

EU Prospectus Regulation & Brexit UPDATE

In the ProShare newsletter we shared an article written by Jeremy Edwards and colleagues at Baker McKenzie, about the impact of a 'No Deal' Brexit on this aspect of pan-European employee share plans. Although much has happened since then – it's a truism that a week is a long time in politics – and with less than a week to go until 29 March (as I write this), we still seem no closer to knowing what type of Brexit that the UK may be subject to, or indeed, when.

The risk of an accidental 'No Deal' Brexit continues to increase with every day that goes by without the UK Government a) unilaterally revoking its Article 50 notice, or b) calling a second/confirmatory referendum or General Election and/or c) gaining the agreement of the EU to a significant extension to the Article 50 period.

The UK Government has had its hands tied somewhat by the Speaker, John Bercow, invoking a centuries-old parliamentary precedent which prevents Mrs May's withdrawal deal being brought back to the House of Commons for a third time (having been voted down by significant majorities twice already) unless significantly altered. The EU has to date been consistent in its refusal to re-open negotiations on the withdrawal agreement and there is no reason to expect any change to their position.

The EU also has the not-so-small matter of the EU Parliamentary elections coming up in the last week of May 2019, which would be complicated by an Article 50 extension overlapping that period, to say the least. If the UK was still a part of the EU and failed to hold MEP elections then it could technically be held to be in breach of its treaty obligations. If the UK did go ahead and hold MEP elections, the vexed matter of Brexit would threaten to swamp any efforts to shift the debate onto the EU's role in defeating populism and the far-right in Europe, and tackling the growing unrest with financial inequality.

On 20 March the UK PM Theresa May wrote to Donald Tusk, EU Council President, to formally request an extension to the Article 50 notice period ([here's the text of the letter](#)). Whilst in the letter itself she doesn't specify the length of the extension being sought, she notes the unpalatable prospect of the UK holding MEP elections, which would imply on the face of it that she expects/needs only a short extension (until 30 June 2019, clarified in PMQs). She reiterates her intention to bring back her deal to the House of Commons for a further vote, implying that this would be possible (in light of the Speaker's views) if the European Council approves the supplementary documents she agreed with EU Commission President Juncker in Strasbourg earlier in March. The letter goes on to state that this third vote and, if passed, the approval of legislation via the Houses of Commons and Lords would not be possible by 29 March – hence the request for a modest extension.

It's worth noting the position of the EU's chief Brexit negotiator, Michel Barnier, as expressed at a press conference earlier in March: "It is our duty to ask whether [this] extension will be useful. Because an extension will be something that will extend uncertainty, and uncertainty costs. It has a cost for everybody. And we can't prolong uncertainty without having a good reason for it". Any extension, lengthy or otherwise, would require the consent of all other 27 EU Member States.

On 21 March, [EU leaders discussed the UK's request to delay Brexit](#). They decided to extend Article 50 until 22 May 2019 if the UK Parliament approves the withdrawal agreement by 29 March 2019. If it does not, EU leaders agree to delay Brexit until 12 April 2019, expecting the UK to "indicate a way

forward before this date". The extension excludes any renegotiation of the withdrawal agreement. This decision by EU leaders was formally adopted on 22 March 2019.

The House of Commons' expected order of business for this week is set out [here](#). The Speaker's role in selecting which amendments to section 13 of the European Withdrawal Act 2018 will be debated and – crucially – voted upon on Wednesday 27 March, will once again be under intense scrutiny from all sides regardless of whether these are 'indicative' votes or something more definitive. NB: Friday 29 March is still written into law as the day the UK leaves the EU, and to avoid an 'accidental' no-deal exit the Government will need to legislate before then.

Enough political brinkmanship, back to share plans. With or without an extension, any 'gap' (accidental or otherwise) between

- a) the expiry of the Article 50 period, 29 March 2019, or an agreed extension date which could be 12 April or 22 May 2019, and
- b) the date on which the EU Prospectus Regulation becomes fully applied, 21 July 2019,

still poses a potential problem requiring urgent action for many share plan issuers, in particular those offering an employee share purchase plan to EU-resident employees. For affected employers, the clock will be ticking loudly as regards the impending instruction, payroll deduction and purchase dates, and what to communicate to participating employees. With what looks like the longest available extension, to 22 May 2019, the shortened gap becomes less significant, though still undesirable and somewhat problematic.

ESMA, the European Securities and Markets Authority, issued an [updated Q&A](#) in January and, in light of the UK's still unresolved situation regarding Brexit, there are some key sections worthy of close review by anyone with concerns regarding the aforementioned 'gap' in the event of a 'No Deal' Brexit:

- Point 103: Choice of PD home Member State for third country issuers, and
- 104: Use of prospectuses approved by the UK.

ProShare has previously written to ESMA and the EU to respectfully request that they consider 'closing the gap' by bringing forward the full application of the more broadly drawn exemption in the EU Prospectus Regulation, to no avail. Whilst this response is perhaps unsurprising given that it could be seen to erode (albeit in a minor way) the EU's united position as regards Brexit, it offers no comfort to the millions of EU citizens whose UK parent company employers may have to temporarily suspend their participation in ESPPs.

Efforts are also being made by other bodies, including the QCA, who are engaging with ESMA, the European Commission and relevant MEPs on recommending that National Competent Authorities simply do not prioritise enforcement of the relevant obligations in EU law, as regards the 'gap' period. This is an eminently pragmatic and practical suggestion that has ProShare's full support, and we hope that it is heard and considered carefully by decision-makers in the EU. If an extension to the Article 50 notice period is granted by the EU then it may make this particular suggestion more palatable to the EU and therefore more likely to be agreed.

ProShare remains committed to keeping its members up-to-date on all Brexit-related developments with an impact on employee share ownership.

NB: Whilst this matter has been covered several times in ProShare publications and at events including our focus groups and our Annual Conference, this is general information only and should not be construed, relied or acted upon as advice. Plan issuers with concerns regarding this matter should seek guidance from their legal advisors.