

## Brexit and your prospectuses

The events surrounding the Brexit negotiations continue to be in a state of flux - but we do have some clarity around the status of the Prospectus Regulation in the UK whatever the outcome of the UK Government's negotiations with the EU.

We summarise the latest developments regarding the status of the new prospectus regime if the UK leaves the EU with or without a “deal” and highlight some practical points to consider when planning your post-exit day equity capital markets transactions in 2019.

### The Prospectus Regulation – current status

The [Prospectus Regulation \(EU\) 2017/1129](#) (**PR**), which came into force on 20 July 2017, sets out a new framework of rules which govern when a prospectus is required, what information must be included and how it must be approved. It will repeal the current Prospectus Directive (2003/71/EC) and its implementing measures (the so called **PD regime**).

Whilst certain of the provisions are already applicable in the UK, the majority of the PR's provisions apply from 21 July 2019 – that is, after 29 March 2019, being the current date scheduled for the UK's exit from the EU (**exit day**).

#### *Will the PR apply in the UK?*

Under the terms of the [EU \(Withdrawal\) Act](#) 2018, direct EU legislation, which is operative immediately before exit day, will form part of UK law on, and after, exit day. “Operative” means that the legislation must be in force and applies immediately before exit day.

As the majority of the PR's provisions do not apply until 21 July 2019, only the limited provisions of the PR that apply now will continue to apply in the UK after its exit (unless exit is delayed until after 21 July 2019). Click [here](#) for our summary of these provisions.

The status of the PR provisions that do not apply in the UK prior to exit day will depend upon whether there is a “deal” agreed between the UK Government and the EU regarding the UK's exit. Read on for a summary of the position if the UK does or does not secure a “deal” on its exit from the EU.

### What happens in a “no deal” scenario?

In a “no deal” scenario, the Government has stated in its [explanatory information](#) to the (then draft) Official Listing of Securities, Prospectus and Transparency (Amendment) (EU Exit) Regulations 2019 (**Regulations**) that it intends to domesticate the provisions of the PR that are not in effect at that date in due course. At this stage however, the timing and extent of any reform to the current prospectus regime in the event of a “no-deal” remains unclear.

Consequently, from exit day, the PD regime will continue to apply in the UK (together with the PR provisions already applicable) and the Regulations will take effect to address deficiencies in the Prospectus Directive and the Transparency Directive that arise from the UK's exit.

The Regulations replicate, as far as possible, the current regime, but there are some specific changes to note:

- A non-UK issuer will need to secure the FCA's approval of its prospectus, irrespective of whether the prospectus has already been approved by a national competent authority of an EEA member state.
- There will be a grandfathering period so that prospectuses passported into the UK under the EU passporting regime before exit day may be used in the UK until their twelve month validity expires. Subject to FCA approval, issuers will also be able to supplement these prospectuses where necessary whilst they remain valid.
- However, there are no reciprocal grandfathering arrangements in place in the EU27 Member States and the three EEA EFTA States (being

Iceland, Liechtenstein and Norway) for UK approved prospectuses after exit day. In its latest edition of the [Prospectus Q&As](#) published on 31 January 2019, ESMA considers that, if the UK withdraws without a “deal”, prospectuses approved by the FCA prior to exit day cannot be passported to the EU27 Member States and EEA EFTA States and can no longer be supplemented. Consequently, ESMA notes that such prospectuses can no longer be used to offer securities to the public, or admit securities to trading on a regulated market, within the EU27 Member States and EEA EFTA States after the UK’s exit, as this would entail a risk of a significant new factor, material mistake or inaccuracy arising without the issuer being able to inform investors, which in turn, deprives investors of their withdrawal rights.

- HM Treasury (HMT) will be responsible for determining the equivalence of non-UK jurisdictions whilst the FCA will provide technical assessments of their regimes. Existing European Commission equivalence decisions regarding the presentation of historical financial information within a prospectus will also be domesticated into UK legislation.
- HMT will assume the Commission’s function of determining whether the third country jurisdictions’ accounting rules meet the necessary standards to be deemed equivalent.
- Issuers will be required to use IFRS as adopted by the UK for their consolidated accounts and, in order to provide continuity, HMT intends to issue an equivalence decision in time for exit day which determines that EU-adopted IFRS can continue to be used by issuers (including those in EEA states whose securities are admitted to trading on a UK regulated market or are making a public offer of securities in the UK) to prepare financial statements for transparency requirements and for the purposes of preparing a prospectus. Issuers will also be able to continue to prepare financial accounts using EU-adopted IFRS for financial years beginning before exit day.
- At the same time, the UK Government intends to seek equivalence on accounting under the EU’s existing third country regimes.

The FCA published consultation paper [CP 18/36](#) which proposes amendments to its FCA Handbook to reflect the above changes in the event of a “no-deal” scenario. The consultation period closed on 21 December 2018 and in February 2019, the FCA published its [Brexit Policy Statement PS 19/5](#) which, amongst other things, published

feedback on CP18/36 and confirmed its intention to proceed with its proposals.

### What happens if the UK secures a “deal”?

If the UK Government secures a deal with the EU, the UK and the EU are expected to enter into a withdrawal agreement which governs the terms of the transition period which starts from the UK’s exit and is currently scheduled to end on 31 December 2020, unless extended. During the transition period, unless provided otherwise, EU law will apply in the UK and, consequently, the remaining PR provisions will apply in the UK when they become operative on 21 July 2019.

In January 2019, the FCA published consultation paper [CP 19/6](#) which sets out its proposals to align the FCA Handbook with the PR to ensure that the rules are consistent with the PR on the basis that it will apply in the UK during the transition period. The consultation period closes on 28 March 2019 and the FCA expects to publish a policy statement by the end of May this year.

### Planning your transactions

As we approach exit day and wait to hear the final outcome of the Government’s negotiations, issuers and advisers should consider the following practical implications when structuring their equity capital markets transactions for 2019:

#### *Choosing a new “home” Member State*

- In a “no-deal” scenario, third country issuers which have chosen the UK as their home Member State for prospectus approval, and issuers who currently have the UK as their home Member State for prospectus approval due to having a UK registered office, will have to choose a new home Member State when they wish to make a public offer or be admitted to trading in the EU27 Member States / EEA EFTA States.
- In its [Prospectus Q&As](#), ESMA considers that these issuers should choose between the EU27 Member States / EEA EFTA States in which they have activities after the UK’s withdrawal (being either offers or admissions made after the withdrawal or admissions made before the withdrawal which continue after the withdrawal). Member States in which offers have been opened and closed before the UK’s withdrawal should be disregarded for this purpose.

#### *Continuing an offer to the public after a “no-deal” exit*

- Continuing an offer to the public in the EU 27 Member States / EEA EFTA States after the UK’s “no-deal” exit may not be possible. If an issuer has an open offer to the public in

an EU27 Member State which is based on a passported prospectus approved by the FCA before exit day, ESMA is of the view that, if there is “no deal”, the issuer would need to have a prospectus approved in its chosen new EU27/ EEA EFTA home Member State for the part of the offer which will take place after the UK’s exit. However, as the issuer can only choose a new home Member State when the UK, its existing home Member State, has exited the EU, it cannot formally seek approval of a prospectus by its new home Member State before 30 March 2019. Consequently, it is unlikely that the offer will be able to continue on 30 March 2019 as there will likely be timing constraints related to seeking the new approval. Instead, ESMA states that it is likely that the issuer will have to start a new offer once a prospectus is approved within the EU27 / EEA EFTA States.

#### *Maintaining your admission to trading in the EU after a “no-deal” exit*

- Issuers will be relieved to learn that ESMA considers that, where there is “no-deal”, an issuer’s admission to trading on a regulated market in an EU27 Member State which is based on an FCA approved passported prospectus remains valid. Consequently, there is no need to apply for new approval of the prospectus in the relevant EU-27 Member State in order to maintain the issuer’s admission to trading in the relevant market.

#### *New admissions to trading in the EU after a “no-deal” exit*

- If, after a “no-deal” exit, an issuer wishes to seek a new admission to trading on a regulated market in an EU-27 Member State with a prospectus which was approved by the FCA pre-exit day and which remains valid, ESMA considers that the issuer would also need to have a prospectus approved in its new EU 27 home Member State.
- Note that ESMA considers that, where additional approval of the prospectus is required by the competent authority of the new Member State (as referred to in the above scenarios), the same FCA approved prospectus drawn up by the issuer could be submitted for approval. The issuer is not obliged to draw up an entirely new prospectus.

#### *Consideration and location of your offerings under the PR*

- Issuers should continue to consider the consideration and geographical location of their offerings under the new PR exemption thresholds and whether an EU prospectus

should be prepared for investors in each Member State. To assist planning, ESMA has recently published [this list](#) of the thresholds below which an offer of securities to the public does not need a prospectus in the various Member States.

#### *Free float – now includes “rest of world” investors*

- Note that, after exit, the current free float requirement under which issuers must ensure that 25% or more of their issued shares are held in public hands in EEA states will be amended so as to require 25% or more shares to be held by investors in any jurisdiction. Whilst the FCA regularly grants waivers for ‘rest of the world’ investors counted in free float calculations, the requirement to seek such a waiver will be removed from the admission process and may be considered a small yet useful relaxation for issuers.

#### *Drafting your prospectus*

- The FCA has noted that some issuers may wish to prepare a prospectus under the PR before 21 July 2019 for approval on or after 21 July 2019. However, updates to the FCA’s PR sourcebook will be subject to EU measures under the PR becoming final – the timing of which is uncertain. Helpfully, the FCA encourages issuers to give them advance notice of their transactions so that they can assist issuers with planning their transactions as the PR’s implementation deadline approaches.
- Note that issuers will still be able to submit a draft prospectus to the FCA under the current regime until the new regime takes effect on 21 July 2019. The FCA has stated that it will be pragmatic and review draft prospectuses according to the regime under which they were submitted.
- If there is a “deal”, issuers with a prospectus approved in the 12 months before 21 July 2019 will be subject to the measures in place before the Regulation repeals the PD regime. The PR also provides that prospectuses approved before 21 July 2019 shall continue to be governed by the national law applying at the time of approval until the end of their validity or until 12 months have elapsed after 21 July 2019, whichever occurs first.

#### **ECM expertise**

For assistance with structuring your transactions, planning your capital raising strategy in 2019 and beyond or for a general discussion of our thoughts on Brexit, please do speak to your usual contact at Hogan Lovells or one of the listed contacts.

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