# Transition and beyond

## Brexit legal risk report 2020

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# Introduction

Now that the UK has formally left the EU we are starting to get clarity on where the UK is likely to be at the end of 2020 – even if we don't yet know the extent of the UK's relationship with the EU after this date. This report gives a snapshot of some of the key legal areas you need to consider when preparing your business for Brexit and the overall impact of the expected changes.

We now expect a Brexit transition period until 31 December 2020, which the UK and the EU will use to negotiate their long-term relationship after this date. During the transition period, Brexit won't hugely impact the UK's legal landscape since EU law will still apply to the UK, so really maintaining status quo.

The transition period will provide businesses active in both the UK and EU markets with the opportunity to prepare and start to adjust to the new regime as the UK/EU negotiations develop. Despite the inevitable upheaval Brexit will bring, there could be opportunities for those businesses who remain agile and alive to the new regulatory environment.

There is still uncertainty as to whether the UK and the EU can come to a deal during the transition period – often it takes years for countries to conclude trade agreements. But, the message from the UK Government is that there will be no extension to the transition period – even though an extension is possible under the withdrawal agreement. This means a no deal situation – or something similar to what the UK Government is now calling the Australian model – cannot be ruled out yet. What is pretty certain given the course of Brexit so far, is that there will be further twists and turns as the negotiations develop during 2020.

If you have any questions about our report or the challenges and opportunities that Brexit will bring, please do get in touch.


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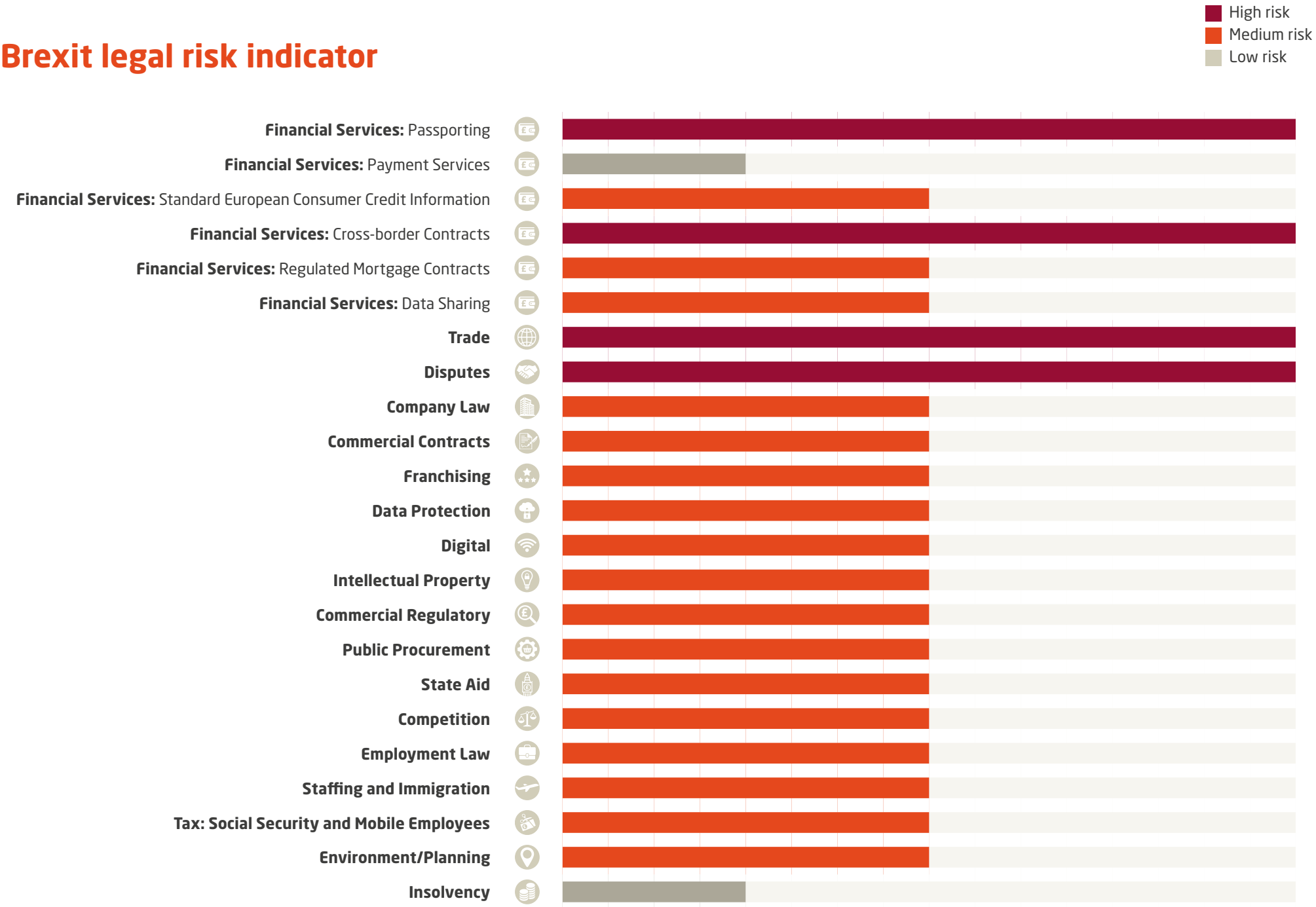
# Brexit legal risk indicator



# Financial Services

**Brexit will be highly relevant for financial services providers that carry out business in the EEA.**

## What does this mean for you?

### Passporting

The passporting regime will end. An implementation period began on 1 February 2020 and will run until 31 December 2020. During that time, inbound financial services firms and investment funds may continue to carry out business in the UK under the Temporary Permissions Regime (TPR).

Firms that rely on inbound passporting to the UK had to notify the FCA by 30 January 2020 if they intend to carry on business in the UK under the TPR. Firms should consider whether they need to obtain authorisation after 2023, as the TPR is only set to last for three years.

**Risk profile: High:** Businesses will not be able to provide financial services within the EU without suitable arrangements. It is important that firms that have not submitted an FCA notification know they will not be able to use the TPR to continue doing business in the UK.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'The passporting regime will end. An implementation period began on 1 February 2020 and will run until 31 December 2020.'

### Payment Services

EU Regulations such as PSD2 and 2EMR have been transposed into UK law by virtue of the Payment Services Regulations 2017 and Electronic Money Regulations 2011. However, there are likely to be a number of changes to legislation, which firms will have to monitor.

**Risk profile: Low:** There is no immediate risk to businesses, but they will need to monitor any changes.


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### Standard European Consumer Credit Information

There will be some modest changes to the Standard European Consumer Credit Information but very little else. The majority of consumer credit legislation originates from the UK. Yet there remains a question of whether HM Treasury will want to row back from some of the requirements of the UK Consumer Credit Directive (implemented in 2011). Whilst the changes are minimal, these still need to be taken seriously.

**Risk profile: Medium:** A failure to provide the specified information can mean that an agreement is unenforceable without a court order.


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## Cross-border Contracts

Cross-border contracts will need to be checked to make sure they're still enforceable after Brexit. For further information, see the section on Disputes.

**Risk profile: High:** Businesses that have initiated litigation, or are considering it, will need to check how a judgment would be enforced and if there are any additional costs involved.


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## Regulated Mortgage Contracts

As things currently stand, Brexit is unlikely to lead to any significant changes to the rules around regulated mortgage contracts. However, there is potential for HM Treasury to consider more broadly whether it wants to move away from some aspects of the Mortgage Credit Directive. The Mortgage Credit (Amendment) (EU Exit) Regulations 2019, which came into force on exit day, made some changes to foreign currency loan disclosures in the European Standard Information Sheet (ESIS), the definition of consumer buy to let (to capture UK policy only) and enabled HM Treasury to modify the Annual Percentage Rate of Charge (APRC). However, it may be that HM Treasury looks to make broader changes as part of any deal struck during the current transition period.

Although the changes to-date have been minimal, firms (particularly those offering foreign currency loans) should consider whether any changes need to be made to product documentation.

**Risk profile: Medium:** Firms should continue to monitor for changes to mortgage regulation introduced during the transitional period.


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## Data Sharing

Firms should consider data sharing and whether customers' personal data is being transferred between the UK and the EEA. The UK Government has made provision for the UK to transfer data to the EEA and other agreed countries. However, the position on data transfers from the EEA to the UK once the transition period ends isn't clear. Please see the section on Data Protection for more information

**Risk profile: Medium:** This will need to be assessed for each business. We expect it to be a significant consideration for most medium/large financial services providers.


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'Firms should consider data sharing and whether customers' personal data is being transferred between the UK and the EEA.'

# Trade

## What will change?

A key task for the UK and the EU during the transition period is to negotiate the terms of their future relationship. It is also a key task for the UK to negotiate the terms of its future relationships with third party countries.

The common forms of trade relationship mooted between the UK and the EU include a free trade agreement, a customs agreement with the EU, a customs union, trading with the UK as a World Trade Organization (WTO) member, European Economic Area membership, and European Free Trade Association membership together with bilateral trade agreements with the EU.

The UK Government appears to be swaying towards a free trade approach but the European Commission has explained that the deal ultimately negotiated will be the result of trade-offs.

Separately, the UK has also started trade agreement negotiations with a number of third-party countries. Although the UK is a member of the WTO in its own right, the European Commission represents EU member states collectively on the majority of WTO matters. At the end of the transition period, the UK will very likely trade with other WTO members as an independent member of the WTO. In anticipation of this, the UK has already signed continuity trade deals covering a variety of countries and territories.

## What does this mean for you?

The actual impact of Brexit upon businesses trading with the EU specifically will depend on the detail of the trade deal negotiated before the end of the transition period.

Where the UK enters into trade deals with third party nations, the impact of these may also be felt by businesses trading with these areas. At this stage, businesses should assess the impact of Brexit through exercises such as a thorough review of their export markets and supply chain mapping.

It may be that certain businesses will benefit greatly from trade agreements with third party countries; businesses may therefore be best placed to engage in lobbying activity now to make their voices heard as to the terms of these trade agreements (and who they are concluded with), either directly or as part of a trade association.

Businesses should also engage with legal and policy advisors to consider the barriers to cross-border trade in certain key target countries for export (or countries which could form a favourable part of a supply chain), with a view to assessing risk and lobbying governments to facilitate trade.

**Risk profile: High**


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'At the end of the transition period, the UK will very likely trade with other WTO members as an independent member of the WTO.'

## Disputes

**Brexit will be of interest if you are already involved in or are likely to be involved in a dispute with an EU angle. This may be where an opponent is domiciled and/or has assets in the EU or where you need to enforce an English judgment in the EU. Brexit will also be relevant if you need to consider the implications of English jurisdiction and choice of law clauses in your existing and future contracts.**

### What will change?

Not much will change during the transition period. There will not be any changes to the EU rules for determining which country's courts have jurisdiction to hear a dispute, how judgments are enforced, or the way in which proceedings are served on an opponent domiciled in the EU. At the end of the transition period, we understand that the Government intends to seek an agreement with the EU that is similar to current arrangements but whether or not this will happen is not yet clear.

### What does this mean for you?

- In situations where proceedings are issued before the transition period, the current rules on jurisdiction and enforcement of judgments will continue to apply. If you have any existing disputes involving an opponent domiciled in the EU, you should obtain urgent advice about whether it would be sensible to issue proceedings before the end of the transition period in order to benefit from the ongoing application of the existing rules. You should also consider if it is necessary to seek local advice to assess how you would enforce a judgment and/or serve proceedings in a particular EU country if the UK is unable to reach an international agreement on these issues.
- As the EU Service Regulation will no longer apply, you should consider the notice provisions in your contracts to ensure you can serve English court proceedings without any difficulty at the end of the transition period.
- If you would like a potential dispute to take place in a particular location, consider making jurisdiction clauses exclusive to avoid any resulting challenges. Being clear on the choice of law will also provide certainty.
- Brexit will have no or minimal impact on English arbitration law. Consider whether arbitration could be a suitable alternative for resolving disputes post-Brexit.

**Risk profile:** The risks are **high** for current or potential disputes where proceedings are to be issued.

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'Brexit will have no or minimal impact on English arbitration law. Consider whether arbitration could be a suitable alternative for resolving disputes post-Brexit.'

## Company Law

**On the basis that the UK and EU have entered into the withdrawal agreement, we don't expect Brexit to have a significant impact on UK company law. Unsurprisingly, its greatest impact will be on UK companies with a connection to the EEA and vice-versa.**

This guidance focuses on the impact on private limited companies, as the most commonly used business vehicle in the UK.

### What will change?

We expect that from the end of the transition period:

- The UK will become a "third country". This means that the legal personality and limited liability of UK companies may not be recognised if they have their central administration or place of business in one of the remaining 27 EU member states (EU-27). However, the UK and EU may negotiate otherwise as part of the transition discussions, or such companies may be recognised by a member state's national law or international law treaties.
- UK citizens owning, managing or directing a company registered in the EU may have to meet additional requirements (e.g. in relation to nationality or residency).
- Branches of UK companies operating in the remaining EU-27 are likely to become subject to the same information and filing requirements that apply to third country branches.
- UK companies will not be able to carry out EU cross-border mergers.
- European Public Limited-Liability Companies (or Societas Europaea) will lose registration rights in the UK.
- Where parent companies or subsidiaries are incorporated in the EU (not the UK), additional requirements for preparing and auditing accounts are likely to be introduced.
- EEA companies appointed as officers of a UK company will have to file more information with Companies House to meet the obligations of non-EEA companies.
- EEA companies will have to meet more requirements if they have an establishment (whether a place of business or branch) in the UK.

### What does this mean for you?

- UK companies should seek local law advice about their status if they have a connection (e.g. an established place of business) with any of the EU-27.
- Companies incorporated in the EU-27 but with their central management in the UK should check what implications Brexit has on their status, particularly if their place of incorporation adopts the "real seat" theory.
- For corporate groups operating in both the EU and the UK, it's worth checking whether you can continue to follow your current accounting standards and that your auditors will be authorised to operate in both the EU and the UK post-Brexit.

**Risk profile: Medium**

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'On the basis that the UK and EU have entered into the withdrawal agreement, we don't expect Brexit to have a significant impact on UK company law.'

# Commercial Contracts

## What will change?

Although contract law is mainly based on legal principles developed by the English courts, there are some areas of commercial law where EU law has a significant role. These include e-commerce, consumer protection, distribution and commercial agency. Most of this law has been embedded into national law and it seems unlikely that the UK will make any significant changes to this legislation post-Brexit in the short term. However, there is obviously scope for divergence over time.

Although companies may have been aware of the Brexit risks inherent in their contracts for some time, it has been difficult to 'Brexit-proof' contracts without certainty over timings and the future trading relationship with the EU.

## What does this mean for you?

Now that the transition period is in place, it is worth revisiting the following issues:

- **Interpretation of existing contracts:** What are the consequences triggered by a change in law? Does a change in law trigger a price review, a change of control, termination etc.? Does the contract contain any reference to the EU or EU law? If the territorial scope of a contract refers to the EU, it may be unclear whether this will extend to the UK and may need to be clarified.
- **Risk:** Does the contract price vary if new trade tariffs come into play? Who is responsible for late performance due to border delays? In the event of parallel regulatory regimes, who is responsible for compliance and costs (for example, additional licences or certifications)? Could regulatory divergence cause an impact within the supply chain? Where does the risk of any restrictions on the freedom of movement of workers or the freedom to provide services between the UK and the EU sit? Will currency exchange rates affect the cost of performance?
- **Termination of existing contracts:** If contracts are no longer profitable, does the contract provide any right of termination that may be triggered as a result of Brexit? It is unlikely that a standard force majeure clause will be triggered by Brexit without specific wording. Depending on the drafting, could the financial consequences of Brexit trigger an adverse change provision? Following the European Medicines Agency case last year, it appears that the doctrine of frustration is unlikely to assist, other than in very limited circumstances.
- **New contracts:** It remains a complex task to draft a clause specifying the consequences of specific Brexit-related issues at this stage. Parties may prefer to include a provision to renegotiate if a particular trigger occurs (such as changes in tariffs or regulatory requirements) which will affect the commercial validity of the arrangement.
- **Disputes:** Please see the section on Disputes for information on issues related to jurisdiction and enforcement of judgments.
- **Data:** The transfer of data will be affected by Brexit. Please see the section on Data Protection.

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'Although companies may have been aware of the Brexit risks inherent in their contracts for some time, it has been difficult to 'Brexit-proof' contracts without certainty over timings and the future trading relationship with the EU.'

## Franchising

### What will change?

The level of change post-Brexit for franchising in the UK will depend on the different areas in which franchising structures operate.

UK franchising will depend, for example, on the trade relationship negotiated before the end of the transition period and the level of taxes and tariffs that will apply. If the UK is not able to secure favourable terms, it is likely that the cost and administrative burden may rise significantly.

UK franchising structures may also be affected by new procedures and contractual provisions in relation to cross-Europe data flows if the UK does not benefit from EU adequacy rules post transition. Brexit may also affect contractual rights and obligations, particularly as the changed commercial landscape may prompt contracting parties to reassess their existing contract arrangements.

Protection of intellectual property rights may also affect UK franchising, especially in relation to trademarks and designs. For example, from the end of the transition period, registered EU trademarks and designs will no longer have effect in the UK. Having said that, it has been confirmed that at the end of the transition period the UK will automatically create a comparable UK version of every registered EU trademark and design.

You will find more information on how Brexit could affect areas such as trade, data protection, commercial contracts and intellectual property in the relevant sections of this report.

### What does this mean for you?

The legal and regulatory environment for franchising structures will change depending on their sector. Franchising structures will need to ensure they have carried out appropriate risk assessments to build resilience, where necessary. They should also keep up to date with developments, seek legal advice and assess the potential implications as the form of the new regime emerges.

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# Data Protection

**Brexit raises many data protection issues for UK businesses. These include the end of the application of the One Stop Shop mechanism in the UK, the role of the UK data protection regulator on the European stage and the need for UK businesses with a presence in the EU to appoint an EU representative.**

However, front and centre of many businesses' minds is whether personal data will continue to flow freely between the UK and the EU.

## What will change?

### Transition period

There will be no changes to the UK data protection regime before the end of the transition period. Under the withdrawal agreement, GDPR will still apply in the UK, along with the DPA 2018.

This means that data transfers are expected to continue as usual. The European Data Protection Supervisor confirmed this in a note it published, and the UK Government has stated that it will continue to recognise the adequacy of the EU's data protection rules.

### Post transition

The GDPR will be implemented into UK law by way of the European Union (Withdrawal) Act 2018 and the UK Government intends to continue to recognise EU countries as adequate.

It is expected that the UK and the EU will work towards a reciprocal finding of adequacy by the end of the transition period.

If this deadline is not met, alternative mechanisms, such as binding corporate rules for intra-group data transfers or standard contractual clauses would need to be in place to legitimise data transfers from the EU to the UK. Transfers from the UK to the EU would not be affected, as the UK Government has confirmed that it will recognise all EEA countries as adequate on a transitional basis whilst it works towards a formal adequacy finding for those countries.

The UK and the US have also agreed measures to use the EU-US Privacy Shield to legitimise transfers between each country.

## What does this mean for you?

The intention is for data flows to continue unaffected. But this may be ambitious, given that the EU has a deadline of the end of the transition period to reach a formal adequacy finding for the UK.

Businesses should continue data mapping to identify where they rely on receiving data from the EU and should plan contingency measures that can be put in place to adduce adequacy if the UK is left without an adequacy decision post transition.

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'If this deadline is not met, alternative mechanisms, such as binding corporate rules for intra-group data transfers or standard contractual clauses would need to be in place to legitimise data transfers from the EU to the UK.'

# Digital

**The impact of Brexit on the technology and digital sector will largely depend on the future trading relationship agreed between the UK and the EU. The Prime Minister has already opened up this question by making it clear that the UK will not agree to alignment to EU rules after the transition period ends.**

## What will change?

During the transition period, the UK will need to continue to apply and implement EU law, including ongoing EU Digital Single Market reforms, aimed at improving online access, promoting advanced digital networks and maximising the digital economy.

In some areas, the UK has already made it clear that it will no longer align. For example, the Prime Minister's recent statement said the UK would not implement Article 13 of the Copyright Directive. But the following reforms are due to be implemented during the transition period:

- **Telecoms:** Ongoing EU reforms to the regulatory framework for telecoms, including the European Electronic Communications Code (Recast) (EECC) with an implementation deadline of December 2020.
- **Media:** A Directive amending the Audiovisual Media Services Directive, with a completion deadline of September 2020.

In highly regulated areas such as telecoms and media, it is likely that the UK will keep the primary national legislation derived from EU law in the short term post-Brexit. But the Government will of course have scope to amend these laws going forwards.

## What does this mean for you?

The broader impact of Brexit outlined in this report will be relevant for all technology and digital businesses. They should follow developments on trade negotiations to understand how matters such as tax and tariffs, movement of workers, data protection, software export controls and conformity assessments will impact their business.

In regulated sectors, issues around reciprocal recognition will need to be resolved in order to minimise the impact on businesses in these sectors post Brexit. These include:

- The EU framework that allows surcharge-free roaming in the EU will no longer operate for UK consumers.
- Cross-border content portability.
- Broadcasters will lose the benefit of the "country of origin" principle which allows them to transmit into other member states.

It is currently unclear whether these issues will be addressed in any future trading agreement or if they will need to be resolved through commercial agreements or the restructuring of business operations.

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'In regulated sectors, issues around reciprocal recognition will need to be resolved in order to minimise the impact on businesses in these sectors post Brexit.'

# Intellectual Property

**Intellectual Property (IP) rights in the UK will largely stay the same until the end of the transition period.**

## What will change post transition?

Some of the key types of IP rights that Brexit will affect include trademarks, designs and geographical indications. It's unlikely that Brexit will significantly affect copyright law (other than in relation to some cross-border aspects).

EU registered trademarks and designs will no longer have effect in the UK. However, the owners of these registered rights will be granted new cloned UK registrations (a comparable UK trademark), which will maintain the original filing and registration dates. The UKIPO has indicated that it has no intention to charge for this comparable UK trademark.

EU trademark and design applications that are still pending at the end of the transition period won't be granted comparable rights. Instead, applicants will have a 9-month window to apply for UK rights while maintaining the filing date of the pending EU application. UK application fees are expected to be paid as though this were a new application.

Issues around enforcement of EU trademark rights raise some interesting issues. One of these relates to injunctions granted by UK courts prohibiting acts which would infringe an existing EU trademark. In these circumstances, the terms of the injunction will be treated as if they also apply to the comparable UK trademark.

On another point, geographical indications (i.e. signs used to designate products' specific geographical origin) that are protected in the EU at the end of the transition period will have the same level of protection in the UK as under EU law, without any re-examination. The UK will establish its own regime in this area, which will broadly mirror the current EU regime.

Any more changes will depend on any future trade agreement between the UK and the EU.

## What does this mean for you?

Brexit will change the way these rights are protected in the UK. Owners of these rights should ensure that their interests are protected as finer details of a deal are negotiated. There are steps owners can take, including:

- Ensuring that trademark and design registrations are in place to protect owners' current activities.
- Checking registrations will remain fit for current and future purposes and filing additional applications where necessary.
- Reviewing any agreements (such as licences) that refer to EU IP rights or list the EU as the relevant territory for enforcement issues.

**Risk profile: Medium**

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'Issues around enforcement of EU trademark rights raise some interesting issues.'

# Commercial Regulatory

## What will change?

Some trade bodies have appealed for regulatory alignment post-Brexit. They warn of a serious risk to competitiveness and significant disruption and cost for UK companies if the UK makes major legislative changes. In the run up to Brexit, the Government has been seeking to reassure businesses that it will only use the freedom to diverge if it thinks that a change in the law is worthwhile.

Many sectors are subject to significant regulation derived from EU law, such as financial services (see the section on Financial Services), manufacturing and the food and drink sector. The UK could choose to remove or amend EU regulations in these areas, but businesses that wish to trade with the EU will still need to comply with EU standards.

## What does this mean for you?

The implications of Brexit on distributors and manufacturers of goods are wide-ranging and include changes to the labelling of goods, import and export licences, tariffs, VAT rules and new customs procedures. Here are some particular areas of interest:

- **Change from distributor to importer:** Under EU law, an importer is the economic operator established in the EU that places a product from a "third country" on the EU market. The UK is due to become a third country following the expiry of the transition period. As a result, EU-based economic operators that sell UK products will become importers (subject to importers' obligations) rather than just distributors. This is likely to trigger additional regulatory requirements on the EU side, for example for product labelling and technical conformity. Conversely, UK-based importers of products produced in the EU may be subject to additional importer duties once the UK is no longer a part of the single market.
- **Manufacturing authorised representatives:** Manufacturers that designate an authorised representative or responsible person must ensure that such entity is established in the EU. Post-Brexit, the UK will no longer be an EU country.
- **Conformity assessments:** The UK plans to introduce its own UK Conformity Assessed (UKCA) marking, mirroring the EU's CE marking. However, the EU Commission has made it clear that conformity assessments carried out by UK conformity assessment bodies will no longer be recognised in the EU post-Brexit. Goods placed on the EU market will therefore need to conform to the requirements of an EU-recognised conformity assessment body.

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'The UK plans to introduce its own UK Conformity Assessed (UKCA) marking, mirroring the EU's CE marking.'

# Public Procurement

**The UK public procurement regime comes from EU public procurement directives, which have been implemented into UK law through UK regulations. These EU public procurement directives will still apply in the UK during the transition period.**

## What will change?

### Transition period

There will be no changes to the UK public procurement regime before the end of the transition period. The EU public procurement rules will continue to apply to UK public procurement procedures. The UK will also remain part of the World Trade Organisation's Agreement on Government Procurement (GPA), which contains requirements for public procurement that member parties have to comply with.

The EU public procurement regime will continue to apply to any public procurement procedures launched before the end of the transition period, even if the procedures are not finalised on the last day of it.

### Post transition

At the end of the transition period, the UK public procurement regulations would be preserved in UK law.

Having said that, before the December 2019 election, Boris Johnson announced a new Brexit roadmap that included the intention to amend the public procurement rules to reflect UK public procurement policy. The corollary to this was the UK becoming a member of the GPA in its own right (rather than through its EU membership). While similar to the EU public procurement regime, the GPA has a narrower range of public procurement activity and is less prescriptive. The UK Government has stated that it intends to continue to be part of the GPA post transition, which will allow it to reconsider the current public procurement rules and build in GPA-compliant flexibilities, if considered appropriate.

The nature of any future trade agreement between the UK and the EU would also affect the scope of the UK public procurement regime post transition.

## What does this mean for you?

Public sector organisations that are involved in public procurement activities (or predicting that they'll be involved at some point) should keep up to date with developments in this area. As we learn more about the post transition regime, organisations will need to assess the potential implications and obtain legal advice to mitigate risks during this period of change. They should also assess proposed regulatory divergence and its potential to impact their wider supply chain.

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'The UK Government has stated that it intends to continue to be part of the GPA post transition, which will allow it to reconsider the public procurement rules...'

# State Aid

**The EU's State aid rules are established under Article 107 of the Treaty on the Functioning of the European Union. They prohibit member states from granting State aid that distorts competition and trade in the EU.**

## What will change?

### Transition period

There will be no change to the State aid rules before the end of the transition period. During this period, the current EU State aid regime will continue to apply, including legislation and case law, which sets out exemptions. The European Commission will continue to approve UK State aid and the UK will remain subject to the decisions of the European Court of Justice (ECJ).

### Post transition

In 2019, the Government published the draft State aid (EU Exit) Regulations 2019 (the Regulations) intended to establish a UK State aid regime in the event of a no deal Brexit. The regime under the Regulations is broadly similar to existing State aid legislation, including adopting into national law certain exemptions for certain categories of aid. The regime includes minimal modifications to ensure effective domestic operation, with the CMA replacing the role of the European Commission.

The draft Regulations have not yet been passed. If they are not, it is anticipated that some equivalent alternative measure will be required as the effect of the European Union (Withdrawal) Act 2018 is to transpose into domestic law all directly effective EU law. The upshot of this is that the UK would be bound by the Treaty prohibition on unapproved State aid (including exemptions under EU law) without having an approval mechanism in place.

Before the 2019 election, Boris Johnson announced in a new Brexit roadmap the Government's intention to abandon the "red tape" of EU State aid. The corollary to this was the possibility of the adoption of a World Trade Organization (WTO) anti-subsidy style system. While similar in principle, it is anticipated that this regime would deliver significantly less certainty.

The EU, however, has indicated that it intends to insist upon the UK implementing a "level playing field" in exchange for any free trade agreement, including alignment on State aid rules. The ability to negotiate EU trade deals, and in particular to deliver a deal by the end of 2020, could be compromised if the UK pushes back on this point.

## What does this mean for you?

Public sector organisations granting State aid and undertakings in receipt (or anticipating receipt) of State aid will need to keep up to date, obtain legal advice and assess the potential implications as the form of the new regime post-transition emerges.

**Risk profile: Medium**

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'Before the 2019 election, Boris Johnson announced in a new Brexit roadmap the Government's intention to abandon the "red tape" of EU State aid.'

# Competition

## What will change?

### Transition period

During the transition period, EU competition law and jurisdiction will continue to apply as if the UK were a member state. The UK will continue to apply Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), Regulation 1/2003 and EU exemptions. The European Commission will continue to have jurisdiction over competition matters that affect trade between the UK and the EU.

Section 60 of the Competition Act 1998 will also continue to apply. This means that the CMA and the UK courts must continue to ensure that, so far as is possible, questions arising under the Chapter I and II prohibitions in the Competition Act 1998 are dealt with in a way that is consistent with the treatment of corresponding questions at EU level.

### Post transition

After the transition period, the CMA will no longer enforce EU rules. The Guidance published by the CMA on 28 January 2020 "EU Exit from the EU" provides further insight:

- Where the European Commission has formally initiated proceedings before the end of the transition period, it will continue to have competence for these proceedings. The CMA may however seek jurisdiction over "UK elements" of 'live' European Commission cases after the end of the transition period.
- Similarly, where the CMA has started to investigate conduct that may affect trade between EU member states and has not issued the decision before the end of the transition period, it will no longer enforce Articles 101 and 102 TFEU after the transition period.
- As regards mergers, the EU Commission will retain exclusive jurisdiction to review mergers that were notified or formally referred to it before the end of the transition period. The CMA has encouraged merging parties to approach the CMA for pre-notification discussions in cases where a merger might not be formally notified to the European Commission before the end of the transition period and the CMA is likely to have jurisdiction over the merger thereafter.

## What does this mean for you?

Given the similarity between EU and domestic competition rules, not much will change post-Brexit (for the time being). However, there will be some important procedural changes that will affect businesses. Most notably, the UK will stop being subject to the EU one-stop shop principle in relation to mergers with a consequence that merging parties may need to be prepared for parallel review of their transaction in the EU and the UK.

**Risk profile: Medium**

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'As regards mergers, the EU Commission will retain exclusive jurisdiction to review mergers that were notified or formally referred to it before the end of the transition period.'

## Employment Law

**The impact of Brexit on HR and employment law falls into two broad categories: the employment law framework and staffing (the latter is dealt with in the Staffing and Immigration section of this report).**

Employment law is one of the key areas of jurisdiction of the EU. Some pre-existing domestic rights were reproduced at an EU level (such as maternity rights and equal pay); and some new rights have been transposed into UK employment law as a consequence of our membership of the EU (for example, limits on working time and protections on the transfer of undertakings).

### What will change?

Employment legislation that fell within the remit of the EU mostly remains in place post-Brexit, which means that there is no immediate or automatic change to the domestic employment law landscape. Any changes are likely to be phased in as a medium priority for the Government. It's unlikely that key areas of EU law (such as protections on the transfer of undertakings and limits on working time) will be repealed in their entirety or significantly amended.

The Government has made assurances that workers' rights will be preserved post-Brexit. In addition, commentary from both the UK and the EU has indicated that 'level playing field' obligations will need to form part of a UK-EU trade agreement, preventing worker rights from falling below pre-Brexit levels. However, it is likely there will be some divergence from EU-derived rights over time. These are the likely candidates for reform:

- Restrictions on working time.
- Information and consultation obligations.
- Uncapped discrimination compensation.
- Some aspects of the Transfer of Undertakings (Protection from Employment) Regulations 2006 (TUPE) – for example, the restrictions on post-transfer harmonisation of terms of employment.

### What does this mean for you?

It is difficult to put practical plans in place ready for the impact of Brexit on the employment landscape, as much will depend on the extent to which the Government repeals or amends retained legislation. However, businesses should consider:

- Reviewing any contractual terms that rely on the application of TUPE as originally enacted.
- The extent to which Brexit impacts on your employment contracts (for example, governing law clauses for overseas staff and any definitions that assume the UK is covered as part of the EU).
- The impact on any international consultation vehicles.
- The impact on any employee data transfers outside of the UK.
- A workforce communication strategy should be in place in respect of the ongoing Brexit process, both now and as Brexit evolves during the transition period and beyond.

**Risk profile: Medium**

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'It's unlikely that key areas of EU law (such as protections on the transfer of undertakings and limits on working time) will be repealed in their entirety or significantly amended.'

# Staffing and Immigration

## What will change?

Leaving the European Union will result in the end of free movement of people as we know it – although not until the end of the transition period.

EU/EEA/Swiss nationals (and certain family members) who are resident in the UK by 31 December 2020 can apply for UK immigration status under the EU Settlement Scheme. The Scheme is intended to be user-friendly, aiming to grant UK immigration status where possible. The application process is simple and involves identity, residence and criminal record checks.

Depending on length of residence, applicants can either be granted "settled status" (permanent residence) or "pre-settled status" (time-limited residence that can be potentially converted to permanent residence at a later date). The Scheme has been open for nearly a year, with around 2.5 million people having already been granted status.

The position from 2021 onwards has yet to be definitively confirmed. The Government has stated that an "Australian-style" points-based system will be introduced, but these comments have yet to be expanded upon. The Migration Advisory Committee recently published its report on the potential use of a points-based system, but broadly recommended that the framework of the existing Tier 2 (General) system be retained. The MAC Report is advisory only, with proposals expected from the Government in the coming months.

However, it's almost certain - as recommended by the MAC – that the new system will bring EU/EEA/Swiss migrants (who arrive in the UK for the first time after 31 December 2020) and non-EU/EEA/Swiss migrants under the same umbrella when implemented.

## What does this mean for you?

One of the biggest risks is that staff supply will be impacted. Many EU/EEA/Swiss nationals will find it more difficult to migrate to the UK from 2021 onwards. Staff granted settled or pre-settled status will not face the same restrictions as those governed by the new rules, so ensuring eligible staff make Scheme applications should be a priority for employers throughout 2020. We recommend that employers carry out workforce audits to establish those who may be impacted.

Employers should also be mindful that wholesale changes to the current immigration system may leave their HR teams with knowledge gaps. They should provide training and support, ensuring that developments are tracked and cascaded appropriately.

Finally, the provision of immigration advice is a regulated area. Providing unregulated immigration advice is a criminal offence, so take care when communicating with staff. It is advisable to direct staff to existing Government resources, including the detailed toolkit in relation to the Scheme which is available online.

**Risk profile: Medium**

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'...ensuring eligible staff make Scheme applications should be a priority for employers throughout 2020.'

## Tax: Social Security and Mobile Employees

**For employers with EU-based employees working in the UK and UK-based employees working in the EU and EEA, one of the main Brexit-related concerns will be social security coordination.**

Currently, the social security rights of these employees are protected by EU Social Security Regulations (the Regulations). These Regulations ensure that employees (and their employers) are only subject to the social security rules of one EU member state at any time. Additionally, the Regulations provide significant cost and compliance savings by permitting contributions to continue to be paid in the home member state in certain situations (most commonly where employees are sent overseas on short term assignments).

### What will change?

The withdrawal agreement ensures that during the transition period, EU law, including the Regulations, continues to apply.

However, uncertainty remains about the position post-transition. Given the Prime Minister's pledge not to extend the transition period, there is a clear risk of a "no-deal" scenario following the transition period (either generally or specifically for post-transition social security co-ordination). If this happens, the European Union (Withdrawal) Act 2018 will create a new body of retained EU law. This will include the Regulations (as amended by the four no-deal Brexit social security regulations that were made in March 2019). Separate agreements with Ireland and Switzerland providing for social security coordination will also take effect.

The aim is to replicate (so far as possible) the EU social security coordination regime in UK domestic law. However, there is no guarantee that, once the UK is no longer a member state, the rest of the EU (other than Ireland) will take the same approach. This means there is a risk of double social security contributions and increased compliance obligations. While the UK has social security reciprocal agreements in place with some EU member states that might mitigate this risk, many are out of date or have limited scope.

### What does this mean for you?

Employers should be alert to the potential cost and compliance implications of a "no-deal" outcome and keep existing and future arrangements under review. While employers will want more certainty about how UK-EU social security coordination will work before making significant changes, it may beneficial to implement certain changes, such as bringing forward the start date of assignments, before the end of the transition period.

**Risk profile: Medium**

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'The aim is to replicate (so far as possible) the EU social security coordination regime in UK domestic law.'

# Environment/Planning

## What will change?

Although less pressing than other Brexit-related changes, the assessment of the environmental impact of development proposals is an issue that is almost certain to change in the medium to long term.

Most planning legislation is domestic in origin and will not change as a result of Brexit. However, there are two key areas, which relate to large scale development, that are governed by EU legislation. These are:

- The Environmental Impact Assessment (EIA) Directive; and
- The Habitats Directive.

Essentially, any major development that is likely to have significant effects on the environment will be subject to the EIA regime. Both major and smaller scale developments can fall within the Habitats Directive, if the proposal may have adverse impacts on EU-designated habitats or species that are protected within designated areas. If this is the case, a "Habitats Regulation Assessment" (HRA) is required.

Both the EIA and HRA regimes are well-established but, over the years, both have been subject to various legal challenges, causing substantial delays in development projects and creating an evolving regulatory framework. Under the European Union (Withdrawal) Act 2018 the basic position is that nothing will change: the EIA and Habitats Directives will be subsumed into the UK's domestic legislation.

In principle this preserves the status quo. However, the way these Directives have been interpreted in the UK has been shaped by many decisions of the European Court of Justice (ECJ). Post-Brexit, the Supreme Court may interpret them however it likes. It may take guidance from past and future ECJ decisions, or it could completely disregard them – its stance is not yet clear. It is also unclear whether lower courts (currently bound by existing ECJ decisions) will be able to ignore ECJ rulings after the transition period.

In practice, this opens the door to possible legal challenges on matters previously considered settled by "landmark" ECJ decisions. Domestic courts could potentially apply a more liberal interpretation of the EIA and HRA regimes, especially considering recent criticism of the overly prescriptive nature of the HRA framework.

## What does this mean for you?

This freedom could benefit new development whilst not necessarily reducing the overall environmental protections, although that cannot be ruled out. In the medium term, the prospect of re-opening once-settled legal issues might cause further delays to development approvals. Challengers could seek to overturn previous judicial decisions on the basis that established precedents no longer need to be followed.

**Risk profile: Medium**

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'In the medium term, the prospect of re-opening once-settled legal issues might cause further delays to development approvals.'

# Insolvency

**Currently, the EU's Recast Insolvency Regulation 2015/848 (the Regulation) has direct effect in the UK. One of the main purposes of the Regulation is to ensure that insolvency proceedings are automatically recognised across all EU member states, if they are commenced against a debtor in an EU member state (excluding Norway) which constitutes its Centre of Main Interests (COMI).**

## What will change?

Under the terms of the withdrawal agreement, the Regulation will continue to have effect in the UK until the end of the transition period. However, from 31 December 2020 (or the expiry of any extended transition period), cross border recognition of insolvency proceedings between the UK and EU member states will cease unless equivalent arrangements are agreed in the meantime.

The end of automatic recognition will mean that any insolvency practitioners taking new appointments in the UK after the transition period will find that, in many cases, they have no automatic power to take actions in respect of company assets located throughout the EU unless they obtain a domestic recognition order from the courts of the relevant member state. The inherent uncertainty, cost and time of undertaking such foreign legal proceedings will have consequences for both creditors awaiting returns from insolvency processes and on insolvency practitioners, who may question the commerciality of taking appointments with EU aspects altogether.

Additional consequences of the Regulation ceasing to provide automatic recognition of UK insolvency proceedings are:

- Companies in administration and compulsory liquidation in the UK will lose the benefit of the automatic statutory stay of proceedings against them in other member states.
- Pre-pack administration sales involving companies with assets located in the EU will be more complicated and potentially less attractive.
- The English courts will retain jurisdiction to wind up foreign companies under the Insolvency Act 1986 on the basis of the 'sufficient nexus' test and will no longer be bound to apply the higher COMI test for EU companies, as required by the Regulation.

## What does this mean for you?

The UK has long been known for its robust insolvency regime and enviable reciprocity arrangements with the EU and beyond. An absence of the Regulation will undoubtedly leave a gap in this framework insofar as European cross-border scenarios are concerned.

Insolvency practitioners will be directly affected and will need to consider how best to bridge the gap left by a lack of automatic recognition on a case by case basis. In addition, lenders to companies and individuals with assets and supply chains across the EU will be considering the security a cross-border regime provides them with. They will need to determine what steps they can take to minimise the risks created by a lack of automatic recognition with the EU.

**Risk profile:** Low

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'Insolvency practitioners will be directly affected and will need to consider how best to bridge the gap left by automatic recognition on a case by case basis.'

# Northern Ireland and Scotland

## Northern Ireland

Northern Ireland will remain part of the UK customs territory and will be included in UK free trade agreements. Essentially, it's leaving the EU Customs Union with the rest of the UK. Having said that, many EU customs rules will still apply in Northern Ireland, particularly for goods arriving that may be destined for the Republic of Ireland.

The protocol allows for "unfettered market access for goods moving from Northern Ireland to Great Britain" but the practical implications of exactly how goods will move between the two are not yet clear. Businesses remain uncertain about the extent of paperwork, checks on goods and how movement will differ one way across the Irish Sea versus the other. These details are only expected to become clearer through discussions during the transition period.

Cross-border cooperation in areas such as the Single Electricity Market will continue. This means that EU electricity wholesale rules, for example, will still stand. Under the latest protocol, the Northern Ireland Assembly is also given the option to "consent" to continuing certain EU regulations in Northern Ireland with periodic votes to take place after the end of the transition period.

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## Scotland

In the extensive UK-EU talks, no role has yet been carved out for the UK's devolved Governments. This means that there's still a great deal of uncertainty around the Scottish Government's functions post-Brexit. Foreign affairs and international relations are matters reserved to the UK Parliament, but observing and implementing international obligations are not reserved.

As any future relationship negotiated with the EU will likely be broad in scope, it is expected this will include obligations in devolved policy areas. The Institute for Government has maintained that the UK Government must include the devolved administrations to properly reflect Scottish, Welsh and Northern Irish interests during discussions.The Scottish Government has said that where there are devolved competences, the decision on those must be made by the devolved administrations, not by anybody else.

The Scottish Government has also put forward an argument that the Scottish Parliament and Government must have a larger role in the development of future trade policy and the preparation, negotiation, agreement, ratification and implementation of future trade deals. According to the Scottish Government, its key areas of interest during the future relationship negotiations will include: level playing field and regulatory alignment; fisheries; food, drink and PGIs (protected geographical indications); agriculture; services; justice and security; and immigration/ mobility.

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'Businesses remain uncertain about the extent of paperwork, checks on goods and how movement will differ one way across the Irish Sea versus the other. These details are only expected to become clearer through discussions during the transition period.'

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