particular circumstances in which reliance is placed on any derogation.

What about an 'adequacy decision' by the EU?

16. An adequacy decision by the EU Commission under Art.45 GDPR would treat the UK as effectively within the scope of the GDPR. However, at the moment of departure there won't be one. Whilst it is understood that the UK government is likely to seek such a decision, this is likely to take some time (and there is no guarantee that one will be granted). Hence, it will be necessary to consider the steps set out above.

Resources and further information

ICO:

- <https://ico.org.uk/for-organisations/data-protection-and-brexit/data-protection-and-brexit-for-small-organisations/>

- As a last resort the ICO can be contacted using the details on their website <https://ico.org.uk/global/contact-us/>. Note that calling them is likely to mean a long wait, but they are usually very helpful.

European Data Protection Board:

- https://edpb.europa.eu/sites/edpb/files/files/file1/edpb-2019-02-12-infonote-nodeal-brexite_en.pdf

Important Notice

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