# Impact of a no-deal Brexit — considerations for mainstream DCM

In this note we set out an overview of some of the practical implications for mainstream DCM of the UK exiting the EU on 31 October 2019 (the “exit date”) without a withdrawal agreement (a “no-deal Brexit”).

In planning for a no-deal Brexit, the UK government and Financial Conduct Authority (the “FCA”) have aimed to ensure that the existing prospectus, transparency and market abuse regimes will continue to function in the UK, with only such changes as are needed to adjust for the UK no longer being a member of the EU. Existing EU law as it applies at the date of exit will be “on-shored” and become part of UK law, with appropriate amendments. The UK will have its own versions of the EU prospectus, transparency and market abuse ("MAR") regimes mirroring the EU versions. Which regime(s) will apply will depend on where an issuer is seeking a listing/listed and where relevant activities take place. The on-shored EU law and UK domestic legislation implementing EU legislation will be amended with effect from the exit date to remove references to EU institutions and reciprocal arrangements with European Economic Area (“EEA”) member states.

 Whilst the UK regimes will not be fundamentally different from now, the changes necessary to separate the UK regimes from their EU counterparts will lead to some significant differences with practical implications for mainstream DCM. It remains to be seen to what extent the UK domestic regimes will diverge over time.

### Status of UK in the EEA

The UK will become a “third country” for the purposes of EU law. This will have implications when it comes to compliance with various pieces of EU legislation.

### Changes to documentation

Documentation changes will be needed to reflect the UK’s exit from the EU and to refer to on-shored legislation where appropriate. References to “the EU”, EU law, “EU Member States”, EU entities or the “EEA” may need to be clarified or amended as these terms will no longer include the UK. References to UK domestic legislation will also need to be considered.

UK investment firms may need to use EU 27 affiliates to perform transactions to avoid breaching EU regulatory requirements. (Many MTN programmes have already been amended to include additional EU 27 entities for this purpose). Similar considerations may also apply to EU 27 institutions accessing UK markets, although specific transitional measures will mitigate the immediate impact.

Current ICMA EEA public offer and PRIIPs selling restrictions, MIFID II product governance legends and EU stabilisation language will no longer encompass UK law.

ICMA has produced draft UK versions of certain materials for a no-deal Brexit. The Prospectus Regulation ("PD3") came into effect in the EU (including the UK) on 21 July 2019. PD3 will continue to form part of UK law following a no-deal Brexit. While, the prospectus regimes in the UK and the EU will be identical initially, it will not be possible to passport FCA approved prospectuses into the EU 27, or vice versa. Following a no-deal Brexit, issuers making or continuing a non-exempt public offer OR making a new application for parallel UK and EU 27 regulated market listings will need both UK and EU 27 approval and may need two prospectuses. Unlisted institutional-only and other PD3-exempt offers in the UK and EU 27 will not be affected. Prospectuses passported into the UK before Brexit will remain valid in the UK until their nominal validity expires. Subsequent supplements to these prospectuses may require approval by both the FCA and the relevant EU 27 NCA. ESMA Prospectus Directive Q&A (April 2019) provide further detail.

ICMA has produced Brexit FAQs on Primary Markets (expected to be updated to reflect the implementation of PD3).

### Prospectuses and PD3

The Prospectus Regulation (“PD3”) came into effect in the EU (including the UK) on 21 July 2019. PD3 will continue to form part of UK law following a no-deal Brexit. While, the prospectus regimes in the UK and the EU will be identical initially, it will not be possible to passport FCA approved prospectuses into the EU 27, or vice versa. Following a no-deal Brexit, issuers making or continuing a non-exempt public offer OR making a new application for parallel UK and EU 27 regulated market listings will need both UK and EU 27 approval and may need two prospectuses. Unlisted institutional-only and other PD3-exempt offers in the UK and EU 27 will not be affected. Prospectuses passported into the UK before Brexit will remain valid in the UK until their nominal validity expires. Subsequent supplements to these prospectuses may require approval by both the FCA and the relevant EU 27 NCA. ESMA Prospectus Directive Q&A (April 2019) provide further detail.

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### Market abuse regime

The UK on-shored version of MAR will apply the requirements of MAR to financial instruments in the UK as well as in the EEA. Investment banks will need to consider the implications of the dual UK and EU MAR regimes for the transactions that they work on. The general rules on stabilisation, market soundings and handling of inside information, as well as market manipulation will continue to apply. Banks acting as stabilising manager will need to consider which entity within their group can benefit from the relevant safe harbours and whether dual notification requirements apply.

### Benchmarks and ratings

Where the EU Benchmarks Regulations (“EU BMR”) applies, EU supervised entities will only be permitted to use a benchmark in the EU if such benchmark, or its administrator is registered with EMSA.

In practice, this will not be of immediate concern because current transitional arrangements under the EU BMR broadly allow continued use of existing benchmarks until 1 January 2020 and agreement has been reached to extend this to the end of 2021. Similar obligations regarding the use of benchmarks by UK supervised entities in the UK will apply under the UK version of the EU BMR. Specific temporary measures by the FCA should mean that this will be of little immediate significance.

In the event of a no-deal Brexit, the FCA will assume responsibility for registering and supervising Credit Rating Agencies (“CRAs”) in the UK and any legal person wishing to issue credit ratings in the UK for regulatory purposes on or after the exit date will need to be registered or certified with the FCA. This will be in addition to the applicable registration for CRAs operating in the EU. FCA transitional relief, ESMA statements and preparations by CRAs, mean that the immediate practical implications for DCM transactions will be limited. Prospectus disclosure on the registration status of the relevant benchmark or CRA may need to be amended to reflect the status of the such benchmark or CRA in each of the EU and UK.

### Bank Recovery and Resolution Directive (“BRRD”)

Contractual recognition of bail-in language (Article 55 BRRD) will need to be included in English law terms and conditions of securities issued by EEA financial institutions and certain English law contracts involving such financial institutions, including subscription agreements.

Equivalent language will need to be included in any in-scope EEA law governed contracts entered into by UK financial institutions.
Key contacts

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Issuer continuing obligations, accounts and auditors

Issuers with EU 27 listed securities will not be able to choose the UK as their Home Member State for filing regulated information under the EU Transparency Directive. Existing issuers of EU 27 listed securities who have chosen the UK will need to choose a new Home Member State. ESMA Transparency Directive Q&A (April 2019) provides further detail.

If an issuer has listings in both the UK and an EU 27 state, it will need to comply with both the UK and the EU regimes from the date of exit in respect of filing of regulatory information and disclosure of inside information.

UK issuers will be required to use IFRS as adopted by the UK (“UK IFRS”) for their accounts for financial years starting on or after the exit date. For subsequent financial years, issuers from outside the UK with securities admitted to the main market of the London Stock Exchange (“LSE”) will be able to continue using other accounting standards (including EU IFRS) only if those standards have been declared equivalent to UK IFRS in accordance with the procedure that the UK is currently establishing. UK issuers with securities admitted to an EU 27 regulated market may need to provide additional assurance to the relevant authority that their accounts comply with IFRS as adopted by the EU. (The EU has not given any indication that it would declare UK IFRS equivalent even though EU IFRS and UK IFRS will be the same immediately after exit day.) Equivalence decisions can be subject to political pressure so there is no guarantee that equivalence determinations will be made quickly, if at all, after Brexit. In addition, it should be noted that UK and EU accounting standards may diverge over the longer term.

After exit, the UK will be a “third country” under EU rules, and UK companies which have securities admitted to trading on a regulated market in the EEA will need to ensure that their auditors comply with the relevant third country auditor registration requirements. Similarly, as EEA countries will be “third countries” under UK rules, EEA companies listed in the UK will need to ensure, for financial years commencing on or after exit day, that their auditors register as statutory auditors in the UK or as third country auditors on the register of third country auditors maintained by the Financial Reporting Council.

ECB eligibility

To be eligible collateral for the ECB, securities need to be admitted to an approved market. Following a no-deal Brexit, the main market of the London Stock Exchange (“LSE”) will no longer be an approved market for ECB eligibility purposes and so securities that are only admitted to the LSE will no longer meet the ECB eligibility criteria unless the EGB amends its criteria or designates the LSE as an “acceptable” market. The LSE announced in March 2019 that, in the event of a no-deal Brexit, BondVision (an Italian MTF) will admit LSE listed securities to trading, without requiring any action on behalf of the issuer where those securities satisfy BondVision’s admission criteria. As BondVision has been recognised as an acceptable market by the ECB, any LSE listed securities which are otherwise ECB eligible, should retain their eligibility once admitted to trading on BondVision. It remains to be seen whether or not this provides a solution for all affected issuers.

Governing law and jurisdiction

See our newsletter “No-deal”, applicable law, jurisdiction and recognition of judgments in the UK – Where are we now? (June 2019) for an outline of the impact of a no-deal Brexit.

Due diligence and disclosure

Careful consideration should be given to an issuer’s exposure to a no-deal Brexit during due diligence. Prospectus risk factors will need to address the particular circumstances of the issuer as well as more generic direct and indirect risks associated with Brexit.

Speak to us

If you would like to find out more about this topic or Brexit planning generally, please look at our Brexit microsite or our Client Knowledge Portal. We have a wealth of knowledge and experience on Brexit planning and understanding the law, UK or EU, after Brexit so please do not hesitate to contact your usual Linklaters contact if you would like to discuss any aspect with us.

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1. These would need to be reconsidered in the event of any “deal” being agreed between the UK and EU 27.
2. These amendments have generally been made by Statutory Instruments made under the European Union (Withdrawal) Act 2018. Other relevant changes are those made by the FCA to its rules in preparation for exit.
3. Issuers will be permitted to continue to prepare financial statements using IFRS as adopted by the EU for financial years beginning before exit day.
4. These amendments have generally been made by Statutory Instruments made under the European Union (Withdrawal) Act 2018. Other relevant changes are those made by the FCA to its rules in preparation for exit.

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