



# Green CDL Group

Guidelines December 2020 on Brexit and the  
implication for data protection

Version 1.5  
22 December 2020

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01625 724704

[info@greencdl.com](mailto:info@greencdl.com)

Green CDL Group is a trading name of Green CDL Ltd is a company registered in England and Wales, registration number 8709166  
Registered office CyberSuite One, Spaw Engineering, Dowry Park Ind Est, Turner Street, Lees, Oldham, OL4 3NU, and  
Green CDL EU Data Protection OÜ is a company registered in Estonia with offices across the EU including Ireland, registration number  
16088273, Registered office Harju maakond, Tallinn, Kesklinna linnaosa, Sakala tn 7-2, 10141

## What happens if there is a no deal Brexit

At the end of the transition period on 31<sup>st</sup> December 2020 the General Data Protection Regulation (GDPR) will no longer directly apply in the UK. The Data Protection, Privacy and Electronic Communications (Amendments) etc) (EU Exit) Regulations 2019 has introduced the UK GDPR from the 1<sup>st</sup> Jan 2021, this will apply directly in the UK.

The UK GDPR largely adopts the GDPR apart from making a number of technical amendments to make it work as a domestic law, such as replacing the words EU and Union with UK. This also amends the Data Protection Act 2018 in a similar vein.

You will need to know which law applies as the differences means certain things need to be deployed depending on what you are doing.

If you are processing personal data in the UK of persons in the UK and do not transfer this data out of the UK then the UK GDPR will apply, if you are currently compliant with the GDPR you will also be compliant with the UK GDPR.

If the person is in the EU (including Ireland) then in order to ascertain whether the GDPR applies indirectly you need to assess whether or not Article 3 of the GDPR

01625 724704

[info@greencdl.com](mailto:info@greencdl.com)

applies, similarly organisations in the EU should be assessing whether Article 3 of the UK GDPR applies.

Article 3 states that the GDPR will apply if either:

1. You are offering goods or services to an individual in the EU, regardless of whether they have to pay for these goods or service, (this can include such things as making your website available in EU Member States, offering to ship to the EU or selling in Euros or any direct offering of goods or service) and you process their personal data in relation to such offering (such as making a sale/entering a contract etc), or
2. You are monitoring the behaviour of individuals in the EU insofar as that behaviour occurs in the EU. This can be such things as using cookies on your website to track behaviour or having employees in the EU and monitoring their performance.

If either of these apply then the EU GDPR applies. As the UK GDPR replaces the words Union with UK organisations in the EU will also need to assess whether they are carrying out these activities in relation to the UK.

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[info@greencdl.com](mailto:info@greencdl.com)

Article 27 of the GDPR says that if article 3 (above) applies then you must appoint a representative in the EU unless you are a public body or authority. There is a narrow exception to this, that is where the processing is occasional, does not contain special categories of data/criminal conviction data on a large scale **and** not be a risk to the individual. All three have to be present before being able to rely upon this narrow exemption.

To understand what is meant by “occasional” analogies can be drawn to “repetitive” or “ongoing”.

The problem where most fall foul is by the very definition of processing as it is not limited to doing something with the personal data, the definition specifically states it includes storage and storage equals archiving. So even those who no longer have any dealings in the EU may still be processing personal data of persons in the EU in archive/storage.

To recap:

If:

- you are offering goods or services to persons in the EU and you process that person’s personal data for the purpose of the offering of goods or services, or

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- you are monitoring the behaviour of persons in the EU insofar as that behaviour is occurring in the EU, and
- You are not a public body or authority

You will need to appoint a representative in the EU unless the narrow exemption applies.

### If you are a Company in the UK with offices in the EU

If your company is incorporated in the UK but have branch offices on the EU then you will not need to appoint an EU representative. This is because you will have physical assets in the EU which supervisory authorities can enforce against in the EU Courts

### If you are a Group of Companies in the EU/UK

If you have other companies or subsidiaries established in the EU which are separate legal entities then you will need to appoint an EU representative if Article 3 applies and the Article 27 exemption does not apply. This is because the Supervisory Authorities cannot enforce against a separate legal entity. The obvious solution that springs to mind is you appoint each other as respective representatives in the EU/UK to satisfy Article 27 of the GDPR and the UK GDPR.

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[info@greencdl.com](mailto:info@greencdl.com)

The problem, which can be remedied, is Recital 80. Whilst there are other obligations on the representatives that need adhering to Recital 80 states:

*“The designated representative should be subject to enforcement proceedings in the event of non-compliance by the controller or processor.”*

This means that you representative in the EU is liable for any of your fines or other enforcement from an EU supervisory authority and equally the EU representative is liable for any of your fines or other enforcement from the Information Commissioners Office (The Commissioner)

The problem is time, because of Recital 80 respective legal will need to commence preparing and negotiating sufficient contractual obligations and indemnities. All of this can take some considerable time and time is not what we have.

We recognised this problem some time ago, we came up with solutions and can be your EU or UK representative with our sister companies established in the UK and across the EU either on short term monthly rolling contract whilst legal get to work or a permanent solution.

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[info@greencdl.com](mailto:info@greencdl.com)

To recap:

If you are a single legal entity in the UK with offices in the EU you will not need to appoint an EU representative.

If you are a group of companies looking to appoint each other this is going to take considerable time due to the legal complications.

If you need to appoint a representative we can be either be your EU/UK representative either short term or long term.

## Transferring personal data to and from the EU

Transfer of personal data is separate to, and not contingent on having a representative in the EU/UK.

## Transferring personal data from the EU to the UK

The GDPR allows for free transfer of personal data around the EU.

For countries that are not member states personal data can be transferred from organisations in the EU to those organisations in those countries that have been granted adequacy by the EU.

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[info@greencdl.com](mailto:info@greencdl.com)

Adequacy is a mandated process that must be gone through and takes around two years to complete.

Those countries who are not member states and have not been granted adequacy are known as a “Third Country” in that an appropriate “safeguard” needs to be put in place to transfer personal data from the EU unless one of the narrow exemptions apply.

The most common safeguard to use is the Standard Contractual Clauses, these are a set of contractual clauses that cannot be altered. Following a case in the European Court over the summer the Court found that there has to be substance to these contracts, they cannot be simply a piece of paper one signs.

These approved Standard Contractual Clauses are considerably out of date and a new set have been published but yet to be approved, the new sets are unlikely to be approved before exit day on 1<sup>st</sup> Jan.

The responsibility of putting in place these Standard Contractual Clauses is the organisation in the EU as liability for unlawful transfers lie with them. Our advice is take the initiative, instigate talks with your counterpart in the EU to prevent a sudden stop on transfers.

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[info@greencdl.com](mailto:info@greencdl.com)

## Transferring personal data from the UK to the EU

On the 1<sup>st</sup> Jan the UK will have its own rules surrounding “adequacy” and have pledged that it will grant the EU adequacy in accordance with the new domestic rules.

In that scenario you will be able to transfer personal data freely from UK organisations to EU organisations without any safeguard.

There is a possibility this could change should relationships sour.

### To Recap:

EU organisations transferring personal data to UK organisations will need to have in place an appropriate safeguard if none of the exemptions apply as the UK is very unlikely to be granted adequacy status (see further below). The most common safeguard is a Standard Contractual Clause.

UK organisations transferring personal data to the EU will not need to put in place any safeguards and can continue to freely transfer.

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## What will happen if there is a deal

We have asked to be granted adequacy status by the EU, the EU has confirmed that there is a due process for non-member states to follow and we would not be able to apply until we are a non-member. The last adequacy decision was for Japan and that took nearly 2 years. We are therefore very unlikely to be granted adequacy status on 1<sup>st</sup> Jan.

If there is a deal there may be some quasi agreement allowing free transfer of personal data whilst we follow the due process of applying for adequacy but this is pure speculation.

## What about the EU Representative if there is a deal

Article 27 and the requirement to appoint an EU representative will very unlikely not be affected by a deal or no deal. We have asked for adequacy, adequacy only allows for the free transfer of personal data it does not negate the requirement to appoint an EU representative. Therefore those organisations in countries that have been granted adequacy still need to appoint a representative in the EU, it only means that personal data can freely flow from any EU organisation to that organisation in the country granted adequacy.

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[info@greencdl.com](mailto:info@greencdl.com)

Therefore in the UK, regardless of any deal, you will still need to appoint a representative in the EU. The reasoning behind this is that the EU Courts will no longer have jurisdiction in the UK and the European Supervisory Authorities need to be able to enforce any proceedings and can only do so on organisations in the EU such as your EU representative.

### **To Do List**

- Immediately assess the likelihood of whether Art 3 applies
- If likely appoint us as your temporary EU representative
- In the New Year:
  - There needs to be a full understanding as to what you do with the EU
  - There needs to be an assessment as to whether Art 3 applies
  - There needs to be an assessment as to Art 27 and whether a derogation applies
  - There needs to be data flows showing personal how personal data moves in and out of the EU/UK
  - There needs to be individual assessments on these flows as to whether any of the listed derogations apply

### About Green CDL Group of Companies

We are a group of companies established in the UK and the EU, we provide advice, guidance and training on data protection and cyber security matters. We are a

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**info@greencdl.com**



preferred trainer of the International Association of Privacy Professionals and are a Cyber Essentials Certifying Body. We work to a very high standard having achieved ISO 27001 and 9001 certifications in the UK and are a preferred supplier of the Manchester Cyber Resilience Centre. The Group is headed by Emma Green, PGCert CIPP/E CIPP/M, a specialist trainer and advisor and our data protection/cyber security in house lawyer John Green. John has been educated by both Harvard Law School and Harvard Kennedy School in the US and, alongside Emma at the Defence Academy of the United Kingdom, John is currently studying International Cyber Warfare at Tallinn University, the home of the Tallinn Manual (Tallinn 2.0).

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