

LMA Webinar GDPR and LMA facility documentation

Richard Jones, Director of Data Privacy – Clifford
Chance



Agenda

How is the GDPR relevant to syndicated loan transactions, and do its requirements need to be addressed in syndicated lending documentation?

- Brief introduction to the GDPR
- Its implications for commercial contracts
- Data sharing in syndicated loan transactions
- Relevance to syndicated lending documentation

Brief introduction to the GDPR

- An EU Regulation, also implemented in the UK from Brexit
- Key concepts:
 - “personal data”
 - “processing”
 - “controller” and “processor”
- Key requirements:
 - legitimacy of processing and data protection principles
 - fairness, data minimization, purpose limitation, deletion...
 - transparency and data subject rights
 - restrictions on transfer outside the UK / EEA
 - “accountability” measures to ensure compliance

GDPR implications for commercial contracts (1)

- Starting point: no implications

- neither party is the “data subject” – a contract cannot be used to obtain consent or provide information

- Required contract terms where a “controller” appoints a “processor”

- restricted use
- security and audit
- co-operation to assist controller with compliance
- deletion or return on termination

GDPR implications for commercial contracts (2)

- Need to document an “arrangement” between “joint” controllers
- Need for a data transfer agreement to allow transfer of personal data outside the UK/EEA
- Data sharing provisions for risk-management purposes, where the privacy risks are significant:
 - Recipient seeks comfort from discloser:
 - commitment to provide recipient’s privacy notice to data subjects
 - assurance that disclosure is lawful
 - Discloser seeks comfort from recipient:
 - protect the disclosed data
 - Inform and co-operate if data privacy issues arise (e.g. security breach)

Data sharing in syndicated loan transactions (1)

– Pre-mandate - *no relevant LMA documentation*

- Arranger due diligence on borrower
 - including KYC / AML information
 - data relating to directors, beneficial owners, etc.
- Exchanges of contact data
- Arranger mandated

– Post-mandate (syndication) – *LMA confidentiality and front running letter for primary syndication*

- Arranger / agent discloses borrower due diligence and other information to potential lenders
- Exchanges of contact data
- Lenders join facility

– Post-signing – *LMA facility agreement*

- Limited data sharing for CP / drawdown / facility administration purposes

– Secondary trading – *LMA confidentiality agreements for secondary trading*

- Existing lender discloses borrower due diligence and other information to potential new lender
- Exchanges of contact data
- New lender joins facility

Data sharing in syndicated loan transactions (2)

– The roles of the parties

- Each party (borrower, arranger, agent, lender, etc.) discloses / receives / otherwise processes personal data for its own purposes, as a “controller”
- No controller / processor or joint controller arrangements
(parties may use third party service providers to process data on their behalf, outside the scope of the lending documentation)

– Key relevant obligations

- Transparency, particularly with regard to due diligence on individuals
- Data minimization, purpose limitation and deletion
- Security
- Not *contract* issues
- No international transfers unless lenders outside EEA

Relevance to syndicated lending documents (1)

- No controller / processor or joint control arrangements, so no mandatory provisions
- AML / KYC data:
 - arranger ensures that appropriate privacy notices are provided to data subjects through the due diligence information collection process
 - data disclosed in confidence and used only for AML/KYC purposes
 - each party must keep secure and delete when no longer needed
 - modest data privacy risk, therefore no need for contractual reinforcement, which would in any case not address any real privacy implications for the data subjects
- Other personal data:
 - relatively trivial exchanges of contact and “CV” data
 - no data privacy implications to be addressed in the syndicated lending documentation

Relevance to syndicated lending documents (2)

- Some institutions may nonetheless wish to seek privacy assurances from their counterparties - but no established market practice
- Other possibilities:
 - Personal data disclosed to a potential lender outside the UK / EEA – possible need for a international data transfer agreement
 - mandatory model form approved and published by the European Commission
 - LMA templates designed for European markets and on the basis of UK / EEA lenders
 - Transaction party appoints a service provider to process personal data (e.g. data room provider) – need to include controller / processor provisions in service agreement
- It is for each institution to consider how its data privacy compliance arrangements apply to syndicated lending transactions and whether contractual protection may be required