

# Brexit risk register

## Data Protection



As the date for the end of the UK's "transition period" under the EU Withdrawal Agreement looms ever closer, our legal experts have pulled together a must-read risk register for all organisations. Our register highlights the vital issues that you need to be thinking about now in the run-up to 1 January 2021.

The risk	How to mitigate it
<p>Uncertainty over the legal basis for transferring personal data across international borders resulting in:</p> <ul style="list-style-type: none"><li>• Potential disruption to operations if data flows cease; and/or</li><li>• The risk of claims, enforcement action or fines for you or your overseas suppliers/customers if personal data is transferred across borders in breach of data protection laws</li></ul> <p>The main potential risks relate to personal data transfers out of the EU/EEA to the UK in a scenario where the UK has not been granted a decision by the EU that it offers an adequate level of protection for personal data as at 1 January 2021.</p>	<ul style="list-style-type: none"><li>• Establish which cross border data flows are critical to your operations.</li><li>• Seek professional advice and engage with relevant suppliers and customers as appropriate.</li><li>• Where possible, implement appropriate measures before 1 January 2021 to mitigate risks. For example, entities in the EU/EEA may require you to agree "Standard Contractual Clauses" before they will transfer personal data to you in a "no-deal" scenario. Any reliance on Standard Contractual clauses also needs to be considered in light of the Schrems II judgment, see our summary <a href="#">here</a>.</li></ul>
<p>Data sharing contracts that continue after 31 December 2020 may contain inappropriate provisions.</p> <p>For example, they may prohibit personal data transfers to entities based outside the EEA or contain definitions that no longer work properly after 31 December 2020. These contracts might become open to termination or uncertain in scope.</p>	<ul style="list-style-type: none"><li>• Review contracts to check whether they contain such prohibitions/definitions.</li><li>• Consider amending contracts/entering discussions with other parties as appropriate.</li></ul>

The risk	How to mitigate it
<p>Where you are not established in the EU/EEA but offer goods or services to EU/EEA data subjects, or monitor their behaviour, the General Data Protection Regulation (GDPR) “extra-territorial provisions” apply.</p> <p>There is a risk of fines or enforcement action if you do not appoint an EU/EEA “representative” where required under GDPR.</p> <p>Similarly, where you are not established in the UK, but offer goods or services to UK data subjects, or monitor their behaviour, the “extra-territorial provisions” of the UK’s version of GDPR (“UKGDPR”) may apply after 31 December 2020. And there is a risk of fines or enforcement action if you do not appoint a UK “representative” where required under UKGDPR protection documentation is not updated after 31 December 2020.</p>	<ul style="list-style-type: none"> <li>• Undertake a review of your activities to establish whether they fall within the GDPR or UKGDPR “extra-territorial provisions”.</li> <li>• If you are unsure whether this triggers an obligation to appoint a “representative” in the EU/EEA or UK, seek professional advice.</li> <li>• If appropriate, designate a representative under a written mandate that meets GDPR/UKGDPR requirements.</li> <li>• If your activities fall within the GDPR’s/UKGDPR “extra-territorial provisions” and you have appointed a Data Protection Officer or are obliged under GDPR to appoint a DPO, consider whether your DPO should be located within the EU/EEA or the UK.</li> <li>• Review relevant documentation e.g. GDPR privacy notices and records of processing activity.</li> <li>• Implement appropriate updates to reflect any transfers to EU/EEA countries (the EU/EEA will become “third countries” on 1 January 2021, subject to the terms of any withdrawal agreement) and the appointment of any representative.</li> </ul>



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