

Brexit Essentials: contingency planning - what corporates can do between now and the referendum

Our last [Brexit Essentials briefing](#) discussed the potentially significant consequences of a Brexit for businesses and financial markets, but explained how the precise impact would depend on the form that any EU exit would take.

We will not know the result of the referendum vote for nearly two months. If the UK electorate votes to leave, the precise form of exit may then not be known for considerably longer. Are there any contingency planning steps corporates could sensibly be taking between now and 23 June 2016?

This is the sixth in a series of briefings covering the essential aspects and implications of the UK's referendum on EU membership. This edition of Brexit Essentials discusses the types of contingency planning that should be applicable to most businesses as we await the outcome of the referendum. Some sectors (for example financial institutions) will have a number of additional considerations to take into account, which are not covered in this briefing.

Because of the ongoing uncertainty over whether (and, if so, in what form) there will be a Brexit, extensive due diligence of existing contractual and other arrangements is likely premature at this stage. However, there may be scope to muster key documentation to assess potential risks/rewards of a Brexit. This "cautious monitoring" could then accelerate action and/or improve readiness for third party action after the referendum.

In respect of arrangements being entered into between now and 23 June, some "referendum proofing" may also be prudent.

Review of existing arrangements

Contracts: The key issue to consider - particularly in respect of material financing and other arrangements - is whether a Brexit could trigger any contractual rights, most notably:

- Material adverse change?
- Breach of financial covenants?
- Events of default and/or termination?
- Ratchets?
- Force majeure?

If a Brexit would trigger these contractual rights, would a Brexit vote represent a threat to an advantageous contract position, or an opportunity in respect of a disadvantageous one? We should expect counterparties to be asking themselves the same questions, so - where positions are advantageous - it may be prudent to prepare for counterparties seeking to renegotiate or terminate contracts. As part of that preparation, it will be important to assess the likelihood of any such approach - what is the impact of Brexit on partners, suppliers, customers and other contractual counterparties?

Employees: Pending confirmation of the form any exit would take, businesses may want to assess the potential labour and cost implications on their business of a change in the immigration status. The starting point for this assessment will be to determine the number of employees who are UK nationals working in other EU member states, and those who are non-UK EU nationals working in the UK.

Considerations for new arrangements

M&A: The forthcoming referendum may have an impact on both the timing and format of any transactions currently under consideration. Key questions include:

- What is the impact of market uncertainty on the deal? For example, uncertainty and financial market volatility associated with the referendum may impact the availability or cost of borrowing. Banking relationships and lender/bondholder behaviour should be monitored as the referendum approaches.
- Would Brexit impact your decision to proceed? If so, consider adding specific Brexit-related conditions or termination triggers (and scrutinise closely any such terms proposed by a counterparty). Your ability to invoke more generic provisions (such as MAC clauses) will be fact-specific but in any event far less certain than tailored protection.
- For public M&A, it is unlikely that a bidder would be able to walk away if the UK votes in favour of Brexit. The bidder would have to convince the UK Takeover Panel that the result of the Brexit referendum was of material significance to the bidder in the context of the offer, which may well prove very challenging in the absence of exceptional circumstances.

Public statements: If you are due to launch / publish any public statements between now and 23 June:

- At shareholder meetings and/or in annual reports do you need to include a specific disclosure on the potential impact of a Brexit? You may also need to prepare for referendum campaigners to be present, particularly if your business has taken a public stance on the debate.
- Does a Brexit risk factor need to be disclosed in a prospectus or circular? The trend is moving towards more specific disclosure.

Dispute resolution: Where parties choose a governing law for their contract, it is likely that the English courts will continue to respect that choice, even post-Brexit. That is because the current (EU) law is, in this respect at least, similar to the former (English) law. However, it is by no means clear how any English judgment might be enforced in an EU of which the UK is no longer part. When drafting contractual dispute resolution clauses, it may therefore be prudent to provide for arbitration in certain circumstances. For example, English arbitral awards are enforceable across borders by virtue of the New York Convention, a non-EU instrument.

IP registration: If seeking to register new rights in Europe, consider whether also to apply for a separate UK national right given the uncertainty over how the UK would treat pan-European rights (EU Trade Marks and Community Registered Designs) in the event of a Brexit.

IP licensing: Can these be “Brexit proofed” in terms of interpretation issues arising post-Brexit - e.g. in relation to defined terms, the territory to which the licence applies and the actual rights licensed?