



Brexit: planning ahead

Given the slow progress of Brexit negotiations to date, businesses need to consider what they would do if the UK left the EU in March 2019 without a deal. Whilst ideally, it would be preferable to await the outcome of negotiations, effective contingency planning on some issues may require a decision well before October 2018, when the negotiations are expected to conclude. Our checklist summarises the key legal issues which businesses need to consider, and actions to be taken, in advance of March 2019.

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Your suppliers

Your suppliers: goods

Imposition of tariffs and customs controls on trade with the EU is likely to increase the cost of imports. Customs controls could also disrupt trade flows, particularly for HGV traffic via the Channel ports and for businesses reliant on "just in time" distribution (which typically have limited storage capacity). Consider the following:

- Does your business rely on supplies of goods originating in the EU or in countries with which the EU has a Free Trade Agreement (which may cease to apply on Brexit)? If you rely on suppliers based in the UK, such as wholesalers, do you know how far they are reliant on products sourced from the EU?
- Do you know what tariffs will apply to those goods if trade with the EU is based on WTO rules only or the relevant EU FTA ceases to apply? Could you pass on or absorb the increased price or do you need to explore alternative sources of supply (potentially involving sourcing of goods from within the UK or from outside the EU)?
- How would your business be affected if there is e.g. disruption to HGV traffic through the Channel ports? In particular, do you rely on just-in-time distribution? Consider what can realistically be done to mitigate the effects of disruption e.g.
 - exploring alternative sources of supply either from within the UK or from outside the EU;
 - increasing UK storage capacity to accommodate a "reserve stock" which could be drawn upon if just-in-time deliveries are seriously disrupted; and/or
 - ensuring that your wholesaler or logistics provider has adequate contingency plans in place.

See also under "**Commercial contract issues**", "**Export controls and sanctions**" and "**Environmental, social and corporate governance**" below.

"[DEXEU] must focus on addressing the logistical trade hurdles of delays at customs posts. The alternative will be even worse congestion on the M20 after Brexit than that which exists at present."

Brexit-supporting think tank, The Bruges Group

Your suppliers: services

- Does your business rely on services supplied from the EU or from another country with which the EU has a Free Trade Agreement? If so, will Brexit have any impact on that supply? For example:
 - if EU-UK trade is based on WTO rules only with no agreement to maintain current EU passporting arrangements, financial services firms based in the EU may not be able to continue providing services to customers in the UK;
 - if your business exchanges personal data with service suppliers in the EU, this could become unlawful on Brexit unless certain conditions are met (see under "IP and data protection" below).

See also under "**Commercial contract issues**", "**Export controls and sanctions**", "**Financial services regulation**" and "**Environmental, social and corporate governance**".



Your customers



Supplying your customers: goods

- If you export goods to customers in the EU or in countries with which the EU has a Free Trade Agreement, do you know what tariffs will apply under WTO rules? What impact will tariffs have on pricing? Have you made provision for additional transaction costs due to increased border red tape?
- Will your products face technical or regulatory barriers on Brexit – for example, if there is no agreement with the EU on mutual recognition of product standards?
- Is it necessary for your business to establish a presence in the EU or to appoint an EU representative? For example, EU product safety rules require suppliers which are based outside the EU to appoint an authorised representative in the EU (in many cases, the importer/distributor of the products is appointed as the authorised representative). See also under "IP and data protection" below.
- How would your business be affected if there is e.g. disruption to HGV traffic through the Channel ports? Consider what can realistically be done to mitigate the effects of disruption e.g.
 - exploring alternative transportation arrangements such as short sea shipping;
 - increasing storage capacity in the EU to accommodate a "reserve stock" which could be drawn upon if deliveries from the UK are seriously disrupted; and/or
 - ensuring that your EU distributor or logistics provider has adequate contingency plans in place.

See also under "**Commercial contract issues**", "Export controls and sanctions" and "**Environmental, social and corporate governance**" below.

Supplying your customers: services

- If you provide services to customers in the EU or any country with which the EU has an FTA (which may cease to apply on Brexit), do you rely on any form of regulatory "passporting" or similar measures designed to facilitate market access for services providers? In particular, consider the following:
 - can WTO rules be relied upon to preserve equivalent levels of access after Brexit?
 - is there any other set of rules or international convention allowing services to be provided to customers in the EU despite Brexit? (e.g. in the case of linear TV broadcasting, the Council of Europe Convention on Transfrontier Television should be considered);
 - is it necessary for your business to be established in the EU to continue to take advantage of market access rights or to appoint an authorised representative in the EU? See also under "**IP and data protection**" below;
 - If your business exchanges data with customers in the EU, this could become unlawful upon Brexit unless certain conditions are met (see under "IP and data protection" below).
- Do your staff need to be able to travel/work in different locations in the EU? Can WTO rules be relied upon to preserve sufficient equivalent rights to travel/work after Brexit?

See also under "**Commercial contract issues**", "**Export controls and sanctions**", "**Financial services regulation**" and "**Environmental, social and corporate governance**".

Your contracts

Commercial contract issues

Consider whether contracts may need to be amended or contingency plans made to address any of the following concerns:

- Is the "Territory" in relation to e.g. any distribution agreements or licences defined by reference to the EU? Does the contract need to be amended to make clear that, post-Brexit, the UK is intended to be included or excluded, as the case may be?
- Are changes needed to any provisions dealing with VAT? See under "Tax" below.
- Whose responsibility is it to comply with and/or to bear the cost of any customs formalities, import duties or other additional obligations which may be imposed as a result of Brexit (but may not have been anticipated when the contract was signed)?
- Could Brexit or events associated with it (e.g. market volatility) constitute an event of "force majeure", "material adverse change" or other event entitling one party to terminate or to be relieved of its obligations? Commercially, is Brexit likely to prompt counterparties to seek early termination or to wind down the volume of business under any contracts?
- Does your business have long term contracts which are likely to be affected by Brexit? Does the contract need to be amended to address any issues not anticipated when the agreement was entered into?
- Is there a significant currency risk? Can this be managed e.g. hedging or by obtaining payment in euros on contracts with customers based in the EU and then using those funds to pay suppliers based in the EU?

See also under "**Your suppliers: goods**", "**Your suppliers: services**", "**Supplying your customers: goods**", "**Supplying your customers: services**" and "**Financial services regulation**".

Enforcement of contracts and dispute resolution

- The benefits of using English law to govern international contracts are unaffected by Brexit, and EU courts will continue to recognise and uphold that choice post-Brexit. The attraction of using English courts to resolve international disputes will also remain, as will the importance of London as an arbitral centre.
- The one area where Brexit may have an effect is that, following Brexit, an English court judgment may be less quickly and readily enforceable in EU member states than is the case now (and vice versa in the case of EU court judgments in the UK). Whether this turns out to be the case depends on the outcome of the

Could Brexit constitute a "material adverse change" allowing counterparties to terminate contracts? Is Brexit likely to prompt some counterparties to try to terminate contracts early in any event?



ALTERNATIVES TO EXCLUSIVE JURISDICTION CLAUSES

- non-exclusive jurisdiction clauses which will allow the flexibility of being able to choose the most appropriate jurisdiction at a later date, when it may be clearer which laws apply to establish jurisdiction and to what extent English judgments will be enforceable in the EU;
- choosing another acceptable EU court; or
- submitting disputes to arbitration, which will continue to be enforceable in the EU (and other jurisdictions).

negotiations between the UK and the EU. If there is no deal, many of the extensive EU rules which seek to harmonise cross-border litigation rules will fall away. Whereas, at the moment, there is a one-stop enforcement process within the EU, businesses may need to be prepared to deal with a more complex position. That will not matter if enforceability of court judgments within the EU is not important. If it is important, some alternative options are set out in the text box above.

- In the light of this, consider whether dispute resolution provisions in new or existing contracts should be modified in the light of Brexit.
- Whilst the UK is part of the EU, it is party (as an EU member) to the 2005 Hague Convention on Choice of Court Agreements which means that exclusive jurisdiction clauses in favour of the English courts will be respected in the EU. It is likely that the UK would accede to the Hague Convention in its own right following Brexit, so an exclusive English jurisdiction clause may still be enforceable - but you may still wish to consider the other options outlined above.

Your people

Employees: short-term issues

- Consider conducting an audit of the number of EU nationals working in the organisation and in which part of the business they are working.
- Consider also what support might be offered in the short term for employees and their families applying for EU residence documentation, and in future if UK visas become necessary post-Brexit.
- Keep an eye on proposals for changes to visa requirements for EU nationals and any potential changes in employment legislation – and consider the need for employee communications about possible changes.

Employees: medium to longer term issues

- Depending on the timetable for Brexit, you may need to consider the social security status of EU nationals working in the UK following Brexit.
- Longer term, you might also need to:

- review employment contracts, handbooks and policies in light of any legislative changes;
- consider any necessary changes to practices (such as the calculation of holiday pay or asking employees to sign opt outs of the weekly working limits) which might flow from legislative changes; and
- amend your employee incentive arrangements to take account of any changes in the prospectus regime.

Pensions

- Trustees of UK defined benefit pension schemes who have been given guarantees by companies resident in other EU member states will be asking questions around the ease of enforceability after Brexit; see further "**Enforcement of contracts and dispute resolution**".

Your tax position

VAT

- VAT is a European tax which has been implemented into UK domestic law. In the longer term, the UK will be free to decide whether to retain or repeal existing VAT legislation, although it is unlikely that the UK Government will abolish VAT (or even replace it) due to the cost.
- Check VAT provisions in your commercial contracts to ensure that these are "Brexit-proof". VAT provisions defined by reference to EU VAT legislation only may not cover UK VAT or any future replacement of it.
- Does your business have any supplies which could be impacted by changes to the place of supply rules, and the time at which VAT is payable, as a result of the UK no longer being an EU member state? For example:
 - cross-border supplies of goods from the EU to the UK will be subject to import VAT rather than acquisition VAT;
 - as a result, UK VAT-registered businesses (that have not been approved for deferment) will have to pay VAT on supplies of goods from EU countries at an earlier time - the time of import - than would currently be the case, giving rise to a cash flow disadvantage.
- Does your business rely on any EU-wide VAT administrative simplifications? For example, suppliers of digital services can register for VAT in one member state and use the mini-one stop shop (MOSS) to discharge their VAT liability in other member states.

VAT on goods from EU countries may have to be paid at an earlier time (the time of import) than at present, giving rise to a cash flow disadvantage

Withholding tax and other issues

- Broadly, UK parent companies receiving interest, royalties or dividends from subsidiaries elsewhere in the EU will receive those payments free from withholding tax imposed by the EU countries in which the subsidiaries are located (and vice versa) due to the effect of EU tax directives.
- Outside the EU, the UK's network of double tax treaties will maintain the status quo for cross-border payments between the UK and EU countries with which the UK has agreed a 0% rate of withholding tax. However, UK companies may lose withholding tax protections where the rate of withholding tax agreed in the double tax treaty is at a rate above 0% (e.g. interest payments from Italian or Portuguese subsidiaries).
- UK domestic legislation currently exempts the receipt of dividends paid to a UK parent company from corporation tax (subject to the dividend satisfying the conditions of the dividend exemption). It is not envisaged that the UK will make changes to its dividend exemption following Brexit, as this would damage the UK's position as a holding company jurisdiction. Other EU countries could, however, tax EU parent companies on the receipt of dividends from UK subsidiaries.
- Corporate groups should consider what payments are made into the UK from an EU group member (and vice versa) to assess where additional taxation may arise.

Your intellectual property and data

Intellectual property issues

- Does your business rely on any EU-wide intellectual property rights such as Community Trade Marks or Community Design Rights?
 - It is unclear whether such rights will continue to apply in the UK post-Brexit. If they have not already done so, businesses may therefore wish to secure relevant UK national IP rights to ensure that protection is maintained.
 - In some cases it may be appropriate to consider obtaining protection under national IP rights in other EU countries as well, particularly if they are important markets for your products/services.

If you rely on EU-wide IP rights, consider applying for relevant UK national IP rights to ensure that protection in the UK is maintained after Brexit.

Data protection issues

- Does your business export/import personal data to/from the EEA?
 - Unless the UK is recognised by the European Commission as offering adequate protection for personal data immediately after Brexit, additional steps may be needed to ensure exchange of such data remains lawful (such as putting in place agreements based on approved model clauses or binding intra-group corporate rules).
 - It may be necessary to appoint an authorised representative in the EU for data protection purposes.

Your property

- Businesses may require less space to house their workforces following Brexit. For example, the European Medicines Agency and European Banking Authority are required, for regulatory reasons, to relocate to an EU country following Brexit, but some financial institutions are also considering relocating some or all of their UK-based workforce.
- If your business is occupying leasehold property and you consider that relocation or a reduction in floorspace may be likely or desirable, conduct a review of your current leases to determine whether there is flexibility (usually in the form of tenant break rights or rights to assign) to terminate or assign all or part of your space, together with any conditions and notice requirements for doing so. If there are no break rights but assignment is permitted, are there any tenants who might wish to take on that space?
- If you are a landlord, consider whether any of your tenants have break rights and whether they are likely to want to relocate or reduce the amount of space they have let. If so, are the break conditions likely to be met, and are there other tenants who might wish to take new leases of the vacated premises?



Regulatory issues

Financial services regulation

- For UK companies engaged in the provision of financial services, Brexit will clearly have the greatest impact on those who rely on cross-border passporting rights. For those companies:
 - identify business lines reliant on EU passporting rights and key risks arising from Brexit;
 - identify key EU27 jurisdictions in which the organisation will wish to continue to operate;
 - begin considering whether certain operations should be relocated to existing EU subsidiaries or whether new EU subsidiaries will be required; and
 - continue to monitor the status of Brexit negotiations and determine whether restructuring may be needed for continued market access.
- Once the shape of the UK's future relationship with the EU becomes clearer, consider obtaining legal advice from overseas counsel in the relevant jurisdictions. **Note that there may be a long lead time for regulatory authorisation of financial services businesses in some jurisdictions, so you may need to take a decision on restructuring well before the final outcome of the Brexit negotiations becomes known.**

Export controls and sanctions

- If you supply military, "dual use" or other controlled products or you obtain such goods from suppliers in the EU, either you or your suppliers may need licences, prior notifications or registrations in order to continue with such EU-UK trade after Brexit (whereas at present, such controls may not be required due to exemptions on internal EU trade). Such requirements could give rise to delays whilst the relevant conditions are complied with.
- Would disruption of this type be problematic for your business? If so, make sure that you and/or your suppliers have taken all possible steps to comply with the relevant requirements in advance of Brexit and consider the points made in sections above about other ways in which potential delay/disruption to supplies can be mitigated.
- Will your business be affected by sanctions legislation? For example, does your business contract with EU or UK subsidiaries of Russian blacklisted firms (which may be prohibited if, as appears to be envisaged by the UK Government, the UK leaves the EU customs territory)?

Environmental, social and corporate governance ("ESG")

- For companies operating in an area in which 'product-related' environmental and safety controls apply (including in the chemicals, pharmaceuticals, food and consumer goods sectors), a close eye must be kept on the approach the UK takes to the various EU market access regimes.
- Companies exporting to the EU will need to consider appointing representatives there for internal market product compliance purposes, and also consider issues such as data sharing.
- As many of these regimes are currently set out in EU Regulations and have not to date needed to be transposed into domestic legislation, they will cease to apply in the UK post-Brexit. New UK-wide legislation and national bodies are likely to need to be established going forward. UK manufacturers wishing to export to the EU may therefore need to continue to comply with both the UK regime and existing EU product standards (to the extent that such regimes may differ). Whilst Government policy, at least in the short term, is to avoid reducing environmental standards overall, there could be a move to a more risk-based approach, for instance.

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- Consider also any changes which may arise in ESG reporting. Note that as the UK's Modern Slavery Act 2015 (along with a more general push for corporate transparency) was championed by Theresa May, it is likely that we will see (if anything) a ratcheting up of corporate reporting obligations in this area.
- However other areas of ESG reporting, such as energy auditing, are based on EU-driven initiatives and may be affected given the ongoing Government review into the simplification of business energy and carbon reporting schemes. That said, in view of the wider trend towards increased transparency in sustainability reporting, the nature of the matters that need to be reported may remain substantially the same.

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For more detail on the background to these issues, please refer to our [Brexit site](#).

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