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Brexit

Key issues for equity capital markets issuers

1 February 2020

Background

On 31 January 2020 (at midnight CET, 11pm UK time, **exit day**), the UK ceased to be a member state of the EU, and the European Communities Act 1972 – the statutory basis for giving effect to EU law in the UK – was repealed. This is a profound change, but its immediate impact on UK law and regulation is limited in two important ways.

- Under the UK-EU agreement on the UK's withdrawal from the EU (the **Withdrawal Agreement**), virtually the whole of EU law remains "applicable to and in the UK" from exit day until at least 31 December 2020. The Withdrawal Agreement calls this the "transition period". Here, we call it the **implementation period**, following terminology used in the European Union (Withdrawal Agreement) Act 2020 (the Act **2020**). The 2020 Act implements the Withdrawal Agreement into UK domestic law.

- Under the European Union (Withdrawal) Act 2018 (the **2018 Act**), all the EU law that applies in and to the UK immediately before the end of the implementation period(a substantial proportion of all UK regulation) will continue in force as UK domestic law (with some modifications) unless and until it is replaced or amended by new UK legislation. Under powers contained in the 2018 Act, the UK government has already issued a large number of statutory instruments to amend that "on-shored" body of law, and make it fit for purpose as domestic UK legislation in a post-Brexit environment. These statutory instruments are due to come into force at the end of the implementation period.

The Withdrawal Agreement provides for the implementation period to end on 31 December 2020, unless the UK and EU agree, by 1 July 2020, that it should be extended for a further one or two years. The UK government has indicated that it does not wish to seek such an extension, and the 2020 Act states that the implementation period ends on 31 December 2020.

Deal or no deal?

The implementation period gives the UK and EU a time-limited opportunity to negotiate, against a stable background, the terms of their future relations in respect of trade and the other areas that are currently regulated by EU law. At the end of the implementation period, any given area of UK-EU relations either will or will not be regulated by a new UK-EU agreement (a **future relationship agreement**)

When the Withdrawal Agreement was being negotiated, "deal or no deal?" was used to refer to the fact that at the point when the UK ceased to be an EU member state, there would either be no agreement on the terms of the UK's withdrawal (and so effectively a legal vacuum in UK-EU relations), or the UK would enter a transition period in which, for the duration of that period, the status quo would be largely preserved. At the end of the implementation period, it is possible that the UK and EU will have reached agreement on all the aspects of their future relations that will be governed by future relationship agreements, or none of them, but it is also quite likely that they will have reached

agreement on some, but not on others, so that the question "deal or no deal?" can only be answered for each individual topic or sector.

No deal at the end of the implementation period

We now have a fair degree of visibility as to how the UK ECM regulatory framework is to be adapted in a no deal scenario.

Secondary legislation made under the 2018 Act and originally put in place for the possibility of a "hard Brexit" on exit day is already on the statute book and is due to come into force at the end of the implementation period.

Prospectus, transparency and listing regimes

Secondary legislation[1] will replicate, as far as possible, the effects of the prospectus, transparency and listing regimes, as they apply.at the end of the implementation period. However, the legislation will make a number of specific changes to reflect the UK's departure from the EU's capital markets union. These include:

- ***Approval of prospectuses***: Under the Prospectus Regulation (EU) 2017/1129, once a prospectus has been approved by one EEA state's competent authority, it can be "passported" into all other EEA states for offers to the public or applications for admission to trading on a regulated market without additional prospectus approval. Without a future relationship agreement in place, the UK will generally default to treating EEA states and issuers as other "third" countries and issuers. In that case, prospectuses for use in the UK will need to be approved by the FCA even if they have been approved by a national competent authority of an EEA member state. Consequently:
    - EEA member state IPO candidates listing shares in London – and only listing in London – will likely not have to front-run a local approval (which is then passported into the FCA), but rather go directly to the FCA. This presumes (i) no public offering in that EEA member state where the issuer is incorporated and (ii) any European offering being sold to institutional investors;
    - EEA member state IPO candidates listing GDRs in London – and only listing GDRs in London – will continue, as previously, to go directly to the FCA for prospectus approval; and
    - EEA member state IPO candidates undertaking a dual listing in London and an EEA member state will have to undertake two separate approval processes for the prospectus, unless either the UK or the relevant EEA member state has determined that prospectus contents are "equivalent" (under Article 29 of the Prospectus Regulation).
- ***Grandfathering***: Prospectuses passported into the UK before the end of the implementation period may be used in the UK until their validity expires.
- ***Equivalence determinations***: Technical assessments of the prospectus regimes of third country jurisdictions will no longer be carried out by the European Commission, but instead will be undertaken by the FCA.

HM Treasury will be responsible for making equivalence decisions (after consultation with BEIS) in respect of the accounting rules of third country jurisdictions for the purposes of determining whether those rules meet the necessary equivalence standards for the prospectus and transparency regimes.

Market abuse regime

Again, secondary legislation[2] will replicate, as far as possible, the effects of the EU market abuse regime (**MAR**) as it applies at the end of the implementation period and will also address deficiencies in domestic legislation related to market abuse to ensure that it continues to operate effectively.

- ***Maintaining the scope of the EU MAR***: UK MAR will capture conduct related to instruments admitted to trading or traded on both UK and EU trading venues.
- ***Notification requirements***: UK MAR will retain EU MAR's notification requirements for issuers to report certain information to the relevant national competent authorities. These include obligations to report manager

[1] Principally the Official Listing of Securities, Prospectus and Transparency (Amendment etc.)(EU Exit) Regulations 2019 and the Prospectus (Amendment etc.) (EU Exit Regulations) 2019
[2] Market Abuse (Amendment) (EU Exit) Regulations 2019

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transactions, to report any delay in publicly disclosing inside information and to provide, on request, insider lists. This will require that:

- certain rules be on-shored with no difference in substantive application. For example, where an EEA member state issuer solely listed in London is currently required to notify the FCA of its delayed disclosure of inside information, this will remain the same; and
- certain rules be substantively changed to reflect the withdrawal. For example, where persons discharging managerial responsibilities of an EEA member state issuer solely listed in London are currently required to notify the local regulator of managers' transactions, this will change to the UK regulator.

Deal at the end of the implementation period

In the political declaration signed by the UK and EU in October 2019, the UK and the EU stated that their intention was to begin the formal process of negotiations on the future relationship as soon as possible after the UK's withdrawal exit day so that the agreements governing the relationship can come into force by the end of 2020.

In the area of financial services, the political declaration signed by the UK and EU in October 2019 includes statements that the UK and the EU:

- are committed to preserving financial stability, market integrity, investor and consumer protection and fair competition, while respecting each other's regulatory and decision-making autonomy, and their ability to take equivalence decisions in their own interest;
- should start assessing the equivalence of each other's regulatory and supervisory regimes as soon as possible after the UK leaves the EU, endeavouring to conclude these equivalence assessments before the end of June 2020;
- agree to keep their respective equivalence frameworks under review;
- agree that close and structured co-operation on regulatory and supervisory matters is in their mutual interest.

However, what this means in practice for the equity capital markets remains to be seen. The European Commission's position on the future UK-EU relationship, appears to be that the equivalence regimes set out in existing EU legislation are an appropriate basis for cross-border market access between the UK and the EU after Brexit. It does not favour the enhanced equivalence regime based on mutual recognition that was favoured by the UK government.

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Law stated as at 1 February 2020