withersworldwide

A key question for corporates during this election: What are the implications going to be for Brexit?

12 NOVEMBER 2019

Sharon Whitehouse
PARTNER | IT

CATEGORY:
ARTICLE

The question is tricky because the positions of the parties – and the likely outcome in terms of Brexit – are still not clear.

As things stand, it looks as though a Conservative victory would result in a push for the approval of the October 2019 revised withdrawal agreement and political declaration, as negotiated by Boris Johnson's government. Labour will try to negotiate its own deal, and then put that to a referendum. The Liberal Democrats want to revoke Article 50. The SNP wants a second referendum.

So the landscape for companies operating both in the EU27 and UK, whether through trading relationships or through group entities, remains opaque. There is still no certainty or clarity.

Can corporates at least be comfortable that a "no deal" Brexit is off the table – as Johnson has indicated should be the case, with his agreement? The passing of the "no deal" Brexit risk on 31 October 2019 – after the passing of the March 2019 deadline – will have caused more temporary relief for many mid- and small-cap corporates. Unlike large multinationals, the resources required to plan effectively for a no-deal Brexit seem to have caused many to adopt a "wait and see" approach. A flurry of concern in September/October 2019 regarding complying with the UK's requirements for imports/exports (and reports of much-increased order numbers, so as to get goods across the border ahead of "exit day") has abated, temporarily at least. Many EU exporter clients to the UK expressed frustration at the government guidance on no-deal planning, on the grounds that it was not sufficiently specific on key issues and essentially they were being asked to take on trust that the government would adopt a "pragmatic approach" to changed legal requirements on matters which affect their production processes. Even at company law level, for groups with UK subsidiaries of EU parent companies (or vice versa), a no deal scenario would potentially mean they had to take on board issues ranging from additional Companies House filing requirements, to the continued application of group accounting exemptions, to additional regulatory requirements, and the tax treatment of dividends.

Even if the "no deal" spectre has abated, however, the implications of the October 2019 withdrawal agreement and political declaration are still fairly ambiguous, assuming that they are both (i) approved by Parliament and implemented into UK law and (ii) approved and ratified by the EU institutions.

As is well known, if the withdrawal agreement becomes legally effective, there would be a transition period till at least 31 December 2020 – a date which, from a planning perspective, is rapidly approaching. A decision would have to be taken by 1 July 2020 as to whether to extend this transition period till the end of 2021 or 2022. During the transition period, reassuringly EU law would (with a few exceptions) continue to apply in the UK. After this, however, it gets more difficult to predict.

During the transition period, under the revised Political Declaration the UK and EU will be "[using] their best endeavours, in good faith" to "negotiate expeditiously" their future arrangements. This will still be (as per the November 2018 documents) for an "ambitious, wide-ranging and balanced economic partnership" but (unlike Theresa May's proposed agreement) the October 2019 political declaration refers expressly to a "comprehensive and balanced Free Trade Agreement" – rather than a free trade area, or building on the single UK-EU customs territory which would have applied by default under the Northern Ireland "backstop". According to the October 2019 documents, it is still expected that there will be no "tariffs, fees, charges or quantitative restrictions" on goods passing between the EU and UK, but as there would not be a single customs territory, rules of origin (i.e. the requirements for proof of the country goods from which goods are deemed to originate, for the purposes of applying tariffs or giving them preferential import treatment) will need to be dealt with.

The House of Commons Library's Briefing Paper of 17 October 2019 notes further that with the new deal (and without the Northern Ireland backstop) there is a "much steeper cliff edge for trade in goods between the rest of the UK [i.e. excluding Northern Ireland] and the EU" if the negotiations during the transition period do not result in a free trade agreement or other arrangement by the end of 31 December

2020/2021/2022 (depending on which applies). If there is no agreement, then the UK would be left trading with EU on the much-cited "WTO terms" i.e. as if it were a member of the WTO without any preferential trading arrangements with the EU in place. Many third countries do of course have these arrangements.

This means that any sense of relief of getting into a transition period could prove short-lived, and 2020 could still prove very unsettling from a planning perspective (will there be an extension by July 2020? Or will there be another race to get something formally agreed by the end of 2020 – if that is possible?).

The UK has also in the October 2019 proposals dropped its "level playing field" commitments as regards labour standards, taxation, environmental protection, competition and state aid. So the scope for divergence between the UK and the EU over time is much wider than previously anticipated. This seems to open the way for the UK to enhance its competitive position in the future – but the compliance implications for companies operating both inside the UK and the EU will need to be worked out.

Overall, the outcome of the election looks likely just to be a step down the road for businesses still trying to understand what role UK entities should play in their operations and corporate structuring."

If you have any questions regarding the UK General Election 2019, please contact your usual Withers contact. You may also wish to view our dedicated webpage which will be updated regularly before Thursday 12 December, click here to view it.

Authors

Sharon Whitehouse

PARTNER | MILAN

Corporate

+39 02 8821 4233 (Milan) +44 20 7597 6191 (London)

sharon.whitehouse@withersworldwide.com