BREXIT: ARE YOU READY?

A checklist for businesses to assess how ready they are for the end of the Brexit transition period.

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BRODIES LLP

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BREXIT: ARE YOU READY?

The Brexit transition period is scheduled to end on 31 December 2020.

The UK left the EU on 31 January 2020, entering a transition period during which the UK and EU continue to act for most purposes as if the UK were still a Member State. That period is due to end at 11pm (UK time) on 31 December 2020.

However, uncertainty remains about what if any agreement will be in place at the end of transition. There is a very real possibility that the period could end without a deal, and the Prime Minister has urged businesses to prepare for that outcome. Even with a deal, there will still be significant changes to navigate. Businesses should therefore take steps to understand what challenges they will need to overcome, including considering what they can do to prepare for all eventualities.

We have prepared a checklist of key questions for you to ask yourself, to assess how ready you are for the end of the transition. If you have formed or activated a contingency plan, you can test it against our checklist. If you are still holding off from forming plans, or think you will be unaffected, you can use the checklist to ensure you identify and consider all the key issues. **Please note that most of the issues in this checklist will arise even if there is a trade deal.**

Our checklist focuses on issues likely to be relevant across a wide cross-section of businesses, but Brexit does of course touch on many issues specific to particular sectors. The UK Government has mounted an information campaign setting out how businesses can prepare for the end of the transition, including a questionnaire to help businesses identify which guidance will be relevant to them. The Scottish Government has also produced its own site on preparing for Brexit. The European Commission has published dozens of 'readiness notices' setting out the EU's plans.

The UK Government has also been making orders under the European Union (Withdrawal) Act 2018 to adapt EU legislation so it works as UK law post-Brexit. These changes will come into effect at the end of transition, at which point EU law as it stands at that date will be incorporated into UK law, subject to the adaptations in the orders. The Scottish Government has been making equivalent orders in devolved areas.

We mention some of these notices and orders below; you can find discussion of others on our Brexit Hub, which also contains regular updates on key Brexit issues.

We are happy to advise you and your business on any of the issues below, or any other Brexit-related questions you might have. Please don't hesitate to get in touch, and our cross-departmental Brexit Advisory Group will be happy to help.

Please contact one of our Group heads Christine O'Neill and Charles Livingstone.

Checklist

Click on the questions to navigate to the relevant page within this document

Tick ☐

1. Have you made sure your EU employees understand what steps they need to take to continue living in the UK post-Brexit?

EU citizens living in the UK prior to the end of the Brexit transition period will be able to stay in the UK, whether or not there is a future trade deal.

The Withdrawal Agreement agreed between the UK and EU provides for no changes to the rights of EU citizens and their families until 31 December 2020. The UK is therefore continuing to observe free movement rights, including for EU citizens (and some of their family members) arriving until the end of 2020 when freedom of movement will end. Equivalent agreements have been reached for EEA and Swiss citizens.

EU, EEA and Swiss citizens and their family members residing in the UK before the end of the transition period, and wanting to stay in the UK longer term, must apply for 'settled status' under the EU Settlement Scheme (or for 'pre-settled status' if they do not yet have the necessary five years of residence). The deadline for applications is 30 June 2021, but only those resident in the UK before the end of the Brexit transition period will be eligible to apply. Settled or pre-settled status will provide a right to live and work in the UK for a period of time. Settled status is a type of indefinite leave to remain.

While UK-resident EU citizens and their family members will generally be entitled to settled or pre-settled status, it will not be granted automatically. Employers should therefore encourage any eligible employees to apply under the scheme well in advance of the closing date. If they do not apply in time, this is likely to have serious implications in terms of their immigration status and ability to work in the UK. There is no fee for making an application to the Scheme.

For more information on the EU Settlement Scheme, see the UK Government's toolkit, aimed at giving employers information on how to support EU employees applying to the Settlement Scheme. Employers can direct employees to relevant information but should not provide immigration advice as this is strictly regulated.

EU, EEA and Swiss nationals who want to move to the UK after 11pm on 31 December 2020 will have to apply for an immigration status in accordance with the UK immigration system in place at that time. Details have been published of the new points-based UK immigration system, which will come into force on 1 January 2021. This will introduce a new single skills-based, points-based immigration system that will apply to EU and non-EU citizens alike. Applications under the new rules will open before the end of the transition period, so employers should be familiarising themselves with the new rules now.

Employers may wish to consider applying for a sponsor licence if they do not already have one, as this will be required to sponsor employees under the new rules. There may also be a delay in processing applications due to COVID-19. Brodies can assist employers with sponsor licence applications.

For up-to-date know-how on these and other employment and immigration law issues (whether Brexit-related or otherwise), sign up for our Brodies Workbox subscription service.

If you need assistance in any of these matters, please get in touch with Lynne Marr or Elaine McIlroy in employment and immigration.

Tick ☐

2. Will you be able to travel to the EU post-transition?

If you are planning to visit the EU after 31 December 2020, you will need to comply with new travel requirements on passport validity. You should check your passport meets these requirements, and renew it if necessary. You should also ensure that any employee who might need to travel to the EU on business is aware of, and can comply with, the potential new rules.

Travel to Ireland will not change, as Ireland and the UK form a separate Common Travel Area that remains in place.

If travelling into the Schengen area (i.e. all EU countries except Bulgaria, Croatia, Cyprus, Ireland and Romania, plus Iceland, Lichtenstein, Norway and Switzerland), your passport (i) must have been issued no more than 10 years prior to the date of arrival in the Schengen country, and (ii) must be valid for at least three months after the intended date of departure from the Schengen area. As a third country national you would be able to stay in the Schengen area for up to 90 days, so you may need to have up to six months' validity on your passport from the date of your arrival.

If travelling to Bulgaria, Croatia, Cyprus or Romania, you will need to check the national entry requirements for these countries.

When travelling to the EU after the transition has ended, you will need to ensure you get appropriate travel insurance with healthcare cover. Your European Health Insurance Card will no longer be valid.

For more on post-Brexit travel considerations, including driving in the EU and travelling with pets, see the UK Government's advice on visiting Europe after the transition and our 2019 briefing on Travelling and Brexit.

The Passport Office has also published guidance on travelling requirements after the end of the transition period, with a questionnaire to help you assess whether you will need to renew your passport

for your planned travel.

For more information contact Christine O'Neill or Charles Livingstone.

Tick ☐

3. Have you reviewed your contracts?

It is vital for businesses to review existing contracts to identify any potential risks, liabilities or complications that could arise from the end of transition. It is also necessary to consider how new contracts should be drafted to ensure they are 'Brexit-proofed'.

You should review your key contracts for references to EU law, EU institutions or the UK being an EU Member State. An example of a potentially problematic reference would be a description of the geographic reach of a contract, such as the territory in a licence agreement or under a distribution agreement, that refers to "the EU" but is intended to include the UK.

If your contracts do contain such terms, they should be reviewed to establish what the risk level is and whether they might need to be revised.

More generally, the UK ceasing to be treated as part of the EU can fundamentally change the commercial complexion of a contract. Is there a risk your key supply chain providers or key customers will default on their obligations, or look to renegotiate? Would you want to try and re-negotiate a contract, or consider exit options? What is the impact on your own supply chain? If you are part of a collaboration or joint venture, the issues will apply to all partners.

Consider using the International Chamber of Commerce's Incoterms to provide clarity on key issues arising from the import and export of goods.

When analysing, drafting and renegotiating contracts, the key issues to keep in mind include:

- Do you know what trade tariffs are likely to apply to the supplies under the contract (see question 4 below)? If there are new trade tariffs, does the price paid under the contract change, or is it fixed? Who will pay those tariffs?
- If VAT becomes payable on goods being traded between the UK and the EU, who is responsible for those costs?
- If border delays result in late delivery or performance, is that the seller's problem or the buyer's (or is it shared)?
- If a contract includes services, where does the risk of any restriction on freedom to provide services between the UK and EU sit?
- If a restriction on the freedom of movement for workers causes a labour shortage (for the seller but also possibly for the buyer), does that give relief from contractual performance?
- If cost or time issues arise from additional licensing, certification, labelling, packaging or other regulatory requirements, how are those risks allocated or shared?
- UK and EU regulatory requirements may diverge. Who is responsible for monitoring and complying with changes to regulatory requirements?
- If a contract is priced in Sterling, but currency exchange rates will affect the cost of delivery, to what extent can those risks be hedged?
- If the contract chooses the law by which it will be governed, and the place that any dispute will be heard, will that still work following the end of the transition period?
- Many contracts will have a "change in law" clause, but the way that is drafted will affect how it responds (if at all) to the end of transition. With a broad brush, don't expect all change in law clauses to deal with all of the issues on this list (or to deal with them in the way you might expect).
- Most contracts will also have a force majeure clause. Whether a Brexit-related impact on a party's ability to perform would give rise to a right of relief will depend on how the clause has been drafted. How will that impact on the contract? What obligations, if any, does the contract impose on the affected party to mitigate that impact?

Our commercial services team can help you review your contracts, identify and assess risks, revise existing contracts and draft new ones, to ensure your business is ready for the end of transition.

Please get in touch with Roger Cotton or Martin Sloan for assistance.

Tick ☐

4. If you export or import goods, are you ready to comply with new trade, customs and VAT requirements?

Whether or not the transition period ends with a deal on trade, the right to move goods freely between Great Britain and the EU will fall away as of 11pm (UK time) on 31 December 2020. As a result, if you trade with the EU (whether importing or exporting) you will have to comply with the more onerous customs, excise and VAT procedures and rules that already apply to goods traded with non-EU countries. Full import and export declarations, and separate safety and security declarations, will therefore be required. In addition, tariffs will be imposed on GB-EU trade unless a free trade deal is agreed. The terms of trade with many other countries will also change.

CUSTOMS CHANGES – the BORDER OPERATING MODEL

The UK Government has published its new Border Operating Model (BOM), explaining how the border between Great Britain and the EU will operate from 1 January 2021 onwards (Northern Ireland has a special status under the Withdrawal Agreement – see below).

Rather than impose full customs procedures on EU imports from 1 January as originally intended, the introduction of UK customs procedures will be staggered to allow businesses time to adjust, with much less onerous requirements in the first six months (though businesses can choose to apply full customs processes if they want). It is crucial that businesses understand what measures the BOM will require them to implement in advance of the end of transition.

VAT CHANGES

VAT will continue to apply after the transition period, though UK VAT may then diverge from EU VAT over time. Import VAT will become payable on goods imported from EU countries, though postponed accounting is to be introduced so UK VAT-registered businesses with UK EORI numbers can pay on their VAT return rather than when goods arrive at the border. A number of EU VAT simplification measures will cease to be available – businesses should check their supply chains to establish the impact of this.

KEY STEPS TO TAKE BEFORE 31 DECEMBER 2020

Apply for a UK EORI number

An EORI number (under the Economic Operator Registration and Identification Scheme) is currently required to trade goods with non-EU countries, and will be required to trade with the EU from 1 January 2021. In 2019, HMRC issued EORI numbers to VAT-registered businesses that did not already have one (perhaps because they only export to or import from the EU). Non-VAT-registered or newly-VAT-registered businesses who have not received an EORI number should register for one.

Apply for an EU EORI number (if required)

Whether or not you already have a UK EORI number, you may also need a separate EU EORI number, for example where you act as an importer of record in the EU. UK EORI numbers will be invalid in the EU from 1 January 2021. Most Member State customs authorities are now accepting applications for EU EORI numbers, which would activate from 1 January 2021. For more information on this issue see our 2019 blog post on EORI numbers and visit our Brexit Hub for regular updates.

Appoint a Customs Intermediary

A customs intermediary will be able to support you with unfamiliar customs formalities. The UK Government is supplying training grants to businesses completing customs declarations, and has set up a guidance page to help businesses check whether they are eligible.

Apply for a Duty Deferment Account (if you can)

A Duty Deferment Account (DDA) allows businesses to: (1) defer payments of VAT and duty on consignments into the UK by up to 30 days, and (2) consolidate all consignments over the relevant period. We recommend applying for a DDA if possible. Guarantees may be required, so allow sufficient time for an account to be set up (although the BOM allows DDAs to be used without a guarantee in some circumstances).

Establish whether you can use a Simplified Customs Declarations Process (SCDP) on imports

For non-controlled goods imported from the EU up to 30 June 2021, traders may automatically be entitled to use simplified customs procedures by recording imports in their own commercial records at the point of entry of the goods (Entry in Declarant's Records (EIDR)), and following up with a supplementary declaration within six months. However, in order to submit the supplementary declaration, and to continue to use SCDP after 1 July 2021, it is necessary to be authorised and to have a DDA. Authorisation should therefore be applied for in good time, by visiting the UK Government's simplified declarations page.

TARIFFS: EU AND NON-EU TRADE

In a no-deal scenario a range of goods would become newly liable to tariffs. For goods exported to the EU, the relevant customs duty set out in the EU's Common Customs Tariff would apply. Imports from the EU, and any other country with which the UK does not have a trade deal, will be subject to the new UK Global Tariff (UKGT). This generally either liberalises (reduces to zero) or simplifies (rounds down to the nearest even percentile) the EU tariffs the UK currently has to apply. The Government has produced a UKGT tool to help businesses identify what tariffs will apply under the new regime.

If you export to or import from the 70 or so countries that have a free trade agreement with the EU, you should understand how the UK's relationship with those countries might change. During the transition period the EU, UK and third countries have continued to act as if the UK remains an EU Member State. The UK Government is aiming to get bilateral agreements in place with those countries, and has signed a number of trade agreements that will take effect from January 2021. However, the UK has not yet replaced all EU agreements. If no agreement is in place with a third country by the end of 2020 then trade with that country will revert to WTO terms, unless and until an agreement is reached.

Any country currently trading with the UK on WTO terms will, unless a new trade agreement is reached before the end of the year, become subject to the new UK tariffs, which for many goods will differ from the EU tariffs the UK currently applies. So, if you import goods from any country that is not already signed up to a trade agreement with the UK, you should be checking how the tariff position will change.

If you are unfamiliar with what the WTO is and how it works, see our 2019 briefing on the WTO.

RULES OF ORIGIN

Trade with the EU will also become subject to new rules of origin requirements, which apply to goods produced with parts or labour from different countries and determine which of those countries they are to be treated as coming from. This issue made news when it was revealed that the EU is refusing to allow Japanese and Turkish car parts to be treated as UK components when assessing whether finished cars are UK origin
(known as 'cumulation'), even though the EU also has free trade deals with Japan and Turkey.

If you trade with third countries you may already be familiar with rules of origin, but should consider whether those countries' rules of origin will apply differently to your goods post-transition.

NORTHERN IRELAND

The Withdrawal Agreement sets out separate rules for Northern Ireland. Goods moving between Northern Ireland and the Republic of Ireland and from Northern Ireland to Great Britain should not be subject to tariffs or restrictions, but in some circumstances 'exports' from Great Britain to Northern Ireland may be subject to controls (though these would be less onerous than the border controls applying to GB-EU trade, and the UK Internal Market Bill seeks to give the UK Government the power to disapply parts of the Withdrawal Agreement). The final position will depend on what (if any) trade deal is agreed between the UK and the EU, and in the meantime the UK Government has published guidance on moving goods into, through or out of Northern Ireland.

More detailed information on trading with the EU, including trade in specific goods such as timber, animal products, controlled goods, plants and GM food, can be found on the UK Government's transition site. See also the EU's readiness notices on various trade-related issues.

For questions on customs or VAT issues, please contact Isobel d'Inverno.

For other trade-related issues, please get in touch with Charles Livingstone.

Tick ☐

5. Will you still be able to export manufactured goods to the EU, or rely on existing certifications in the UK?

Separately from the exporting requirements covered above, if you are a UK manufacturer of goods that are subject to EU-wide standards you should also be reviewing whether your existing conformity assessments and certifications will continue to be recognised in the EU. You should also review whether you will need to obtain separate UK certification to cover use of your products in the UK.

UK bodies approved by the EU for certification purposes will no longer be recognised by the EU (unless a deal provides to the contrary), in which case the results of conformity assessments carried out by those bodies will no longer be recognised either. UK-assessed products will therefore no longer be able to be placed on the EU market unless they have been reassessed and re-marked by a body that remains EU-recognised, or the manufacturer's files are transferred to an EU-recognised body before the end of transition. CE marking based on self-declaration of conformity will still be possible, including when exporting to the EU. For more detail see the EU's readiness notice on industrial products (that link also leads to separate notices on the approval, certification and import of specific goods including: vehicles and engines; chemicals; detergents; cosmetic products; and medicinal products). The UK Government has also published its own guidance on placing manufactured goods on the EU internal market.

The UK Government plans to introduce a new UK mark for new products, to indicate compliance with UK standards (which to begin with will be identical to the EU's, but may then diverge over time). Products with European CE markings will generally still be able to be placed on the UK market as long as: they are currently self-declared with a CE marking; a mandatory third party assessment has been carried out by an EU-recognised notified body; or the certificate of conformity has been transferred to an EU-recognised notified body. The CE marking can then be used in the UK throughout 2021 as long as the UK and EU certification requirements remain the same. Products unable to use the CE marking will have to use the UKCA marking from 1 January 2021. Most products will then have to use it from 1 January 2022. These rules will apply in Great Britain. Separate rules will apply in Northern Ireland, where the CE marking will remain valid alongside a new 'UK(NI)' mark.

For more detail see the UK Government's guidance on placing manufactured goods on the Great Britain market. There is separate guidance on placing goods into Northern Ireland from Great Britain or from the EU. Further separate guidance and rules (which among other things specify where the EU CE marking can continue to be used beyond 2021) exist for: chemicals, medicines, vehicles, aerospace, medical devices, rail interoperability constituents, civil explosives, construction products, and products requiring eco-design and energy labelling. For an example of how these principles will apply in practice, see our 2019 update in relation to construction products.

If you require any assistance please contact Charles Livingstone.

Tick ☐

6. Will you be able to comply with EU obligations on food and drink products?

British-based producers of food and drink products should review what they will need to do to export their goods to the EU post-transition.

EU food labelling rules apply to all food and drink placed on the EU market, independently of its place of production. This includes a requirement to identify a food business operator (FBO) who is responsible for ensuring that the product labelling complies with EU food information law. This means that a producer placing a product on the EU market must itself be established in an EU member state or, alternatively, identify an EU importer who will then have responsibility for the information.

At present, a UK business selling pre-packaged foods in the EU can put its own name and address on the product. Products shipped to the EU (or at least in the distribution chain) before the end of transition can still lawfully be sold afterwards, even if they only show the UK address. Under the Withdrawal Agreement, Northern Irish businesses will still be able to use their own name and address in the EU post-transition, as Northern Ireland will continue to follow EU labelling rules.

However, from 1 January 2021, food and drink products exported from Great Britain to the EU will need to display the name and address of the FBO responsible for complying with the food information rules. This must be either an EU (or Northern Irish) address at which the business is established, or the importer of the products into the EU / NI. The British address of the producer will no longer be valid, and would mean the product could no longer lawfully be sold in the EU (whether it could no longer be sold in Northern Ireland is less clear).

If a British-based producer does not already have operations established in the EU (or NI), it would be required to implement one of the following options to maintain market access:

- set up an EU / NI hub;
- engage an existing EU / NI distributor to act as an importer; or
- appoint a stand-alone EU / NI importer.

It is important to note that the concept of "established in the EU" is not defined in the regulations, and it has never been determined with certainty what is required. However, it is very unlikely that setting up a 'brass plate' subsidiary company in the EU or Northern Ireland, with no 'on the ground' personnel or commercial activities, would be sufficient.

British-based producers may therefore need to implement strategic changes to their corporate structures or supply chains in order to provide a valid FBO name and address. They should also review their product labels and implement any necessary changes to the FBO information.

British-based producers should also keep in mind that their products will no longer be able to be labelled as EU origin after the end of transition, as Great Britain will be treated as a 'third country' (i.e. a country that is not a member of the EU). Notably though, British-produced food will still be able to be labelled for sale in Britain as 'origin EU' until 30 September 2022.

In relation to organic products, it may not be possible for British-produced food to use the EU organics logo or label exports to the EU as organic, unless there is a deal on the EU and UK recognising each other's standards.

In addition to these labelling requirements, and the customs and other trade issues identified in section 4, strict new border controls will apply specifically to exported animal and fish products, including the need to produce an export health certificate and (for fish) a catch certificate. Products will have to be shipped via an EU border control post, which must be given notice of their expected arrival. If you intend to export certain foods of animal origin into the EU (e.g. red or white meat, fish and fish products, or dairy and egg products), you must also ensure your business is 'listed' as an approved establishment with the EU. EU import controls on certain plants and plant products (such as root and tuber vegetables, leafy vegetables, most fruits and some seeds), including the need for phytosanitary certificates and potentially EU border checks, will also apply from 1 January 2021.

For more on these issues, see the EU's guidance on Brexit and EU food law and UK Government guidance on preparing food and drink businesses for the end of transition, including on labelling and on exporting animal products and fish products. The Scottish Government has also published an update for the food and drink sector, summarising the most relevant import and export issues.

For assistance with these issues please contact Grant Strachan or Charles Livingstone.

7. Will you still be able to operate in the EU?

Tick ☐

UK businesses that operate in the EU will become third country businesses as far as the EU and its Member States are concerned. Your ability to continue operating in the EU may therefore be affected post-transition, for example by the introduction of additional approvals in certain EU Member States.

Knowing exactly what kind of changes your business might be subject to is crucial. This will vary by sector and Member State, and may also depend on whether you are operating in the EU via a branch or representative office or via a subsidiary incorporated in an EU Member State. Some Member States restrict who can own, manage or direct companies registered in the State, including through nationality or residency requirements and limitations on the amount of equity that can be held by non-EU-citizens. You should ensure you understand what requirements you might face in the particular Member State(s) in which you operate.

If you run a UK-registered company that has its central administration or principal place of business in another EU Member State, you should take legal advice on whether any structural changes might be required, or new risks might arise, as a result of the UK becoming a third country. Company group structures may also be impacted, including intra-group dividends and payments (such as interest, royalties and services), particularly from a tax perspective.

EU companies that operate branches in the UK will be subject to new information and filing requirements, as with any other third country's companies' branches, but these additional requirements should be minimal.

The UK Government's guidance on owning and operating EU businesses, operating across the UK-EU border and European corporate forms contains additional information, as does the EU's readiness notice on company law. See also our blog posts on cross-border mergers and European Public Limited-Liability Companies (Societas Europaea), Brexit-related changes to UK company law, and UK companies operating in Germany after Brexit.

For advice on operating your business in the EU post-transition, and particularly in relation to any restructuring that might be required:

Please contact Will McIntosh or David Lightbody in our corporate practice.

Tick

8. Will you be able to transfer personal data to or from the EU?

Personal data may be transferred between the UK and EU for a number of reasons. For example, an organisation in the EU may use a service provider in the UK, or a group of companies may share information (such as employee information) between a subsidiary and a parent company.

At least in the short term, the UK's data protection regime will not materially change. The Data Protection Act 2018 will remain in place, and the General Data Protection Regulation will be incorporated into UK domestic law upon the expiry of the transition period (subject to necessary modifications). This includes the rules on transferring data from the UK to the EU, which will – at least in the short term – continue to be permitted as a matter of UK law.

However, transferring data from the EU to the UK may not be so easy. The EU has an "adequacy assessment" mechanism, which authorises the transfer of personal data from the EU to approved non-EU countries.

The authorisation is conferred by the European Commission and it has not yet made an adequacy decision regarding the UK. The UK is subject to the standard adequacy assessment process, which commenced following the UK's departure from the EU on 31 January 2020. While the approval should, in theory, be straightforward given that the UK data protection regime will still be consistent with EU law, it is not automatic and is taking some time. In particular, the adequacy assessment will consider things like the UK's laws on data retention and access to data by intelligence agencies, which have previously been found to be incompatible with EU law. If no adequacy decision has been made by 31 December 2020 then it will be more difficult to transfer personal data from the EU to the UK.

Organisations should keep a close eye on that process, but cannot wait until 31 December to see whether an adequacy decision is forthcoming. If your business involves the transfer of personal data from the EU to the UK, then you should assess how disruptive the absence of an adequacy decision might be, and what steps you can take to mitigate its impact.

This may include agreeing 'standard contractual clauses' (SCCs) with the party who would be sending you the data. SCCs are clauses the Commission has approved for use when transferring personal data to countries that do not have an overarching adequacy approval. There are different SCCs depending on whether the relationship is one of controller and processor or controller to controller. The Schrems II decision in July 2020 emphasises the additional diligence on UK law and supplementary measures that EU data exporters will need to consider before relying on the SCCs.

The UK Government has published guidance on data protection during and after the transition period. The Information Commissioner's Office has also issued guidance on data protection at the end of the transition period. We have produced a detailed guide on data protection, including bullet point checklists for different types of organisations.

Our analysis also covers the obligations of UK organisations that offer goods or services to data subjects elsewhere in the EU, or otherwise monitor their behaviour. If your business does this, you will need to:

- appoint a representative in the EU by the end of the transition period; and
- understand how, and by which regulator, your activity in the EU will be supervised.

Similarly, controllers located elsewhere in the EU that offer goods and services to data subjects in the UK, or otherwise monitor their behaviour, will need to appoint a representative in the UK.

For more on data protection issues post-transition:

Please get in touch with Martin Sloan or Grant Campbell in our technology practice.

Tick ☐

9. Will you still be able to protect your intellectual property?

A business' most valuable asset is often its IP; its brand names and logos, product designs, patents and copyright material. During the transition period, there is no change in the status of EU IP rights in the UK. By and large, the IP provisions of the EU Withdrawal Agreement seek to preserve the essence of these rights at the end of the transition period.

In November 2018, we produced a briefing on what the then-draft EU Withdrawal Agreement said about IP protection during and after the proposed transition period. Although that briefing was about the previous Government's draft Agreement, the relevant provisions did not change in the final version.

The UK Government has published guidance for those holding various types of EU IP rights, to explain how the UK will deal with these rights from 1 January 2021.

- EU-registered trade marks (EUTMs) will no longer protect trade marks in the UK. Instead, the Intellectual Property Office (IPO) in the UK will create a comparable UK trade mark for all rights holders with an existing EUTM. This will be done free of charge. Although UK registration certificates will not be issued in respect of these trade marks, their details will be accessible on the UK Government's website. Where an EUTM application is still pending at 1 January 2021, the applicant will have nine months to apply to register a comparable UK trade mark (while retaining the filing date of the pending EUTM). The usual UK fees will apply . Parties with an EUTM can opt out of the comparable UK trade mark on request after 1 January 2020, as long as the comparable UK trade mark has not been used in the UK, assigned or licensed; is not the subject matter of an agreement; and is not the subject of litigation.
- Registered Community designs (RCDs) granted by the EU IPO will similarly no longer be valid in the UK but will be immediately and automatically replaced by UK rights. The equivalent UK design right will be recorded on the UK register at no cost to the RCD holder. It will retain the registration and application dates of the RCD and inherit any priority date. Holders of RCD applications that are pending as of 1 January 2021 can apply within nine months for the equivalent UK right. They will retain the filing date of the pending RCD but, as with pending EUTMs, the usual UK fees will apply. RCD holders will be able to opt out of the equivalent UK right after 1 January 2021, unless the re-registered design has been assigned or licensed, or is the subject matter of an agreement, or the holder has raised proceedings based on the UK right.
- Unregistered design rights will no longer be valid in the UK at the end of the transition period. As is the case for EUTMs and RCDs, on 1 January 2021, they will immediately and automatically be replaced by UK rights. Designs that are protected in the UK as UCDs before 1 January 2021 will be protected as a UK continuing unregistered design for the remainder of the three-year term attached to it. A UK unregistered design right called supplementary unregistered design will be created, to ensure that the full range of design protection provided in the UK prior to 1 January 2021 will remain available.
- In respect of patents, it will still be possible to apply to the European Patent Office (EPO) for patent protection that will cover the UK, and existing patents from the EPO will be unaffected. However, the UK will not participate in the proposed Unified Patent Court, the UK Government having withdrawn its ratification of the Unified Patent Court Agreement.
- Most UK copyright works will still be protected in both the EU and the UK, due to the UK's participation in the international treaties on copyright. For the same reason, EU copyright works will continue to be protected in the UK whether the works were created before or after the end of transition. However, UK consumers' ability to access UK online content in EEA Member States may be affected, as the EU Portability Regulation (which allows EEA consumers to access 'their' online content services elsewhere in the EEA) will no longer apply to the UK.
- Database rights that exist in the UK or EEA before 1 January 2021 will continue to exist there for the rest of their duration. However, UK citizens, residents and businesses will not be eligible to receive and hold database rights in the EEA for databases created on or after 1 January 2021. They will therefore need to consider whether an alternative means of protection can be relied upon in the EEA, such as licensing agreements or copyright.
- After 1 January 2021, there will be some changes to the UK system for the exhaustion of IP rights and parallel trade. IP rights in goods placed on the UK market by, or with the consent of, the rights holder may no longer be exhausted in the EEA. This means that businesses may need the right holder's consent to export IP-protected goods from the UK to the EEA. Similarly, IP rights holders will need to consider whether to allow parallel exports of their IP-protected goods from the UK to the EEA. Where goods are placed on the market anywhere in the EEA prior to 1 January 2021, by or with the consent of the rights holder, the IP rights will have been exhausted in the EEA and the UK. However, the position regarding IP-protected goods placed on the EEA market after 1 January 2021 and then imported into the UK is, at present, less clear.

For more on IP issues post-Brexit, please contact Anne Cornelius.

10. Do you know how, and by whom, your business activities will be regulated?

Tick ☐

The orders made by the UK and Scottish Governments under the European Union (Withdrawal) Act 2018 (the EUWA) will adapt EU legislation so it works as UK law post-transition. In a no-deal scenario they will all come into effect at the end of transition (if there is a deal then some of them will not be required, though which ones will depend on the terms of the deal). While the orders are intended to preserve the status quo as far as possible, some laws and regulations will simply not work outside of the EU and so may need to be dramatically altered. If you operate a business that is subject to EU regulation, it is vital to understand how this might change post-transition and how you might need to adapt to your new regulatory environment.

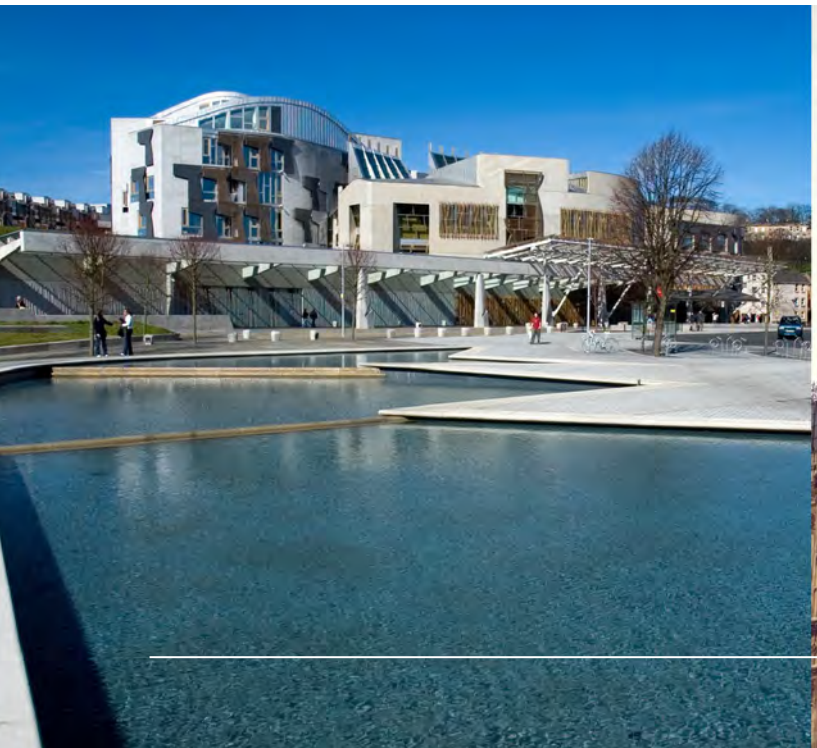
In some cases the changes will also include replacing an EU regulator with a UK regulator. For example, the Scottish Government is establishing a new environmental body, Environmental Standards Scotland, which will take on some of the responsibilities previously exercised by the European Commission. In the event that State aid rules continue to apply in the UK (which is currently a sticking point in the negotiations, with the UK resisting that), enforcement responsibility would transfer to the UK Competition & Markets Authority.

All businesses that deal with EU regulation or with EU bodies should understand how the rules applying to them might change, and who could be responsible for enforcing them, post-transition. Read our explanation of the EUWA process followed at Westminster, which remains ongoing notwithstanding that the original Brexit deadline and indeed Brexit itself have long since passed.

Scottish businesses should also keep in mind that various matters currently dealt with by the EU will (at least in principle) be the Scottish Parliament's responsibility post-Brexit, including in key areas such as agriculture, fisheries, the environment and public procurement. As a result the Scottish Government is principally responsible for making the Scottish 'statute book' in those areas fit for purpose post-Brexit, and has made a number of orders to that end. We produced a briefing summarising the first tranche of these orders, as well as updates on changes to public procurement and environmental law. The Scottish Parliament is currently considering a Bill allowing the Scottish Government to adopt EU law developments in devolved areas through secondary legislation (a so-called 'keeping pace' power), which could mean Scotland continuing to follow EU law (in some areas), even if the rest of the UK does not.

Negotiations are still ongoing between the UK and devolved governments about the introduction of new UK-wide frameworks in key areas, to ensure the harmonisation that currently flows from common EU rules is not replaced by different regulatory regimes in the various UK nations that would create new barriers to intra-UK trade. The UK Government's Internal Market Bill, which is intended to avoid such barriers, has been met with strong resistance from the Scottish Government. It therefore remains unclear what regulation Scottish businesses will be subject to in these important areas, who will be responsible for making it, and whether it will be enforced by Scottish-only or UK-wide bodies. Businesses will need to pay close attention to these issues as the end of transition approaches.

For more on these issues, please contact Christine O'Neill or Charles Livingstone.



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