



Pinsent Masons

Into the breach:

The role of general counsel in navigating
a successful business Brexit

Executive Summary

On 29 March 2019 the UK will leave the EU. Despite some political agreement on the terms of the withdrawal agreement in principle, this will not become legal certainty until the final agreement is ratified. As a consequence, there remains significant uncertainty on both the proposed transitional period, and on the final shape of the UK's post-EU status.

Faced with this uncertainty, many companies have already triggered contingency plans for a no-deal scenario.

In order to fully enact contingency plans, businesses need to have a comprehensive understanding of their risk environment and stress test what risks will materialise in a range of different Brexit scenarios. It's therefore vital that this is done now.

Given this urgency, and also because risk reporting requirements for publicly listed companies are expected to be more detailed as we move closer to Brexit, it's imperative that businesses plan for a range of Brexit scenarios immediately and report their findings to the board, and in turn that listed companies report material Brexit risks to shareholders.

With this in mind, international law firm Pinsent Masons commissioned The Lawyer and YouGov to survey general counsel (GCs) and the boards of the UK's largest listed and private companies. We wanted answers to a number of important questions relating to what boards expect from their GCs when it comes to Brexit planning and how well prepared businesses are for Brexit.

The findings of this survey are presented in detail in this report. The main finding is that boards want GCs to be heavily involved with a variety of aspects of Brexit preparations, from risk assessment and scenario planning to devising contingency plans.

While many GCs are meeting boards' expectations – 69% of surveyed board members are satisfied that GCs are involved in Brexit planning at an appropriate level – 25% would welcome GCs' even greater involvement. There is therefore an opportunity for GCs to work even more closely with boards.

In order for boards and GCs to work more closely together, boards need to clearly outline what they expect from their GCs with regards to Brexit planning and risk assessment, and specify clear deadlines. In parallel, GCs need to be proactive in notifying boards of major Brexit risks. They must also not be afraid to tell boards if business' preparations are not sufficiently comprehensive.

Key findings

- **Boards are already triggering Brexit contingency plans for a no deal scenario.**
Working closely with GCs, just over half of boards have already triggered contingency plans for a no-deal scenario.
- **General counsel are performing well on Brexit.**
69% of surveyed boards are satisfied that GCs are involved in Brexit planning at an appropriate level.
- **Still work to do.** 94% of board members consider their businesses to be very or quite well prepared for Brexit, compared with only 53% of GCs.
- **Brexit provides opportunities for GCs.**
61% of surveyed board members want their GCs to be responsible for Brexit scenario planning and 95% expect GCs to notify them of any major risks.
- **GCs must now step up to meet boards' deadlines.** Almost three quarters (70%) of surveyed boards that want a risk assessment expect this to be conducted by the end of June 2018. Yet only 47% of GCs expect to be in a position to share their risk assessment by this deadline.
- **Don't be afraid to seek external support.**
29% of surveyed boards have consulted external expertise to inform risk assessment and decision making, almost double the 16% of GCs that have already done so.

Five steps GCs should take to prepare for Brexit



Boards want GCs to take a leading role. Take control of Brexit and plan for a range of future Brexit scenarios.



Ensure a broad range of business functions are represented at scenario planning sessions. Consider bringing in external expertise to inform your Brexit scenarios and to provide a broad sector perspective.



As a minimum, assess the impact of five key areas of risk on your business: customs duties & tariffs, supply chain disruption, labour shortages, restrictions on transfers of customer data, and risk exposure in contracts.



Where major risks are identified, report these to the board immediately.



Brexit-related disclosures in annual reports should become increasingly specific as Brexit draws closer. Ensure that the board and company secretary understand these risks when drafting and approving annual reports.

Pinsent Masons is top-ranked in Legal 500 for our Brexit advice. We offer a variety of services that bring boards and GCs together to help them prepare for the risks and opportunities presented by Brexit. To learn

more about these or discuss this report, please don't hesitate to contact us or visit www.pinsentmasons.com/brexit.



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About the Research

Pinsent Masons' report, 'Into the breach: The role of general counsel in navigating a successful business Brexit', is based on the data from two surveys conducted January-February 2018. The first survey, conducted by The Lawyer magazine, sought the views of 100 general counsel at FTSE 100 or FTSE

250 companies, or private unlisted companies of equivalent size. The second survey, conducted by YouGov, captured the views of 100 board members of FTSE 100 or FTSE 250 companies, or private unlisted companies of equivalent size.

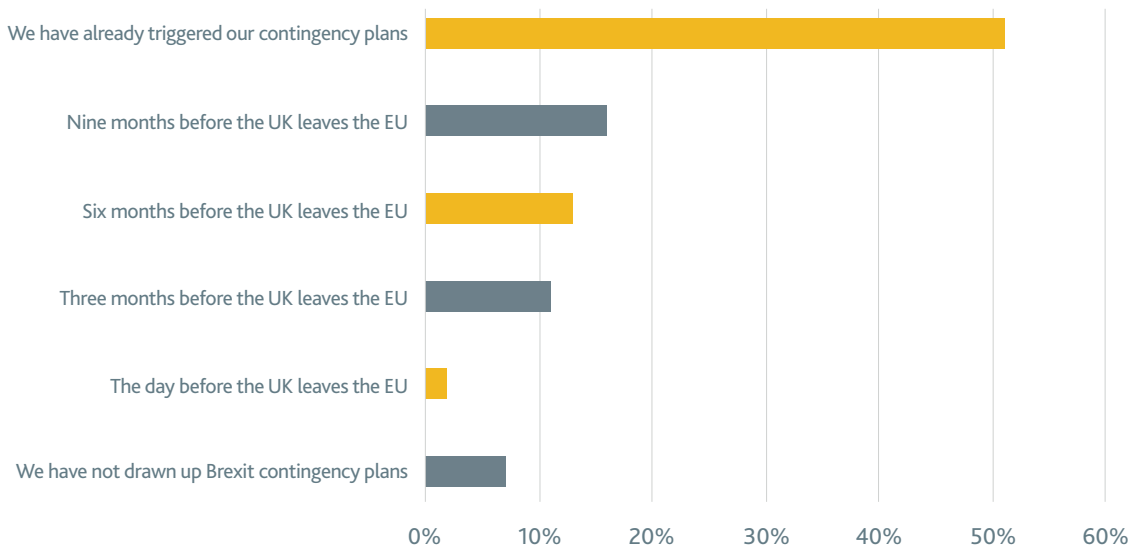
Businesses are already triggering Brexit contingency plans

“ 51% of companies surveyed have already triggered their contingency plans.”

Working closely with GCs, boards are already triggering contingency plans for a no-deal scenario with no transitional arrangement. This is not necessarily because they expect a worst-case scenario outcome from EU/UK Brexit negotiations, but more likely because businesses simply cannot afford to wait for clarity on the final shape of the UK's post-EU status and the transition to it.

Understandably, the research shows contingency plans take time to implement, hence why just over half (51%) of companies surveyed have already triggered their contingency plans with a year to go until Brexit date. A further 40% expect to do so by the end of 2018 if no trade deal or transitional arrangements have been struck between the EU and the UK.

Boards: If no trade deal or transitional arrangements have been struck between the UK and EU, at what point will your organisation trigger contingency plans drawn up for that scenario?



So why are businesses triggering their contingency plans for a no-deal and no transitional arrangement scenario now, rather than waiting for a potential solution to emerge?

In some sectors, with financial services and other highly regulated sectors being obvious examples, businesses are being warned by their sector regulators to act early. For other businesses,

the lead times are sufficiently long to mean that Brexit-related actions (e.g. switching some operations and/or staff to another EU country) cannot be left until later in the day. In either case, delaying action is not a feasible strategy.

Guy Lougher

Partner and Head of Brexit Advisory Unit,
Pinsent Masons

A wide range of contingency plans are being considered

What contingency plans will be triggered? The survey data reveals that businesses are considering many, from relatively minor changes to supplier arrangements, to moving operations out of the UK. Indeed some 35% of boards (and 39% of GCs) expect their non-UK subsidiaries to switch to EU-based suppliers and away from those based in the UK.

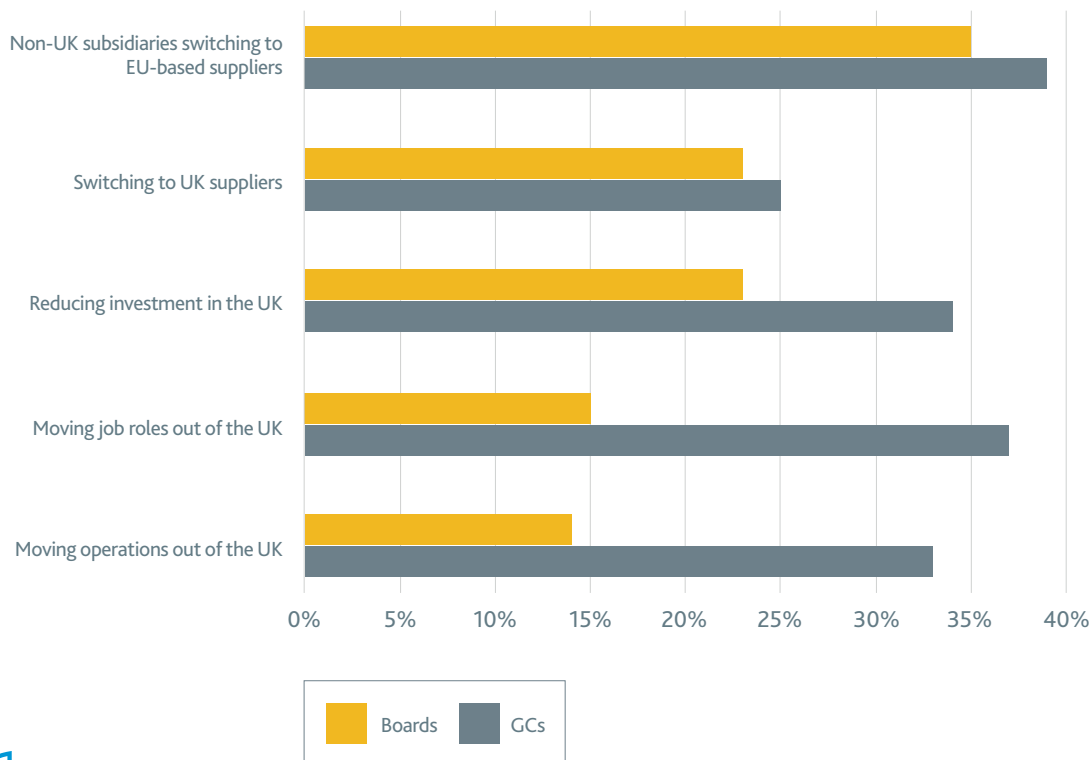
23% of boards and 34% of GCs say their businesses will likely reduce investment in the UK as a result of Brexit. In parallel, 15% of boards will likely move job roles out of the UK and 14% will likely move some operations from the UK.



We have already announced that we will be moving our headquarters to an EU country because we rely on the EU in a lot of aspects of the business.

GC, FTSE 350 or equivalent company

How likely is your business to make each of the following changes as a result of Brexit?



We are waiting to see if the UK operations are viable in the medium to long term: we can move to Ireland or Netherlands or Switzerland if it makes more sense.

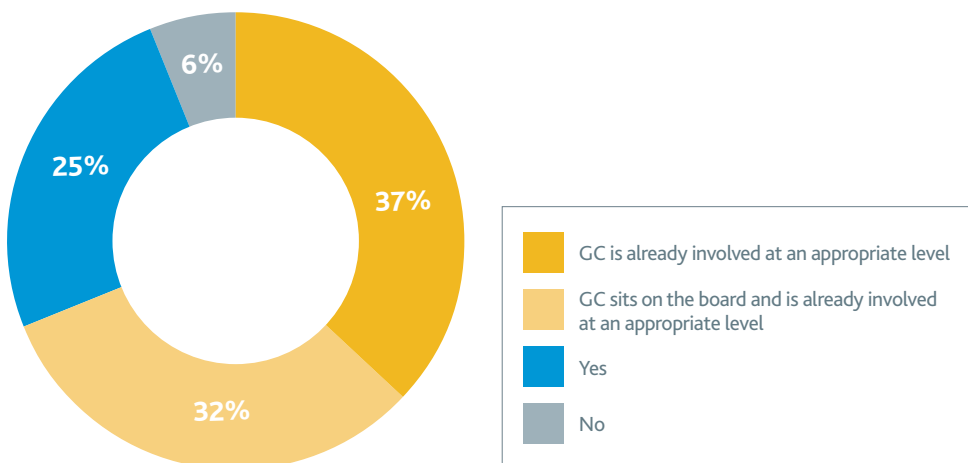
GC, FTSE 350 or equivalent company

General counsel are instrumental in Brexit planning

The survey data reveals boards highly value the role GCs are playing in Brexit preparations. The majority (57%) of surveyed board members see GCs as an important strategic advisor in preparing for Brexit, with more than two thirds (69%) satisfied with the level of involvement their GC is already playing in this planning.

However, one in four (25%) boards would welcome an even greater role for their general counsel in deciding how their business should manage risk and operate during transition and post-Brexit. There is therefore an opportunity for GCs to work even more closely with their boards to help navigate the uncharted territory of Brexit successfully.

Boards: **Would you welcome a greater role for your general counsel in deciding how your business should manage risk and operate during transition and post-Brexit?**



Brexit planning – lessons from national security

When Pinsent Masons set up our Brexit advisory unit we brought together expertise from strategy, policy and legal practice to provide market-leading advice to our clients in a time of unparalleled change. Working with former Cabinet Minister Douglas Alexander as a strategic adviser to the firm, alongside UK government strategy adviser Lynette Nusbacher, our objective was to steer boards and GCs through the short, medium and long-term challenges and opportunities offered by Brexit.

Having recently set up the Strategic Horizons Unit within UK government to develop the national security strategy, Lynette Nusbacher was brought

in after Number Ten scrapped the first attempt because the process hadn't started with essential structured scenario development.

Lynette said:

"Structured scenario work prepares you for the future you're going to have to deal with, not just the one you'd like to deal with. You can never get rid of uncertainty, but structured scenario work can help you understand and prepare for the reality when it comes."

Read more about the approach to Brexit Pinsent Masons has developed in partnership with Lynette Nusbacher on page 13 of this report.

Brexit provides opportunities for GCs to show their worth...

“ 61% of surveyed board members want their GCs to be responsible for Brexit scenario planning.

With some boards actively welcoming a greater role for their GC, how can GCs make the most of the opportunity to reshape their place within a business that is faced with Brexit? While boards and GCs are aligned as to the GC's role as strategic advisor, there is a real opportunity for GCs to lead in the planning and response a business has to Brexit, becoming a key player in ensuring their businesses are well prepared to successfully navigate Brexit.

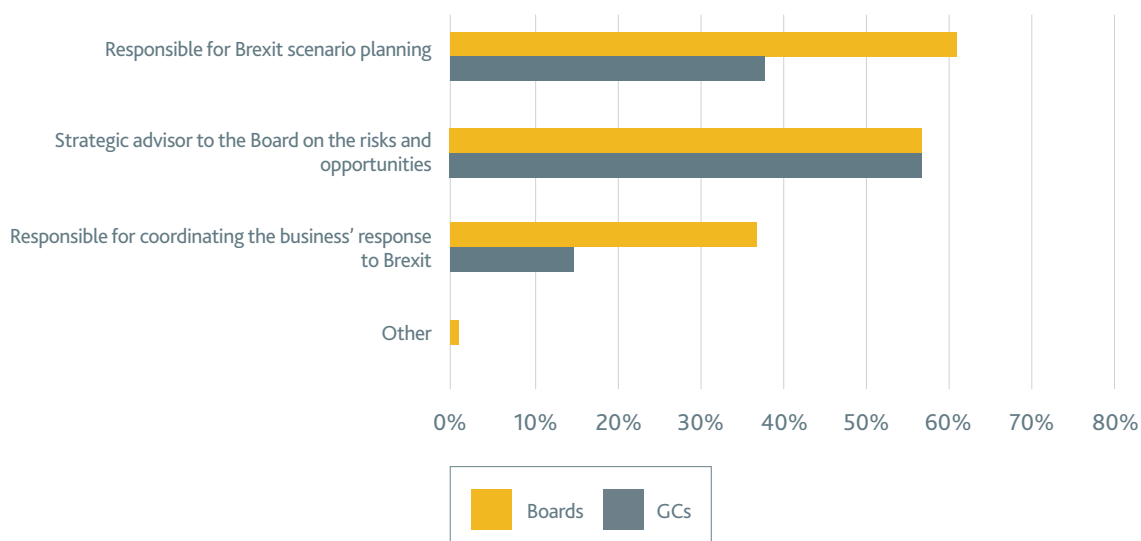
- Nearly all (95%) surveyed board members expect their GCs to notify them of any contractual, operational or legal risks arising from Brexit which may have a material impact on the financial performance of their business.
- 61% of surveyed board members want their GCs to be responsible for Brexit scenario planning, including identifying the likely impact of a range of negotiating outcomes.
- 37% of boards want their GCs to take responsibility for coordinating the business' response to Brexit.



There are several acceptable jurisdictions in the EU and we foresee no difficulty in adopting them instead of English Law / Courts.

GC, FTSE 350 or equivalent company

GCs: **How do you see your role as GC in supporting your business to manage the risks associated with Brexit?**
Boards: **How do you see the role of your general counsel in preparing for Brexit?**

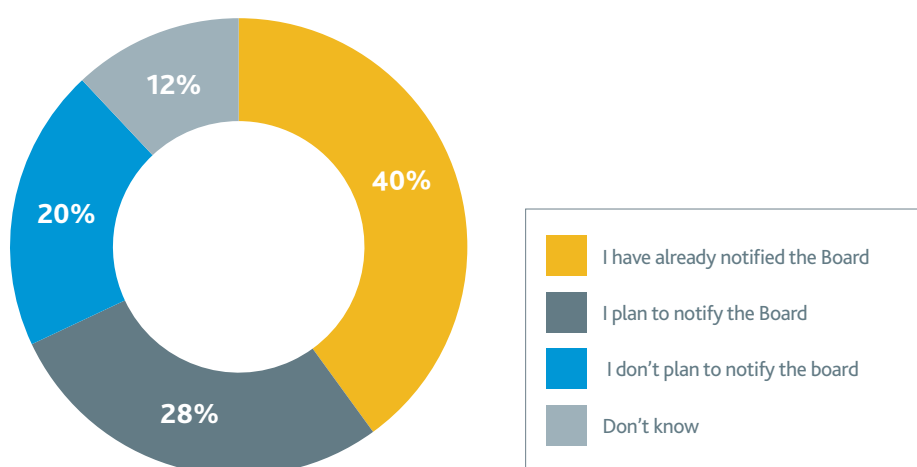


GCs must now step up to meet boards' deadlines

As of March 2018, only 40% of GCs had notified their board of specific risks related to Brexit that may have a material financial impact. A further 28% plan to.

There is therefore a significant opportunity for many GCs to engage their boards on Brexit. However GCs must act now to keep boards on side.

GCs: Have you notified the board of any contractual, operational or legal risks arising from Brexit which may have a material impact on the financial performance of your business?

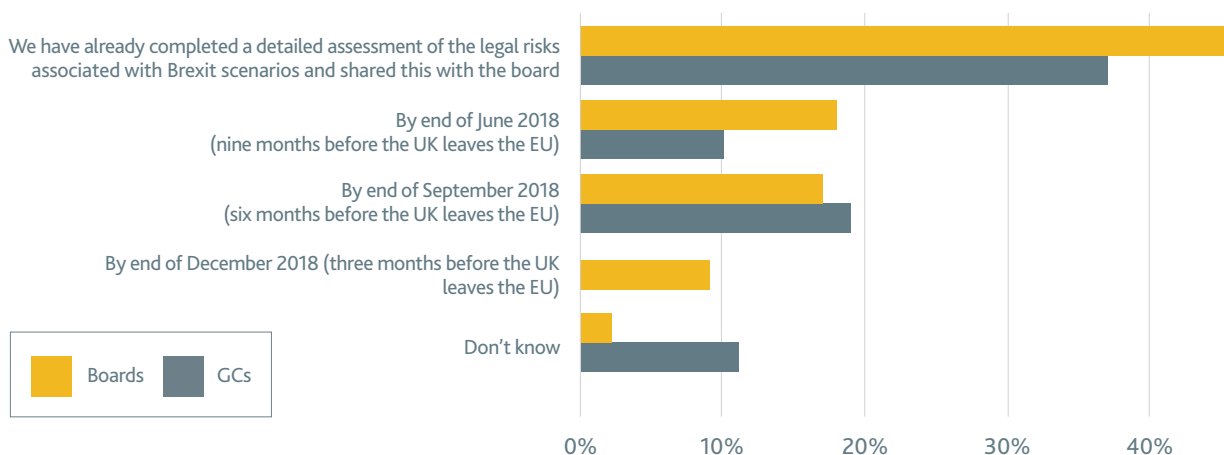


The survey data indicates that some GCs' expected timings for conducting risk assessments won't meet boards' anticipated deadlines. Indeed, of the boards that expect a detailed risk assessment from their legal team, 70% expect this to have already been shared with them

or, if not, by June 2018. In contrast, only 47% of GCs expect to share their risk assessment with their board by this deadline. Both parties need to actively and openly communicate their plans and expectations to ensure they are on the same page.

GCs: By when do you expect to share a detailed assessment of the legal risks associated with Brexit scenarios with the board?

Boards: By when do you expect a detailed assessment of the legal risks associated with Brexit scenarios to have been completed and shared with the board



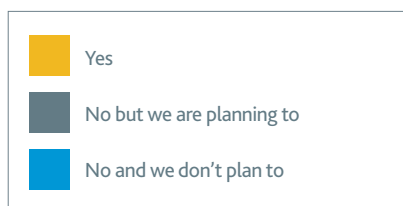
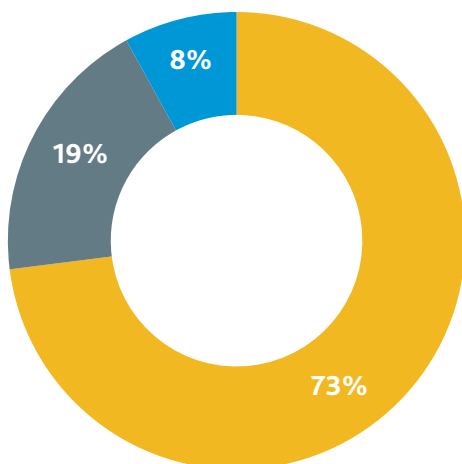
Conducting a risk assessment is paramount

“ 73% of surveyed board members have asked GCs to assess the legal risks associated with Brexit. Only 50% of GCs have done so.

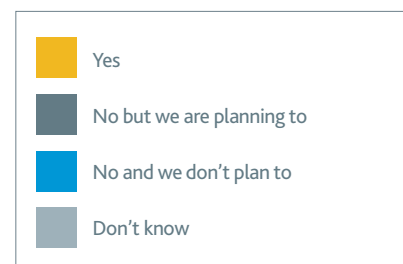
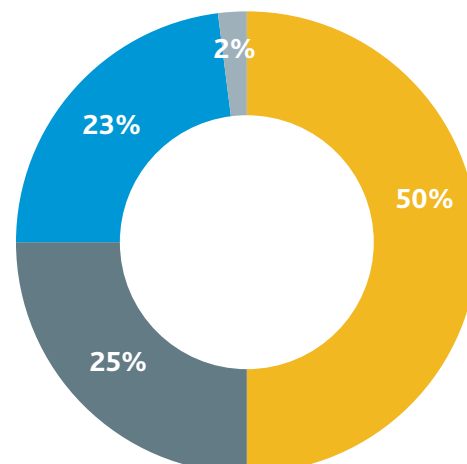
A detailed risk assessment must be conducted before any specific risks can be reported to the board. While 73% of surveyed board members have asked GCs to assess in detail the legal risks associated with Brexit, only 50% of GCs have already done this. While a further 25% plan to do so, time is running out. GCs should therefore do this as soon as possible.

“““ Brexit has caused a great amount of upheaval in our organisation, which is why we are taking the risks and threats very seriously and aim to alleviate the harmful results to our financial performance.
GC, FTSE 350 or equivalent company

Boards: Has the board of your business asked the general counsel and legal function to assess in detail the legal risks to the business associated with Brexit?



GCs: Has your legal team conducted a detailed assessment of the legal risks associated with Brexit?



A broad range of Brexit risks must be assessed

Boards want their legal teams to assess a range of risks related to Brexit. Two thirds (64%) want risks associated with restrictions on transfers of customer data between the UK and EU to be assessed. The same number want the impact of customs duties and tariffs applied to supplied goods imported into the UK/exported to the EU to be evaluated. The majority of surveyed board members also expect risks related to supply chain disruption (58%) and diminished ability to attract highly-skilled workers (54%) to be assessed.



Our primary service or “product” is actually the people working for us. Therefore, the free movement of workers between the UK and Europe is very important to us...

GC, FTSE 350 or equivalent company

Boards: Do you expect a detailed assessment of the following risks associated with Brexit to be undertaken by your business?

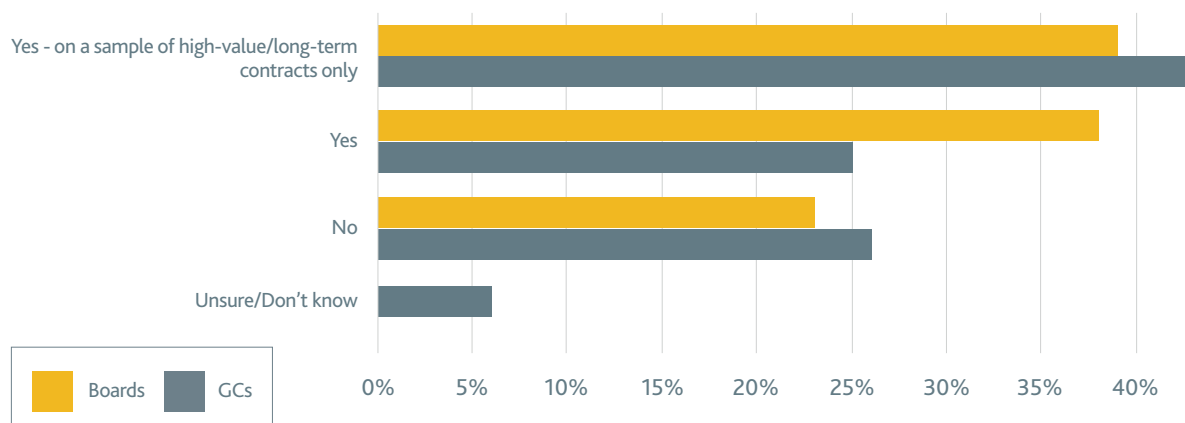


Assessing contractual risk exposure is vital for boards. 77% of surveyed board members want their legal teams to review existing contracts for risk exposure, half of

which only require this in relation to a sample of high-value or long-term contracts. 26% of GCs haven't yet done this.

GCs: Has your legal team reviewed existing contracts for risk exposure?

Boards: Would you encourage your business to conduct a review of existing contracts for risk exposure?



Work still to be done

“94% of board members feel prepared for Brexit. Only 53% of GCs feel their businesses are prepared.”

Just how well prepared are businesses for Brexit? It depends who you ask. Some 94% of board members consider their businesses to be very or quite well prepared. In contrast, only 53% of GCs believe their businesses are well prepared.

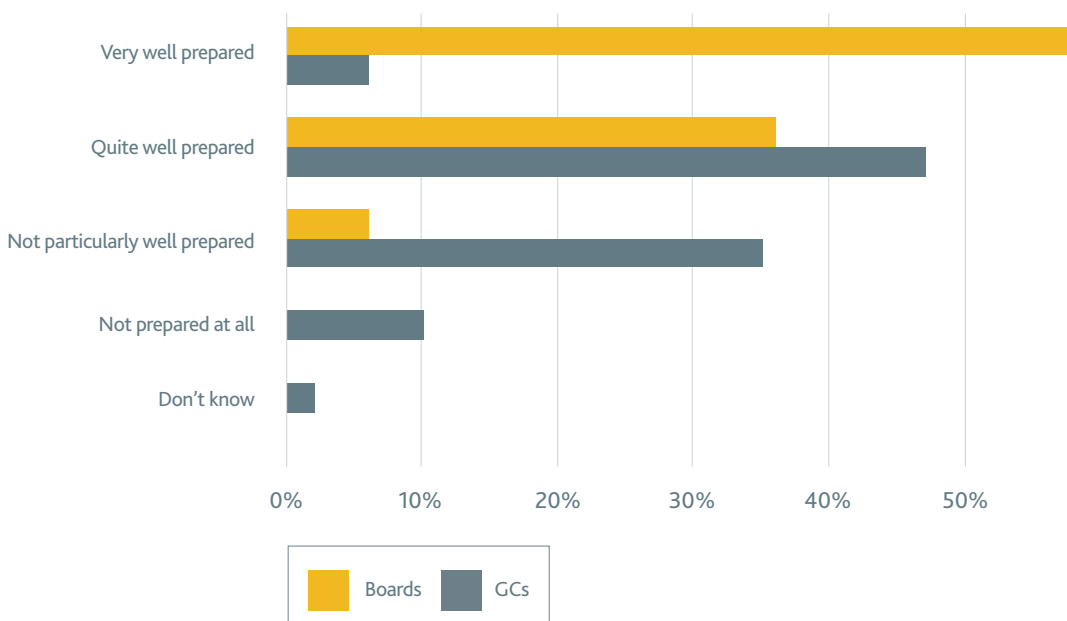
So, while boards are very confident about their Brexit preparations, GCs feel there are outstanding risks that require examination, perhaps because they are much closer to the detail and scope of the work still to be done. It's vital that GCs ensure boards understand potential risks, their severity, and take the lead on communicating realistic timescales for implementing changes that will protect against these risks.

In our experience, there is a very broad spectrum of Brexit-readiness. Many companies have implemented contingency plans but not yet taken Brexit-related irreversible steps because they are trying to leave their options open for as long as possible. Some businesses have done very little, and others have taken significant steps which they will not be able easily to rescind. Regulated businesses are often the ones that have so far committed most to taking those difficult-to-reverse steps.

As to why boards and GCs perceive their business' preparedness for Brexit differently, it may simply reflect the fact that GCs are likely to be focusing on the detail of what needs to be done, whereas boards are more likely to focus on the big picture issues. GCs are therefore more aware of the number and complexity of steps yet to be taken in order to deliver on boards' ambitions.

Guy Lougher
Partner and Head of Brexit Advisory Unit,
Pinsent Masons

At this point in time, overall, how well prepared do you think your business is for Brexit?



Don't be afraid to seek external support

One third (35%) of surveyed board members say they have consulted external expertise to inform risk assessment and decision making or plan to. A similar number of GCs (36%) say this is also the case. Although there is broad agreement on the need for external expertise, more than twice as many GCs than boards (12% v 6% respectively) are yet to bring in this expertise, even though they have acknowledged they need it.

Given that the timings for planning a business' path to post-Brexit success are tight, GCs should take action and make the business case to bring in external support to help their team now, or they risk falling short of boards' expectations.

GCs: Does your legal team have all the tools to assess Brexit-related risks in-house or is external expertise likely to be required to inform risk assessment and decision-making?



Boards: Does the board of your business have all the tools to assess Brexit-related risks in-house or is external expertise likely to be required to inform risk assessment and decision making?



How to plan for a range of Brexit scenarios

The majority (61%) of surveyed board members believe GCs should be responsible for Brexit scenario planning, including identifying the likely impact of a range of negotiating outcomes. How can businesses use structured scenario planning to achieve this?

To help you understand the likely impact of Brexit on your business, Pinsent Masons has developed a range of scenarios to help you plan for a set of possible futures in a post-Brexit world.

Through structured workshops, Pinsent Masons is working with a range of businesses to map their risk exposure, identify opportunities, and support their businesses to mitigate Brexit risk across a range of Brexit scenarios.

A bespoke, actionable risk and mitigation strategies report is produced at the end of the process to provide you and your board with the tools to take control of your business' place in the future.

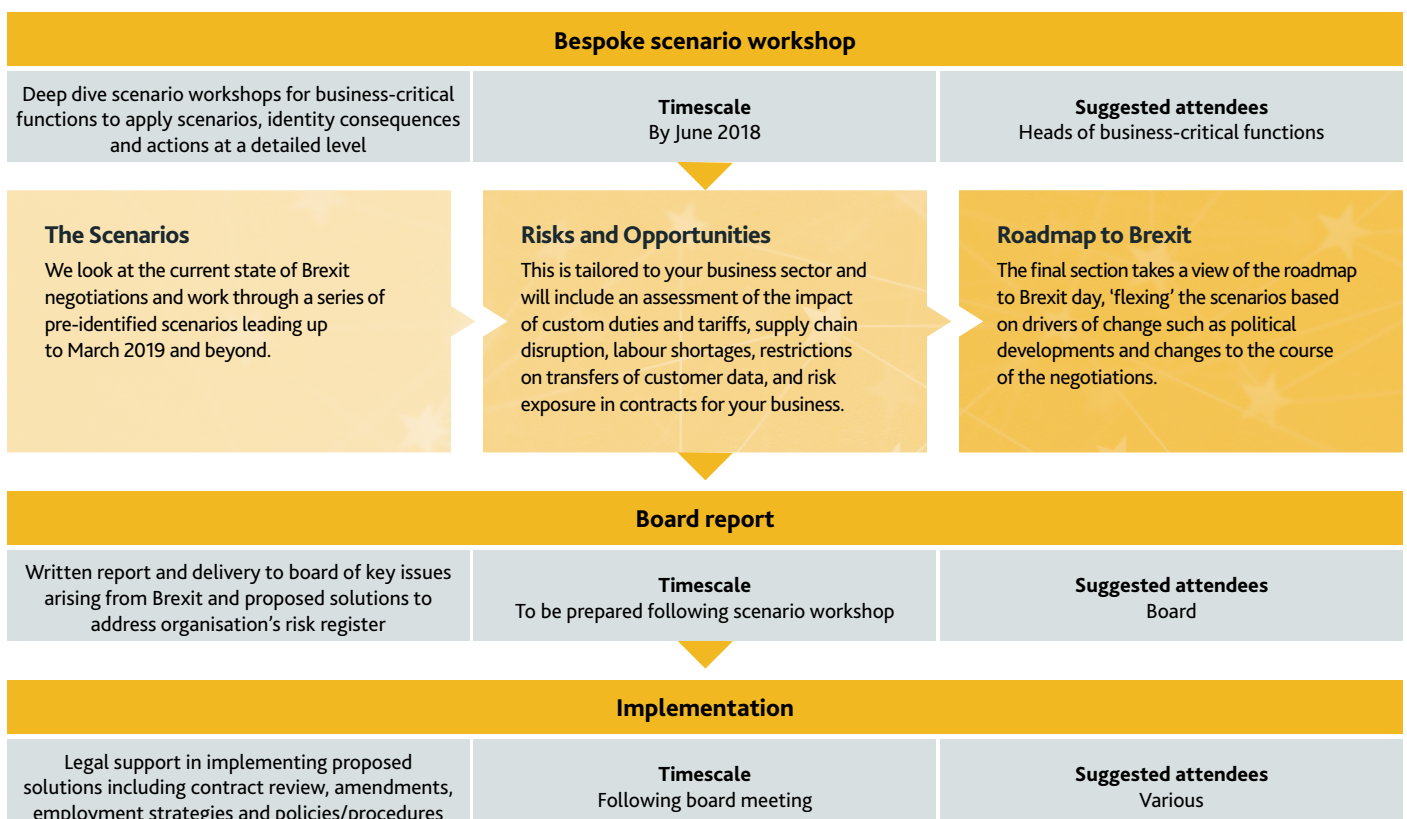


In the workshops that we have conducted, we have actually seen a high potential for Brexit to benefit our business. In short our services may be in higher demand as a result.

GC, FTSE 350 or equivalent company

The following abridged scenario process can be adapted for your business depending on scale, preparedness for Brexit and the number of business

operations which will be impacted. We also offer consultancy support and run workshops to 'test and challenge' existing preparations.



Next steps

Whether it is scenario planning, risk assessment or risk reporting, boards want their GCs to be heavily involved in Brexit preparations.

As Brexit is an external factor businesses have never had to deal with in the past, there is no existing roadmap to success. Every organisation needs to make the most of the varied expertise within it to ensure it tackles the Brexit process in the best-prepared, most well-informed way possible. While some GCs are heavily engaged in initiatives to prepare for Brexit, given the necessity of correctly handling the legal aspects of Brexit, there is an opportunity for them to do more; for GCs to step up and take a lead on navigating their organisation through the choppy waters of Brexit.

With 91% of businesses expecting to have triggered contingency plans by the end of 2018 for a no-deal scenario, it's vital that boards and GCs work effectively together on these initiatives. Regular, open channels of communication are the first step towards this successful working. It is only by doing this that expectations and requirements can be clearly understood by all parties, and an achievable plan of action to account for and tackle the risks presented by Brexit can be prepared and enacted.

To take control of the future of your business, contact Guy Lougher to arrange a structured scenario session.



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Notes

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This note does not constitute legal advice. Specific legal advice should be taken before acting on any of the topics covered.

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