



EU LEGISLATION & SHARE PLANS

This document seeks to describe the key interactions of EU law with employee share plans, for UK-based firms, in light of the outcome of the EU Referendum held in the UK on 23 June 2016. Following some background notes on EU law and enabling UK law, and a summary of EU treaties, the document then looks at key areas of EU law, summarising those most relevant to share plans and where possible naming the relevant regulations, directives and treaty articles.

Background

In general the law of the European Union is valid in all 28 EU Member States. Opt outs from treaties and legislation have been negotiated by certain member states in the past, i.e. Denmark & the UK (four opt-outs each), Ireland (two opt-outs) and Poland (one opt-out).

Opt-outs currently: Schengen Agreement on border controls (Ireland and UK), Economic & Monetary Union (Denmark and UK), Defence (Denmark), Charter of Fundamental Rights (Poland and UK), Area of freedom, security & justice (Denmark, Ireland & UK).

The European Communities Act of 1972 was passed in the UK to enable UK government ministers to lay regulations before Parliament to transpose EU directives and ECJ rulings into UK law. The UK and Gibraltar joined the EU (or EEC as it was then known) on 1 January 1973. In 1975 a referendum was held on continued membership, approved by 67% of voters.

The European Union Referendum Act 2015 made provision for the holding of a referendum in the UK no later than 31 December 2017. The referendum was held on 23 June 2016 and the UK voted by a majority of 51.9% to 48.1% to leave the EU.

Treaties

The treaties of the European Union are a set of international treaties between the EU member states which set out the EU's constitutional basis. The key treaties are briefly described below.

Lisbon – signed on 13 December 2007 and came into force on 1 December 2009. The purpose of the Treaty of Lisbon was to make the EU more democratic, more efficient and more able to address global problems, such as global warming, with one voice. This treaty for the first time gave member states the explicit legal right to leave the EU or to rejoin it, through the recently oft-quoted Articles 50 and 49 respectively.

Nice – signed on 26 February 2001 and came into force on 1 February 2003. Main purpose was to reform institutions so that the EU could function efficiently after reaching 25 member states and incorporate eastward expansion. Amends Maastricht and Rome treaties. Treaty of Nice initially rejected by Irish voters in a June 2001 referendum, but accepted a year later.

Amsterdam – signed 2 October 1997, came into force on 1 May 1999. Purpose was to reform EU institutions in preparation for arrival of new member states, including amendment and consolidation of EU and EEC treaties and to achieve more transparent decision-making. Member states agreed to devolve certain powers from national governments to the European Parliament, on a number of areas including immigration, adoption of civil and criminal laws and elements of foreign and security policy, so far as this is necessary for the free movement of people within the EU.

Maastricht – signed 7 February 1992, came into force 1 November 1993. Purpose was to prepare for European Monetary Union, creation of the single European currency, the Euro, and introduce elements of a political union, e.g. citizenship, common foreign and internal affairs policies. The Maastricht Treaty also established new forms of cooperation between EU member state governments, for example on defence, justice and home affairs. Ratification of this treaty was initially rejected by the Danes in June 1992, subsequently achieved in May 1993. French referendum ratified the treaty by a narrow majority (51.05%).

Rome – signed 25 March 1957 by Belgium, France, Italy, Luxembourg, the Netherlands and West Germany, came into force on 1 January 1958. Purpose was to set up the European Economic Community (EEC) and the European Atomic Energy Community (Euratom) in order to foster cooperation in developing nuclear energy. Extended European integration to include general economic cooperation. The Rome Treaty established the much-debated ‘four freedoms’ – goods, people, services and capital.

Instruments of EU Law

EU laws are created through two main types of instrument, directives and regulations, defined below.

Directives

A directive is a legal act of the European Union, requiring member states to achieve a particular result without dictating the means of achieving that result.

Regulations

A regulation is a legal act of the European Union that becomes enforceable as law in all member states simultaneously.

Areas of EU Law

EU law itself covers many areas which have both direct and indirect impacts on share plans. The key areas for share plans are outlined below.

Competition

Free competition is a key element of an open market economy. It stimulates economic performance and offers consumers a broader choice of better-quality products and services and at more competitive prices.

European Union competition policy ensures that competition is not distorted in the internal market by ensuring that similar rules apply to all companies operating within in it. Title VII, chapter 1 of the Treaty on the Functioning of the European Union lays down the basis for Community rules on competition.

State aid is prohibited under the Treaty, although exceptions exist because such aid may be justified by, for example, services of general economic interest. It must be demonstrated that they do not distort competition in such a way as to be contrary to the public interest.

Specifically: mergers & acquisitions of companies, state aid, competition.

EC Merger Regulation (2004) and the Implementing Regulation (2004; amended 2008), including Articles 101 – 119, 346 of TFEU

Article 107(1) of the Treaty on the Functioning of the European Union (TFEU) - State aid to promote risk capital investments in small to medium-sized enterprises.

EU State Aid rules also impact the EMI scheme, see section on 'Enterprise' below.

EU Prospectus Directive - implemented in 2003, EU member states enjoy an exemption from having to issue prospectuses for their share plan offerings. As part of the EU's Capital Markets Union action plan and its wish to simplify and harmonise EU laws, the EC consulted on the PD [ProShare responded to this consultation via its EU (now Global Issues) Focus Group] and in November 2015 adopted a proposal for a new Prospectus Regulation. If the UK leaves the EU then it will become a 'third country' in the context of this regulation and UK companies wishing to issue share plans to EU employees will have to comply with the Regulation. This could be expensive, complex and may result in UK companies deciding not to offer share plans to EU employees.

Employment and social policy

European society is evolving due to factors such as technological progress, globalisation and an ageing population. Crucially, it was also heavily impacted by the economic and financial crisis of 2008 and its fall-out.

European employment, social affairs and equal opportunities policies aim to improve living conditions by promoting employment, sustainable growth and greater social cohesion.

The EU is a catalyst in social change, seeking to increase employment and worker mobility, improve the quality of jobs and working conditions, inform and consult workers, combat poverty and social exclusion, promote equal opportunities and combat discrimination, as well as modernise social protection systems.

Specifically: gender equality, employment rights inc. working time, parental leave, agency workers, part-time work.

Council Directive of 2 July 2008 - principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.

Enterprise

Businesses are key to jobs and growth in the aftermath of the 2008 economic crisis, and the European Union (EU) aims to create an environment that nurtures initiative, entrepreneurship and cooperation to maximise their potential.

As part of the Europe 2020 strategy, the EU is redrawing its policy to ensure a strong, diversified, resource-efficient and competitive industrial base to meet the challenges of the global market.

Under Article 173 of the Treaty on the Functioning of the European Union, the EU has set itself the goal of creating the best possible conditions for competitiveness.

Specifically: SMEs – facilitate SMEs’ access to finance, ensure timely payments, adapt public policy to SMEs’ needs and make better use of State Aid possibilities, create an environment in which entrepreneurship is rewarded.

Small Business Act or ‘SBA’ – contains legislative proposals for implementation at EU level and at national level however, non-binding on EU member states but supported by EC and EP.

Share plans: reference to EU State Aid rules links to design of EMI, around size of SMEs that can benefit i.e. <250 employees, and other requirements including qualifying trades.

Information society

The last three decades have seen rapid innovation in information technology. Mobile phones, the internet and high-speed digital delivery systems have revolutionised much of the world around us. Under the Treaty on the Functioning of the European Union (Articles 179–180), the EU aims to promote the development and dissemination of these new technologies, introducing a battery of rules to ensure customers and businesses have fair and affordable access to networks and services, and to remove barriers to competition.

As one of the flagship initiatives of Europe 2020, the EU's strategy to deliver smart, sustainable and inclusive growth, the Digital Agenda for Europe seeks to optimise the benefits of digital technologies.

Specifically: Data protection, 'right to be forgotten' on internet, 'privacy by design'.

EU General Data Protection Regulation (GDPR) – due to come into force in EU member states in May 2018, two year implementation period underway. Plan issuer companies and plan administrators may have a significant amount of work to do in order to ensure that they meet the requirements of this Regulation, as it extends many responsibilities and imposes much higher financial penalties for non-compliance. As Article 50 of the Lisbon Treaty has not yet been triggered by the UK Government, and there is a two year negotiation period following the trigger date, this Regulation will come into force prior to the UK's EU leaving date.

Internal Market

The internal market of the European Union (EU) is a single market in which the free movement of goods, services, capital and persons is assured, and in which citizens are free to live, work, study and do business.

Since its creation in 1993, the single market has opened itself more to competition, created jobs, and reduced many trade barriers. The [Single Market Act](#) was put forward in two parts, in 2011 and 2012, containing proposals to further exploit the opportunities afforded by the single market, in order to boost employment and improve confidence in European business.

Specifically: system of recognition of professional qualifications, making labour markets more flexible and underpinning principle of free movement of workers (Directive 2005/36/EC of EP and Council of 7 September 2005); combatting financing of terrorism – anti-money-laundering regulations; and other areas.

Companies: protecting the interests of members (i.e. shareholders) and third parties via the EU Shareholder Rights Directive, focussed on notice period for AGMs and voting rights. Implemented into UK law in 2009 by way of the Companies (Shareholders' Rights) Regulations 2009 and changes to Part 13 of the Companies Act 2006.

Admission of securities to official stock exchange listing and information to be published on those securities.

EU Market Abuse Regulation – in force as of 3 July 2016.

Capital Requirements Directive / CRD IV – in force as of 1 January 2014, and included bonus cap for ‘Material Risk Takers’ or ‘MRTs’ within financial institutions, limiting bonus payments to no more than 100% of their fixed pay or 200% of fixed pay with shareholders’ approval.

Immigration – if the UK exits the EU then depending on the outcome of negotiations, this could spell the end of current EU freedom of movement principles. This will undoubtedly have an impact on businesses’ ability to hire employees from the EU and to deploy (UK) employees to the EU, potentially making this more difficult and expensive. The cost of maintaining a truly globally mobile workforce inclusive of the EU may well increase for employers and this is likely to focus attention on benefits budgets for this population, including eligibility for share plans.

Taxation

Tax policy in the European Union (EU) has two components: direct taxation, which remains the sole responsibility of Member States, and indirect taxation, which affects free movement of goods and the freedom to provide services in the single market.

With regard to direct taxation, the EU has however established some harmonised standards for company and personal taxation, and member countries have taken joint measures to prevent tax avoidance and double taxation.

On indirect taxation, the EU coordinates and harmonises law on value-added tax (VAT) and excise duties. It ensures that competition on the internal market is not distorted by variations in indirect taxation rates and systems giving businesses in one country an unfair advantage over others.

Specifically: indirect taxes on raising capital (impact on IPO companies and introduction of share plans), financial transaction tax (may catch securities relating to share plan transactions), common consolidated corporate tax base (given CT deduction may be claimed by plan issuer companies in order to defray share plans costs), elimination of double taxation (important for mobile employees participating in share plans).

EU Directive on Administrative Cooperation 2014/107/EU covering mandatory automatic exchange of information between EU member state tax administrations, including interest, dividends and other types of income (essentially a European version of the US’ FATCA rules). Came into force on 1 January 2016, and gradually replaces EU Savings Directive 2003/48/EC.

ifs ProShare – 28.07.2016

ifs ProShare does not assume responsibility, or have any liability, to any person in respect of this communication. The purpose of this communication is to provide information as to EU legislation with an actual or potential impact on employee share plans. It does not contain a full analysis of the law nor does it constitute an opinion of ifs ProShare on the points of law discussed. You must take specific legal advice on any particular matter which concerns you.