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Brexit for corporate crime lawyers (2019)

7th February 2020

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Brexit for corporate crime lawyers (2019)

The law as stated during this webinar is up to date as of **3rd February 2020**

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Introduction

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Jason Sugarman QC
Foundry Chambers



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Data protection in the EU & UK
What to expect after Brexit

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The EU's role in data protection

- The EU has taken measures to harmonise Member States data protection laws in accordance with two of the EU's core ambitions
 - The effective functioning of the internal market
 - The protection of fundamental rights
- Data protection is enshrined in various sources of primary EU law
 - Article 8 of the EU Charter of Fundamental Rights
 - Article 16 of the TFEU
 - E-Privacy Directive
 - Council Framework Decision on the protection of personal data
 - General Data Protection Regulation (GDPR)
- The GDPR supersedes the previous Data Protection Directive
 - Sets out the rights of individuals and obligations placed on organisations
 - Harmonises how data is collected shared and used throughout the EU
 - Binding law in all member states without the need for implementation

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The transition period

- The UK will remain subject to all EU law except those expressly excluded within the Withdrawal Agreement
- The GDPR and related EU privacy laws will continue to apply as will relevant EU jurisprudence
 - Legal consistency in data protection laws
 - Free flow of data between the UK and EU
- The UK will continue to be treated as a Member State for GDPR purposes
 - Not subject to restrictions on data transfer to third states
- After the transition period, data originating from the EU which is still being processed in the UK will not lose its GDPR protection
 - This will cease if and when the EU secures an adequacy decision

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The future partnership

- Retained EU law under the European Union (Withdrawal) Act 2018
 - Takes effect at the end of the transition period
 - Susceptible to subsequent amendment
 - The GDPR will become the UK GDPR
- The Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019
 - Will apply necessary changes to the UK GDPR to ensure it functions
 - Remove references to cross-border data transfers with Member States
 - Remove references to participation in EU wide institutions
- The Data Protection Act 2018 will remain in place alongside the UK GDPR
 - Predominately enacts the GDPR's requirements
- The Privacy and Electronic Communications (EC Directive) Regulation 2003
 - Remains in place but amended

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What should we expect?

- The GDPR imposes restrictions on the transfer of personal data to third states
 - Personal data only transferred outside the EU and EEA if an adequate standard of data protection is guaranteed
 - Data transfer to the UK will be restricted
- For data flow to the UK to be unhindered the European Commission will need to determine that the UK offers adequate data protection (Art. 45 GDPR)
 - Time pressure for adequacy decision to be reached during transition
- If an adequacy decision is not reached UK organisations that process EU data will have to rely on other measures for data to be transferred
 - Standard contractual clauses
 - Binding corporate rules (approved by EU supervisory authority)
- Given the necessity of free flow of data to the UK it is unlikely there will be any substantial divergence in domestic data protection

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A case study

- In 2007 the MD of a major pharmaceutical company illegally obtained confidential on an employee. The case concerned an historic lifestyle report commissioned into an employee over 10 years ago. The report by an independent private investigator was alleged to have breached s. 55 of the Data Protection Act 1998.
- The legal team with the assistance of an expert witness managed to re-construct, from previously created civil litigation documentation, a report that showed that multi-million pound frauds were being committed against the company involving off shore companies in Panama and bank accounts in Switzerland and Dubai at the same time that the life style report was commissioned. Thus providing a statutory defence to the client that the obtaining of the data was necessary for the detection or prevention of crime. Despite this overwhelming evidence presented to the ICO they still pressed ahead with the case.

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Case study

- There was disagreement between the prosecution and the defence as to the true construction of section 55 (a) and (d) in the Act: namely, whether the obtaining of said data was necessary for the detection or prevention of crime, or in the public interest. The defence teams (the company and individual) mounted a legal argument that the construction of a statutory 'defence' in section 55 of the Act must be an objective, not subjective, test, with retrospective knowledge being allowed. The judge held that the test was indeed objective.
- The Judges finding in favour of the defence submissions led to the ICO offering no evidence on the second day of trial.
- If the EU restricts or changes the way in which information from other jurisdictions are accessible to UK individuals faced with such prosecutions it may hamper defences. In this case the fact that civil proceedings in the UK and Switzerland were able to draw on banking evidence and the Panama papers allowed a defence to be put forward. Any restrictions or interruptions in the free flow from the EU and other jurisdictions would hamper such defences on grounds of admissibility and potentially those engaged in fraud may be able to hide their criminality.

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Bribery laws in the EU and UK
What to expect after Brexit

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The EU's role in bribery prevention

- 2003 Framework Decision on combatting corruption in the private sector
 - Criminalises active and passive bribery
 - Applies to profit and non-profit business activities
 - Member States are required to penalise intentional acts
- Contact-point network against corruption (Council Decision 2008/852/JHA)
 - Facilitating information exchange
- Since the Lisbon Treaty corruption is a Euro-crime (Article 83 TFEU)
 - Particularly serious crime
 - Cross-border dimension
 - EU has capacity to adopt directives to define and establish sanctions
 - No such action taken in respect of bribery

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The transition period post Brexit

- Bribery Act 2010
 - One of the strictest anti-bribery statutes globally
 - Effective and an example to other countries
 - Unaffected by Brexit
- Under the Bribery Act the act of bribery need not have occurred in the UK
 - Individual perpetrator has a close connection to the UK
 - Corporate offence of failure to prevent
- Prosecution and other involved authorities remain the same after Brexit
 - Crown Prosecution Service
 - Serious Fraud Office
 - National Crime Agency
 - Police forces
 - HMRC

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The future partnership post Brexit

- Bribery offences are often complex and international
- Information sharing between countries unlikely to be affected by Brexit
 - Global practice not tied to EU membership
- Ability to investigate and prosecute individuals may be impacted
 - European Arrest Warrant
 - European Investigation Order
- Need to negotiate alternative methods for the arrest and extradition of EU nationals subject prosecution in the UK
 - Bilateral agreements with each Member State

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What should we expect

- UK businesses will be looking to access markets outside the EU
 - Temptation for lax enforcement of anti-bribery laws?
- Any attempt to 'free up business' in a post-Brexit trade environment must be firmly resisted
- Anti-corruption provisions must be built into any new trade agreement

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A case study

- Operation Steamroller- believed to be the largest boiler room fraud ever pursued by the UK authority SFO in which sales entities operating from Madrid sold shares in US-listed companies on a fraudulent basis.
- Investors in the companies bought shares that had restrictions on their resale for a 12 month period. When the investors came to sell the shares after the expiry of this period, they often found that they were unable to do so as they were worthless, and that the shares were in shell companies or companies that were not operating at all.
- One of the defendants was a solicitor who was senior partner of his firm. He was allegedly given a £1 million bribe to allow investor's funds to move through his firm's clients accounts.
- The evidence was from Spain, Hong Kong, Australia and the USA. One of the features of the case was that the SFO was not able to obtain evidence from Hong Kong and Spain. Certainly because the Hong Kong authorities never investigated this or in other related frauds in the Asia Pacific area did mean several defendants who lived in HK were acquitted on the basis that their jurisdiction did not support the SFO's investigation.

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IP laws in the EU and UK
What to expect after Brexit

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The EU's role in intellectual property law

- Not originally deemed part of the EU's competence
 - Member States held IP rights to be a domestic matter
- Accepted that IP rights had an impact on the effective functioning of the internal market
 - EU level legislation accordingly allowed
 - EU laws enacted to ensure approximation in Member States IP laws
- EU IP legislation no longer territorially restricted
 - EU Trade Mark Regulations
 - Community Designs Regulation
- Procedural EU legislation adopted
 - Directive on the enforcement of IP rights
 - European Union Intellectual Property Office (EUIPO) established

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The transition period

- EU IP laws will continue to operate
- The UK will remain part of the EUIPO
 - UK legal representatives can still represent their clients in ongoing cases after the transition period
- Continued protection of existing EU IP rights after the transition period
 - All EU Trade Marks will be converted into a UK equivalent
 - All Community Designs will be converted into a UK equivalent
 - Pending application will not be converted
 - Must apply for UK equivalent within 9 months
- All EU IP law becomes retained EU law of domestic effect at the end of the transition period

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The future partnership

- Status of cross-border arrangements unique to the EU is uncertain
 - E.g. Reciprocal protection for databases
 - Will depend on agreement reached with the EU
- Exhaustion of rights
 - Rights exhausted in the EU and UK before the end of the transition will remain exhausted in both jurisdictions
 - IP (Exhaustion of Rights) (EU Exit) Regulation provides asymmetric regional exhaustion after Brexit

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What should we expect

- Unlikely to see domestic laws significantly diverge
 - Interconnection of trade is important
 - Approximation is preferable
- Patents
 - The European Patent Organisation is distinct from the EU
 - EU Member States and non-EU European States are signatories
 - Brexit will not affect the current European Patent System
 - Paris Convention is international
- Copyright
 - Governed by international treaties
 - Independent of EU membership
 - Unaffected by Brexit

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John Binns
Partner
BCL Solicitors LLP



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**Criminal Justice Co-operation,
Money Laundering, and
Sanctions**

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Criminal Justice Co-operation
EU-UK Co-operation, post-Brexit

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Criminal Justice Co-operation: The Position Now

- EU Justice and Home Affairs (JHA) Measures
 - European Arrest Warrant (EAW) scheme
 - Joint Investigation Teams (JITs)
 - Europol
 - Eurojust
 - Databases
 - European Public Prosecutor's Office (EPPO) (note opt-out)
- The Transition Period
 - Continued participation, though non-members, cannot lead JITs
 - EAW objections allowed under the Withdrawal Agreement (a 185)
 - Member states' right to object to surrender of own nationals (Germany, Austria, Slovenia)
 - UK may retaliate

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Criminal Justice Co-operation: Post-Transition Period

- The Future Partnership
 - Political Declaration implies close co-operation; security treaty?
 - Predicated on protection of fundamental freedoms and personal data
- Transitional Provisions in the Withdrawal Agreement (a 62-65)
 - Mitigation of 'cliff-edge' if no deal reached
- A Case Study
 - UK national suspect in criminal case involving (an) EU member state/s
 - EU measures help facilitate co-operation, even in transition period
 - Objections under Withdrawal Agreement may prevent surrender
 - Transitional provisions where case straddles end of transition period
 - May need to fall back on pre-EAW extradition treaties, if they subsist
- Predictions?

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Anti-Money Laundering (AML)
Will Brexit Make a Difference?

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AML Laws in the EU and the UK: The Position Now

- EU Directives to Regulate Financial and Other Services
 - Financial Action Task Force (FATF) Recommendations
 - EU Money Laundering Directives (MLDs)
 - UK Money Laundering Regulations (MLRs)
 - 'Gold-plating': eg MLD5 led to MLRs 2019, crypto-asset definition
 - Interaction with Proceeds of Crime Act 2002 and Terrorism Act 2000
- The Transition Period
 - UK continues to be bound by MLDs, treated as a member state
 - Banks etc treat UK businesses as if they were EU businesses
 - MLD6 to be transposed this year but UK opt-out (made under JHA)
 - Corporate offence/failure to prevent money laundering: relevant?
 - Beneficial Ownership Registers: potential for controversy?

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AML Laws in the EU and the UK: Post-Transition Period

- The Future Partnership
 - Political Declaration implies close co-operation (mention of MLD5)
 - Interaction with broader trade treaty issues: 'fish for finance'?
 - Unlikely to commit to dynamic alignment; level playing field?
 - UK to be treated as a third country with equivalent AML laws?
- A Case Study
 - UK firm seeks services from bank etc in the EU
 - Owners in higher-risk jurisdictions, Politically Exposed Persons (PEPs)...
 - Equivalence relevant to how much due diligence is necessary
 - Consider application to Northern Ireland
 - Relevance of beneficial ownership registers, EU-wide systems
- Predictions?

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Sanctions
The New UK Sanctions Framework

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Sanctions in the EU and the UK: The Position Now

- EU Common Foreign and Security Policy (CFSP)
 - EU Regulations enforced by UK Regulations (criminal penalties)
 - Asset freezes and travel bans (targeted/financial sanctions)
 - May be challenged in the EU courts – but process is flawed
 - Office for Financial Sanctions Implementation (OFSI)
 - Sanctions and Anti-Money Laundering Act 2018 (SAML A)
 - Various regulations made and partly in force; no designations yet
- The Transition Period
 - UK continues to be bound by EU sanctions, but no policy role
 - UK and EU both intend to introduce 'Magnitsky sanctions' regimes
 - Unclear what scope these will have and how far the UK may go

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Sanctions in the EU and the UK: Post-Transition Period

- The Future Partnership
 - Intentions are unclear; UK departure may affect EU policy
 - Potential for US pressure to move closer to its position (eg Iran)?
 - Sanctions usually work best on a multilateral basis
- A Case Study
 - Individual subject to non-UN sanctions during and after transition period
 - UK system may be clearer and licences may be easier
 - Once designated under SAML A regulations, may request review
 - Review decisions and regulations themselves may be challenged in court
 - Separate challenge against EU sanctions – may be divergent decisions
- Predictions?

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On Demand Brexit webinars

- Brexit and the consequences for business immigration (2019) – Available until 5th February 2021
- Brexit and dispute resolution (2019) - Available until 6th February 2021
- An update on the movement of EU Nationals into the UK pre and post 29th March 2019 - Available until 15th February 2021
- The UK's future immigration system - Available until 22nd February 2021
- Supply chain management throughout Brexit (2019) - Available until 25th February 2021
- Brexit and arbitration (2019) - Available until 3rd April 2021
- The implications of Brexit for legal practice management (2019) - Available until 7th May 2021
- Brexit for in-house lawyers (2019) - Available until 30th May 2021
- Brexit and family law (2019) - Available until 17th September 2021
- An introduction to devolution (2019) - Available until 19th October 2021
- Brexit – implications for the life sciences sector - Available until 27th November 2021
- Retained EU law post Brexit (2019) – Available until 6th January 2022

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