BRODIES LLP

BREXIT: ARE YOU READY?

A checklist for businesses to assess how ready they are for Brexit.

Brexit: Are You Ready?

The UK is scheduled to leave the EU on 29 March 2019 at 11pm GMT. This is just weeks away, yet there remains no certainty on what will happen at that point. Businesses should therefore be taking steps to understand their exposure to the risks of a no-deal Brexit, and considering what they can do to prepare for all eventualities.

We have prepared a checklist of key questions businesses should be asking themselves, to assess how ready they are for Brexit. If you have formed or even activated a Brexit contingency plan, you can test it against our checklist. If you are still holding off from forming plans, or think you will be unaffected by Brexit, you can use the checklist to ensure you identify and consider all the key issues.

Our checklist identifies the issues most likely to be relevant across the widest cross-section of businesses, but Brexit does of course touch on many other issues specific to particular sectors. The UK Government has produced dozens of *'technical notices'* setting out what it would propose to do in various areas in the event of a no-deal Brexit (plus a new *tool to help businesses identify which notices will be relevant to them*), and the Commission has published equivalent *'preparedness notices'* containing the EU's proposals. The UK Government has also been publishing orders under the *European Union (Withdrawal) Act 2018* to adapt EU legislation so it works as UK law post-Brexit. In a no-deal scenario these changes will come into effect at the point of Brexit.

We mention some of these notices and orders below; you can find discussion of others on our *Brexit Hub*. This contains regular updates on Brexit key issues, including our *recap of the Brexit state of play (as of 9 January 2019).*

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?

The UK Government has said that, whether or not there is a deal on Brexit, EU citizens living in the UK prior to Brexit will be able to stay in the UK.

If the proposed Withdrawal Agreement is agreed and implemented, there will be no changes to the rights of EU citizens and their families until 1 January 2021 (or longer if the transition / implementation period were to be extended). The UK would therefore continue to observe free movement rights, including for EU citizens arriving post-Brexit, until at least the end of 2020.

However, EU citizens who were residing in the UK before the end of the transition period, and who wanted to stay in the UK longer term, would have to apply for 'settled status' under the new *EU Settlement Scheme.* The Scheme has been piloted in the higher education and health care sectors, and from 21 January 2019 was opened for applications from the wider public in a further test phase. The Scheme is expected to become fully operational on 30 March 2019, and under the Withdrawal Agreement the deadline for applications would be 30 June 2021.

However, while the *UK Government* has said that it would adopt an approach "based on the Withdrawal Agreement" in the event of a no-deal Brexit, there would be some changes. If there is no Withdrawal Agreement then there will be no transition or implementation period, and in those circumstances the EU Settlement Scheme would be open only to EU citizens who were residing in the UK by 29 March 2019. The deadline for applications to the Scheme would in these circumstances be 31 December 2020.

While UK-resident EU citizens will generally be automatically entitled to settled status (or to an equivalent 'pre-settled status' if they do not yet have the necessary five years of residence), it will not be granted automatically. It is therefore vital that your EU employees understand they must apply.

Applications to the Scheme were originally going to be subject to a £65 charge, which some employers had been asked to meet for their EU employees. However, on 21 January the Prime Minister announced that this fee would be waived when the scheme opens fully on 30 March 2019. Anyone who has applied already, or who applies and pays a fee during the test phases, will have their fee refunded.

For more information on the EU Settlement Scheme, see our recent post *"Settled status: what do employers need to know?"* You might also find useful the UK Government's *toolkit*, aimed at giving employers information on how to support EU employees in applying to the Settlement Scheme.

In the longer term, EU nationals who want to move to the UK after 31 December 2020 will have to apply for immigration status in accordance with the UK immigration system in place at that time. The UK Government published a *White Paper* shortly before Christmas on "The UK's future skills-based immigration system". See *here* and *here* for our earlier updates on what that future system might look like, and keep an eye on our Brexit Hub for more detail in the near future. *The Immigration and Social Security Coordination (EU) Withdrawal Bill 2018* was introduced to Parliament on 20 December. It will repeal EU free movement and subject EU nationals and their families to UK immigration control from 2021 onwards. The Bill provides the framework for the UK's future immigration system but the detail of that (as set out in the White Paper) will be contained in Immigration Rules and secondary legislation, which are yet to be published.

What is unclear at the time of writing is what rules would apply in a no-deal scenario to EU citizens arriving after 29 March 2019. If free movement rules would no longer apply and they would not be eligible for settled status, but the new immigration system will not be in place until 2021, some separate provision may have to be made to confirm their status. We will provide further updates on that and other related issues on our Brexit Hub.

For queries about the position of EU national employees and what you as an employer can or must do in respect of them, or to arrange a session for your employees (either EU nationals or UK nationals with EU family members) on the settled status scheme and application process:

Please get in touch with Lynne Marr or Joan Cradden in our employment team.

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

Tick ☐

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

If you are planning to visit the EU after 29 March 2019, and there is a no-deal Brexit, 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.

If travelling into the Schengen area (i.e. all EU countries except Bulgaria, Croatia, Cyprus, Ireland and Romania, plus Iceland, Lichtenstein, Norway and Switzerland) in a no-deal scenario after 29 March 2019, 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 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.

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

The Home Office has published *guidance on travelling requirements in a no-deal scenario*, and the Passport Office has created a tool for *checking whether your passport will be suitable for travel to the Schengen area.*

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

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 Brexit. 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 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. This requirement is not limited to a no-deal scenario – even if there is a transition period in which the UK and EU act as if the UK essentially remains a Member State, your contract may depend on the UK actually being part of the EU.

More generally, Brexit 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? Might you want to try and re-negotiate a contract, or consider exit options? What impact will Brexit have on your own supply chain? If you are part of a collaboration or joint venture then the issues will apply to all partners.

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

- If there are new trade tariffs, does the price paid under the contract change, or is it fixed?
- 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 or other regulatory requirements, how are those risks allocated or shared?
- 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 post-Brexit?
- Many contracts will have a "change in law" clause, but the way that is drafted will affect how it responds (if at all) to Brexit. 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 29 March 2019.

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

Tick

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

In the event of a no-deal Brexit, the right to move goods freely between the UK and the EU would fall away as of 29 March 2019, and trade would revert to World Trade Organization (WTO) rules. As a result, if you trade with the EU (whether importing or exporting) you may have to comply with the more onerous customs, excise and VAT procedures and rules that already apply to goods traded with non-EU countries – in a no-deal scenario the UK and EU would treat goods moving between them in the same way they currently treat trade with non-EU countries. Full import and export declarations, and separate safety and security declarations, may therefore be required.

An EORI number (under the Economic Operator Registration and Identification Scheme) is currently required to trade goods with non-EU countries, and so may be required to trade with the EU in the event of a no-deal Brexit. If you have not already registered for a UK EORI number (e.g. because you do not trade with non-EU countries) and you export to or import from the EU, you can register *here*. HMRC issued *letters* in December to VAT-registered businesses that only trade with the EU, to highlight the need to obtain an EORI number and other steps those businesses may need to take.

In a no-deal scenario a range of goods would become liable to tariffs. For goods exported to the EU, the relevant customs duty set out in the EU's Common Customs Tariff would apply. Goods coming into the UK from the EU would be subject to a new UK tariff, under the *Taxation (Cross-Border Trade) Act 2018*. The UK Trade Tariff is not yet finalised, but the Government has indicated that (at least initially) it expects to simply copy across the EU's existing tariffs. Goods would also have to comply with new rules of origin requirements, which apply to goods produced with parts or labour from different countries and determine where they are to be treated as coming from.

If you export to or import from non-EU countries, you should be considering whether those are among the 70 or so countries that have a free trade agreement with the EU, and if so how the UK's status under the agreement might be affected by Brexit. In a transition period the intention is for the EU, UK and third country to continue to act as if the UK remains an EU Member State. If there is no deal the *UK Government has said* it would aim to get bilateral agreements in place with the relevant countries as quickly as possible, but there would almost certainly be a gap between Brexit and any new agreements entering into force. During that time, trade would be on the same WTO terms as would govern UK-EU trade.

More detailed information on importing and exporting goods in the event of no-deal, including specific goods such as timber, animal products, controlled goods, plants and GM food, can be found in the UK Government's *technical notices* and in *the guidance issued by HMRC.*

See *here* for our summary of the technical notice on VAT for businesses: the Government is aiming to keep VAT procedures as close as possible to those that apply at the moment, though there will be some specific changes exporting and/or importing businesses should be aware of. In particular, VAT will become payable on goods imported from EU countries, though postponed accounting is to be introduced so businesses can pay the VAT on their VAT return rather than when goods arrive at the UK border.

For specific questions on VAT issues, please get in touch with Isobel d'Inverno in our tax team.

For other trade-related issues, please contact Charles Livingstone or Hannah Frahm.

Tick ☐

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

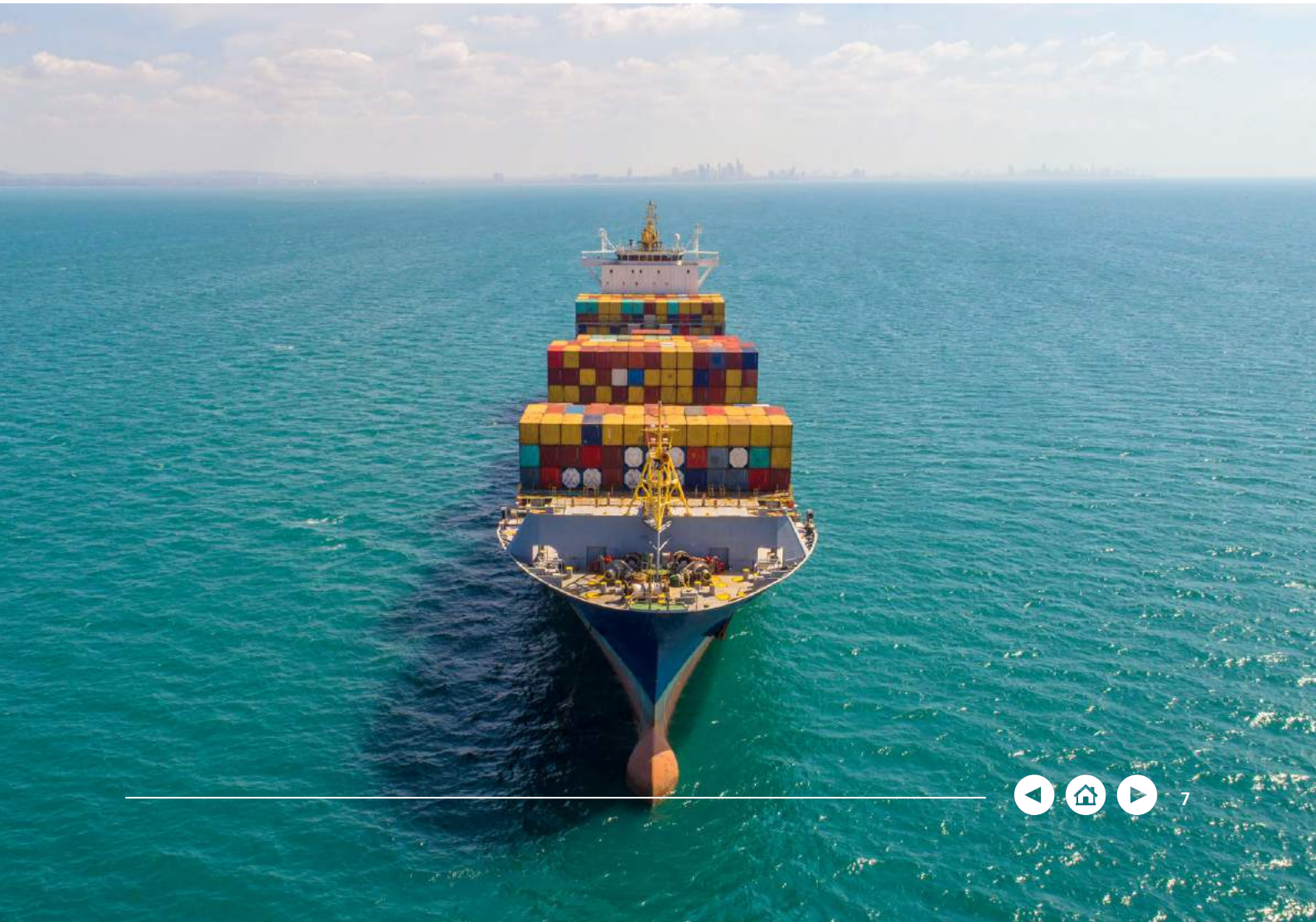
Separately from the exporting requirements covered above, if you are a UK manufacturer of goods that are subject to EU-wide standards you should also be reviewing whether your existing conformity assessments and certifications will continue to be recognised in the EU. You should also review whether you 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, so in a no-deal scenario the results of conformity assessments carried out by those bodies will no longer be recognised either (see the *EU's preparedness notice on industrial products* for more detail). Products assessed by UK bodies 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 pre-Brexit. CE marking based on self-declaration of conformity will still be possible, including when exporting to the EU.

Meanwhile, the UK Government plans to introduce a new UK mark for new products, to indicate compliance with UK standards (which at the point of Brexit will be identical to the EU's standards, but may then diverge over time). Products that have a European CE marking will still be able to be placed on the UK market, though that option will be time-limited for products certified post-Brexit, and so a duplicate UK marking may ultimately be required.

For more detail see the UK Government's *technical notice* on this issue, or our recent *update on the application of these principles to construction products.*

If you require any assistance please contact Charles Livingstone or Hannah Frahm.



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

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 impacted in a no-deal scenario, 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-nationals. You should ensure you understand what requirements you might face in the particular Member States 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.

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 *technical notice* contains additional information. See also our recent blog post on *cross-border mergers and European Public Limited-Liability Companies (Societas Europaea).*

For advice on operating your business in the EU in the event of a no-deal Brexit, and particularly in relation to any restructuring that might be required:

Please get in touch with Will McIntosh or David Lightbody in our corporate team.

Tick

7. 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 change even in the event of a no-deal Brexit. The Data Protection Act 2018 will remain in place, and the European Union (Withdrawal) Act 2019 will incorporate the General Data Protection Regulation into domestic law (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 Commission has said that the UK will be subject to the standard adequacy assessment process, and takes the view that it cannot even begin that process until the UK ceases to be an EU Member State. While the approval should in theory be straightforward given that the UK data protection regime will still be entirely consistent with the EU's own requirements, it is not automatic and will take some time. In particular, an 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. A no-deal Brexit may therefore be followed by a period in which it would be more difficult to transfer personal data from the EU to the UK.

If your business involves the transfer of personal data from the EU to the UK, you should assess how disruptive a no-deal Brexit might be, and what steps you might be able to take to mitigate its impact. This includes 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 UK Government has published a *technical notice* on data protection in the event of no-deal, and you can *read our analysis of that* (including some key points about the use of SCCs). *The Information Commissioner's office has also issued guidance on a no-deal Brexit.*

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 and also understand how, and by which regulator, your activity in the EU will be supervised.

Similarly, under proposed amendments to UK data protection law, 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.

Representatives will need to be appointed by 29 March 2019 in the event of a no deal Brexit, or by 31 December 2020 if there is a transition period.

For more on data protection issues post-Brexit:

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

Tick

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

A business' most valuable asset is often its IP, whether in the form of product designs, software or brand names. The UK Government has said that, whether or not there is a deal on Brexit, it will aim as far as possible to continue to recognise existing EU-wide IP in the UK, whether by automatically creating a new equivalent UK right or by creating new IP rights in the UK. However, if you hold the rights to any IP you will need to keep a close eye on how any Brexit arrangements might impact on the protection and enforcement of that IP in the UK, as Brexit could have a wide-reaching impact.

We previously produced a detailed briefing on the relevance of Brexit to various categories of IP, which can be found *here* (a separate briefing specific to food & drink, which also touched on IP issues, can be found *here*). We also produced an assessment of what the Withdrawal Agreement says about IP protection during and after the proposed transition period to 31 December 2020, which can be found *here*.

The UK Government has published a number of *technical notices* on how IP would be dealt with in a no-deal scenario. Key points include:

- *EU-registered trade marks and designs* that exist pre-Brexit will continue to be protected and enforced in the UK by a new UK equivalent right. The intention is for this to cause minimal administrative burden for IP owners, but you should check what costs and procedures will be involved and also consider whether you might in fact want to opt out of receiving a new UK-equivalent trade mark or design. If you have an EU-wide application pending at the point of Brexit you would have a nine month period from the date of exit to apply for the new UK right while retaining the date of your EU application.
- The UK will continue to recognise *unregistered community designs* existing at Brexit and create a new UK equivalent design right to mirror the broader community protection.
- Provisions will need to be made about the status of ongoing UK legal actions at the date of Brexit dealing with EU trade marks and designs, with the UK Government indicating that more information will be provided about this prior to Brexit.
- Existing *patent rights* and licences in force in the UK at Brexit, including supplementary protection certifications, will remain in force in UK law with no action required.
- While the UK Government would intend to explore the possibility of remaining part of any *Unified Patent Court* that comes into being, if that is not possible UK businesses would no longer be able to use the new Court in the UK and will have to enforce UK patents (including any unitary patents that exist pre-Brexit which are converted into UK patents for the UK) in the UK courts.
- As UK business could still be sued in the Unified Patent Court for actions in the remaining EU countries, you should keep an eye on whether and when the Unified Patent Court goes live, and decide in advance whether some or all of any existing or pending European patents you have should be opted out of the new system.
- While much of the existing EU and international *copyright* protections will continue to apply in the UK post-Brexit, a no-deal Brexit could impact on some database rights protection and the ability of UK consumers and businesses to use or access online content outside the UK. You may therefore want to consider what steps you can take to protect any rights that might be affected.
- The UK will continue to recognise the *exhaustion* of IP rights for goods placed on the market in the EEA, and so there will be no impact on the import of such goods into the UK. There may be limitations on the marketing of UK goods in the EEA if a different person owns the relevant IP in respect of the EEA and has not given their permission.

For more on IP issues post-Brexit, please contact Robert Buchan in our IP team.

Tick ☐

9. Have you checked how, and by whom, your business activities will be regulated?

The orders made by the UK Government under the *European Union (Withdrawal) Act 2018* (the EUWA) will adapt EU legislation so it works as UK law post-Brexit. If there is a transition then these orders will not be needed until 2021, if at all, but in a no-deal scenario they will come into effect at the point of Brexit. 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 be changed post-Brexit and how you might need to adapt to your new regulatory environment.

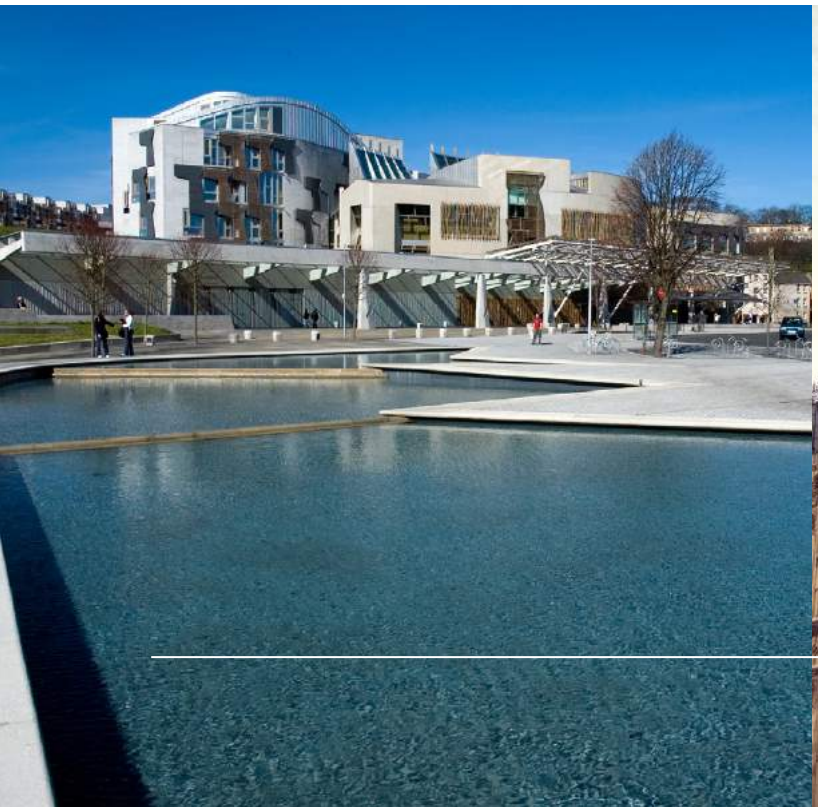
In some cases the changes would also include replacing an EU regulator with a UK regulator. For example, the EU's State aid rules will be *incorporated into UK law* by the EUWA, with *enforcement responsibility transferring to the UK Competition & Markets Authority*. The CMA has published various *guidance documents* in anticipation of that and other changes.

All businesses that deal with EU regulation or with EU bodies should understand how the rules applying to them might change, and who might be responsible for enforcing them, in the event of a no-deal Brexit. Read *our update for more information on the EUWA process*.

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 EU legislation in those areas fit for purpose post-Brexit, but as yet has not published any orders adapting the relevant EU legislation. This may be because the legal dispute over its intended equivalent to the EUWA was only *decided* by the Supreme Court in December. It remains unclear how matters will proceed in Scotland, but time will be tight to get all the required orders published, approved (where necessary) and in force pre-Brexit.

Negotiations are also 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. 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. For more information read our *update on those negotiations*.

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



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If you are reading a hard copy of this document you can also view an online version on the Brexit hub at **Brodies.com/Brexit**

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