WALKERS

Global Legal and Professional Services

Brexit – November Update
Client Trends and Wider Developments

November 2016

Introduction

Now that the initial surprise has worn off since the outcome of the Brexit referendum (replaced with surprise at the outcome of the US election!), coupled with the UK Government's announcement that Article 50 will be triggered in March 2017, we have set out below an overview of the client trends and wider developments that we have seen since 23 June.

The recent decision of the UK High Court in the Article 50 ruling illustrates that there is still uncertainty as to how the UK will communicate its intention to leave the EU and if the stated preference to trigger Article 50 in March 2017 will be met. The High Court's decision is now under appeal and the final form Brexit will take is also, as yet, completely unclear.

"Having a separately authorised subsidiary inside the EU would future proof businesses against the current uncertainty"

Walkers have been interacting with our clients on the potential impact of Brexit, while closely monitoring ongoing events and developments to ensure we can advise on the risks and opportunities that this unprecedented development brings.

Client interaction on Brexit issues

We have been helping clients with a wide range of queries on the impact on their businesses. This includes responding to requests for Irish perimeter and establishment advices from clients that are considering relocating some or all of their business to Ireland in a worst case 'hard Brexit' scenario.

Regulated financial service provider clients have been particularly cognisant of the risk of a 'hard Brexit' that could see them lose the ability to freely passport the provision of financial services from the UK throughout the EU. The most obvious step to future proof businesses against the current uncertainty is to have a separately authorised subsidiary inside the EU.

Interestingly, we are seeing a lot of the same queries arising repeatedly, regardless of the specific sector that our clients are operating in. In particular, clients want to know about:

» establishment requirements and the staff numbers they will need on the ground in Ireland;

» guidance on engagement with the Central Bank of Ireland (the "CBI") and timelines to obtaining a financial services authorisation or licence;

» how permissible is outsourcing and to what extent can existing UK operations be relied upon and leveraged off;

» taxation issues and how to avail of Ireland's favourable corporate tax regime.

Clients are understandably reluctant to make hasty (and potentially costly) decisions in relation to expanding or moving the jurisdictions in which they operate. We have mainly been seeing a 'wait and see' approach so far with credit institutions, asset managers, insurance and funds entities investigating opportunities and undertaking contingency planning while keeping unfolding events under close review. In fact, despite a number of alarming predictions from various quarters, the UK Government in a recent House of Commons briefing paper has indicated that only one credit institution, the Russian Investment Bank VTB, has announced it will leave London so far.

Notwithstanding this, regulated financial service providers who want to guarantee continued passporting rights across the EU will not be able to remain in a 'holding pattern' indefinitely. If it becomes clear there will be a 'hard Brexit', firms should remember the timeline and runway for obtaining an authorisation in another EU member state (which may be measured in months for an asset manager, but much longer for a larger entity such as a credit institution) will start to run from when Article 50 is triggered.

"Ireland's low 12.5% corporate tax rate could provide savings to firms while offsetting the operational costs of moving"

Even for those UK financial service providers that do not envisage moving jurisdiction, the knock on effects of Brexit will bear close consideration, including, for example, the impact on any current EU-wide consolidated supervision arrangements and the future status of existing business cross-border business lines and branch establishments.

Reactions from the Irish Government and the CBI

Despite an initial perception that the Irish Government was taken by surprise by the result of the referendum, a number of positive steps have been taken since the result. This includes the adoption of a contingency framework identifying key policy issues to be managed by Government departments arising from the Brexit vote.

In addition, the Irish Government body, the Industrial Development Agency (Ireland) (known as the "IDA") has been active in promoting Ireland as a location for inward investment in financial services. In certain circumstances, the IDA offers financial and other supports for foreign firms directly investing in Ireland. It should be noted that the active promotion of Ireland in this manner is the role of the IDA, not the CBI which has said it remains open for business but on a "*neutral*" basis.

The CBI has also been quick to react to Brexit and how it will impact on Ireland, issuing publications and having representatives speak at industry events on the subject and starting an internal re-organisation to prepare for the consequences of Brexit. The CBI has recently confirmed that:

- it acknowledges the potential for a material increase in the number of applications for authorisation by the Central Bank due to the possible loss of passporting rights of UK-authorised entities;
- it is ready to process these applications and is open for constructive engagement and pre-application meetings with properly prepared firms;
- it must be satisfied that an applicant firm will have a "*substantive presence*" before authorising a business or line of business that will be run from Ireland – ie the board and management of the entity should run the firm and make decisions from Ireland with sufficient staff and resources to manage risks;
- properly managed outsourcing and insourcing are allowed, if done in compliance with applicable law and best practice – but a completely disconnected head in Ireland "*would not make much business sense*";
- the CBI publishes indicative turnaround times for authorisations, but actual timeframes will depend upon a wide range of factors, not least of which is the complexity of the proposed business model;
- the fact an applicant group or firm is already authorised elsewhere (ie the UK) will not allow it to "*short-circuit*" the authorisation process. The CBI has responsibilities under EU law and to the Irish state, to fully assess each application on its merits;
- however, the CBI expects that a group or firm that is already authorised will be at an advantage as it will already have the experience and processes etc. in place to allow it to make a complete, strong application.

Other Irish Developments

The Irish budget for 2017 was announced by the Minster for Finance on 11 October 2016. Brexit featured prominently and measures were announced to address the economic risks and potential opportunities for Ireland as a result of the UK's decision to leave the EU. Specific 'Brexit' measures included:

- measures to enhance Ireland's international personal tax competitiveness to help attract high earners, post Brexit;
- a sectoral analysis of the exposure of the Irish economy to Brexit risks, together with a summary of the results of that analysis (available here and here); and
- a review of the stamp duty on stocks or marketable securities of an Irish incorporated company in the context of the sustainability of the stamp duty yield and the future UK relationship with the EU.

In addition, the Government has again reaffirmed Ireland's commitment to its 12.5% corporation tax rate and to meeting international tax standards while also delivering certainty for businesses and maintaining Ireland's competitiveness. This rate could prove very attractive for profitable financial services firms that could avail of substantial tax savings as well as a means of offsetting operational costs of moving jurisdictions.

"Businesses will need to be prepared to act fast once Article 50 is triggered"

This commitment repeats and reflects the robust response delivered by the Government to the European Commission's recent tax decision in the Apple case. As discussed in fuller detail our client briefing on the Apple case (available here), the Apple decision was a one-off case that turned on its individual merits and is not in any way linked, and will not impact on, Ireland's 12.5% corporation tax rate.

Another surprising outcome of the Brexit referendum has been the sharp increase in the number of the number of UK solicitors registering with the Law Society of Ireland. Over 700 British solicitors have registered so far this year, up from an average of about 100 in previous years.

This increase in registrations has not been matched with the establishment of physical practices in Ireland, instead it seems to be a precaution to ensure continued rights of audience in EU courts.

The New Normal?

Initial predictions of an immediate negative impact on the economy of the UK have not yet materialised. For Ireland too, the economic outlook remains broadly positive, despite challenges for Irish exporters to the UK caused by a much weakened sterling.

While there is some anecdotal evidence of the chilling effect of Brexit uncertainty on the broader economy and deal flow, the realisation that a formal Brexit is still over two years away seems to be sinking in across the market. Perhaps one of the most surprising outcomes of the Brexit result is how rapidly business life has adapted to the new normal since the outcome of the referendum.

Despite this, it would be a mistake for any business to believe that the impact of Brexit has passed – in reality, the real impact has not yet been felt. Once Article 50 is triggered and some of the uncertainty around what shape Brexit will take dissipates, businesses will need to be ready to act fast to manage the risks that Brexit will bring.

The pre-negotiation stances of both the UK and EU to date will not be of great comfort to market participants, with indications so far pointing to a high probability of a hard Brexit. This is not the outcome hoped for in Ireland, where this type of exit is virtually guaranteed to have a negative knock-on effect to the wider Irish economy.

Key Contacts

If you would like to discuss in more detail please do not hesitate to contact us or your regular Walkers contact.

Eoin O'Connor
Partner - Head of Risk and Compliance, Ireland
T: +353 1 470 6664
E: eoin.oconnor@walkersglobal.com

Garry Ferguson
Partner - Head of SPCM
T: +353 1 470 6659
E: garry.ferguson@walkersglobal.com

Noeleen Ruddy
Partner
T: +353 1 470 6650
E: noeleen.ruddy@walkersglobal.com

Shane Martin
Regulatory Compliance Director
T: +353 1 470 6673
E: shane.martin@walkersglobal.com

Andrew Traynor
Partner
T: +353 1 470 6632
E: andrew.traynor@walkersglobal.com

Jonathan Sheehan
Partner - Head of Tax
T: +353 1 470 6639
E: jonathan.sheehan@walkersglobal.com