

Brexit Toolkit: UK Creative Industries and the Data Economy in a Post-Brexit Britain

2019

Responsible Marketing

DM
Data &
Marketing
Association **A**

/ Contents

Introduction.....	03
The UK Creative Industries as global leaders	03
The Data Economy and the Creative Industries.....	03
Data and Marketing.....	04
The free flow of data.....	04
How to Exchange Personal Data.....	06
Standard Contractual Clauses (SCCs).....	06
Codes of practice	07
Binding Corporate Rules (BCCs).....	08
ICO and DCMS Guidance.....	09
Conclusion.....	10
Key Contacts.....	11
About the Responsible Marketing Campaign	12
About the DMA.....	13
Copyright and Disclaimer.....	14

/ Introduction

The UK Creative Industries as global leaders

The UK's exit from the European Union poses significant risks and opportunities for the UK's creative industries. To maintain global leadership status, we must make sure that the creative industries remain vibrant and dynamic after Brexit .

British creativity does not just secure jobs and economic prosperity at home, it also supports British 'soft power' all over the world.

This solidifies our ability to collaborate with countries all over the world and help to shape international perceptions of the UK.

The Data Economy and the Creative Industries

Cross-border data flows are the veins that feed the modern global economy. The success of data-reliant sectors – such as advanced manufacturing, logistics, financial services, data-analytics, marketing, and IT – are contingent on the UK's ability to maintain data-flows with the EU.

The UK is an international leader for data flows, which have increased 28 times between 2005 and 2015. The UK currently has the largest data centre market in Europe, worth over £73 billion, with over 75% of UK data transfers occurring within EU countries.

The EU knows this is an important issue. Estimates suggest that around 43% of all large EU digital companies were started in the UK, and the UK's position on the EDPB has driven a lot of pan-European legislation implemented today.

The Creative Industries employ around 3 million people in all (9.3% of the UK total) and contributed £87.4bn to the UK's economy in 2015. They account for 9.4% of all services exported from the UK, worth £21.2bn, with 45% going to the EU; and for 5.2% of all goods' exports, another £14.7 billion in 2015.

The UK has the largest internet economy of any G20 nation at over 10% of GDP. Nesta estimates that digital technology contributes £160 billion to the UK economy and 1.56 million jobs with 12% of them in data management and analytics solutions.

For the economy to thrive post-Brexit, the UK must remain a global centre of excellence for digital transformation, data analytics, data security and innovation.

/ Data and Marketing

The free flow of data

Data drives economic growth in the creative industries as it allows for intelligent insights into consumer behaviour and, ultimately, a tailored and personal offering from companies.

UK creative businesses operate across Europe and rely on the supply of data to inform and facilitate their work. Cross border exchanges of personal data are therefore paramount.

Brexit will affect the organisations' ability to send personal data from the EU to the UK. As a member of the EU, organisations based in the EU were able to freely send personal data between the UK and EU.

The UK Government, in recognition of UK's alignment with the EU on data protection, will permit the transfer of data from the UK to the EU after Brexit. However, the EU have not made a similar offer.

Article 71 of the Draft Withdrawal Agreement covers this point and states that EU data protection law will continue to apply in the UK during the transition period.

The UK will continue to have the same data protection law as the EU. It is likely that the transition will last for around two years. This effectively maintains data flows between the UK and EU.

Any variation of the current deal would most likely maintain regulatory alignment with the EU on data protection now and in the future. In the transition period following the agreement of a deal, the current regulatory environment for the free-flow of data will continue.

After the transition period, the UK will need adequacy status in order to facilitate data flows. The EU will begin adequacy talks with the UK in the transition period (when the UK becomes a third country), which will now take place on 31 October 2019.

Adequacy status is a measure in the General Data Protection Regulation (GDPR), which allows the EU Commission to certify that a country has adequate levels of data protection. Once certified, EU member states are allowed to exchange personal data with that country.

The European Commission has so far recognised Andorra, Argentina, Canada (commercial organisations), Faroe Islands, Guernsey, Israel, Isle of Man, Jersey, New Zealand, Switzerland, Uruguay and the United States of America (limited to the Privacy Shield framework) as providing adequate protection.

Adequacy talks are ongoing with South Korea. The adoption procedure of the adequacy decision concerning Japan was launched on 5 September 2018.

Given the UK's unique position of regulatory alignment with the EU, the adequacy process should be relatively straightforward. However, there is always a risk that decisions like this become politicised and a point of leverage in negotiations.

Similarly, the current government's position means a no-deal Brexit is significantly more likely.

In this case, there would be no agreement on data protection and data flows between the UK and EU and, without alternative arrangements, the processing of personal data of citizens in the EU would be illegal. However, there are some solutions to this which we will discuss in the next section.

/ How to Exchange Personal Data

This section discusses a number of proposed solutions which can be implemented in the event that a no-deal Brexit occurs.

Standard Contractual Clauses (SCCs)

SCCs are legal contracts which can be signed by the organisation processing personal data and the person or organisation having data processed.

These are – as the name implies – standardised and downloadable from the [EU Commission website](#). When both parties agree for these to be used, the data transfer can be completed using the same process as if there were open data flows.

While a relatively straightforward solution, an SCC must be used for every data transfer. This makes implementation cumbersome and resource-heavy.

While larger organisations may have the manpower to implement this, smaller organisations may struggle to cope with the administrative burden.

SCCs are the next best solution to replicating the free-flow of data in the case of a no-deal Brexit, or a Brexit deal that does not include a data adequacy agreement.

However, there is one potential drawback to this option.

Standard contract clauses are currently being challenged in the courts by privacy activist, Max Schrems, who successfully led a case against the US Government, accusing them of breaching EU data protection standards.

The legal challenge to contract clauses is on-going. If Max Schrems wins the case, it is almost certain that the European Commission will produce a revised and updated version of the standard contractual clauses to take account of the court's decision.

An organisation will simply have to update their standard contractual clauses to take account of the revised and updated version.

See the [Commission judgement](#) about what you need to include in your contracts.

Codes of practice

Another solution made available through the GDPR is the creation of industry codes to detail good practice which adheres with EU data protection laws.

When organisations sign up to this code and pass a compliance test, this would confirm that they work in-line with EU data protection practices and can freely process the data of EU citizens, continuing to do business with the EU on the same basis as they do currently. In other words, this would essentially be an industry-specific adequacy agreement.

Together with our European partner body, FEDMA, the DMA is in the process of writing one of these industry codes.

This would offer a sanctuary for our industry and for any business that wishes to continue to trade with the EU on the same terms which exist today.

Both EU partners and the Department for Digital, Culture, Media and Sport have issued their support for the DMA and FEDMA's efforts, and will do what they can to speed up the process and support in any way.

There is, unfortunately, a time-sensitive hitch. While the code is in the process of being approved, it is unlikely it will have completed the **European Data Protection Board (EDPB) approval** process by 31 October.

It is unclear how long it will take to get the code approved, but the DMA is confident the interested parties (including those on the EU side) are keen to get this approved as soon as is practically possible.

Similarly, when the code is approved, companies will need to be assessed and cleared through the compliance process before they can operate freely under the guidelines.

The time it would take to achieve compliance is unclear, though proactive companies with strong data protection practices will obviously complete the process speedily.

While this option is not on the cards at present, it is the ideal method of conforming to EU practices in the case of no-deal Brexit, or an insufficient deal.

Even in the case of an adequacy agreement, conforming to the **FEDMA** code will be a validation of data protection practices and will offer assurance that your organisation is complying with the law.

Check into the [DMA website](#) for updates and further information.

Binding Corporate Rules (BCCs)

In short, BCCs allow businesses to have their data protection practices validated by the EDPB, which would allow them to process the personal data of EU citizens on the same basis which currently exists.

To create a BCC, the company must draw up their business practices in conformity to EU law and submit them for approval. This is resource heavy and would require significant drafting.

Equally, the approval timeline is a minimum of 18 months. This means that if a business has not already started the process, this would not be a viable option as the earliest they could receive approval would be 2021.

Furthermore, a European regulator, like the **Information Commissioner's Office**, must approve it.

It is unclear whether the UK ICO will be able to approve binding corporate rules from UK organisations without reference to other regulators in EU Member States post-Brexit.

While this is technically an option that could be pursued for future practices, it is a resource-heavy, time-consuming, and lengthy process, rendering it a poor option.

To discuss strategy for weathering the various challenges posed by Brexit, contact the [Policy and Legal Team](#) for advice and further information.

/ ICO and DCMS Guidance

Both the **ICO** and **DCMS** have recently released guidance on the transfer of data in a no-deal Brexit scenario.

There are a few key developments:

1. The UK will transitionally recognise all EEA states, EU and EEA institutions, and Gibraltar as providing an adequate level of protection for personal data.
2. Where the EU has made an adequacy decision in respect of a country or territory outside of the EU prior to exit day, the UK government intends to preserve the effect of these decisions on a transitional basis. This will mean that transfers from UK organisations to those adequate countries can continue uninterrupted.
3. Provisions will be made so that the use of Standard Contractual Clauses (SCCs) that have previously been issued by the European Commission will continue to be an effective basis for international data transfers from the UK in a 'No-Deal' scenario. In practice this means organisations that transfer personal data to organisations overseas on the basis of SCCs can continue to rely on the documentation.
4. The Government intends to replicate Article 27 of the EU GDPR, which requires a controller or processor not established in the EEA to designate a representative within the EEA. The UK will require controllers based outside of the UK to appoint a representative in the UK.

For more information and to read the full statement by **DCMS**, [click here](#).

The **ICO** has also released advice on processing personal data in a no-deal Brexit situation.

You should familiarise yourself with their literature and review their 'six steps guide' to preparing for a no-deal Brexit.

You can read this and other advice on no-deal Brexit planning from the ICO [here](#).

/ Conclusion

While Brexit in any form poses challenges to the UK data, marketing, and wider creative industries, the UK has the chance to create opportunity from Brexit and make sure that the UK's creative industries remain a global leader.

As discussed above, the key issues involve the free flow of data, and industry access to talent.

Uncertainty over the future of these two points could potentially threaten the global status of the UK's creative industries. The best way to prepare your business for the multitude of potential outcomes is to engage in comprehensive planning.

To help our members prepare for Brexit, the DMA continues to work with Governments, Parliaments, and civil service departments in Brussels, Westminster and Holyrood, as well as with industry partners.

For further developments and analysis, keep checking in on the DMA website.

For questions or more specific advice, please get in contact with members of the DMA's policy, external affairs, and legal teams. You can find their details below.

/ Key Contacts

Should you have any queries or need further support, please contact:



Michael Sturrock
Public Affairs Manager
Michael.Sturrock@dma.org.uk



Asli Yildiz
Head of Legal
Asli.Yildiz@dma.org.uk



John Mitchison
Director of Policy and Compliance
John.Mitchison@dma.org.uk



Mike Lordan
Director of External Affairs
Mike.Lordan@dma.org.uk

/ About the Responsible Marketing Campaign

Working responsibly means putting your customer-first at each and every touchpoint, in each and every interaction.

It is inherent to how the DMA works – and how we encourage the UK's data and marketing community to work.

That means growing an appreciation of, adhering to and ultimately implementing best practice in marketing approaches, especially in light of the arrival GDPR.

These changes to the governance of data have far-reaching consequences for your business, and are still making waves.

At the DMA we aim to demystify this new regulatory environment so you and your customers can benefit.

Access our [GDPR guidance series](#) - developed in accordance with the ICO - to help you on your journey to GDPR compliance.

Our suite of [best practice guides](#) tackles a range of key marketing challenges, and are infused with the real-world knowledge of experts and leaders from around the UK data and marketing industry.

The [DMA's events calendar](#) is packed with legal update sessions, morning briefings and webinars that harness the expertise of our Public Affairs, Legal and Compliance teams.

Through our world-renowned Institute (IDM) we offer on and offline learning across responsible marketing themes, at individual and corporate levels.

And through learning initiatives run by [DMA Talent](#) we ensure the next generation of marketing leaders emerge into the industry fully aware of how to work with a genuine customer-first ethos.

Responsible marketing is in everything we do well.

Head to our [campaign hub](#) to learn more, and get involved.

/ About the DMA

The Data & Marketing Association (DMA) comprises the DMA, Institute of Data & Marketing (IDM) and DMA Talent.

We seek to guide and inspire industry leaders; to advance careers; and to nurture the next generation of aspiring marketers.

We champion the way things should be done, through a rich fusion of technology, diverse talent, creativity, insight – underpinned by our customer-focused principles.

We set the standards marketers must meet in order to thrive, representing over 1,000 members drawn from the UK's data and marketing landscape.

By working responsibly, sustainably and creatively, together we will drive the data and marketing industry forward to meet the needs of people today and tomorrow.

Published by The Direct Marketing Association (UK) Ltd Copyright © Direct Marketing Association.

All rights reserved.

www.dma.org.uk

/ Copyright and Disclaimer

'BrexIt Toolkit: UK Creative Industries and the Data Economy in a Post-BrexIt Britain' is published by the Data & Marketing Association (UK) Ltd Copyright © Data & Marketing Association (DMA). All rights reserved. No part of this publication may be reproduced, copied or transmitted in any form or by any means, or stored in a retrieval system of any nature, without the prior permission of the DMA (UK) Ltd, except as permitted by the provisions of the Copyright, Designs and Patents Act 1988 and related legislation.

Application for permission to reproduce all or part of the Copyright material shall be made to the DMA (UK) Ltd, DMA House, 70 Margaret Street, London, W1W 8SS.

Although the greatest care has been taken in the preparation and compilation of this report, no liability or responsibility of any kind (to extent permitted by law), including responsibility for negligence is accepted by the DMA, its servants or agents. All information gathered is believed correct at August 2019. All corrections should be sent to the DMA for future editions.