

The Commercial Impact

The exact manner of the UK's exit from the EU is still unknown, but despite this uncertainty, organisations should start thinking now about the possible implications from Brexit, and a key element of this will be the potential commercial impact on your organisation.

1. Could Brexit impact us financially?

The simple answer is yes. Leaving the EU without a deal could affect you commercially in a number of ways:

- Exchange rates could vary considerably and lead to a rise in the price of imported sporting goods and other supplies you may rely upon?. Consider the effect of a fall in the value of sterling and appropriate strategies to mitigate currency volatility, such as hedging. Who would be responsible for any large fluctuation in currency under your contracts?
- Tariffs could be applied to goods traded between the UK and the EU following Brexit and there could be changes in tariff rates for trade with countries outside the EU, which could decrease the profitability of your contracts for the purchase of sports equipment and clothing from within the EU.
- Your suppliers may need to change the jurisdiction in which they source certain components of their products to comply with rules of origin or face paying tariffs, adding expense to your contracts. If possible, consider restructuring your supply chain to maximise tariff efficiencies or using different goods or services suppliers that are less exposed to Brexit-related risks.
- In a no deal Brexit, the UK will be considered a 'third country' for customs purposes in the EU. Customs checks will be required for goods entering and leaving the EU, increasing costs and delays. Not only could this make obtaining equipment required for a tournament or sporting event more difficult, it may take longer to receive the equipment which will have a knock-on effect on lead times and price. ***[see module on Travel and Logistics for further information]***
- Businesses you work with may choose to relocate their operations to a country within the EU. Hosting sporting events in the UK, for example, may become more difficult. If the UK will no longer be automatically subject to free movement rules, the additional cost and administrative burden associated with the movement of those individuals and equipment into and out of the UK may be problematic. ***(See modules on Travel and Logistics and Immigration for further information)***

EU Funding

- The UK sport and recreation sector currently benefits from EU funding from a number of sources. The most obvious example is the ERASMUS+ programme which provides funding for projects aimed at sport but also education, youth and volunteering. The ERASMUS+ programme has a specific sport element administered and funded centrally by an executive agency of the European Commission while funds for education, training, youth and volunteering projects are decentralised to national level. UK sport and recreation bodies also benefit from funding through the EU Structural Funds.
- The precise impact of a no-deal Brexit is hard to determine at this stage, but it is likely that the UK will no longer be able to access EU funding streams designed to support sport, principally ERASMUS+ once we leave the EU. Regardless of the circumstances of the withdrawal, all existing Erasmus+ projects that have a contract to deliver funded activities have been advised to continue to do so, as the government has said it will continue to fund these for their lifecycle provided that funding was approved before the exit date. Please note that this guarantee does not cover funding committed to partners and participants in other

Member States and other participating countries, meaning that where a UK organisation is the lead member of a partnership, any funding it distributes to non-UK associated beneficiaries is not covered by the guarantee. <https://www.gov.uk/guidance/register-to-claim-erasmus-and-esc-funding-from-the-government-guarantee>

2. How might Brexit affect our contracts?

2.1 Could Brexit be a ground for termination of my agreement?

Brexit as a concept could fit into the ambit of various legal concepts known as *force majeure*, *material adverse change* or *frustration*.

- Force majeure clause

The success of relying on this clause as a ground for termination will heavily depend upon the facts of the case. If Brexit makes performance of the contract **impossible**, it may be a force majeure event. However, force majeure events do not normally encompass events which one party reasonably foresees will inevitably happen, so check the date of your contracts as this may be relevant when determining the application of such clauses.

- Material adverse change

Not all agreements have a material adverse change clause, but it is worth looking out for these. These clauses are wider than a standard *force majeure* clause and could potentially be triggered by financial hardship suffered post Brexit and may allow you to renegotiate your terms should the contract become unprofitable or subject to a change in the law.

- Frustration

Parties may try to argue that a contract has become 'frustrated' as a result of Brexit. This essentially means that it has become impossible to perform certain obligations under a contract, but no one party is to blame.

2.2 So, is there anything I can do now?

Yes, there are a few things:

- First of all, take a look at your existing contracts, particularly if the contractual term will run beyond the date of the proposed Brexit Date, and/or the nature of the contract means that it crosses the UK-EU border in some way. Whether this is a sponsorship agreement, a management agreement or a supply agreement, it is important for you to start to look at how this could affect your organisation. For example, is there any interest in seeking early termination of an agreement or is there a risk of the other party terminating?

Looking ahead to your new contracts:

- Include an express statement in all new contracts to confirm that the force and effect of the contract (or certain clauses within the contract) are not to be prejudiced or diminished by the UK leaving the EU.
- Include express wording to address pricing mechanisms, pricing reviews and allocation of currency risk.
- Think about re-defining the meaning of 'force majeure' so that it encompasses certain Brexit-related events relevant to the subject matter of the contract. It would be good practice to address delays in delivery of goods such as sports equipment due to cross-border issues to prevent the risk of increased cost and possible payment penalties or termination for late delivery.

- As a precaution, where legislation is incorporated ‘as amended’, the contract should state that any changes that will have a material adverse effect on either party within the agreement are disregarded where possible.

2.3 *My contract includes references to the EU. Will this continue to include the UK post-Brexit?*

- Look at the definition of ‘territory’ within the contract. If it refers to member states “from time to time” then the UK will NOT be included post-Brexit. If there is a full list of countries named in the definition, and the UK is one of these countries, the UK should still be covered by the contract after Brexit.
- When entering into new contracts, if the contract should always include the UK, add express wording to say that if and when the UK leaves the EU, then the relevant territory is automatically extended to include the UK along with the EU. It is sensible to plan ahead and draft the provision as the ‘UK as it stands now’, or the ‘UK as it changes from time to time’. This would cover the situation where Scotland could try and seek independence in the future or where a border poll is taken in Northern Ireland.

2.4 *Jurisdiction and dispute resolution*

- Brexit could introduce further complications to any disputes between parties where one remains in the EU and the other does not. Currently, the UK is subject to the Brussels Regime’s rules on determining jurisdiction for disputes, but one possible future effect of leaving the EU without a deal is that the rules will cease to apply to the UK. The UK and EU could enter into an agreement that mimics the approach under the Brussels regime, but this is not guaranteed.
- If you are a party to a current dispute which relates to the UK and another part of the EU, look at steps to resolve the dispute sooner by way of settlement or an alternative form of dispute resolution. If you have a judgement to enforce in another EU state, prioritise action as soon as possible.
- In all new contracts include a ‘non-exclusive jurisdiction clause’ in respect of the UK courts or choose the exclusive jurisdiction of any other appropriate member state. Arbitration will not be affected by Brexit and this may be a better method of dispute resolution.

Each business has its own different commercial requirements and you should take focused advice from a commercial contracts specialist. If you have any questions, Gateley Legal’s Commercial team will be happy to help.