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Are you ready? – Implications of a no-deal Brexit for UK listed companies

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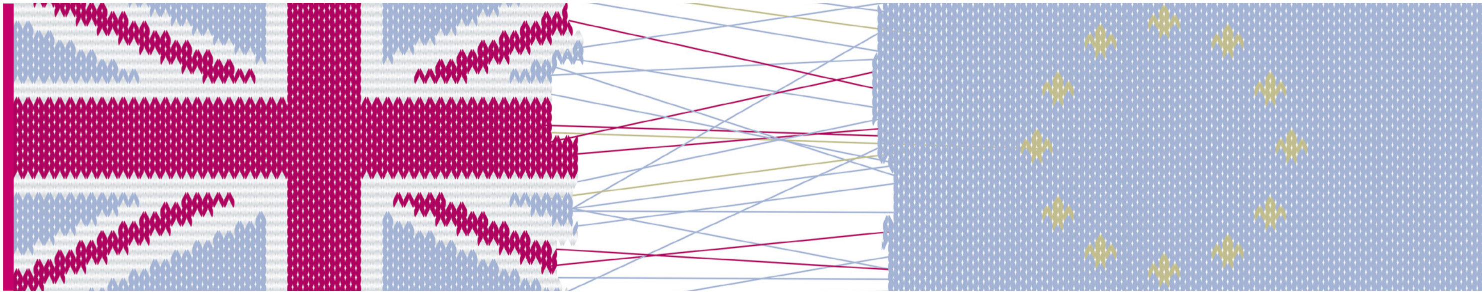

In this note, we highlight the impact of Brexit on the prospectus, transparency and market abuse regimes for UK listed companies, if the United Kingdom leaves the EU on or after 31 October 2019 without a withdrawal agreement and transition period (a "no-deal" Brexit).

In planning for a no-deal Brexit, the UK government and Financial Conduct Authority (FCA) have aimed to ensure that the existing prospectus, transparency and market abuse regimes continue in the UK, with only such changes as are needed to adjust for the UK no longer being a member of the EU. Existing EU law as it applies at the date of exit will be "on-shored" and become part of UK law, with appropriate amendments. The UK regime will therefore be broadly unchanged but there will be some differences with practical implications.

Which rules will apply going forward and where can we find them?

Because the UK is on-shoring existing EU law as it applies on exit day, the UK will have its own versions of the EU prospectus, transparency and market abuse (**MAR**) regimes mirroring the EU versions. Which regime(s) will apply will depend on where an issuer is seeking a listing/listed and where relevant activities take place.

The on-shored EU law and UK domestic legislation[1] implementing EU directives will be amended with effect from exit day (31 October 2019) to remove references to EU institutions and reciprocal arrangements with European Economic Area (**EEA**) member states. These amendments have generally been made by Statutory Instruments made under the European Union (Withdrawal) Act 2018. Other relevant changes are those made by the FCA to its rules[2] in preparation for exit.

We have a live transaction that straddles exit day – what do we need to think about?

We have an outstanding public offer in the EEA

For listings or public offers in the UK, the UK version of the EU Prospectus Regulation will apply to all public offers in the UK and admissions to trading on a UK-regulated market from the date of exit. However, new prospectuses will no longer be able to be passported into the UK after exit day.

For admission applications or public offers in the UK which straddle exit day, a prospectus approved by an EEA competent authority and passported into the UK before exit may continue to be used for the duration of its validity. Any supplement to that prospectus published after exit day will need to be approved by the FCA as well as by the EEA competent authority.

From exit day, UK-approved prospectuses will no longer be able to be passported into the EEA. If an FCA-approved prospectus has previously been passported for use on a public offer in the EEA that continues on or after exit day, a new EEA prospectus will be required, approved by the issuer's new EEA home member state. While the content of this prospectus should be the same as the existing FCA-approved prospectus, the additional prospectus approval and publication process may require adjustments and could result in delays to the deal timetable.

Impact on documentation

Changes to contractual documentation may be needed to reflect the UK's exit from the EU/EEA and to refer to on-shored legislation where appropriate. Investment firms in the UK will lose the benefit of EU rules allowing them to work across the EEA and may need to use an affiliate to avoid breaching regulatory requirements. In order to ensure that the correct group legal entity can perform the transaction, the right to change entity may need to be provided for in engagement and/or underwriting agreements, particularly on transactions that may straddle exit day. The Association for Financial Markets in Europe has produced Q&A for issuers explaining why such clauses are required, which can be found here.

How will the changes to the transparency regime impact us?

The UK is our home member state for the purposes of the Transparency Directive – do we need a new home member state?

The Transparency Directive covers the regimes on disclosure of interests in shares (transposed in the UK by the FCA's DTR 5) and periodic reporting and disclosure of regulated information (DTR 4 and 6).

UK issuers, and non-EEA issuers whose home state is the UK, will need to select a new home member state if they have securities admitted to trading or offered to the public in the EEA. The European Securities and Markets Authority's guidance encourages such issuers to disclose their new home member state under the Transparency Directive "without delay" after exit day. If a choice has not been made by three months after exit day, the member state where the issuer has securities admitted to trading will automatically be considered as that issuer's home member state. If the issuer has securities admitted in more than one member state, ESMA considers that each such state will be the issuer's home member state until the issuer has chosen and disclosed its home member state.

1. *In particular, the Financial Services and Markets Act 2000 and the Companies Act 2006.*
2. *Including the Listing Rules, Transparency Rules and Prospectus Regulation Rules.*

We are listed in the UK and in another EEA state – which transparency regime applies?

UK listed issuers which also have a listing in the EEA will need to comply with both the UK and EU regimes from the date of exit.

Do we need to make any notifications to the market?

The impact of Brexit, if material, should be discussed in risk factors and other disclosures, such as periodic reports, and companies should consider whether any inside information arises which would require immediate announcement.

An issuer which has a listing in the EEA as well as the UK should consider whether there are any differences between the UK rules and the rules under the transparency regime in its EEA home member state. For example, under the rules requiring notification of share dealings by major shareholders, the member state thresholds that trigger a notification may be different from the UK thresholds.

Will UK MAR require us to change our internal MAR policies?

The on-shoring of the Market Abuse Regulation will mean that UK listed companies' obligations under MAR relating to disclosure of inside information and directors' and managers' (PDMR) dealings will continue to apply after exit day. However, companies incorporated in the UK and listed in the EEA or vice versa may have to make notifications to a different competent authority. Issuers with listings in both the UK and the EEA will need to make notifications to both the FCA and the relevant home member state authority in the EEA.

The UK is our home member state for the purposes of the prospectus regime – do we need a new home member state?

You will need a new home member state immediately if you have an outstanding public offer in the EEA – in other circumstances a new home member state is required prior to an EEA offer to the public or admission to trading on an EEA-regulated market.

Can we continue using EU-adopted International Reporting Financial Standards to prepare our accounts?

UK issuers will be required to use IFRS as adopted by the UK (UK IFRS) for their accounts for financial years starting on or after exit day. Issuers will be permitted to continue to prepare financial statements using IFRS as adopted by the EU (EU IFRS) for financial years beginning before exit day. For subsequent financial years, issuers from third countries will be able to continue to use other accounting standards, including EU IFRS, if those standards have been declared equivalent to UK IFRS in accordance with the procedure that the UK is in the process of establishing. In addition, existing equivalence decisions (such as for US GAAP) will continue to apply for issuers with securities traded in the UK.

UK issuers with securities admitted to trading on an EEA market may need to provide additional assurance to the relevant listing authority that their accounts comply with IFRS as adopted by the EU. The EU has not given any indication that it would declare UK IFRS equivalent even though EU IFRS and UK IFRS will be the same immediately after exit day. Issuers and those who rely on their accounts should be aware of the possibility that UK and EU accounting standards may diverge over the longer term.

Our company is a member of a group which includes EEA entities. Will the same accounting and reporting exemptions apply?

Some current accounting and reporting exemptions will no longer be extended to companies with parents or subsidiaries incorporated in the EEA from financial years commencing on or after exit day. UK companies should review the exemptions they currently rely upon and consider if they will still be available. Further information is given in the note published by BEIS on accounting if there is no Brexit deal, available here.

EEA subsidiaries of UK companies, which currently benefit from the group exemption from preparing accounts, will need to consider if they will have to prepare their own accounts under the relevant local law or whether alternative exemptions apply.

Do we need to change our auditors?

After exit, the UK will be a "third country" under EU rules, and UK companies which have securities admitted to trading on a regulated market in the EEA will need to ensure that their auditors comply with the relevant third country auditor registration requirements.

Similarly, as EEA countries will be "third countries" as far as the UK is concerned, EEA companies listed in the UK will need to ensure, for financial years commencing on or after exit day, that their auditors register as a statutory auditor in the UK or as a third country auditor on the register of third country auditors maintained by the Financial Reporting Council.

Can we continue to offer share plans to our UK and EEA employees?

Offers of non-transferable securities (so most options and conditional awards/restricted stock units) and free shares will continue to fall outside the prospectus regime in both the UK and EEA after Brexit. For other types of plans, in particular share purchase plans, issuers will find that familiar exemptions remain available, enabling them to offer their share incentives to UK and EEA employees without having to produce a prospectus.

The employee share plan exemption will continue to apply, both in the UK and EEA. Issuers relying on this exemption should check that they meet the relevant requirements, including ensuring that the information document to be provided to employees (containing information on the number and nature of the securities and the reasons for and details of the offer) reflects the applicable legislation.

The useful "150 persons" exemption will also remain available to issuers. It will apply if a plan is offered to fewer than 150 people in the UK, or to fewer than 150 people per EEA member state. Similarly, the prospectus exemption which applies where the total consideration for the offer (over a 12-month period) is below the applicable threshold can still be used after Brexit. This threshold is €8m for offers in the UK, and generally between €1m and €8m for EEA offers, depending on the country.

Further resources

Accounting if there's no Brexit deal (May 2019):
https://www.gov.uk/guidance/accounting-if-there's-no-brexit-deal.

Auditing if there's no Brexit deal (May 2019):
https://www.gov.uk/guidance/auditing-if-theres-no-brexit-deal.

Amendments to the Companies Act 2006 and other legislation:

> The Accounts and Reports (Amendment) (EU Exit) Regulations 2019 explanatory memorandum.

> The International Accounting Standards and European Public Limited-Liability Company (Amendment etc.) (EU Exit) Regulations 2019 explanatory memorandum.

Changes to FCA Handbook – set out in PS 19/5 (April 2019).

ESMA Transparency Directive Questions and Answers (April 2019).

ESMA Questions and Answers (prospectuses) (April 2019).

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