



BREXIT READINESS: FREQUENTLY ASKED QUESTIONS

Last updated: 31 October 2019

Commissioned by CHIPE

1. What is the practical difference between a “hard/no deal Brexit” and a “deal”?

If there is a “hard/no deal Brexit” for any length of time, some of the adverse impacts (as summarised in the CIPHE Brexit factsheets) apply. The UK has until the 31st January 2020 to reach a deal with the EU. Any deal will set out the consequences of the UK’s exit from the EU, and will, of course, present risks and opportunities to all members of CHIPE.

REGULATORY QUERIES

2. Will the regulatory framework materially change once the UK exits the EU?

Broadly speaking, it is expected to be “business as usual” for health and safety, and other regulatory technical requirements in the short term (ie. regulatory equivalence within the EU is likely to continue). In the mid to long term, expect some changes and divergence.

Expected headline examples of changes include:

- The CE-marking regime will be replaced by the new UKCA/body mark. There will be a transitional period of 18 months post-Brexit, during which CE-marked products can continue to be placed within the UK market. Currently the EU has not offered reciprocity, therefore all UK exporters need to have arrangements in place to ensure that they adhere with the EU based approval mechanism/CE-marking.
- Businesses able to self-declare for CE-marking purposes shall continue to be permitted to do so.
- There will be new labelling and compliance requirements for importing/exporting between UK/EU. Some UK businesses which bring products in from an EEA state who were previously described as “distributors” will become “importers” and, therefore, will acquire new legal duties.

Some practical guidance links are as follows:

- *The Government’s designated Brexit pages* [\[LINK\]](#)
- *‘UK Product Safety and Metrology Guidance in a ‘no deal’ Brexit’* [\[LINK\]](#)
- *Regulation (EU) 2016/426 and the Gas Appliances (Enforcement) and Miscellaneous Amendments Regulations 2018* [\[LINK\]](#)



COMMERCIAL CONTRACTS - MINIMISE RISKS OF DISPUTES

3. What can I do to “Brexit proof” my existing commercial contracts?

Check all your major commercial contracts to see who has responsibility to take on the risk of external material changes e.g. changing in prices in plumbing supplies hardware, currency rate changes, metal prices, impact of tariffs, labour cost changes, product standard checks etc. If there is a risk that a contractual counter-party will seek to argue that “Brexit” allows them to immediately walk away from a contract, this needs to be addressed now (this will be rarely a sustainable claim, as it is unlikely that even a hard Brexit in itself could amount to a repudiatory breach/force majeure (“Act of God”). That said, depending on the type of Brexit, it could amount to a material adverse change which might allow a party to vary or even terminate a contract early. Therefore, where issues are potentially unclear, get clarity in your contracts to seek to avoid future disputes and establish the apportionment of risk post- Brexit.

4. Does that mean principles of “good faith” are now less likely to be implied in any of my contractual dealings?

Yes. That said, this is still a developing area of the law within the UK. Where this argument is raised, each contractual relationship is looked on by a case-by-case basis. Post- Brexit, it is much less likely that continental European legal principles of good faith will by themselves now directly influence your contractual dealings as when the UK exits the EU, it is the intention that the UK will no longer be subject to the supremacy of EU law or courts. Finally, if you want ‘good faith’ to be a term of a “relational” contract, you should include an express term to that effect.

RESOLVING UNAVOIDABLE COMMERCIAL DISPUTES

5. I have a potential dispute with a customer/supplier who is outside of the UK and I have not issued legal proceedings, what do I do?

If this dispute cannot be quickly resolved, and after taking local legal advice, you should consider where the legal claim must be commenced and take appropriate legal advice on whether protective legal proceedings should be issued as quickly as possible before Brexit in the appropriate country applying the law of choice. After that date, the rules relating to commencing proceedings in the event of a hard Brexit are complex, less certain and costly.

6. I have managed to secure a UK judgment which I need to enforce either within the EU, Norway, Iceland or Switzerland. What can I do?

In the absence of a deal, you should quickly take necessary local legal advice, as you may be able to enforce quickly in time to benefit from the reciprocal regime of enforceable judgments within the EU (and Norway, Iceland or Switzerland). Currently, in a post hard Brexit world, the UK government’s advice is that the UK courts have indicated that they will ordinarily respect any EU judgments coming into the UK for enforcement, but conversely, the EU has indicated that there is no guarantee (absent a deal) that the EU will respect UK judgments in the same way. Post a hard Brexit, it is unlikely that the UK can rely on a deal to apply the default recast Brussels Regulation and there is uncertainty over the impact of the alternative rules (the Hague Convention on Choice of Court Agreements 2005). Again specialist legal advice should be urgently sought over the correct jurisdiction and law to determine any cross-border dispute



7. Given that some of my valuable commercial contracts are with customers/suppliers outside of the EU, how I can get more certainty as to which Court will resolve the matter and ensure the effective enforcement of any award in my favour?

As part of your “Brexit proofing” process, we recommend you consider inserting into your cross-border commercial contracts both an arbitration clause and exclusive England and Wales jurisdiction/choice of law clause, as such an award ultimately should be enforceable against all EU states (and most other countries for that matter while most countries remain signatories to the New York Convention which is unaffected by Brexit). That said, legal advice should be sought as to whether arbitration is an appropriate forum for resolving your cross border disputes as it can be relatively slow and costly.

IMPORTING FROM, AND EXPORTING TO, THE EU

8. I import bathroom fittings from Germany. What do I need to do?

If you have not already got one, you will need get an Economic Operator Registration Identification number, known as an EORI number. This will start with ‘GB’. If you do not have one, it may lead to increased costs and delays. You can apply for an UK EORI number at www.gov.uk.

You will need to complete customs declarations for the goods you import from the EU. This can be complicated, but you can use a freight forwarder or customs agent to do it on your behalf.

To make it easier to import goods from the EU in a no-deal Brexit scenario, you can also register for “transitional simplified procedures”. You can do this online at www.tax.service.gov.uk. This will allow you to delay your customs declaration and payment of import duties and VAT.

For more information about how to get your business ready to import goods from the EU to the UK after Brexit, please visit: <https://www.gov.uk/prepare-import-to-uk-after-brexit>

9. We export our products to Spain. What do we need to do?

If you export goods to the EU, again you will need to get an Economic Operator Registration Identification number, known as an EORI number. This will start with ‘GB’. You can apply for one at www.gov.uk. Equally, the business located in the EU will need an EU EORI number. You should ensure that your importer has one of these.

You will need to complete customs declarations for goods you export to the EU. You can ask a customs agent to do it for you.

Goods exported to the EU after Brexit will need to be labelled with the details of the importer based in the EU or EEA.

For more information about how to get your business ready to export goods from the UK to the EU after Brexit, please visit: <https://www.gov.uk/prepare-export-from-uk-after-brexit>



10. Will there be any changes to customs tariffs on imports and exports after Brexit?

If the UK leaves the EU without a deal, it will be required to apply customs and excise duties on goods traded within the EU. The UK will be treated like other non-EU countries.

However, the UK has introduced a temporary regime, for up to 12 months, so that the duties applied to most goods imported into the UK from the EU will be zero-rated. After this period, if there is no deal, the World Trade Organisation rules will apply.

When exporting goods to the EU post-Brexit, your importer in the EU will need to pay tax and duty.

11. How do we claim VAT refunds after Brexit?

If the UK leaves the EU without a deal, businesses will not be able to use HMRC's VAT online service to claim a VAT refund from an EU member state.

Each EU member state has its own process for refunding VAT to businesses based outside the EU. You can find out what the process is for each country on the European Commission website at https://ec.europa.eu/taxation_customs/business/vat/eu-country-specific-information-vat_en.

REVIEWING MY SUPPLY CHAIN

12. I am worried about my supply chain after Brexit. What should I do to protect our business?

We recommend that you review all your supply chains for Brexit-related risks, if you haven't done so already. This will be particularly important where you import goods from, or export to, the EU or EEA. Ideally, your review should include all parties in the supply chain, as issues affecting businesses further up or down the chain can have a knock-on effect for your business.

In particular, it is worth considering risks of:

- (a) Increases in costs;
- (b) Availability of products, components, employees;
- (c) Increases in time and cost going through customs; and
- (d) Exchange rate volatility.

Our top tips to reduce the risks presented by Brexit are:

1. Put a plan in place to ensure that you can communicate quickly and easily with other businesses in your supply chain.
2. Consider expanding your supplier network to multiple suppliers, to offset the risk of one of your key suppliers failing.
3. Review your contracts to check who bears the risks in Brexit-related scenarios. For more information on this point, see our fact sheet: 'Reviewing your Contracts; Brexit Clauses'



REVIEWING MY CONTRACTS AND BREXIT CLAUSES

13. Several of my customers and suppliers are based in the EU. How will this impact my contracts with them?

If you haven't already done so, it is sensible to review your contracts with your suppliers and customers to consider who bears various Brexit-related risks. Liability for these risks may have a significant impact on the profitability or viability of your agreement.

You should ensure that you have signed contracts for all your supplier and customer agreements; and then review the terms for each of them.

You should consider the duration of the contract; the termination provisions; whether the territory refers to 'EU', and therefore should it be amended to include the UK post-Brexit; potential currency fluctuation risks; data protection issues; and how disputes should be settled.

14. I'm worried my contracts won't be profitable after Brexit. What should I do?

If you are worried about the profitability or viability of a new or existing contract with your supplier or customer, there are a number of terms you can consider including in your agreement to enable you to renegotiate, suspend or terminate the agreement if certain triggering events occur. These clauses include:

- (a) *Hardship clauses*: Where one party suffers hardship caused by a pre-defined event (e.g. price rises or a shortage in resources) and it makes the agreement unprofitable, the parties can renegotiate, suspend or terminate the agreement.
- (b) *Price variation clauses*: This allows for a pre-defined price variation to be made when triggered by a particular event.
- (c) *Supplier priority clauses*: This protects a party where its supplier has a limited amount of the product available. It requires the supplier to prioritise the other party to the agreement over its other customers.

INTELLECTUAL PROPERTY RIGHTS

15. Our business has an EU trade mark registration. Will the brand still be protected after Brexit?

Yes. Existing EU trade marks will no longer cover the UK after Brexit. They will only provide protection in the remaining 27 EU member states. Brexit will not impact the protection in the other member states.

However, the UK will continue to protect EU registered trade marks in the UK. From the date of Brexit, the UK Intellectual Property Office will automatically create equivalent rights in the UK free of charge. No further action needs to be taken by you (whether a deal is agreed or not).

Your new UK trade mark will have the same filing, priority and renewal dates as the corresponding EU registration. It will be a fully independent UK right, and may be challenged, assigned and licensed separately from the corresponding EU registration. It will also be subject to its own renewal fees with the UKIPO. However, pending applications at the date of Brexit should be refiled with the UK Intellectual Property Office within 9 months of Brexit Day, in order to benefit from the original filing date of the EU application.

All the above applies to Registered Community Designs.



16. Are there any other intellectual properties issues I need to consider when importing and exporting goods after Brexit?

Yes. One of the key changes in relation to intellectual property caused by Brexit will be to the 'exhaustion of IP rights'.

Currently, where a product is sold in the EEA, the IP rights in that product are considered to be 'exhausted'. This means that a product can be re-sold anywhere else in the EEU (including the UK) without infringing the IP rights in that product. After Brexit, placing goods on the UK market will no longer 'exhaust' the product's IP rights in the EEA. To sell those goods in the EEA, the IP right holder's consent will be required, which may cause delays.

DATA PROTECTION

17. We have a subsidiary in France, and a supplier based in Germany. We receive contact details about their staff. What do we need to consider in relation to data protection?

The GDPR applies to the processing of any personal information of individuals in the EU. This is information that relates to an identified person, or which could be used to identify that person, such as staff contact details.

In a no deal scenario, there would be no immediate change to UK data protection requirements. The UK has already introduced the Data Protection Act to mirror the GDPR.

However, after Brexit, the UK will be a "third country" for the purposes of the GDPR. This means that, unless the EU decides that the UK has adequate protection for personal data, transfers will only be able to be made from the EU to the UK if there are appropriate safeguards. The EU is reserving its decision on whether the UK will have adequate protection until after Brexit.

So, if your business needs to receive personal data from a business in the EU, you will normally need to sign an agreement with them, incorporating "standard contractual clauses". These are clauses created to comply with the GDPR for data transfers, to be signed by the sender and receiver of data.

COMMERCIAL AGENCY REGULATIONS & DISTRIBUTION AGREEMENTS

18. What are the Commercial Agency Regulations, and will they apply after Brexit?

The Commercial Agency Regulations protect commercial agents who buy or sell goods in Great Britain for or on behalf of another person/business. Where English law applies, the Regulations automatically apply to all regulated commercial agency agreements (whether agreed in writing or verbally).

The Regulations impact all aspects of a Regulated Agreement, including its termination provisions. The key provisions include:

- (a). imposing minimum notice periods;
- (b). requiring termination payments to be made to the agent; and
- (c). limiting the use of restraint of trade provisions after termination (i.e. provisions which prevent agents from competing with the principal's business).



Due to the European Withdrawal Agreement Act 2018, the Regulations will continue to apply immediately after Brexit. However, the long-term future of the Regulations is remains unclear. To encourage trade and free market conditions, the Regulations may be modified or repealed entirely in time.

19. How will Brexit affect the rights of my distributors?

EU law does not protect distributors in the same way as commercial agents. Arrangements with distributors are primarily contractual in nature. Therefore, Brexit is unlikely to have any effect on the relationship between manufacturers/suppliers and their distributors. However, note that distributors in the EU will be required to comply with importer obligations, post-Brexit.

IMMIGRATION

- Have your current EU staff members applied under the EU settlement scheme?
- How will the post-Brexit immigration system affect businesses and their hiring needs?

Questions	Answers
EU Settlement Scheme	
What is the EU Settlement Scheme?	The EU Settlement Scheme is a system set up by the UK government to process applications for immigration status from EU citizens and their family members. It is intended to be a relatively simple and straightforward process.
Why was it introduced?	Freedom of movement will end post Brexit and EU citizens and their family members will require official confirmation of their residence in the UK.
Who must apply?	EU citizens, citizens of Norway, Switzerland, Iceland and Liechtenstein and those who hold documents granted under EEA regulations (such as permanent residence documents).
Who does not need to apply?	Irish nationals (although their family members will need to apply) and those who hold indefinite leave to enter or remain.
How much does it cost?	There is no cost.
How is an application made?	There are two stages to the process: the first is to prove identity via an app on Android or iPhone 8 (or newer models), the second is to complete an online application form providing details of residence and criminal history (if any).
What status am I entitled to?	Those that have lived in the UK for; <ul style="list-style-type: none"> • less than 5 years will be eligible for pre-settled status • more than 5 years will be eligible for settled status
When should EU nationals apply for Settled or Pre-	Much would depend on an individual's circumstances but the government requires applications to be submitted by 30 June 2021 if the UK leaves the EU



Questions	Answers
settled status?	with a deal or 31 December 2020 if the UK leaves with a no deal.
How long does it take to receive a decision?	A preliminary decision is made promptly after submission and the final decision is expected within 5 working days. More complex applications can take up to 1 month.
Do those who have applied receive a document confirming their status?	EU citizens' status will be given a digital status whereas family members who are non EEA nationals will receive a Biometric Residence Permit.
How do employees prove their status under the scheme?	EU citizens and their family members can prove their status online. They can do this by generating a 'share code' on the government's website and sharing this with their employer to enter online and view their right to work.
How will Irish citizens be affected?	There are no changes to the rights of Irish nationals. They can continue to demonstrate their right to live and work in the UK by presenting their Irish passports.
Post Brexit immigration system – Following Exit Day to 31 December 2020	
How do we recruit EU citizens immediately following Brexit?	If the UK leaves with no deal, the government proposes to introduce a European Temporary Leave to Remain (Euro TLR) status for EU citizens moving to the UK from Exit Day to 31 December 2020 (before the new immigration system is introduced in January 2021). Employers can therefore continue to recruit EU citizens but if they wish to stay in the UK post 31 December 2020, the EU national employee will need to obtain Euro TLR or apply under the new immigration system.
What is Euro TLR?	In the event of no deal this is a status granted for 36 months to those EU nationals who enter the UK following 'Exit date' and want to continue to reside in the UK after 31 December 2020.
Should we carry out right to work checks on our EU employees now?	<p>There will be no change to the right to work of EU nationals living in the UK until 31 December 2020. Employers have a duty not to discriminate against such workers. Employers cannot require employees to show their status under the EU Settlement Scheme or Euro TLR until 1 January 2021.</p> <p>Employers will not be required to undertake retrospective checks on existing EU employees.</p>
I only work with self-employed contractors. Do I need to do	Employment status and how that impacts Right to work checks can be a complex area. Please refer to the Home Office's guidance on Right to Work



Questions	Answers
anything?	Checks.
Where can I sign up to get up-to date information	<ul style="list-style-type: none"> You can sign up to alerts from the Government at https://www.gov.uk/search/news-and-communications/email-signup

Post Brexit immigration system – January 2021	
Does the government intend to introduce a new immigration system from January 2021?	The current conservative government plans to introduce a new single immigration system from 1 January 2021.
What type of immigration system is expected post -2021	The future skills-based immigration system white paper (The White Paper) sets out the government’s plans for a future immigration system. In conjunction with these proposals the Home Secretary has commissioned the independent Migration Advisory Committee (MAC) to advise on the characteristics of an Australian Points-Based System.
Under the proposed post-Brexit immigration system will all skill levels be covered	<p>The White paper proposes the following;</p> <p>Tier 2 (work visas)</p> <ul style="list-style-type: none"> a simplified system abolishing the annual quota abolish the requirement to conduct a resident labour market test lower the skill level from RQF level 6 (graduate level) to RGF level 3 <p>Temporary short-term worker route</p> <ul style="list-style-type: none"> will be available to nationals from specified low risk countries will allow individuals to come to the UK for a maximum of 12 months and work at any skill level those using the route will be subject to a cooling-off period, preventing them from re-entering the UK using the same route for at least 12 months. under this route individuals will not require sponsorship



**PENNINGTONS
MANCHES
COOPER**

CIPHE
ciphe.org.uk

**Chartered Institute of Plumbing
and Heating Engineering**

FIND OUT MORE

For further information, please contact:



ALEX FOX
Commercial Disputes Resolution Partner
T: +44 (0)20 7753 7724
E: alex.fox@penningtonslaw.com



ANNA FRANKUM
IP IT Commercial Partner
T: +44 (0)20 7457 3205
E: anna.frankum@penningtonslaw.com



PAT SAINI
Immigration Partner
T: +44 (0)20 7457 3117
E: pat.saini@penningtonslaw.com



CHARLES BROOKS
Corporate Partner
T: +44 (0)1256 407125
E: charles.brooks@penningtonslaw.com



JENNI GREGOR
Commercial Disputes Resolution Associate
T: +44 (0)20 7753 7825
E: jenni.gregor@penningtonslaw.com