

Brexit

Key issues for equity capital markets issuers

12 October 2020

Background

The UK left the EU on 31 January 2020 (**exit day**). However, this profound change has so far had limited impact on UK law and regulation. Under the agreement on the UK's withdrawal from the EU (the **Withdrawal Agreement**), the UK continues in most respects to be treated as if it were still part of the EU from exit day until 31 December 2020 (the **implementation period**). The Withdrawal Agreement provided a mechanism to extend the implementation period but it has not been used. It therefore appears that the full legal consequences of Brexit will begin to be felt from 1 January 2021.

The Withdrawal Agreement does not regulate future trade between the UK and EU, or any other area of potential future EU-UK cooperation, except to a limited extent in relation to Northern Ireland. It remains unclear if a deal on future UK-EU relations will be agreed by 31 December 2020. In some areas, there is an obvious legal fall-back framework in the absence of a deal (for example, if agreement is not reached on tariff-free trade, "WTO rules" will apply); in other areas there is not. Whatever happens, those trading between the UK and EU will face significant regulatory changes (for example, in relation to customs). It also seems likely that, if the UK and EU reach a deal in the coming weeks, it may be a fairly "thin" agreement, meaning that negotiations on some aspects of the UK-EU post-Brexit relations may continue well beyond 2020. For more detailed background, click [here](#).

Prospectus, transparency and listing regimes

Whether or not a deal on future UK-EU relations is agreed, it is clear that the regulatory framework for ECM transactions is not currently on the negotiating table. Therefore, as matters stand, secondary legislation made under the European Union (Withdrawal) Act 2018, and originally put in place for the possibility of a "hard Brexit" on exit day, will come into force at the end of the implementation period.

This secondary legislation¹ will replicate within the UK, 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:

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

- 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 and until either the UK or the relevant EEA member state has determined that prospectus contents are "equivalent" (under Article 29 of the Prospectus Regulation or, in the case of the UK, its on-shored equivalent).
- **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 legislation² 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 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.

Contacts

Richard Barham

Partner

D +44 20 7246 7109

M +44 7795 618263

richard.barham@dentons.com



Nikolas Colbridge

Partner

D +44 20 7246 7102

M +44 7769 248817

nikolas.colbridge@dentons.com



Anna Janik

Managing Practice Development Lawyer

D +44 20 7246 7384

M +44 7747 656819

anna.janik@dentons.com



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² Market Abuse (Amendment) (EU Exit) Regulations 2019