Managing UK nationalisation risk in the face of a General Election

In the face of an impending UK General Election, the Labour Party's manifesto commitment to put nationalisation at the core of its economic strategy has come sharply into focus. Public statements to the effect that it plans to pay less than fair market compensation for nationalised assets are prompting potentially-affected entities to take steps to manage their risk.

In particular, investors in the energy, rail and water sectors have been assessing potential protections available under domestic legislation, including the Human Rights Act, as well as international law. Restructuring to attract the protection of Bilateral or Multilateral Investment Treaties such as the Energy Charter Treaty may maximise the prospects of success in a future claim for compensation, and thus apply maximum leverage in any negotiations with a nationalising Government.

However, it is not a "given" that restructuring potentially-affected investments – for example by introducing into the holding structure a foreign entity ("Newco") in a jurisdiction with an investment treaty in force with the UK - will automatically provide the desired level of protection.

Many factors should be weighed up when deciding if, how and where to restructure, since any restructuring in the energy, water or other UK infrastructure sector could require companies to assess and potentially reconsider their tax and regulatory positions.

We set out below some key points to think about – or to double check - as you consider putting in place protection for the weeks ahead.

With the prospect of a General Election on the horizon, taking risk-mitigation steps to secure protection in the face of potential nationalisation has become time-critical.

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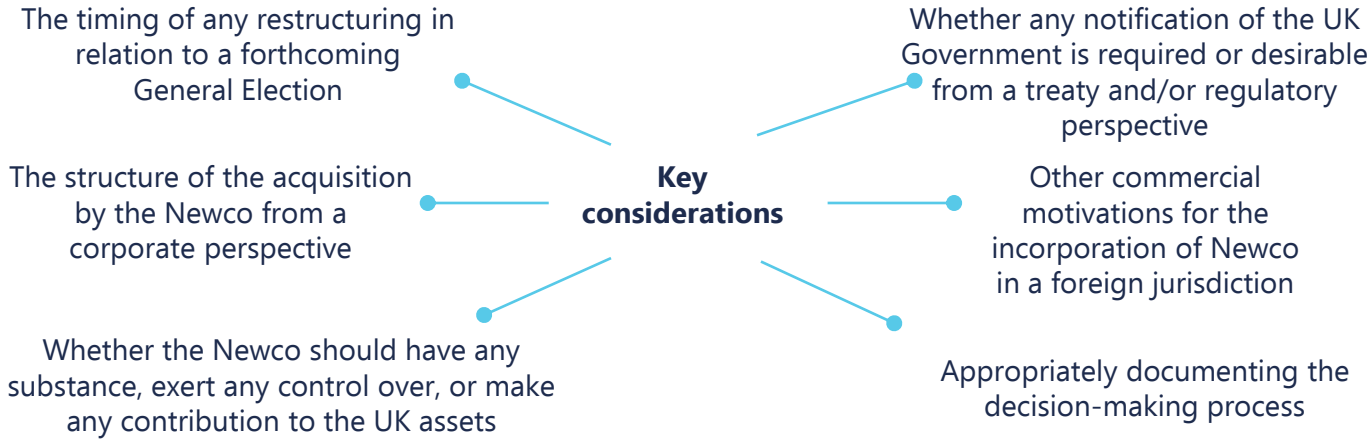
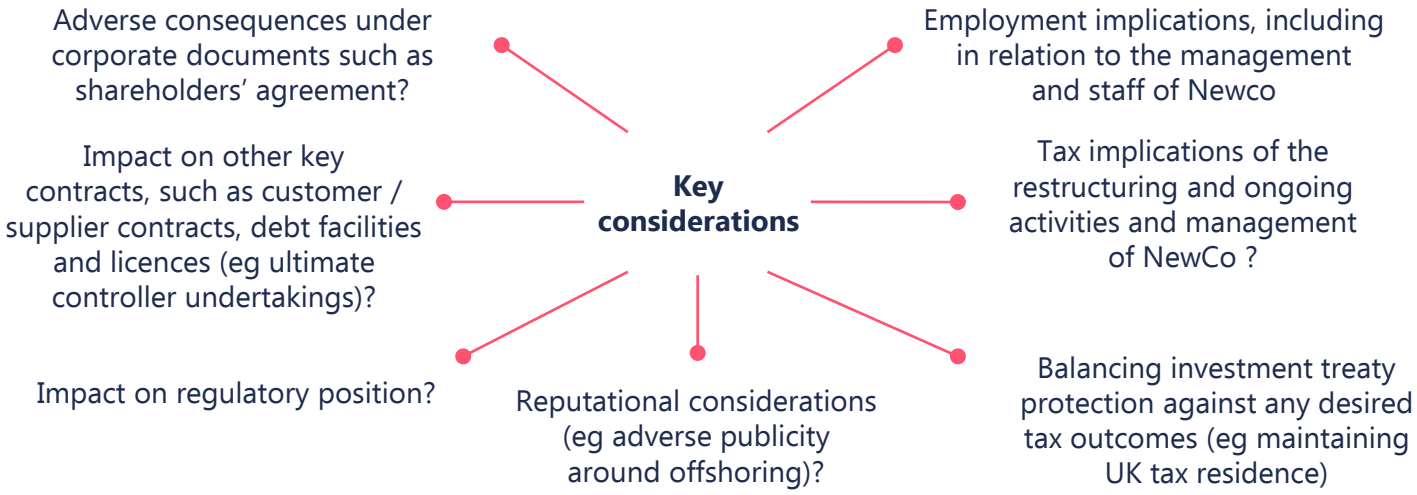
Will the foreign Newco qualify as an "investor" with an "investment" in an eventual arbitration against the UK Government?

The wording of the relevant investment treaty and the applicable procedural rules will determine to some extent what constitutes a qualifying "investor" with a qualifying "investment" – and therefore whether a tribunal has jurisdiction. But it is also important to look beyond the wording of these legal instruments. Significant unpredictability exists, as demonstrated by the divergent arbitral case law, particularly in cases considering corporate restructurings effected to maximise treaty protection ahead of a potential dispute.



Will the restructure result in unintended consequences?



Where to incorporate Newco?

Many different factors go into answering this question. The UK has a large number of investment treaties in force. However, pre-Brexit, issues exist in relation to intra-EU state treaty protection. In light of this, Hong Kong and Singapore are attracting attention, bearing in mind their relatively favourable corporate law and tax environments and the speed and efficiency with which companies can be set up in those jurisdictions. However, good reasons may exist to look elsewhere.

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