

Uncertain times need an expert hand



It is expected to take a minimum of two years for the UK to negotiate its exit from the European Union, and the eventual shape of the agreements between the UK and the EU will determine how this will affect your business. That said, there are a number of areas that it is advisable for you to start considering now:

Your business: Commercial contracts

- Long-term contracts:** the type of contract most affected will be long-term cross-border agreements irrespective of whether they are with EU or other countries (remember that the UK is likely to have to negotiate new trade agreements with non-EU countries). If possible, seek to amend them now or at a suitable time over the next two years (e.g. when a contract variation is being agreed). If this is not possible, you will need to assess and seek to mitigate the likely risks that will flow from them.
- New contracts:** new contracts are where you can do the most to minimise your Brexit risk. As a business you will need to consider whether you wish to enter long-term agreements that will bridge the likely date of any Brexit or whether you want a shorter term agreement, a right to break the agreement early or a price adjustment provision that deals with cost changes arising from a change in law following Brexit.
- Force majeure:** review your force majeure clauses. In itself Brexit is unlikely to be a force majeure as it is not expected to prevent a party from performing its contractual obligations. Changes in specific laws or the imposition of quotas via international trade agreements, may cause a force majeure provision to be invoked.
- Pricing:** the effect on the world financial markets as a result of the Brexit vote has emphasised the need to be clear on pricing and the assumptions that are built into any price. At present, this is as important in short-term contracts as it is in long term ones. Factors to consider include:
 - o what is your choice of currency?
 - o have you dealt with currency fluctuations?
 - o have you included an appropriate index linking mechanism?
 - o how is the cost of legal /regulatory change, and its effect on price, dealt with?
- Import / export costs:** all international supply agreements will need to apportion the cost of import and export tariffs. Make sure you are aware as to which party is responsible for these risks and, in new contracts, negotiate accordingly. Remember that Incoterms and other similar standard terms will apportion these costs if they are incorporated into your contract.
- VAT:** there is a potential that the scope, and rates, of VAT may change post-Brexit. Make sure that your pricing mechanism minimises the impact of such changes on you.
- Territory:** make sure that references to the EU being the “territory” are clear as to whether this includes England, Wales, Scotland and Northern Ireland both before and after any Brexit. In view of the possibility of further moves by Scotland for independence, ensure that references to the United Kingdom are stated to include all four countries (and again, whether they should still do so after any Scottish independence).
- Funding:** is your counterparty directly or indirectly funded by EU grants? If so, consider how it will continue to fund itself in the event that those funds decrease or cease? If your counterparty requires private funding to perform its obligations, are you confident that it has such funding or that it is in a financial position to obtain it?
- Hedging:** speak to your trade financier about managing potential risk through interest rate hedging.

- Supply chains:** once you are clear on the risks in your customer relationships, review how such risks are passed down your supply chain and, if they are not, consider passing them down to your suppliers at your next re-procurement. Ensure that critical suppliers have in place business continuity plans that cover any disruption that may be caused by an eventual Brexit.
- Governing law clauses:** when negotiating new contracts think carefully about the dispute resolution and governing law clauses. These clauses should be drafted to make it clear which courts are to have jurisdiction in the event of a dispute and which law is to govern the contract.
- Follow the Financial Conduct Authority on Twitter to keep abreast of any regulatory changes @TheFCA.

Your financial position: Insolvency

- As UK insolvency law is not derived from EU law, the effect on businesses domiciled and trading solely in the UK will be minimal. However, businesses should identify whether they have significant exposure to businesses in the EU.
- Businesses with a parent or subsidiaries in other EU countries need to understand the solvency of these entities as recognition of local insolvency office holders could end.

Protecting your assets: Data Protection and IP

- Identify whether you trade with individuals in the EU or 'monitor behaviour' of individuals in the EU for example, by placing cookies on websites. If so the new General Data Protection Regulation (GDPR) will still apply to you even though you are based in the UK. You should continue with your GDPR readiness program.
- Identify whether your use of personal data is restricted to UK based individuals only. If so, the Data Protection Act 1998 will continue to apply to your activities for the time being, however the Information Commissioner's Office has indicated it will seek UK law reform in this area.

Your people: Employment and Immigration

- Identify any members of staff who work outside the UK and within the EU and EEA. We don't yet know if free movement of workers between the existing EU and EEA states will continue, but if not, visas may be required.
- Identify any members of staff recruited from the EU. Such staff are entitled to continue to work in the EU for the time being. Consider whether key individuals should be encouraged to apply for a permanent residence card to remain in the UK (they will need to have lived in the UK for at least five years to apply for this). EU staff resident in the UK for less than five years should consider applying for a registration certificate.
- It is still possible to recruit EEA nationals without work visas, but if your business relies heavily on unskilled labour from the EEA, start to consider how you may be able to fill any vacancies from the UK labour market. If you are recruiting staff you must continue to consider any applications from EU nationals and cannot prioritise candidates from the UK.
- Review all employees' contracts of employment and identify those who have refused to opt out of the 48 hour working week. The Working Time Regulations restrict individuals from working an average 48 hour working week unless the worker has opted out of this. If this restriction is removed, employers may (depending on the contractual terms agreed between the parties) be able to insist that their workforce work longer hours.
- Review the holiday pay arrangements in place for all staff. The issue of holiday pay has been particularly contentious and the Government may decide that workers are only entitled to receive their basic pay (excluding overtime and commission payments) when they take a holiday. Legislation will be needed to clarify the position given recent binding case law in this area.

Securing the future: Pensions

- Work with your scheme trustees /managers to assess and refresh your funding strategy in order to minimise risk from any current market volatility.

Financial position: Tax

- The UK tax regime relies on European law in a number of respects, in particular in relation to VAT. If your corporate structure includes subsidiaries based in EU member countries, you may well be affected by withholding tax on dividends or royalties or domestic taxes relating to cross border payments. These are all areas which in due course could be affected by our departure from the EU.

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