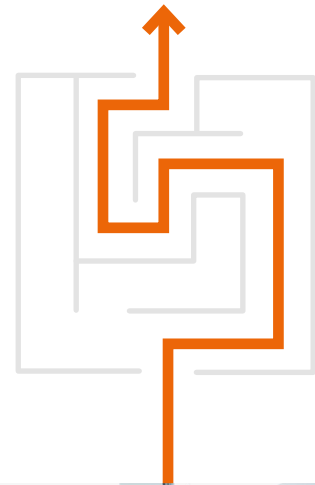


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## Getting ahead:

navigating legislative  
change post-Brexit



# The Certainty and Uncertainty of Change

For all of the uncertainty surrounding the United Kingdom's (UK's) departure from, and new relationship with, the European Union (EU), one thing has been certain from the very start of the process: change. The negotiations on the future UK-EU relationship were unique; they started from a position of alignment and convergence of policy and rules. The UK government has at various points noted that one of the central points of the UK's withdrawal from the EU was to seek to diverge from those rules and forge new trade and regulatory policies. This has presented many in the legal profession, and wider business, with challenges and opportunities.

The close of 2020 can be seen as the beginning of the endgame for Brexit, as the 11-month post-Brexit transition period expired, the future relationship agreements were signed, and many of the legal changes associated with the UK's withdrawal from the EU came into force. As the future UK-EU relationship begins to take shape, the policy and subsequent legislative changes should become clearer.

These policy, regulatory, and legislative changes have significant implications in several areas, such as cross-border trade, immigration, financial services, competition and state aid, data protection, and the environment.

The European Union (Withdrawal Agreement) Act 2020 maintained considerable legal continuity after the UK's withdrawal from the EU by enabling the UK to give effect to most EU law until the end of the Brexit transition period. With the UK outside the orbit of the EU, the European Union (Withdrawal) Act 2018 aims to avoid a legal cliff-edge by domesticating EU law, as far as possible, into a category known as 'retained EU law'. However, much retained EU law requires amendment. A vast body of amending legislation had already been passed in preparation for the end of the transition period, opening the door for legislation divergence.



**48,000+** amendments to **3,400+**  
Retained EU Regulations and Decisions

Source: Thomson Reuters (accurate as of November 2020)

This will leave lawyers challenged to track, compare and analyse the impact of new and amended UK and EU legislation on an ongoing basis. Monitoring how legislation diverges across jurisdictions is complex and a manual, piecemeal approach is resource-intensive, time-consuming and prone to error.

A 2018 study from the Organisation for Economic Cooperation and Development (OECD) and the International Federation Of Accountants (IFAC) examined the costs and risks that impact financial services companies when regulations diverge across jurisdictions. The study surveyed more than 250 experts and leaders from global financial institutions and found that for most of the responding organisations:

- Legislation divergence is a moderate-to-substantial barrier to international growth.
- Costs incurred as a result of legislation divergence are material to overall financial performance. Most of these material costs are caused by divergence in competition law, market-based regulation, and product regulations and consumer protections.
- There was a need to divert resources—including capital and senior management time—away from risk management activities in order to contend with the impact of regulatory divergence.

As the UK-EU relationship takes effect and details of divergence become known—the need for clear, accurate and up-to-date information will be imperative as lawyers provide guidance and advice on managing risks and optimising opportunities.

## Wide-Ranging Impact

The ramifications of divergence are already impacting business and law in several fundamental ways. UK businesses, EU businesses, and multinationals with a footprint in the either jurisdiction know that the legal implications touch many significant and highly regulated operational areas.

As a result, their legal advisors—whether in-house counsel, traditional law firms or alternative legal service providers, such as the Big 4 accounting firms—need a reliable, comprehensive and efficient tool for legislative comparison allowing for prompt analysis and assessment of the impact of diverging legislation. This would enable lawyers to assist their clients in formulating the appropriate legal and business strategy.

Also impacted, of course, are government lawyers responsible for advising on proposed policy by government ministers and drafting legislation, who will need a firm grasp of the ways in which UK and EU legislation evolves and diverges.

In addition, academics and students need a reliable, efficient way to see and understand precisely and comprehensively how UK domestic legislation now deviates from EU law.

There are also the financial and operational challenges that make it imperative to track legislation divergence in a cost-effective manner. For law firms, this work is likely to be non-chargeable, so it must be done efficiently as well as comprehensively, accurately, and reliably. It's a similar story for corporate legal departments, which are bringing more work in house and being pressured to do more with fewer resources.

The OECD/IFAC study suggests that legal teams that master this task have the potential to deliver extraordinary value by helping their clients and organisations minimise costs and risks. The financial services companies responding to the survey incurred average costs equalling five to 10 percent of their annual turnover when "regulations are opaque and information regarding requirements that are divergent across different jurisdictions is difficult to acquire". About one in 12 respondents placed the cost at 25 to 50 percent of annual turnover. These costs included:

- increased staffing required to manage local, international, and cross-jurisdictional regulatory matters;
- training for personnel who manage regulation and legislation across different regions and cross-jurisdictional issues;
- the need for multiple different systems specifically designed to address regulatory divergence; and,
- restructuring of compliance departments and use of external consultants to better address regulatory divergence.

The study also found that most significant jurisdictional inconsistencies involved supervisory interpretations and practices, fundamentally different regulatory frameworks, and different regulatory or data definitions.



## 5-10%

of turnover consumed  
by costs related to  
divergence



## 75%

of respondents claim  
that costs incurred as a  
result of divergence are  
material to their overall  
financial performance

Source: OECD/IFAC 2018

## Staying Ahead of the Game

This leaves legal counsel responsible for navigating the complexities and uncertainties of the post-Brexit regulatory landscape. As the UK and EU legal systems are diverging and new legislation emerges, lawyers need timely access to information on new laws in each jurisdiction in order to effectively, proactively and confidently advise clients, lobby for changes, and help businesses stay compliant as they plan ahead. Manually tracking legislative developments represents a significant time and cost investment and increases the risk of error.

A well-equipped intelligent statute comparison tool used for tracking and assessing legislation divergence should feature the following capabilities:

- **It's current:** Oftentimes, public legislation databases are not up to date, and don't reflect the most recent changes;
- **It provides context:** Lawyers need to see how, where and why divergence occurs in legislation as well as what it means for their client or organisation;
- **It has transparent methodologies:** To earn lawyers' confidence, a solution must have clearly defined editorial processes; and,
- **It's built upon high-quality information:** The underlying data must be current and comprehensive.

In addition, an intelligent tool for tracking legislation divergence is most valuable when it:

- provides side-by-side, marked-up comparisons of EU and UK law to clearly show how they diverge;
- allows legal professionals to see how UK and EU laws change over time, so they can compare laws and regulations as they stood at a point in time relevant to the matter at hand;
- conveys how the law affects relevant parties at different points in time;
- compares two versions of legislation across multiple jurisdictions with key differences marked. This includes historical, current, and prospective versions; and,
- predicts what a piece of legislation may look like in the future if it were amended by Bills currently before Parliament, or draft Brexit statutory instruments.

## Meeting the Challenge of Legislation Divergence

With these insights from the research tools, lawyers can understand how legislation diverges and deviates, communicate the implications of these changes to their clients and organisations, and stay ahead of the latest amendments and their impact.

Having effective tools and methodologies to track and evaluate the impact of UK-EU legislation divergence is essential for lawyers working in corporate legal departments, law firms and government agencies. Managing this task effectively will enable their clients and organisations to see what's coming, proactively assess the risks and opportunities, and confidently navigate the certainty and uncertainty of change.

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