

# Brexit checklist

Following the UK referendum decision to leave the European Union, contingency planning by those in the insurance industry is now a reality. This checklist is designed to set out some of the key questions that businesses will need to consider in their initial planning phase as they evaluate their existing structures and operations. By taking such steps now, businesses should be well placed to identify the risks and opportunities that lie ahead and the potential impact of Brexit on them.

## Brexit Focus Group

Kennedys' Brexit Focus Group, comprising specialist lawyers from our international offices and practice groups, is monitoring developments closely and is in regular contact with government and industry bodies, and leading insurers in each of our jurisdictions. Members of the Group are available to provide answers, recommendations, strategy and tactics on the specific legal and regulatory implications of Brexit for businesses and structures in the UK, Ireland and in Asia. You can access our Focus Group through your usual Kennedys contact.

## Checklist

### Data protection

- Do you transfer personal data (e.g. customer data or HR data) between the UK and other EU Member States?
- Are the major data processing decisions for your business (i.e. decisions about how and why personal data are processed) taken in the UK, another EU Member State or a jurisdiction outside the EU?
- Does your business engage service providers in other EU Member States to process personal data on its behalf (e.g. payroll service providers or cloud storage solutions)?

### Disclosure and communications

- Do you need to make any public statements or disclosures in relation to the potential impact of Brexit on your business under any applicable listing rules?
- Do you need to say anything in your annual report or interim financial statements?
- Do you need to start talking to suppliers, customers and commercial partners about the issues?
- What is your strategy for communicating with your staff about the potential impacts on your business and the implications for them?

### Environmental law

- Does your business currently benefit from emissions allowances under the EU Emission Trading System (ETS)?

### EU funding

- What sources of grants or other funding from the EU are relevant to your business?
- Do you currently have the European Investment Bank, the European Investment Fund or any other EU institution as a lender, investor or guarantor?
- How might the loss of that funding affect your business?

### Existing contracts

- What issues could arise under your existing contracts?
- Might they need amendment and how do they allocate the risks?
- Issues to consider could include:
  - Do they contain specific references to EU territories, laws or regulators?
  - If there is a concern over whether the contract can continue to be performed in the manner originally contemplated, what will the impact be of force majeure, change in law or similar provisions? Might there even be a risk that the contract could be treated as frustrated entirely?
  - Could additional tariffs or costs arising due to Brexit render the contract uneconomic to perform on current terms?
  - If you have M&A transactions waiting to close, what conditions or termination rights could be triggered, allowing either party to refuse to close?
  - Could there be an impact on your ability to enforce against assets in other EU Member States?

### Financing

- If you have financings that have yet to close, what conditions, termination rights or drawstops could be triggered? What Brexit flex rights ("Flexit") do your creditors have?
- Could exchange rate or interest rate movements, other market impacts of the UK's vote to leave or subsequent developments have a sufficiently adverse impact on your business to create a risk of breach of financial covenants in financing agreements?



- How are your financial ratios determined, and could exchange rate movements and volatile spot rates affect these (in particular if the testing mechanism does not provide for the use of average rates)?
- Will a fall in asset value cause a revaluation of loan to value calculations?
- Does your current financing contain material adverse effect clauses and could these be triggered?
- If you have upcoming financing or refinancing needs, what alternative finance provider options might be available if the general European loan and debt capital markets are suffering disruption or dislocation?
- Does your current financing provide committed (or uncommitted) acquisition lines? If the UK's vote to leave or subsequent developments give rise to M&A opportunities for you (e.g. as others exit markets or businesses), do you have available financing to take advantage of this?
- Would any change to the UK's credit rating affect your credit rating and what impact might this have on your business?

#### Freedom of movement

- How would your business be impacted by restrictions on freedom of movement of workers between the EU and the UK and the potential need for visas or residence permits, possibly even before Brexit becomes effective?
- Will your ability to recruit or second staff be affected? Should you consider appropriate steps to provide reassurance to prevent flight/assist in continued recruitment?
- How might that impact your operations and costs?
- Should you consider adapting your recruitment policies going forward?

#### Insurance

- Do you need to review your existing insurance policies?
- Are there specific references in those policies to EU governing law, regulation or territories?
- Do policies contain warranties or conditions precedent that need to be reviewed?
- Are increased limits needed (say, because of a sterling devaluation and the risk of losses in stronger currencies)?
- If there is a significant recession leading to insolvencies, collapsed deals and reductions in asset values, are current policies sufficient to deal with the likely resulting claims in various classes including professional indemnity and D&O?

- Given the risk of significant changes to corporate governance, regulation and employment law, does management have adequate insurance in place (including D&O and employment practices liability)?
- Do insurers require notification of changes such as changed asset values or relocation of business premises and personnel?

#### Intellectual property

- To what extent does your business currently rely (only) on pan-EU IP rights (e.g. EU trade marks and Community designs) for protection in the UK?
- How might your IP filing and management strategy be affected?
- Have any of your UK companies registered any .eu domain names?
- Are you relying on pan-EU injunctions that you have obtained in the past from EU national courts to protect your IP rights in the UK?
- Are you currently seeking or planning to seek an injunction only from a UK court in order to protect your IP rights in other EU Member States?
- Do your licences and other IP-related agreements require modification, in particular with regard to their geographical scope and the IP rights covered (e.g. inclusion of potential national UK rights that may be established as successor or transitional rights for pan-EU rights)?
- In particular, to what extent do you use third party IP in the UK on the basis of licences that have been granted to you for the territory of the EU?

#### Internal controls and compliance policies

- To what extent are your compliance policies or strategies or your internal controls tailored to EU laws and regulations?
- Might they need to be adapted going forward to accommodate divergence between EU and UK requirements and enforcement approaches going forward?

#### Premises

- Could there be possible reduction in rents in certain locations resulting from a reduction in tenant demand?
- If rents are falling in your area are you considering a delay in agreeing rent until comparable evidence is available to support that argument to enable you to agree a lower/ no rent increase?
- Are you considering a review of space requirements in EU territory and the effect that Brexit will have on your business in that territory?



### Public procurement

- If you are a UK business, do you participate in public procurement tenders in other EU Member States relating to industries where non-EU parties may be excluded from the process?
- To what extent do your operations depend on liberalised access to the procurement markets of other non-EU countries pursuant to the public procurement chapters of free trade agreements (FTAs) to which the EU is a party?
- To what extent have you been impacted already in on-going procurement processes?

### Supply of goods

- To what extent does your business or supply chain involve supplies of goods between the UK and other EU Member States or other countries with which the EU has trade agreements?
- Will you need to consider relocation to another EU Member State if your ability to supply goods between the UK and the EU could be compromised, for example due to CE marks requirements or due to equivalency arrangements on product safety not being in place?
- How would your business be impacted by the imposition of tariffs or non-tariff barriers if post-Brexit arrangements do not preserve the status quo in relation to those?
- What barriers are businesses concerned about in their dealings with EU partners (e.g. in the realm of research and development, freedom of movement of employees)?
- What genuine concerns do businesses have that Brexit will trigger implications for importers or exporters of goods or services that involve use of EU wide regulations or standards that they currently apply (such as medical devices and medicines regulations)?
- What changes do they anticipate making to their current contractual arrangements to maintain relationships with EU partners and keep supplying services to the EU from the UK?

### Supply of services

- To what extent do your operations or legal structure and the location of your people depend on existing passporting, or similar regimes, enabling financial or other services to be provided from the UK to other EU Member States or vice versa?
- To what extent do your operations depend on liberalised access to the services markets of other non-EU countries pursuant to FTAs to which the EU is a party?
- Will you need to consider relocation to another EU Member State?
- What challenges would you face in implementing a relocation – for example, client or commercial counterparty consents, or tax or regulatory consents? What sort of timelines could they involve?

### Tax

- To what extent do the tax efficiency of your business operations, your capital structure or your profit repatriation strategies, depend upon EU Directives and EU law?
- How might future capital raising involving clearance services or depositary receipt systems be affected in the absence of an applicable Capital Duties Directive?

### Your counterparties

- How are your suppliers, customers and commercial partners likely to be affected by the issues outlined above and the other implications of Brexit?
- What impact could that have on your business?



**Notes**