

Impact of GDPR on share plan documents

The EU General Data Protection Regulation (GDPR) took direct effect in the UK on 25 May 2018. Together with the Data Protection Act 2018, it has replaced the Data Protection Act 1998. Equivalent provisions are expected to apply after the UK leaves the EU. This note focuses on changes which are likely to be needed to current share plan documents which require employees to consent to the processing of their personal data.

Under GDPR, consent by employees to process their personal data must be freely given and employees must be able to withdraw their consent at any time without justification. Consent is not deemed to be 'freely given', and is therefore invalid, if:

- the employee has no genuine and free choice or cannot refuse or withdraw consent without detriment; or
- there is a clear imbalance between the parties.

The UK Information Commissioner's Office (ICO) has stated that obtaining employee consent may not be sufficient to justify processing because the consent may not be freely and voluntarily given, particularly when the employee has no realistic alternative to consent. Its guidance on GDPR advises employers not to use consent as a basis to process data if they have another lawful basis under the GDPR.

In the case of share plans, it may no longer be lawful to make consent to data processing a condition of an employee being allowed to participate. However, personal data can be processed lawfully if this is necessary for:

- entering or performing a contract with the data subject; or
- compliance with a legal obligation to which the data controller is subject.

It is clearly necessary for the employer and the administrator to be able to process participants' personal data to operate share plans effectively and this should be sufficient justification to allow the processing to take place.

A large number of share plans have provisions in the Rules and participant agreements similar to the following:

- "In accepting the grant of an Award, each Award Holder consents to the collection, holding, processing and transfer of any Personal Data by any Group Company for all purposes connected with the operation of the Plan".
- "In entering into a Free Share Agreement or Partnership Share Agreement, a Participant consents to the collection, holding, processing and transfer of Personal Data by the Company or any member of the Company's group for all purposes connected with the operation of the Plan".
- "By accepting the invitation to participate in the plan, you agree that your employer, the Company, the Trustee and any administrator of the Plan may collect, hold, process and transfer your personal data for all purposes connected with the operation of the Plan".

We recommend that the terms of the Plan Rules and agreements should be amended as soon as possible so that there is no requirement for employees' consent to processing of their personal data. Instead, employees should be given clear information that their personal data will be processed to the extent necessary for the operation of the plan.

The amendments should normally be capable of approval by the board of directors without the need for the approval of shareholders in general meeting.