



Ready, steady ... Brexit

Key considerations/preparations

Amid the uncertainty surrounding Brexit, the UK is still due to leave the EU at some point (“**Brexit Date**”). The terms of Brexit are yet to be agreed and could range from a no-deal Brexit to a fully renegotiated position.

We have highlighted some of the key considerations for your business and how we can support you through the process.

Contracts

■ Brexit-related changes

Companies should assess the effect of Brexit on key contracts. E.g. will additional costs arise, who is responsible for these, and is variation or termination required or permitted, do definitions of territory or applicable law need to be updated, is the choice of law or dispute resolution procedure still appropriate?

■ Loss of approvals and permits

Businesses losing EU passporting rights may wish to novate contracts to EU or UK group companies.

■ Supply chain

Companies should assess whether their key suppliers are ready for Brexit. Plans may need to be put in place to mitigate and manage any risks.

Talk to us about:

- Contracts
- Disputes
- HR practice and immigration
- Intellectual property
- Corporate
- Data management

Please also see our sector-specific Brexit brochures or your usual Kemp Little contact for specific market and regulatory concerns.

We can:

- Help identify and prioritise risk areas for businesses.
- Perform wide-scale contract reviews to identify affected terms using our Brexit-focused machine-learning review tool.
- Draft contract novations and variations to ensure compliance with regulatory and commercial requirements and allocation of risk. We can also help manage the novation and variation process.
- Prepare or update templates to ensure future contracts address Brexit-related risks.
- Prepare intra-group service agreements to ensure group companies have access to the assets and services they need.
- Offer workshops and other training to help staff manage changes.
- Provide tech solutions including 4corners, a contract analysis tool, which stores information and legal advice about contracts, and connects these straight to a business’s data to allow key contract questions about data or products to be answered without hunting for the relevant contract or doing fresh legal analysis.

Disputes

■ Charges

Suppliers and customers may try to pass on charges for specific Brexit-related issues such as supply chain issues, cost increases, cost of compliance with laws, or try to use them to exit contracts (force majeure/material adverse change).

■ Attempts to reset commercial bargain

Economic and political factors can change the commercial reality of long term deals. Parties might look to “re-set” fixed prices, attempt to move work into or out of scope or remove agreed discounts.

■ Unlawful contract terminations

There may be attempts to exit contracts which have become unprofitable due to Brexit by unlawful means – such as spurious breach notices and wrongful exercise of contractual provisions regarding termination.

We can:

- Help review contractual positions before taking action.
- Assist with the re-negotiation of complex and valuable contracts.
- Help look for breaches/issues that might allow a company to terminate as part of negotiation strategy.
- Draft and respond to contractual notices.
- Take decisive action to prevent wrongful termination or a claim for damages.

HR practice and immigration

■ EU Settlement Scheme

EU citizens already resident in the UK must apply under the EU Settlement Scheme to evidence their status here.

■ European Temporary Leave to Remain (EU LTR)

In the event of a no-deal Brexit, EU citizens arriving after the Brexit Date seeking to remain in the UK for longer than three months will be required to obtain EU LTR. Those seeking to remain beyond the expiry of their EU LTR or those arriving after 1 January 2021 will be subject to the new immigration system.

■ Redundancy

The economic impact of Brexit and businesses migrating abroad may result in large-scale redundancies and TUPE considerations.

■ Discrimination

In the post-Brexit political climate there may be an increase in employee discrimination and harassment claims.

■ Recruitment

It will likely be more difficult for businesses to recruit and retain EEA nationals post-Brexit and to fill gaps left by departing EEA nationals.

We can:

- Provide advice to EEA nationals regarding immigration requirements.
- Advise employers on assisting their EEA national populations and performing right-to-work checks correctly.
- Assist EEA nationals seeking to obtain evidence of their status.
- Advise on strategy and best practice in relation to redundancy exercises and TUPE transfers of all sizes.
- Advise on Brexit-related employee relations issues, including grievances relating to nationality-based discrimination and harassment.
- Advise on strategy to recruit and retain the best staff, including appropriate incentive schemes.

Intellectual property (“IP”)

■ EU trade mark and design registrations

Applications will need to be re-filed in the UK within nine months of the Brexit Date. Existing EU registrations will be ‘cloned’ into a new UK registration automatically.

■ Exhaustion of rights

The UK has stated it will unilaterally align to the current system of exhaustion of IP rights in the EU/EEA. If this is not reciprocated by the EU, the holder of national or EU IP rights may be able to block the importation of goods that were legitimately put on the market in the UK.

■ Customs registrations

It will no longer be possible to file a single application to ask Customs authorities throughout the EU to take action in respect of goods suspected of infringing the applicant’s IP rights. Instead, individual applications will need to be made for each EU Member State and existing registrations will no longer be valid.

Corporate

■ Changes to a company’s strategic report

A company’s business model may be affected by Brexit. The annual strategic report must contain a fair review of the risks and uncertainties facing the company.

■ Cross-border mergers

Unless completed quickly, a company may need to consider alternative ways of moving a business from the UK to the EU since cross-border mergers involving a UK entity will no longer be possible following Brexit.

■ Impact on legal status

Limited Liability Partnerships and private limited companies incorporated in the UK, but which are managed from an EU Member State which follows the “real seat” theory (such as Germany and Austria), may lose their limited liability status. Companies incorporated in such EU Member States and which have their central management in the UK may be liable to be wound up.

We can:

- Carry out audits of IP portfolios to identify which rights will be affected, work with companies to assess if they wish to opt out of the cloning process and, through our specialist in-house trade mark team, secure registration of EU applications and deal with the re-filing in the UK of any that are still pending upon exit.
- Carry out impact assessments in relation to exhaustion/parallel importation and the risks this may pose and assist in developing an appropriate strategy to deal with this.
- Audit existing Customs registrations to assess which may be affected and assist in re-filing national applications as required.
- Audit domain portfolios to identify any .eu domains that a company has, assess the impact of loss and assist in retaining them where needed and possible.

We can:

- Advise on restructuring of group companies.
- Assist with mitigating acquisition or funding risk by the use of Brexit-related warranty and indemnity protection.
- Advise on the transfer of UK business assets to a group entity in the EU.

Data management

■ Data transfers from the EEA to the UK

In the absence of an EU adequacy decision, or a negotiated transitional period, transfers may require an appropriate data transfer mechanism such as the EU-approved model clauses. Flows from the UK to the USA may also be impacted.

■ EU/UK representative

If a company is a controller or processor based outside either the UK or the EU, and offers goods/services to, or monitors data subjects in either jurisdiction, they may be subject to a requirement to appoint an EU or UK representative in that jurisdiction.

■ Update policies and impact assessments

Privacy notices and impact assessments may need to be updated to reflect data flows and international transfer mechanisms post Brexit.

■ Continue GDPR compliance

Companies should continue to implement GDPR compliance and follow the guidance of the UK Information Commissioner's Office.

We can:

- Perform Brexit impact assessments.
- Advise on data transfer strategies.
- Advise on the extra territorial application of the UK Data Protection Act and EU GDPR.
- Assist with appointing EU or UK representatives.
- Assist with re-drafting privacy documentations (including policies and impact assessments).
- Advise on any other data protection concerns.

Contact us

If you would like any advice relating to your organisation's Brexit preparations including any of the considerations addressed above, please do not hesitate to contact us.



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