

A woman with long dark hair, wearing a black top, is smiling and gesturing with her hands while talking to a group of people in a meeting. The background is a bright, out-of-focus office setting with large windows.

# International Brexit Team Law

Legal risks created by Brexit  
and how to manage them

January 2018

# Editorial

## Brexit — disruption with open questions

It is understandable why many CEOs, general counsel and other members of the C-suite have found addressing Brexit difficult. The consequences of Brexit for businesses inside and outside of the UK are not yet clear, and the number of issues that we may see as a result of the UK leaving the European Union seems overwhelming. This is why businesses may show little enthusiasm for taking actions currently.

## Navigating the unknowns — getting prepared for post-Brexit

However, the lack of planning and engagement may cause considerable disruption to your business. Risk is one of the red-flag dangers for businesses around the world today. Whether the risks are due to market uncertainty, business disruption, legal noncompliance or political developments like Brexit, it is critical for today's corporations to fully identify, quantify and mitigate their risks.

The purpose of this guide is to provide you with basic information on the legal issues associated with a number of different business objectives and sectors, as well as a set of right Brexit-related questions to ask. Should you need more details on any of the described areas, our practitioners at EY are ready to help.

Together, we can work out the specific challenges your business may be facing after Brexit and what you can do today to steer your company safely through them. Please do not hesitate to reach out to us for further guidance.



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### We help clients to identify and steer through disruption, including Brexit. Further insights include:

[EU regulatory law: the bird's-eye view — Brexit law brief](#)

[Competition — Brexit law brief](#)

[Life Sciences — Brexit law brief](#)

[Intellectual Property — Brexit law brief](#)

[Financial Services mobility and relocation — Brexit law brief](#)

[Brexit: a financial services perspective](#)

[Brexit and article 50: what's next for business](#)

[Long-term commercial contracts — Brexit law brief](#)





# Existing commercial contracts — recommended strategy



Legal department/CEO

## The issue

**Brexit will have an impact on commercial contracts in a wide range of areas.**

## The context

The changes brought about by Brexit will require contracts to be evaluated in terms of how they deal with likely extra tariffs, restrictions on the free movement of people, territorial scope definitions, new regulatory regimes, termination options on Brexit and questions on enforcement options.

References to EU laws or UK laws based on an EU law may become redundant after Brexit. This may alter the balance of responsibilities between the parties.

## Recommended action

Existing commercial contracts should be reviewed to assess areas of risk and your business's ability to take steps to guard against such risks. The contractual balance may indeed shift as a consequence of Brexit if contracts are left unattended. This risk may be anticipated and addressed in a strategic or reasonable way in order to enhance relationships with long-standing commercial partners while preserving your best interests.



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## Key questions

- ▶ Do you have commercial contracts with the UK/EU27 (as appropriate) that will extend beyond 29 March 2019?
- ▶ Are you sure those contracts are not at risk in some way due to Brexit?
- ▶ Do the contracts rely on the positive effects of the single market in order to be effective and profitable?
- ▶ Are you sure that your counterparties are unable to terminate the contracts should Brexit have a negative effect on their contractual position?



# Drafting future contracts



Legal department/CEO

## The issue

**The applicable law for a contract that relates to business undertaken in the UK and EU Member States requires careful consideration.**

## The context

As time passes, the laws of the UK and EU relating to the same subject will begin to differ. Changes in law are not predictable at the time of entering into a contract. Consider where the economic center of gravity is in the contract. Typically the applicable law of the contract should be the same as its economic center of gravity.

## Recommended action

Review the forum for litigation under the contract in question. UK courts are expected to become an increasingly inappropriate default forum if the business undertaken under the contract is materially based on EU law.

Definitions referring to the EU may need to be amended. If the reference to territory in a license agreement is “the EU,” this will have to be reviewed to determine whether there is sufficient clarity as to the territorial scope, including or excluding the UK. Similarly, other definitions, such as “Member States,” “Union,” “Treaties,” etc., will also change and need to be addressed.

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## Key questions

- ▶ For contracts to be entered into post-Brexit, which country’s law should apply?
- ▶ Where would it be appropriate in the future to litigate contractual disputes?
- ▶ Do you have contracts with clauses referring to the EU territory or other EU definitions?



# Intellectual property — EU trademark and design



Legal department/CEO

## The issue

**Post-Brexit, the EU trademark or EU design registration with the EU Intellectual Property Office (EU IPO) will no longer cover the UK.**

## The context

IP rights based on EU regulations will no longer be enforceable in the UK after it has left the EU. This concerns, in particular, rights created under the Community Trade Mark (CTM). It is possible that transitional agreements will be negotiated to allow the conversion of these rights into national UK rights or the separate filing of national rights, retaining their original priority dates. CTMs only used in the UK will become vulnerable to non-use revocation, as the hitherto “use in the UK” will no longer qualify as use in the UK in the future.

## Recommended action

Owners of EU trademark or EU design rights should examine in each case whether their rights will be recognized in the UK following Brexit. They may have to consider the registration of a national UK right. Since use of a trademark in the UK will no longer suffice to maintain the right to use it in the EU, trademark owners will need to explicate that they use it in an EU Member State in order to maintain the right. All license agreements have to be reviewed as to the definition of their territorial scope.



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## Key questions

- ▶ Do you have any registered EU trademarks or EU designs? If so, do you currently use them only in the UK?
- ▶ Do you have intellectual property rights that need to be protected in the UK?
- ▶ Do you rely on any unregistered EU rights like the unregistered community design right?
- ▶ Did you conclude any license agreements for the “territory of the EU”?





# Intellectual property — CE mark



Legal department/CEO

## The issue

**New post-Brexit procedures will need to be put in place for UK producers of goods that wish to export to the EU, and such goods must bear the CE mark**

## The context

Many health, safety and environmental EU laws applicable to goods require the manufacturer or importer to ensure they conform and bear the CE mark. New procedures will need to be put in place as the UK may be treated like any other third country whose producers are exporting to the EU.

Traders in the UK will have a more complex role in the future when dealing with products that bear the CE mark.

UK entities will no longer be able to import products from outside the EU and formally recognize them as legitimately bearing the CE mark, making all import-to-export (traders) businesses more complex procedurally.

## Recommended action

Consideration will need to be given about the extent to which third-country producers of CE-marked goods may prefer to sell directly into the EU, rather than selling to the UK for export to the EU.



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## Key questions

- ▶ If you are a trader of goods from or to the UK, what are the processes you need to be aware of relating to the certification of those goods?
- ▶ If you are a UK producer of goods and place the CE mark on those goods, how will this change in future?
- ▶ Are you aware of the legal remedies in case of insufficient labelling, e.g., the risk of an immediately enforceable preliminary injunction against sales?



# Manufacturing and supply chains



Legal department/CEO

## The issue

### Trade flows between the EU and the UK

## The context

The existing tariff-free and matching customs rules trade between the UK and the EU will likely end after Brexit. Under most scenarios, goods traded between the EU and the UK will be subject to customs duties and will be subject also to increased administration (including customs formalities) and non-tariff barriers (NTBs). Examples of NTBs are health, safety and environment standards as well as rules-of-origin requirements. The related costs will be borne by businesses.

UK/EU manufacturing companies (ManCos) will be affected by Brexit if they have parts supplies and sales from the EU or the UK. ManCos trading between the UK and EU27 will likely be subject to extra paperwork, import-and-export declarations and charges, taxes, duties, tariffs and import VAT and extra regulation.

In order to continue to benefit from the free-trade agreements entered into while still in the EU, UK companies may think about restructuring their supply chains.

## Recommended action

Risk analysis of the different possible Brexit deals will allow sensible risk management. Examine your supply chains in the context of Brexit-proof restructuring and consider modeling for various possible Brexit scenarios.



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## Key questions

- ▶ Are you planning to trade some goods between the UK and the other EU Member States in the next 18 months?
- ▶ Are you aware of the possible impact of Brexit on any such transactions?
- ▶ Have you analyzed the possible cost impact on such trade under different Brexit scenarios and how such costs may be reduced?
- ▶ As a UK company, are you planning to analyze and possibly restructure your supply chain to minimize the impact of Brexit?





# Employment — mobility



Legal department/human resources

## The issue

**The effectiveness of employee mobility programs may be affected by Brexit.**

## The context

Transitional rules on immigration are expected from the UK to allow EU/UK citizens already residing and working in the UK and EU, respectively, to remain doing so.

Other EU citizens planning to reside in the UK may be subject to the same immigration/visa system that already applies for non-EU citizens, thereby decreasing mobility.

There is already variation in territorial scope for some UK employment legislation — some provisions apply to England and Wales only, some to Great Britain and some to the UK. Brexit may cause greater variations — especially since Scotland is again exploring the option of formally leaving the UK in order to remain with the EU. The effect of these changes means that the terms “Great Britain” and “UK” may ultimately have different meanings, or even become redundant.

## Recommended action

Review your policies and evaluate flexibility for mobile personnel.



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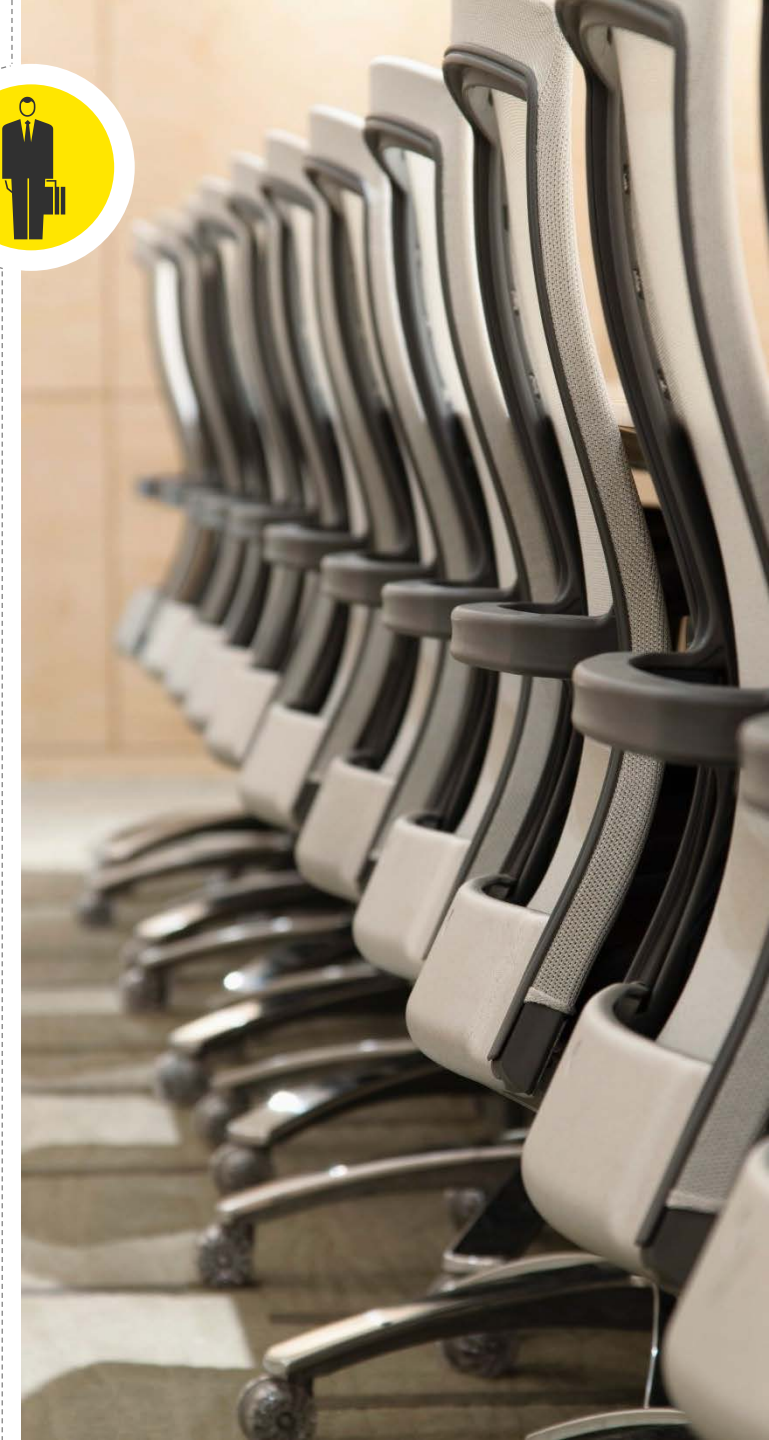
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## Key questions

- ▶ Do you have cross-border commuters in your workforce, and have you considered how Brexit may affect their mobility?
- ▶ Should you review the level of flexibility in your mobility clauses?
- ▶ Should you review current policies on flexible working/commuter-based employees?



# Employment — contingent workforce



Legal department/human resources

## The issue

### Contingent workforce arrangements, including intragroup transfers

## The context

The uncertainty created by Brexit will likely lead to an increase in the contingent workforce (temporary workers and contractors) as UK clients become reluctant to commit to the hiring of permanent staff. In addition, there will likely be changes in worker protection and compliance regulations in relation to the contingent workforce as this is governed by legislation derived from EU regulations.

There is no specific UK legislation that implements the Posted Workers Directive (PWD), in part because it is generally considered that the UK's existing protections were sufficient, so the current UK legislation will likely continue to protect workers posted to the UK.

Exactly how this will work remains unclear with uncertainty over terms such as “UK” and “Great Britain” as outlined in the employee-mobility context (see page 9).

## Recommended action

Review your existing employment agreements and your current and future use of a contingent workforce.



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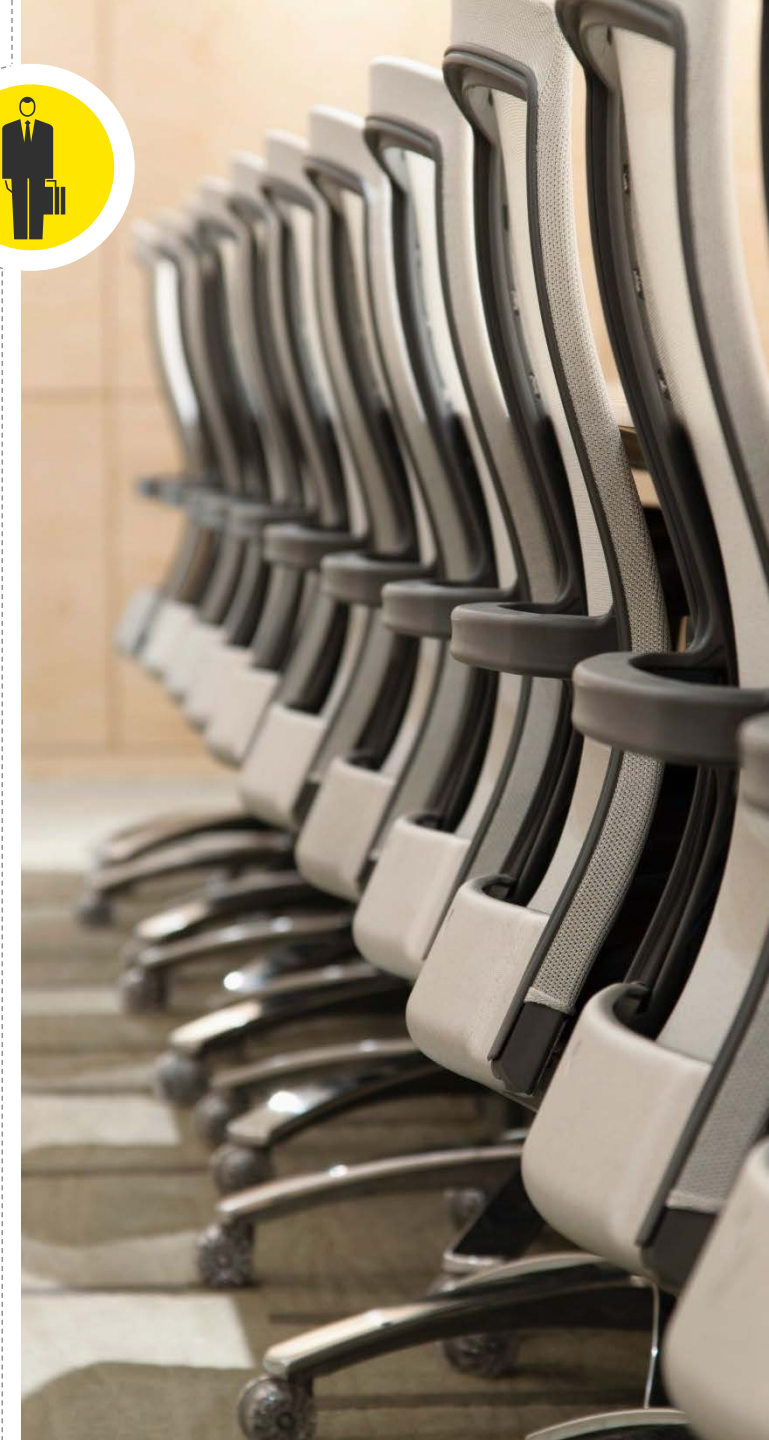
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## Key questions

- ▶ Are you considering increasing the use of contingent workers and/or freezing or reducing the hiring of indefinite employees?
- ▶ Are your assignment policies aligned to the PWD?
- ▶ Are your transfer policies aligned to the PWD?



# Chemicals



Legal department/regulatory compliance

## The issue

### Registration, Evaluation and Authorisation of Chemicals (REACH)

### UK chemicals regulation

## The context

Companies that manufacture and/or market chemical substances in the EU must do so under an appropriate REACH registration for each substance. Registrations can only be held by an EU entity, generally either as an EU manufacturer or, for manufacturers located outside the EU, as an EU importer. Registrations held by UK entities would cease to be valid for activities in EU27 following a hard Brexit. Alternative arrangements would have to be found, e.g., by appointing an EU-based entity to hold the registration in place of the current UK registration holder.

The UK has no specific domestic laws regulating the manufacture and sale of chemical substances. The REACH regulation, based on a central EU chemicals regulator, is directly applicable and difficult to transpose into UK law. The UK will therefore need to replace REACH and create a domestic UK chemicals agency (if that is what they decide to do). It is unclear whether current REACH registrations, whether held by UK or non-UK entities, will be valid post-Brexit or whether the UK and EU27 will reach any agreement on the future of chemicals regulation, e.g., by way of a mutual recognition.

## Recommended action

Review the validity of your current REACH registrations for business in Europe post-Brexit.

Examine the nature and extent of the regulation of chemicals substances in the UK post-Brexit.



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## Key questions

- ▶ Do you manufacture, sell, import or export chemical substances in/into the EU via the UK or in/into the UK?
- ▶ Which legal entity holds your REACH registrations? Is it a group entity or a third party?
- ▶ Do you buy/sell chemical substances from/to UK businesses who will lose their REACH registration status on Brexit?
- ▶ Are you monitoring, either directly or through UK trade associations, the progress of Brexit negotiations and the UK Government's statements on the future regulation of the chemicals industry in the UK?





# Consumer products and retail



Legal department

## The issue

**Commercial contracts in the retail sector may be vulnerable from a commercial and a legal perspective due to Brexit.**

**Current distribution networks may not be effective any longer post-Brexit.**

## The context

European commercial and contract laws may no longer be applicable to UK companies if the UK starts to amend such laws post-Brexit.

Some contracts may refer to EU regulations and such references may become ineffective vis-à-vis the UK post-Brexit.

Adequate anticipation may lead to the need to renew or renegotiate existing contracts and provide adjustment provisions and mechanisms (dealing with hardship, change in applicable regulations, change in applicable case law) as well as dual-track terms and conditions applicable either to the UK domestic market or to cross-border sales.

Certain European regulations applicable to interstate commerce, such as block exemption, competition, online sales, advertising and consumer protection, will no longer be applicable to UK companies post-Brexit; others may be incorporated into UK law as of Brexit but may begin to be changed in the period afterward.

Adequate anticipation may lead to the need to structure differently your omnichannel distribution strategy when targeting domestic UK market or the EU27 markets.

## Recommended action

Review your commercial contracts strategy with regard to retail regulation and examine your omnichannel distribution strategy.



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## Key questions

- ▶ Do your contracts refer to EU laws that may no longer be applicable to a UK contacting party post-Brexit?
- ▶ Are you amending your strategy to anticipate dual-track commercial terms to take Brexit into account?
- ▶ If references to EU regulations are material to the commercial rationale of the contract, how will possible changes to such laws affect the commercial rationale of the contract?
- ▶ How are you dealing with other unknown circumstances in your commercial contracts?





## The issue

### Regulatory structuring

## The context

EU law requires that marketing authorization (MA) holders be established in the European Economic Area (EEA), and that some activities be performed in the EEA, e.g., pharmacovigilance (PV). Manufacturers of medical devices (MD) established outside the EEA must appoint a legal representative. The European Medicines Agency (EMA) has already noted that EU MAs owned by UK companies will need to be transferred from the UK to an EEA-based company. In addition, some pharmaceutical operations and systems will have to be relocated so that they are performed in the EEA: Qualified Person for PV (QPPV), PV System Master File (PSMF) and site of batch release/certification. Manufacturers of MD based in the UK will have to appoint a legal representative based in the EU.

### Regulatory organization

When the UK exits the EU, it is likely that the physical movements of medicinal products from the UK to the EEA (and vice versa) will be deemed as imports. Buy and sell operations between the UK and the EU might also be deemed as imports (depending, in particular, on discussions on legal flows or “virtual imports”).

For MedTech companies, EU operators purchasing products from UK-based companies will become importers, meaning that they will need to implement specific processes as required by the new medical device regulations. Manufacturers may need to change their notified bodies, should the latter not be based in the EU.

## Recommended action

Prepare for Brexit’s impacts on regulatory key issues and distribution flows.



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## Key questions

- ▶ How many EU MAs are owned by your UK company? Which EU entity will apply for or hold these EU MAs? Have you identified all consequences (labeling, packaging) and the contracts which will be affected?
- ▶ Where will your EU central regulatory teams (QPPV, PSMF) and other regulatory functions be located? Are you comfortable with the regulatory substance of the new MA holders?
- ▶ Will the UK company remain the manufacturer of your medical devices? If so, who should be your legal representative in the EU?
- ▶ Do your companies have manufacturing import licenses to operate in the post-Brexit environment? Have you taken into consideration the current challenges of “virtual imports” and title of ownership?
- ▶ Where and by whom will the release operations be performed in the post-Brexit environment?
- ▶ Have you identified all distribution contracts that will be affected, and have you linked them with matching quality agreements?



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