



Brexit Alert for Legal Counsel Impact on IP and Personal Data Protection

With Brexit looming, it is not yet clear whether the UK will leave the European Union with a deal ("soft Brexit") or without one ("hard Brexit"). Regardless of how it occurs, the UK's departure from the EU will have an impact on how companies deal with Intellectual Property Rights (IP) and Data Protection.

In this Brexit Alert, we focus on the impact of a hard (or "no-deal") Brexit on both areas and highlight the most important questions. Laga aims to provide answers as well as practical action points for legal counsels to consider.

Impact on IP

a) Key Questions

Will a European trademark / Community design still be enforceable in the UK?

An existing EU trademark or registered Community design will be transposed into an equivalent registered UK national trademark/design. Brexit will lead to the fact that an EU trademark or Community design will be automatically separated into a European right that is only valid in the remaining member states, and a national right that is valid in the UK and subject to UK national trademark/design right law.

After Brexit, a European trademark/Community design will in itself no longer be enforceable in the UK. The national UK part will of course remain enforceable. Therefore, no action is

required for owners of registered EU trademarks or Community designs. However, action is required for EU trademark or Community design *applications* (see below).

What is the impact of Brexit on patents and copyrights?

Brexit does not lead to major issues for patents and copyrights, as these IP rights are governed by national law and only harmonised to a limited extent. The European Union (Withdrawal) Act 2018 stipulates that it will preserve all EU Copyright Directives and Regulations. Existing national rights will thus remain valid.

Will an IP right be exhausted once it has been put on the market in the UK or the EEA with the right holder's permission?

After the UK leaves the EU, IP-protected goods, which are put on the market within the EEA, will remain to be exhausted in the UK. However, restrictions may be imposed on the parallel import of goods from the UK to the EEA. Companies performing such activities may need to contact the EU right holders to verify whether permission is required.

b) Action points

Taking into account the above, Laga recommends the following action points (both for UK and EU companies):

- If you want to continue ensuring protection for your *registered* EU trademark/Community design in the UK, no immediate action is required. However, as soon as your rights need to be renewed, it should be kept in mind to also renew locally in the UK.
- For EU trademarks/Community designs in the *application process*, special action is required. If you are the holder of an EU trademark or Community design *application* upon the UK's exit date, your IP right should be refiled in the UK, using the standard application process for trademarks/designs, within 9 months after the UK's exit.
- If you do not intend to receive a new comparable UK registered trademark or design, you are able to opt out by contacting the IPO.
- If you want to protect a new brand or design at EU level, you should register your IP right in both the EU and the UK as of now.
- If you are planning to import IP-protected goods from the UK to the EEA, check with the EU right holder whether consent is required.

Impact on Personal Data Protection

a) Key questions

Can EU companies freely transfer personal data to the UK?

Personal data may in principle only freely flow within the EEA. Although derogations may apply, any transfer of personal data outside the EEA is in principle prohibited, unless specific corrective measures are taken. Since the UK will no longer be part of the EEA after Brexit, personal data may in principle not be transferred to the UK (i.e. including storing personal data in the cloud when the servers are located in the UK), without implementing adequate safeguards.

It is clear that this will have a major impact on EU companies. In the future, the European Commission may adopt an adequacy decision with regard to transfers to the UK (the UK would in that case be deemed to offer the same level of protection as EEA member states). However, such process may take months, if not years. Meanwhile, EU companies will need to implement adequate safeguards (e.g. standard contractual clauses, binding corporate rules, etc.), when sharing personal data with UK companies. This will complicate transfers of personal data to the UK considerably.

Will UK companies need to take into account UK personal data protection laws?

Since the UK will leave the EU, GDPR will no longer have direct effect in the UK (although it may still apply to UK companies – see above). This means that the UK may adopt its own personal data protection legislation. The UK parliament already adopted the so called “*The Data Protection, Privacy and Electronic Communications (Amendments, etc.) (EU Exit) Regulations 2019*”, amending GDPR and applying it to a post-Brexit UK. Although these Exit Regulations mainly contain mirroring provisions relative to GDPR, it is possible that they will deviate from GDPR. UK personal data protection legislation will apply to UK companies and to companies established outside the UK that offer goods and services to data subjects in the UK, or monitor the behaviour of individuals in the UK. Consequently, EU companies will need to comply with UK data personal data protection laws in those two situations.

b) Action points

Taking into account the above, Laga recommends the following action points:

- Continue to comply with GDPR obligations when dealing with UK companies (e.g. enter into data processing agreements when relying on UK based data processors or when acting as a data processor on behalf of a UK based data controller);
- Identify data transfers from the EU to the UK;
- Enter into standard contractual clauses, as enacted by the European Commission, when transferring personal data from the EU to the UK;
- Comply with obligations imposed by UK personal data protection law when offering goods and services to data subjects in the UK, or when monitoring the behaviour of data subjects in the UK.

With its extensive experience in IP and data protection work, Laga's IP/ICT team is readily available to provide more information on this topic.

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