

Employment & Benefits

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Brexit and Employee Share Plans - the short term, mid term and long term implications

There is a lot of commentary and conflicting statements on the effect of the referendum vote to exit the EU on 23rd June, 2016 ("the "Brexit" vote) and it is clear that there is a huge degree of uncertainty and market turmoil in the UK generally.

Companies and share plan administrators need to be clear on the implications of the Brexit vote on the operation of their share plans.

Short Term

Legal position

From the legal point of view, Brexit has no effect on the ability of companies to implement and operate employee share and other incentive plans in the UK and elsewhere in Europe. The Brexit vote was an advisory vote and has no direct effect on any legislation now in force. It could be two years or more before any legislation affecting share and other incentive plans is changed.

There is no need for immediate changes to the legal framework underpinning the employee share operations.

Any new EU legislation coming into force in the near future, such as the Market Abuse Regulation, will still come into force.

Market turmoil

While there is no need to change the legal framework, market turmoil is bound to affect the value of the shares held by employees and the perceptions of employees.

We are not expecting companies to change employee share awards and participation to take into account market movements on a short term basis.

There may be a small number of cases where participants are particularly adversely affected-for

instance, through the timing of the vesting of their awards and measurement of their performance conditions. While it is likely to be difficult to change awards within the current regulatory and corporate governance framework, companies could of course check the plan rules and other terms and conditions of the awards to see if there is any flexibility in interpretation.

Mid Term

In the next couple of years, specific legislation will be put forward to replace the present legislation that is derived from EU directives.

The direct impact on the operation of employee share plans is likely to be limited. The UK tax legislation underpinning employee share plans will be largely unaffected-though the social security treatment of participants moving to and from the UK and the EU could change in the longer term.

The main areas of impact are likely to be:

Securities Law Framework

At present, like the other member states of the EU, the UK is subject to the EU Prospectus Directive, requiring a prospectus to be issued in connection with offers of securities, unless an exemption applies.

UK and EU registered companies and companies with shares admitted to trading on an EU regulated market are able to avoid having to file expensive prospectuses in connection with employee share plan offerings by complying with the employee share plan exemption or ensuring that their offering falls within a small offering exemption (of less than 150 persons in each EEA state).

In addition, in common with many other EU member states, the UK takes the view that conditional share awards under long term incentive plans and Restricted Stock Units which are offered for no consideration are not subject to the Prospectus Directive.

The present regime has the biggest impact on non UK and non EU issuers who operate plans, such as employee stock purchase plans, that are considered to be public offerings and therefore require a prospectus. Where a prospectus is required, companies are able to file one prospectus in their home EU member state and "passport" the prospectus to any other EU state in which the ESPP offering qualifies as a public offering.

Quite what will happen to those rules when the UK leaves the EU is a matter of conjecture at this

stage. One possibility is that the UK will implement similar rules for mutual recognition of prospectuses between the UK and EU member states, but that option would require a specific negotiated agreement between the UK and the EU. Under this route, it is also possible that the UK would continue to have legislation that replicates existing employee share plan exemptions. Another route is that the UK simply enacts a blanket employee share plan exemption from prospectus requirements, but for UK-listed companies which are not also listed on another EU exchange, this will not avoid the potential need for a prospectus in other EU member states (unless the EU specifically allows for this).

Data Protection

The General Data Protection Regulation ("GDPR") is scheduled to come into force on 25 May 2018. Though it will not apply directly to the UK once the UK leaves the EU, the two-year period of negotiation over the terms of the UK's exit has not yet begun, and the statement from Prime Minister David Cameron on Friday to the effect that he does not intend to commence that process before his replacement is elected suggests that the UK's exit may not be finalised for some time. It seems likely, therefore, that the UK will be required to comply with the GDPR, at least for a limited period.

In the share schemes context, the GDPR presents additional challenges, including potential restrictions on the use of consent as a means of legitimising the transfer of personal data outside the EU. That issue, and the uncertainty over what, if any, changes the UK will make to the level of data protection compliance required under the GDPR once it leaves the EU, make this a key area of focus for UK share schemes compliance in the coming months and years.

Long term

The long term implications for the UK of a Brexit are likely to be profound (though the direct effect on employee share plans is likely to be limited).

The greatest area of impact is likely to be in the area of **Mobility**. You will shortly receive a separate alert on the impact of Brexit on internationally mobile employees. If you or your colleagues would like to receive further information on the impact of Brexit on internationally mobile employees, please contact Stephen Ratcliffe (Stephen.Ratcliffe@bakermckenzie.com).

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