# Commercial Brief

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## Preparing for replacement of the Data Protection Act by the General Data Protection Regulation.

*GDPR was adopted by the European Parliament on 25th May 2016 and comes into effect on 25th May 2018. Geoffrey Sturgess explains what this means for businesses and what action you need to be taking.*

The Secretary of State Karen Bradley MP confirmed to the Culture, Media and Sports Select Committee on 24 October 2016 that the UK will be implementing the General Data Protection Regulation (GDPR) in May 2018. However, it remains unclear what amendments may be made to data protection laws once the UK has left the EU. The best advice for businesses is to get ready for compliance with the GDPR until, as the Secretary of State said, the government looks "later at how best we might be able to help British business with data protection while maintaining high levels of protection for members of the public".

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**UK Data Protection Rules**

It seems unlikely that UK data protection rules will deviate significantly from the GDPR—as otherwise doing business with EU countries will be unnecessarily difficult.

The UK Information Commissioner's Office (ICO) has produced useful guidance. It was produced before the GDPR was adopted but remains relevant. The ICO has also created a webpage dedicated to EU data protection reform linking to the new GDPR guidance and other relevant sites.

To continue reading this article, please visit our website here.

## UK – USA trade after a hard Brexit

*Educated analysts know that for many reasons most all long-term political and economic forecasts end in failure. Chief among these is the tremendous number of variables attendant to each prediction, as well as the relative weight they should be given. As such, it would be folly to try to predict, during these early days, what trade between the US and the UK might look like after a hard Brexit.*

Of the many variables, two stand out most: First, how will the results of the 2018 US midterm elections impact US views toward trade through 2020 and beyond; and second, how will the US and UK governments and populations view non-tariff trade barriers during that same period?

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The years on either side of 2020 are vital because EU rules prevent the UK from even negotiating an independent trade deal until after its separation from the EU, an event that can occur at the earliest in March 2019. By then, the US will have had the 2018 midterm elections following two of the most chaotic, disruptive and unconventional presidential and congressional years in modern history, and will be well into the campaign for the general election in 2020. Given the pace of political discord and charges of executive unconstitutional actions, it is not entirely unreasonable to imagine that Donald Trump may not even hold the office of the presidency at that time.

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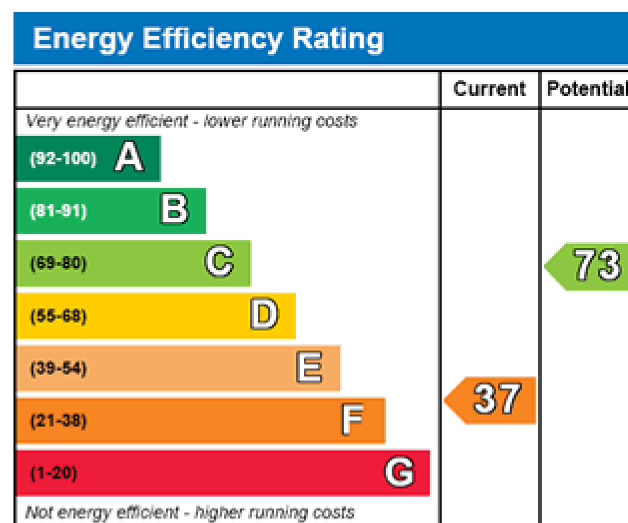
## What are the new regulations on Commercial Property Energy Performance Certificates?

*If you are a commercial property investor or a business tenant, you will have come across an Energy Performance Certificate (EPC) over the last few years. They are required to be provided by a landlord upon the new letting of any commercial property on the open market and are the scale upon which the energy efficiency of a property is assessed. They look rather like this:*




Previously, upon receipt of one of these reports, my clients would frequently ask me 'what do I need to do with this?' or 'what does it mean?'. Previously my answer would frequently be 'nothing'. EPCs were at best a nuisance for landlords to have to provide, and a pretty chart for tenants to look at and file away with the remainder of the paperwork I sent them.

However, new Government legislation has been implemented and from 1 April 2018 we will have to pay attention to the rating given on our pretty charts, and in particular to anything below an 'E' rating. From this date, under the Minimum Energy Performance Standards (MEPS) (or the Minimum energy Efficiency Standards (MEES), depending on who you speak to), it will become unlawful for landlords to let a property with an EPC rating of 'F' or 'G'. This means that if you're trying to rent out your dilapidated old shed with holes in the walls, or let the office area with the rotten wooden window frames, you may wish to think again. You will have to incur the costs of carrying out sufficient works to raise the EPC rating to an 'E' or above before you even put it on the market. This will apply whether it is a new lease being granted, or a lease renewal- 1954 Act protected or otherwise - a sub-lease, headlease or sub-underlease. You get the idea.

'But why?!' I hear you cry. Since 2003, the UK Government, in line with the remainder of the EU member states, committed to the EU directive to significantly reduce CO2 emissions. It was this directive that imposed the EPCs, originally within the ill-fated Home Information Packs, and, after their prompt demise, as a stand alone requirement. It was only a matter of time before they were required to mean something serious for the business community.

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## What does 2017 hold for employment law?

*Most employers this year will be considering how employment law will change as we start our negotiations to leave the EU, and while we cannot predict how this decision will impact employment law at this stage, there are certain areas that we can foresee. Gina McCadden, Trainee Solicitor, here explains what employers should be looking out for this year, and how they can plan now to avoid possible claims.*

Employment status

Following on from the *Aslam and others v Uber BV and others* case last year, Maggie Dewhurst, a bike courier with City Sprint, has this month won her case to be treated as a worker, rather than a self-employed contractor. This means as a worker she is now entitled to certain rights such as paid holiday and sick leave and the national minimum wage. "The consequences of both this and the *Uber* case should make all employers review their employment contracts and contracts with self employed contractors to ensure there are clear distinctions," explains Gina. "It's likely these will not be the only cases we see of this nature."

Gender Pay Gap Reporting

On 6 April 2017, the Equality Act 2010 (Gender Pay Gap Information) Regulations will come into force, meaning all private sector businesses with at least 250 employees must publish details of their gaps in pay between genders, for both basic pay and bonus payments. Businesses will have a year to publish their first report, and then must be submitted each subsequent year.

This coincides with the case *Brierley and others v Asda Stores Ltd*, during which Asda lost an equal pay claim brought by female workers who claimed their work was equal to male warehouse workers. "Even if your business does not employ over 250, reviewing your gaps in pay is a useful exercise to evaluate the likelihood of any equal pay claims that can be brought against you, and to see where any amendments could be made," continues Gina. "It is likely that gender pay reporting will filter down to all business, irrespective of size, in years to come".

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## Overseas liability for web publishing

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*Websites, whether they be .uk or .com or under any other country domain are effectively accessible from anywhere in world. As a result if they contain material offensive or illegal in any jurisdiction in the world the website proprietor could face legal action anywhere in the world. It is, however, obvious that no one, other than a global business, would have the resource or desire to ensure that its website complies with all legal requirements worldwide.*

Indeed some of those requirements could be contradictory making world wide compliance impossible.

It is insufficient to say that because a website address has the suffix .co.uk, or the site is written in English, it is not published in Germany or accessed by Germans, or French or Russians. It is only necessary for a claimant to show that a website has been accessed in a particular country to allow him an action in that country.

This raises the spectre of the website proprietor dealing with multiple claims in multiple jurisdictions, all brought by the same claimant and relating to the same content.

Two cases before the European Court of Justice (ECJ) *eDate Advertising GmbH v X Case C-509/09, 25 October 2011* and *Olivier Martinez and another v MGN Ltd, Cases C-509/09 and C-161/09, 25 October 2011* have provided examples of how this works in the European Union.

## In Brief…

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In each issue of our Commercial Brief, we will bring you brief references to recent legal developments that could be of interest to our readers.

This issue of the In Brief includes the following topics:

- Company fined £120,000 for sending marketing texts without proper consent
- The High Court provides a reminder of a professional's duty of care and importance of a clear retainer
- Argos Limited loses trade mark infringement and passing off claims against Argos.com
- Scottish courts confirm that tax advisers are not liable for damages for distress in negligence claim
- Court decided that a claim under the Data Protection Act can be brought alongside defamation claim
- Former employee prosecuted under the Data Protection Act for unlawfully accessing client data

To read more on these topics, simply click here.

**This Commercial Brief is edited by Geoffrey Sturgess. For further details on any of the articles, contact Geoffrey at geoffreysturgess@warnergoodman.co.uk.**

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