

BREXIT CHECKLIST

1. GUIDANCE

Regardless of whether Brexit results in a deal or not the key areas which are likely to be affected include, free movement of goods and free movement of people. This means supply chains which rely on importing goods from the EU which may suffer delays or additional costs, and unskilled and highly skilled workers who are currently working in the UK as EU citizens.

This checklist is designed to assist you highlight potential risk areas for your business in two ways. Firstly, you will need to be aware of which areas of your business may commercially be impacted as a result of any changes. Secondly, your contracts should be audited so you are fully aware of obligations which could become financially onerous or difficult to achieve, and any areas which you could re-negotiate were necessary or provisions which already grant you some protection.

If we leave the EU without a deal a number of measures have already been decided or considered by the Government. The link below directs you to an EU Exit Readiness Online Tool with 7 simple questions about your business. Once you have answered the questions you will be automatically directed to relevant Government published guidance documents on how a no deal Brexit will impact matters such as: Accessing public sector contracts, VAT for businesses or supporting EU citizens in applying for the EU settlement Scheme as an Employer.

<https://www.gov.uk/business-uk-leaving-eu>

2. WHAT TO REVIEW

You will need to review standard terms and conditions with your suppliers, clients, sub-contractors and bespoke contracts. Be aware that all contracts could potentially be impacted even those which are within the UK as such contracts may rely on an EU supply chain or EU workers. You should also review your consumer contracts, if applicable, and be aware of any potential changes to public sector contracts (guidance available via the above online tool).

Consider how reliant your business or a particular contract is on each of the below considerations, then determine the risk accordingly. You can use the tables below as a reference or devise your own system based on the factors and considerations (all reference to the EU mean the EU excluding the UK). The first table suggests commercial factors you need to consider. You should determine how reliant your business is on each of the factors and whether your responses present a potential risk to your business. The second table lists contractual terms which you will need to review. You then need to decide whether that clause may cause you any difficulty or present a particular risk. A column for your commercial relationship has been included to help you highlight which clauses or contracts you may be able to negotiate. You will then need determine which, if any, contracts will need renegotiating if your commercial relationship allows or where you may need to consider alternatives to protect yourself. This will allow you to sign post higher risk contracts or commercial relationships.

3. REVIEW

COMMERCIAL RISK FACTORS

FACTOR	CONSIDERATIONS	RELIANCE (LOW – MED – HIGH)	RISK
1. EU contracts	<p>Is your business dependent on the EU market?</p> <p>Are you currently conducting work within EU countries other than the UK?</p>		
2. Supply chain and availability of materials	<p>To what extent do you rely on importing goods from the EU?</p> <p>To what extent would an import tax effect your business?</p> <p>Do you currently have any contracts which specify goods must be ordered from a specific company operating in the EU?</p> <p>Are you able to make any allowances in case there is a delay in receiving any such goods?</p>		
3. Availability of high-skilled labour	<p>What percentage of your work force currently rely on the right to work as an EU citizen?</p> <p>Do you rely on agency workers? What percentage of that work force rely on the right to work as EU citizens?</p>		
4. Availability of unskilled labour	<p>What percentage of your work force currently rely on the right to work as an EU citizen?</p> <p>Do you rely on agency workers? What percentage of that work force rely on the right to work as EU citizens?</p>		
5. EU funding	<p>If you are receiving EU funding have you considered alternative options?</p>		
6. Competition law	<p>Are there commercial agreements in place which are subject to competition law rules? E.g. Distribution Agreements.</p>		
7. Agency contracts	<p>Are you acting as agent or have you engaged an agent? Is that agreement subject to the Commercial Agents Regulation?</p>		

CONTRACT AUDIT

CONTRACTUAL CLAUSE	CONSIDERATIONS	RISK/DIFFICULTY (LOW – MED – HIGH)	COMMERCIAL RELATIONSHIP
8. Currency fluctuations	Check whether the currency of the contract price and the payment are specified. (If not or both are specified as pound sterling then this is likely to be low risk.)		
9. Contract Price	Check the contractual pricing mechanism to minimise the impact of the imposition of import tariffs and changes in VAT. Have you agreed a fix price for everything or a price plus VAT or other additional charges?		
10. Force Majeure	Review such clauses to determine what has been included as force majeure		
11. Right to Terminate	Make a note of contracts which are at risk of being terminated for breaches such as delays. Be aware if a contract can be terminated at will.		
12. Extensions of time	Check the relevant events and relevant matters. Will you be able to claim for an extension of time if goods are delayed?		
13. Change in law	Check whether a change of law clause has been included. Check allocation of additional cost and risk depending on the time you have to implement the change.		
14. Jurisdiction, choice of law and dispute resolution	Check whether your contract is subject to English and Welsh or EU law as well as jurisdiction.		
15. EU Law and Regulatory approval	Are any obligations in the contract defined with reference to EU regulations?		

4. SOLUTIONS

To mitigate the risks you have highlighted above consider these solutions. Once you have completed your commercial and contractual audit the BESA Legal and Commercial Team are available to discuss these solutions with you in greater details. If you have specific questions regarding an ongoing or new contract which you have already reviewed we may be able to address any specific concerns or questions you may have through our usual document review service.

COMMERCIAL RISK FACTORS

The commercial risks listed as points one to seven are largely things which you need to be aware of and will need to make allowances for in order to mitigate the risk to your business. You may wish to consider using the no deal government guidance as a reference until further notice. Be aware that if you are contracted with a commercial agent and the Commercial Agents Regulations are abolished after Brexit then the agent may seek to re-negotiate the terms of their contract.

CONTRACT AUDIT

8. CURRENCY FLUCTUATIONS

Based on the majority of contracts submitted to the Legal & Commercial Team for review, it is unlikely that your contracts specify euros or any currency other than pounds sterling. However, if you are purchasing goods in different currencies consider amending the clause to set fluctuation thresholds which would allow you to switch currencies according to market conditions or to re-price the contract.

9. CONTRACT PRICE

It is important to seek to mitigate this risk by renegotiating the price of the contract and to ensure that, if tariffs make the contract unworkable or unaffordable, you can trigger the termination provisions. Check your termination provisions to identify what your options are.

10. FORCE MAJEURE

For a force majeure clause to apply it must be specifically stated in the terms of the contract and excuses you from your obligations due to a disruptive event outside of your reasonable control. The clause itself might refer to specific or generic examples. However, to rely on force majeure to terminate performance under the contract must be prevented by that event physically or legally, but if a contract becomes financially detrimental then you will not be able to rely on force majeure. If a contract has been entered into after the Brexit referendum you are unlikely to be able to rely on force majeure as you are expected to take all reasonable steps to mitigate your position as a prudent business. You should consider your extension of time or termination provisions instead.

11. RIGHT TO TERMINATE

If the other party have the right to terminate due to delays it is likely subject to your compliance with extension of time provisions. For this reason you should ensure you are aware of when and how to apply for an extension of time as discussed below. With regards to termination at will (which are onerous clauses which we generally advise should be removed where possible when negotiating a contract) you need to check whether this is a mutual right or one sided. If the other party has the

right to terminate at will and you do not, then you will need to rely on your commercial relationship to reassure the other party that you will be able to meet your contractual obligations. You should make a note of any contracts where you have the right to terminate at will if necessary.

12. EXTENSION OF TIME

If you need assistance with extension of time applications then standard JCT and NEC notices are available to download from the Members' Area of the BESA website here: <https://www.thebesa.com/resource-centre/legal-commercial/contract-management/>. Such applications should be filed promptly and you should make a note of the relevant contractual clause numbers. If you file an application for extension of time it is likely that you will also be able to apply for loss and expense. Standard loss and expense claims are also available from the Members' Area.

13. CHANGE OF LAW

Generally a change of law clause states who will bear the risk of any additional costs or time required if such costs or delays result from a change in the law during the term of your contract. With contracts you are currently negotiating you should consider a change of law clause carefully. Consider whether allocation of costs should be dependent on the time that the parties have to implement a required change (for example, if the change is to be implemented within a year of the change in law, the risk might be shared equally, but if the parties have more than a year to implement the change, then it might be fair for the risk to be born by the supplier). Also consider how risk should be allocated where a change has retrospective effect and whether changes to industry-specific laws and regulations should bear a different allocation of risk to changes to more general law. You should review changes of law clauses in your existing contracts and note if you will be expected to take on any additional costs.

14. JURISDICTION, CHOICE OF LAW AND DISPUTE RESOLUTION

The majority of contracts which are sent to the Legal & Commercial team are subject to English & Welsh law and the jurisdiction of the English & Welsh courts. If this is not the case and European Union law and jurisdiction has agreed then this will continue to apply after the UK leaves the EU.

15. REGULATIONS

If your contract specifies that your obligations must be completed in accordance with an EU regulations such requirements should be noted and kept under review until the result of Brexit has become clear.

5. PRIORITIES

The majority of the issues above will need to be identified and monitored as the result of Brexit becomes clear. Your priority should be ensuring you consider and implement how best to protect yourself against the higher risk issues you have highlighted above. These are most likely potential additional charges which may be incurred if you are regularly importing goods, and ensuring you promptly make any required applications for extensions of time or claims for loss and expense. Be aware that if you want to terminate an onerous contract then the UK leaving the European Union is unlikely to be considered a force majeure event.