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July 2014

Corporate Update – July 2014

Welcome to our July 2014 edition of Corporate Update, our bi-annual bulletin in which we bring together the key developments in company law and corporate finance regulation which have occurred over the previous six months and consider how these might impact your business. In addition, we look ahead to forthcoming legal and regulatory change. We have highlighted below some of the key developments covered in this Corporate Update.

In June 2014, the Government published the Small Business, Enterprise and Employment Bill. This Bill gives effect to the commitment given by the Government as part of its G8 role, to introduce measures to enhance corporate transparency. Amongst other proposals, the Bill includes provisions that will place a new obligation on UK companies to identify those persons having significant control over them (broadly, a person who ultimately holds 25% of a company's shares or voting rights or who otherwise exercises control over the management of the company) and to keep such information on a publically available register. We take a look at these provisions and some of the other key measures relating to corporate transparency.

As we are now well through the 2014 AGM season, we examine some of the developments which will impact on future AGM reporting seasons, in particular, the FRC's consultation on the Corporate Governance Code focusing on risk management, internal control and reporting on a "going concern" basis. When implemented, these changes are expected to apply to reporting years beginning on or after 1 October 2014. The FRC has also published new non-mandatory principles-based "Guidance on the Strategic Report" which should assist companies when drafting their next strategic report. See the Corporate Governance Update for details.

In May 2014, the FCA finally introduced changes to the Listing Rules that affect premium listed companies with controlling shareholders. We consider the impact of these changes and highlight those matters that premium listed issuers will need to address to ensure their continued compliance with their ongoing regulatory obligations.

Also in May, the Upper Tribunal handed down its long-awaited judgment in relation to the FCA's case against Ian Hannam for market abuse. The FCA had found, and the Upper Tribunal has now held, that Mr Hannam did engage in market abuse by improperly disclosing inside information. We take a look at the lessons for both companies and their advisers involved in handling inside information and pre-sounding activities in advance of transactions. See the Regulatory Update for further information.

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Company Law Update

Government confirms intention to create central register of beneficial owners of companies and LLPs

On 21 April 2014, BIS published the Government's response to its Discussion Paper, *Transparency & Trust: Enhancing the transparency of UK company ownership and increasing trust in UK business* (published in July 2013 and discussed in the January 2014 edition of Corporate Update) and on 25 June 2014, the Small Business, Enterprise and Employment Bill, encompassing these proposals, was introduced to Parliament. This Bill gives effect to the Government's initiative to make it easier for small firms to establish and grow in the UK and also gives effect to the commitment made by the Government as part of its G8 role to enhance corporate transparency. Ironically, some concerns have been expressed that the enhanced transparency may actually make the UK a less attractive place in which to establish a company.

Key provisions of the Bill

The Bill, which amends the Companies Act 2006 and the Company Directors Disqualification Act 1986, includes provisions regarding:

- a new obligation on companies to identify those persons with significant control over the company (broadly, a person who ultimately holds 25% of a company's shares or voting rights or who otherwise exercises control over the management of a company) and to keep such information in a publically available register (known as the "**PSC" register**"). Companies with shares admitted to trading on a regulated market (such as the Main Market of the London Stock Exchange) will be exempt from this obligation on the basis that they are already subject to the more onerous disclosure regime set out in Disclosure and Transparency Rule 5. This exemption will also apply to companies with shares admitted to AIM on the basis that they are also required to comply with DTR 5;
- a new right for a company to impose voting/transfer restrictions on shares the subject of a notice requiring the disclosure of interests in shares, where the recipient of the notice fails to comply with the requirements of such notice, and a subsequent warning notice (similar to the existing provisions in Part 22 of the Companies Act 2006, for public companies, but without the company having to go to court);
- a ban on the creation of new bearer shares. Existing bearer shares will need to be surrendered to the company and exchanged for registered shares within nine months of the legislation coming into effect. Bearer shares not so surrendered and exchanged will be compulsorily cancelled;
- a ban on corporate directors (although the Government intends to provide, via secondary legislation, for specific exemptions where corporate directors may be of value and represent a low risk). There is to be a separate consultation on whether corporate members of limited liability partnerships should also be prohibited;
- applying the general duties of directors to shadow directors, so far as applicable;
- an extension of the directors disqualification regime to apply to a person giving instructions to a director of an insolvent company who has been disqualified, where such person exercised the "requisite amount of influence" over the director (i.e. the conduct of the disqualified director was the result of him acting in accordance with that other person's instructions or directions);
- the ability of the court to make a compensation order against a director who has been disqualified if their conduct has caused loss to a creditor of the insolvent company; and
- reducing the filing and record keeping requirements for companies, in particular by removing the requirement for an annual return and replacing it with an obligation to confirm at least once in every 12 month period that all relevant information has been supplied to Companies House and giving private companies the option to dispense with the need to keep separate statutory registers (such as the register of members and directors) and to elect instead to have the relevant information kept solely on the public register at Companies House instead.

Secondary legislation will also be required, and the Government has indicated that it intends to consult on this over the summer period, with the intention of bringing the complete reforms into effect as soon as practicable. Transitional provisions will be proposed for existing companies.

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Editor Comment:

The Government has listened to responses to its earlier consultation on the question of which companies should be exempt from the requirement to maintain a PSC register and, helpfully, has exempted those listed companies that are subject to the DTR 5 notification rules from the regime. This is to be welcomed given the difficulties that might otherwise arise were such companies to become subject to different but overlapping disclosure regimes.

On a different note, given that existing bearer shares will need to be surrendered to the company and exchanged for registered shares within nine months of the legislation coming into effect, companies are advised to check whether they have any outstanding bearer share structures that will be affected by this change.

A copy of the Government response paper is available at:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/304297/bis 14 672 transparency and trust consultation response.pdf

A copy of the Bill (as introduced on 25 June 2014) is available at:
http://www.publications.parliament.uk/pa/bills/cbill/2014-2015/0011/15011.pdf

Audit Tender – latest position

In our January 2014 Corporate Update we reported on the Competition Commission's (now the Competition and Markets Authority ("**CMA**")) plans to consult on changes to the supply of audit services, including the introduction of legislation to require FTSE 350 companies to put their statutory audit out to tender at least every ten years (consistent with the best practice recommendation in the UK Corporate Governance Code). The Competition Commission decided at the beginning of 2014 to put its consultation on hold pending the finalisation of legislation at EU level on the provision of audit services.

The relevant EU legislation has now been finalised[1] and came into force on 16 June 2014. Member States now have two years within which to adopt these rules. The EU legislation will affect all public-interest entities ("**PIEs**"), which includes all listed companies, credit institutions and insurance undertakings. The provisions are wide ranging and affect many aspects of the role of the statutory auditor and the audit process. As regards, audit rotation however, PIEs will be required to change their auditor after a maximum term of 10 years. Longer rotation periods may be permitted where a public tender has been carried out or where a joint audit is in place. In such cases, the audit term may be extended by a further 10 or 14 years (i.e. to a maximum of 20 or 24 years) respectively. Transitional rules apply to the application of these mandatory rotation requirements in order to avoid a "cliff-edge" effect on the audit market when the new rules come into force.

Now that the EU position on audit rotation has been crystallised, we can expect to see the CMA publish its own proposals in this regard. The CMA has indicated previously that it intends to implement its proposals by October 2014.

BIS consults on the implementation of new European disclosure rules for extractive industries

Following the adoption in June 2013 of new European rules requiring disclosure of payments to governments by extractive industries and loggers of primary forests, BIS has now put forward its proposals for implementing these rules in the UK.

[1] The legislation consists of a Directive amending the Statutory Audit Directive (Directive 2006/43/EC) and a Regulation on specific requirements regarding statutory audit of public-interest entities.

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Background

The European Accountancy Directive promotes and requires greater transparency by companies in extractive industries and forestry in respect of their payments to governments globally. Under the Directive large limited liability companies registered in the European Economic Area and public-interest entities must provide this information annually on a country-by-country and project-by-project basis.

The UK Government is keen to be among the first of the European Member States to adopt implementing legislation for this Directive, having made a commitment to promote greater transparency during its Presidency of the G8 countries (now G7) in 2013. Having consulted earlier this year on its proposals for The Reports on Payments to Government Regulations 2014 ("**Regulations**"), BIS intends to adopt implementing regulations during 2014 (well ahead of the 20 July 2015 deadline set by Europe). As a result, affected undertakings should expect to have to report all relevant payments on an annual basis from the start of their financial year commencing on or after 1 January 2015.

The requirements of the Accountancy Directive

In brief, the key features of the Accountancy Directive are the following:

- Large European extractive companies must disclose their payments to governments (including government bodies at regional and local levels and their agencies).
- EU registered subsidiaries need not report separately if their parent reports on a consolidated basis under the relevant rules of an EU Member State.
- All payments of money or in kind, whether made as a single payment or a series of related payments totalling EUR 100,000 (or its equivalent) must be disclosed.
- Reporting must be on a country-by-country and project-by-project basis, and broken down by type of payment (e.g. tax, royalty or licence fee).
- There are no exemptions from reporting even where making a report would breach the laws of the country whose government is receiving the payment or the terms of the contract under which the payment is made.

Limited exemptions to reporting apply where, for example, in 'extremely rare' cases the information cannot be obtained without disproportionate expense or undue delay or in circumstances where a subsidiary is held only with a view to onward disposal.

What is proposed by the UK Government?

The proposals made by BIS in the Regulations are necessarily limited to those areas which are not already addressed under the Accounting Directive.

Time for reporting

The Accounting Directive requires annual reporting of payments to governments and requires undertakings to report for financial years commencing on or after 20 July 2015 (i.e. the transposition deadline for EU Member States). Consistent with its commitment to adopt implementing legislation early, however, BIS proposes that the first reporting period should be brought forward for UK registered undertakings and reporting will be required for financial years commencing on or after 1 January 2015.

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This approach will mean that UK subsidiaries of a parent incorporated in another EU Member State (or in a non-EU country), will need to report individually any relevant payments it has made until such time as their parent reports payments to governments on a consolidated basis under an equivalent EU regime.

The timeframe for reporting proposed by BIS is 11 months after the end of the relevant financial year. The reporting timeframe will be shortened to six months from the end of a financial year for companies listed on an EU market once changes to the Transparency Directive are implemented (see below: *Listed Companies – Changes to the Transparency Directive*).

Content of the Report

BIS has indicated in its consultation that it does not intend to mandate a specific reporting format but will develop industry guidance and a recommended template for reporting in on-going consultation with industry representatives. A possible reporting template – in the form of two tables: payments by country and payments by project – is provided as an annex to the consultation document.

Place of publication

UK companies will be required to file their reports with UK Companies House within the applicable timeframe. It is anticipated that reports should be filed electronically, and Companies House will determine the rules for delivery and filing fees payable in due course. Reports will be made publicly available on the Companies House website.

Penalties for failure to comply

BIS proposes to penalise non-compliance with the new reporting requirements under the established UK penalty regime applicable to other statutory reporting obligations. As such, failure to prepare and/or file a report will be a criminal offence for directors and failure to deliver a report will give rise to civil penalties for a company.

Listed Companies – Changes to the Transparency Directive

Related changes to the Transparency Directive will extend these new disclosure requirements to companies in extractive industries (and forestry) whose securities are listed in EU markets, whether or not that company is incorporated in an EU Member State. These companies must publish their reports on payments to governments within six months of the end of their financial year – that is, two months after the deadline for publishing their annual financial statements – and keep their reports publicly available for at least ten years.

The changes to the Transparency Directive do not need to be implemented by EU Member States until the later deadline of 27 November 2015. In the UK, HM Treasury (and not BIS) will make proposals for the implementation of these changes in due course.

Under the BIS proposals, while only the Regulations are in force and before the changes to the Transparency Directive have been implemented, a listed company registered in the UK will have 11 months in which to report. In practice, listed companies may find it is simpler to collect the necessary information as part of their usual financial reporting cycle and as a result we may see a number of companies reporting ahead of this deadline.

For a copy of the BIS consultation, see: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/299454/bis-14-622-uk-implementation-of-the-eu-accounting-directive-chapter-10-extractive-industries-reporting-consultation.pdf

Notice of striking off may be given by email

Following the Companies (Striking Off) (Electronic Communications) Order 2014 coming into force on 11 July 2014, communications in relation to the striking off of a company can now be sent by the Registrar of Companies in electronic form. Previously any such communications had to be sent by post. Analogous legislative changes have been made in relation to limited liability partnerships.

Use of communications will not however be mandatory and companies and LLPS will need to stipulate that electronic communication is their preferred method of receiving information from the Registrar and will need to ensure that their email address for such communication remains up to date.

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On the horizon – European Commission proposal to amend the Shareholder Rights Directive

In April 2014, the Commission published a proposal to amend the EU Shareholder Rights Directive (2007/36/EC). This Directive was first adopted back in July 2007, with the aim of improving corporate governance in relation to EU companies with shares admitted to trading on regulated markets.

The Commission's proposals include provisions that will require listed companies to:

- publish detailed information on their directors' remuneration policy. The policy must be approved by the shareholders of the company at least every three years and once approved, payments to directors outside of the limits of the policy will not be permitted (subject to very limited exceptions); and
- seek prior shareholder approval for related party transactions representing more than 5% of the company's assets or transactions which can have a significant impact on profits or turnover. Smaller related party transactions representing more than 1% (but less than 5%) of assets must be publicly announced on conclusion and be accompanied by a report from a third party assessing whether or not the transaction has been conducted on market terms and confirming that it is fair and reasonable from the perspective of shareholders.

The above provisions should not have significant implications for UK premium listed companies who are already subject to similar legal and regulatory requirements. The Directive, if implemented in its current form, will however impact on UK standard listed issuers who are not currently subject to the related party transaction rules set out in the Listing Rules.

The proposed Directive contains additional proposals that will impact on intermediaries[2], proxy advisors and institutional investors and asset managers. In particular:

- intermediaries will be required to offer companies the right to have their shareholders identified and must facilitate the exercise by shareholders of their rights to participate and vote in general meetings;
- proxy advisers will be required to adopt and implement measures to guarantee that their voting recommendations are accurate and reliable and not affected by any existing or potential conflict of interest or business relationship; and
- institutional investors and asset managers will be required to adopt policies on shareholder engagement and to report, on a comply or explain basis, their adherence to such policies.

The proposals are making their way through the European legislative procedure. If the proposals eventually become law, it is proposed that Member States will have 18 months after their entry into force to implement the changes. As these proposals progress and the form of them is crystallised, we will update you on their potential implications.

[2] Defined as a legal person that has a registered office, central administration or principal place of business in the EU and maintains securities accounts for clients.

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Case Law Update

Court of Appeal overturns decision in Eclairs Group case – directors did not use their powers for an improper purpose

The Court of Appeal[3] has overturned a first instance decision that the directors of a company had used their powers for an improper purpose in imposing voting/transfer restrictions on two significant shareholders of the company and that the exercise of such power should be set aside. In a majority decision, the Court of Appeal held that where a recipient of a section 793 Companies Act 2006 notice, requiring him to disclose information about his interest in shares, chooses not to respond truthfully, then it is this choice which is responsible for any restriction notice being placed upon him, not any improper use of a power of the board of directors.

First instance decision

In the January 2014 edition of Corporate Update we examined the case of **Eclairs Group Limited & Glengary Overseas Limited v JKX Oil & Gas Plc[4],** which concerned the validity of certain restrictions on voting and transfer imposed by the board of directors of JKX under its articles on shares beneficially (though not legally) owned by two significant shareholders, Eclairs and Glengary. At first instance, the Court held that the board had reasonable cause to believe that the information provided by Eclairs and Glengary in response to the s.793 notices was false or materially inaccurate and, therefore, the board had the power to impose the restrictions. However, in the Court's view the only permissible purpose of imposing the restrictions was to extract information and as the board had imposed the restrictions primarily to restrict Eclairs and Glengary from exercising their voting rights at the AGM, it held that the board had used its power for an improper purpose. Accordingly, the exercise of the power was set aside.

Majority view of the Court of Appeal

The Court of Appeal held that the misuse of power doctrine was not really relevant in these circumstances. They drew a distinction between other cases where it had been held that the directors had used their powers for an improper purpose, on the basis that the powers in those cases were unilateral powers of the board and the "victim" had no choice. By contrast, in this case, the "victim" of a restriction notice could easily prevent it being imposed by telling the truth, or once imposed could get the restrictions lifted by doing so. Accordingly, the view of the majority of the Court of Appeal was that a party who chooses not to respond properly and truthfully to a s.793 notice and, as a consequence, becomes subject to a restriction notice is a victim of his own choice, not a victim of any improper use of a power of the directors.

The Court went on to support its conclusion by considering the reasons behind both the articles and the statutory regime (contained in Part 22 of the Companies Act 2006). The Court noted that the Companies Act does not specify that the restrictions can only be imposed for a particular purpose, and thought it unlikely that Parliament would have intended there to have to be a detailed inquiry into the minds of the directors before the sanction was imposed: it was far more likely that Parliament intended that the sanction could be imposed simply where no information or incorrect information had been given. The judges were also of the view that if directors were prevented from using the provisions where their predominant purpose was to prevent the relevant shares from being voted, this would prevent them being used in exactly the circumstances in which they were most likely to be relevant. In the present case, they viewed the actions of the directors in seeking to find out what the mutual plans of two of its largest beneficial shareholders were as being exactly the sort of thing that the board of any well-run public company ought to be able to find out and something which other shareholders would want to know, and which the policy behind both the articles and statutory regime – transparency – was aimed at.

Editor Comment:

The decision of the majority of the Court of Appeal – being on the side of the directors of a company seeking to restrict a shareholder's ability to vote shares where requested information has not been forthcoming – will be welcome news to company boards. It is also consistent with the current Government's agenda of seeking to increase transparency around the beneficial ownership of all companies – see the Company Law Update above.

Beware the law on penalty clauses

In **Talal El Makdessi v Cavendish Square Holdings BV[5]**, the Court of Appeal unanimously held that clauses in a sale and purchase agreement providing

[3] **JKX Oil & Gas Plc and others v Eclairs Group Ltd & Glengary Overseas Ltd** [2014] EWCA Civ 640
[4] [2013] EWHC 2631 (Ch)
[5] [2013] EWCA Civ 1539

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that the final instalment(s) of the consideration were not payable to the seller and triggering the buyer's ability to exercise a call option over the seller's remaining shares at a reduced price if there was a breach of certain restrictive covenants were penalties and therefore unenforceable.

Background

Mr Makdessi (**M**), together with Mr Ghossoub (**G**) held 87.4% of the shares in Team Y&R Holdings Hong Kong Ltd (the "**Company**"). The remaining shares were held by a company in the WPP group. In February 2008, M and G sold 47.4% of the shares in the Company to WPP and put in place put and call options over the remaining 40% of the shares. Accordingly, Cavendish Square Holdings B.V. ("**Cavendish**"), a holding company within the WPP group, held 60% of the shares and M and G held 40% of the shares.

The key clauses

The sale and purchase agreement contained extensive restrictive covenants preventing the sellers, M and G, from competing with the business of the group. If either M or G breached any of the restrictive covenants in any respect, (i) he would not be entitled to receive any outstanding instalment of the consideration (clause 5.1) and (ii) Cavendish could exercise a call option and acquire the relevant seller's shares at a price based on net asset value (i.e. excluding any amount for goodwill) (clause 5.6). The exercise of the call option would prevent the relevant seller from being able to exercise its put option in the future, pursuant to which the seller's shares would be sold at a price which included goodwill.

After the sale, WPP claimed that M had breached the restrictive covenants and sought to rely on clauses 5.1 and 5.6. At first instance, the judge held that the clauses were not penalties and were enforceable. M appealed arguing that they were penal and unenforceable; in particular because their effect was to deprive him of up to US$115 million in circumstances where WPP had suffered no loss recoverable at law (because Cavendish's loss as shareholder was merely reflective of the loss of the Company and as such was irrecoverable). WPP argued that the clauses were commercially justified and that their predominant purpose was to adjust the consideration and de-couple the parties, rather than to deter breach.

The judgment

The Court first considered whether the clauses were a genuine pre-estimate of Cavendish's loss. In doing so, it questioned whether there was a substantial discrepancy between the level of damage stipulated in the contract and the level of damages likely to be suffered. The Court found that at the time the agreement was entered into Cavendish's loss for breach of the restrictive covenants was likely to be zero as its loss would be the loss of value to its shareholding and thus reflective of the loss suffered by the Company itself. However, at the time the agreement was entered into the sums that might be withheld from M under clause 5.1 could be anything from zero to over US$44 million and therefore extravagant in comparison with the loss that might be suffered by Cavendish.

Other factors which pointed towards clause 5.1 being a penalty included the fact that there was no proportionate relationship between the breach and the amount withheld and that the range of loss which could be suffered from a breach of the covenants was very large. Similar considerations applied to clause 5.6. Accordingly, the Court held that the clauses, taken in the context of the agreement as a whole, were not genuine pre-estimates of loss and were extravagant and unreasonable.

The Court went on to consider whether there was a commercial justification for the clauses which might mean that they were not penal. Cavendish argued that the clauses were part of a commercial bargain, reached after extensive negotiation, as to the price at which shares in the Company were to change hands. Clause 5.1 should not be regarded as a pre-estimate of loss but as expressing what Cavendish was prepared to pay.

The Court rejected these arguments stating that the underlying rationale of the doctrine of penalties is that the Court will grant relief against the enforcement of provisions for payment in the event of breach, where the amount to be paid or lost is out of all proportion to the loss attributable to the breach and, in that event, such provisions are likely to be regarded as penal because their function is to act as a deterrent. In the Court's view the payment terms of clauses 5.1 and 5.6 did not fulfil a justifiable commercial or economic function on the basis that their effect was such that M was likely to forfeit sums in tens of millions in circumstances where Cavendish was precluded by law from recovering anything at all. Such forfeiture would happen on the occurrence of the first, not necessarily material, breach of any one of the relevant provisions, where the range of activities which might amount to breach and their possible consequences was likely to be very wide and to fall into different categories of seriousness, many of which could not attract compensation anywhere near the value of what M would forfeit or lose. The Court held that the provisions in question went beyond compensation and into the territory of deterrence.

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Editor Comment:

The Makdessi decision highlights the importance of remembering that the law of penalties can apply to a wide range of clauses that might not at first appear to be typical penalty clauses (such as good leaver/bad leaver provisions in private equity articles or forced share transfer provisions in joint venture agreements). When negotiating and drafting provisions of this nature, it is important to consider whether there is an alternative means of achieving the same result – for example, by making payment conditional upon certain events not happening, rather than withholding payment for breach. If this is not possible, then consideration should be given to minimising the factors that would indicate the clause is penal, for example, by providing that the clause is only triggered by a material breach, by making the effect of the clause proportionate to the breach and/or by making sure the clause does not cover different types of breach or different magnitudes of loss. In this case considerable emphasis was placed by Cavendish on the fact that the sale and purchase agreement had been heavily negotiated by experienced lawyers and that it represented a bargain freely entered into by the parties. What is clear from this decision is however that, in the case of penalty clauses, such arguments may carry little weight.

Court of Appeal considers circumstances in which terms may be implied into a contract

The recent case of **Marks and Spencer plc ("M") v BNP Paribas Securities Services Trust Company (Jersey) Limited ("BNP")**[6] considered the test for implying terms into a contract. The Court of Appeal sought to reconcile two different tests previously promulgated by the Courts – the objective reasonableness approach and the requirement of necessity. The decision suggests that in order for the Court to imply a term into an agreement, the term must be necessary to achieve the parties' express agreement, purposively construed against the admissible background.

The facts

M and BNP were parties to a lease. M exercised a break clause in the lease entitling it to terminate the lease early and, on doing so, sought to recover a refund from BNP of rent, a car parking fee and insurance charges paid in advance and which related to the period following exercise of the break clause. There was no express provision to this effect but, at first instance, the judge held that a term should be implied into the lease entitling M to recover those sums. BNP appealed this decision.

The test for implying terms

The Court of Appeal acknowledged that the judge at first instance was correct to apply the test laid down in the Privy Council case of **A.G of Belize v Belize Telecom**[7] that for a term to be implied into a contract, it should spell out in express words what the contract, read against the relevant background, would reasonably be understood to mean.

The Court of Appeal however went on to consider caselaw subsequent to the **Belize** case, including the case of **Mediterranean Salvage v Seamar Trading**[8] where it was held that it was not possible to imply a term as a matter of interpretation following the **Belize** approach unless it is *necessary* that the agreement should contain such a term in order to achieve the parties' express agreement, purposively construed against the admissible background. The Court of Appeal was of the view that a party does not show that a term is unnecessary simply by showing that the party's agreement could work without the implied term.

The judgment

In overturning the decision at first instance, the Court of Appeal held it would have been obvious to the parties before they signed up to the lease that there was a possibility that rent would have to be paid in full for a period which went beyond the break date and that they must have had some discussions about what was to happen on termination by operation of the break clause because other clauses in the lease dealt with certain other consequences of termination. As a result, the Court did not find grounds upon which to imply into the contract a term that rent should be refunded in circumstances where the lease was terminated early.

Editor Comment:

The case highlights the difficulties in attempting to argue that a term should be implied into a contract. The Court's starting point is that if a term has been agreed upon by the parties then it would have been included as an express term. This decision acts as a reminder that taking time at the outset to consider and document all eventualities is time well spent.

[6] [2014] EWCA Civ 603
[7] [2009] 1 WLR 1988
[8] [2009] EWCA Civ 531

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Regulatory Update

Listing Rule changes affecting premium listed companies with controlling shareholders

Changes to the Listing Rules affecting premium listed companies with a controlling shareholder came into effect on 16 May 2014. Companies affected by these changes will need to take action to ensure compliance with the new requirements.

The principal Listing Rule changes that will affect companies with a premium listing are as follows:

Independent business test

A company seeking a premium listing will need to demonstrate that it will be carrying on an independent business as its main activity ("**independent business requirement**"). Existing premium listed companies will need to comply with the independent business requirement on an ongoing basis.

Requirement for a controlling shareholder agreement

As part of the independent business requirement, a company seeking a premium listing must put in place a written and legally binding agreement with its controlling shareholder(s). Existing premium listed companies must ensure a relevant agreement is put in place with any controlling shareholder.

Who is a controlling shareholder?

Any person who exercises or controls on their own or together with any persons with whom they are acting in concert, 30% or more of the votes of the company.

The FCA has declined to provide any guidance on what the term "acting in concert" means. Companies and their advisers are expected to conduct their own analysis of whether parties are acting in concert, including any view taken by the Takeover Panel[9]. On the basis that it does not wish to fetter its own discretion, the FCA has taken an active decision not to incorporate the Panel's guidance on when parties will be deemed to be acting in concert. However, the FCA acknowledges that it is unlikely that its analysis and determination of the situations when parties are acting in concert will differ from the Panel's conclusions.

The agreement must contain undertakings (the "**independence provisions**") that:

- transactions and arrangements between the controlling shareholder (and/or any of its associates) and the company will be conducted at arm's length and on normal commercial terms;
- neither the controlling shareholder nor any of its associates will take any action that would have the affect of preventing the company from complying with its obligations under the Listing Rules; and
- neither the controlling shareholder nor any of its associates will propose or procure the proposal of a shareholder resolution which is intended (or appears to be intended) to circumvent the proper application of the Listing Rules.

[9] The Takeover Code defines persons acting in concert as persons who, pursuant to an agreement or understanding (whether formal or informal), co-operate to obtain or consolidate control of a company or to frustrate the successful outcome of an offer for a company. The Code contains additional guidance as to how this definition should be interpreted.

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Action Point:

Existing premium listed companies have until 16 November 2014 to ensure that a compliant controlling shareholder agreement is put in place or that current arrangements with a controlling shareholder are amended to comply with the new independence provisions. The entering into of an agreement with a controlling shareholder that contains only the mandatory independence provisions should not constitute a related party transaction, requiring the approval of the independent shareholders of the company in general meeting. Companies should note however that if, in putting in place a new agreement or amending any existing arrangements, they intend to grant any rights or benefits to the controlling shareholder, this may constitute a related party transaction. Any such arrangements would need to be assessed on a case by case basis.

Where a company has more than one controlling shareholder it will need to enter into an agreement with each controlling shareholder unless it reasonably considers, in light of its understanding of the relationship between the relevant controlling shareholders, that one controlling shareholder can procure the compliance of the other controlling shareholders and their associates with the independence provisions. Where this is the case, the company may enter into a controlling shareholder agreement with the relevant controlling shareholder which contains a procurement obligation on the part of that shareholder in respect of the other controlling shareholders and their associates to comply with the independence provisions and the agreement must state the names of any non-signing controlling shareholders.

Failure to comply with independence provisions in controlling shareholder agreement

A new continuing obligation will require a premium listed company to notify the FCA without delay if it no longer complies with the independence provisions set out in the controlling shareholder agreement, or if it becomes aware that the controlling shareholder is not complying with the independence provisions in that agreement.

New annual reporting requirements

The company's annual report will also need to contain a statement by the board confirming that, where required, the company has entered into a controlling shareholder agreement. Where no such agreement has been entered into, the annual report will need to contain a statement that the FCA has been notified of the non-compliance, together with a brief description of the reasons for the company's failure to enter into such an agreement. The board will also need to confirm that the independence provisions in the agreement have been complied with or, if this is not the case, a description of the reasons for non-compliance and a statement that the FCA has been duly notified of it. Where any of the company's independent directors decline to support any of the relevant statements then this must be stated in the annual report.

Where (i) a company is not in compliance with the independence provisions set out in the controlling shareholder agreement, or (ii) the company becomes aware that the controlling shareholder is not complying with such provisions, or (iii) any independent director fails to support the statement in relation to such arrangements required to be included in the company's annual report, then enhanced oversight measures will apply whereby the related party transaction provisions in the Listing Rules are modified such that all transactions with the controlling shareholder become subject to prior independent shareholder approval, regardless of the size of the transaction in question.

Appointment of independent directors

For so long as it has a controlling shareholder, a company with a premium listing will need to ensure that the election and re-election of any independent director is approved by both a simple majority of the shareholders generally of the company who vote, whether in person or by proxy, and a simple majority of the independent shareholders of the company (i.e. excluding the controlling shareholder) who vote, whether in person or by proxy. If such dual approval is not obtained then the company cannot propose a further resolution to elect or re-elect the proposed independent director until 90 days after the date of the original vote. Any such further resolution must be voted on within 30 days from the end of that 90 day period but may be passed by a single simple majority vote of all of the shareholders of the company (i.e. including the controlling shareholder).

Any circular to shareholders relating to the election or re-election of an independent director must include details of any existing or previous relationship, transaction or arrangement that the proposed director has or has had with the company, its directors, any controlling shareholder or its associates or a confirmation that there have been no such relationships, transactions or arrangements, along with details of how the company determined that the proposed

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director is independent and the process for his selection.

Action Point:

Whilst the FCA has confirmed that it does not require companies to amend their articles to reflect the above voting requirements, both applicants for a premium listing and existing premium listed companies will need to ensure that their articles do not expressly prevent the appointment of independent directors in this manner. Existing premium listed companies have from 16 May 2014 until the date of their next annual general meeting to comply with this requirement.

Where a company acquires a controlling shareholder after 16 May 2014, it will have until the date of its next annual general meeting to comply with the new provisions regarding the appointment of independent directors, save where notice of the company's annual general meeting has already been given or is given within a period of three months from the event that resulted in the company acquiring the controlling shareholder. In this instance, the company will have until its following annual general meeting to ensure compliance.

Minority protections on cancellation of listing

As the protections afforded by a premium listing fall away on cancellation of listing, the FCA is giving minority shareholders additional voting power in relation to a proposed cancellation of a company's listing.

If a premium listed company has a controlling shareholder and wishes to apply for a cancellation it will have to both:

- obtain the approval of a majority of at least 75% of the votes attaching to the shares of those voting on the resolution; and
- gain approval by a simple majority of the votes attaching to the shares of independent shareholders who vote on the resolution.

Following a takeover, an equivalent requirement based on acceptances of the takeover will apply, except that where a bidder has acquired or agreed to acquire more than 80% of the voting rights in the company no further approval/acceptances by independent shareholders would be required to cancel the premium listing. As a consequence, where the takeover is implemented by a scheme of arrangement then no additional vote will be required in order to delist the target company.

Similar provisions will also apply where a premium listed company with a controlling shareholder is seeking to transfer from a premium listing (commercial company) to a standard listing.

For further details on the changes to the Listing Rules, see our May 2014 briefing available at: http://www.cliffordchance.com/briefings/2014/05/listing_rule_changesrelatingtocontrollin.html

Eight things we now really know about market abuse

On 28 May, the UK Upper Tribunal handed down its long-awaited judgment in relation to the FCA's case against Ian Hannam for market abuse. The Financial Conduct Authority ("**FCA**") had found, and the Upper Tribunal has now held, that he engaged in market abuse by improperly disclosing inside information. The FCA is seeking to impose a financial penalty of £450,000, although the Tribunal is yet to determine the appropriate penalty.

The FCA's action was based on two emails sent by Mr Hannam in September and October 2008 whilst he was advising an oil exploration company. The emails, sent to a representative of a potential purchaser, referred to positive exploratory drilling results and indicated that an offer would imminently be made by another interested party.

Mr Hannam had argued that the emails did not contain inside information and that the

Editor Comment:

Premium listed companies will need to examine any existing "relationship" agreement with any controlling shareholder to ensure that it satisfies the new Listing Rules requirements. Where this is not the case, the agreement will need to be amended or, where no such agreement exists, a new agreement put in place. With regard to timing, a compliant agreement needs to be put in place by not later than 16 November 2014. As mentioned above, enhanced oversight measures will apply in circumstances where the company is not able to ensure compliance with the independence provisions required to be set out in the controlling shareholder agreement and, in addition, the company will need to self report any non-compliance to the FCA.

Companies will also need to review their articles of association to ensure that there is nothing in them that prevents the election of independent directors being conducted in the manner described above. Any necessary amendments to the articles should be put on the agenda as an item to be addressed at the company's next annual general meeting. In addition, companies will also need to ensure that next year's annual report contains the necessary controlling shareholder disclosures.

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information was, in any event, disclosed in the proper course of his employment. Although there was no suggestion that Mr Hannam had intended to commit market abuse and the Tribunal said that there was no suggestion that Mr Hannam is not a fit and proper person, the Tribunal held that the disclosure could not be considered to have fallen within the exception of having been made in the proper course of employment and therefore did amount to market abuse.

The Tribunal's findings do not break new ground. However, the Tribunal considered the issues in great detail in a 130 page judgment in relation to two short emails. As a result, the judgment provides some important pointers for both companies and their advisers involved in handling inside information and pre-sounding activities in advance of transactions.

The confirmation it provides in relation to the meaning of "inside information" (under section 118C of the Financial Services and Markets Act ("**FSMA**") (see box opposite)) will be of particular importance for companies considering whether it is necessary to make announcements. Likewise, it provides useful clarification to advisers and other market participants who must decide whether and how information can be disclosed and whether they are free to deal in securities even though they have received non-public information.

The Tribunal's views on what is inside information will continue to be important under the new EU Market Abuse Regulation, scheduled to replace the existing UK law in mid-2016. The Regulation uses similar tests of what constitutes inside information and improper disclosure, although it includes a more formal set of requirements for market soundings by companies and their advisers.

What is "inside information"?

"Inside information" is defined for the purposes of the UK civil market abuse regime by section 118C(2) of FSMA, by reference to particular "qualifying investments" as:

"information of a precise nature which –

a) is not generally available

b) relates, directly or indirectly to one or more issuers of the qualifying investments or to one or more of the qualifying investments, and

c) would, if generally available, be likely to have a significant effect on the price of the qualifying investments or on the price of related investments".

Section 118C(5) of FSMA adds:

"Information is precise if it –

a) indicates circumstances that exist or may reasonably be expected to come into existence or an event that has occurred or may reasonably be expected to occur, and

b) is specific enough to enable a conclusion to be drawn as to the possible effect of those circumstances or that event on the price of qualifying investments or related investments".

Section 118C(6) of FSMA further adds:

"Information would be likely to have a significant effect on price if and only if it is information of a kind which a reasonable investor would be likely to use as part of the basis of his investment decisions".

Key lessons

1. When will information be "likely to have a significant effect on price"?

Non-public information is inside information if it would be "likely to have a significant effect on price", but section 118C(6) FSMA states that information is likely to have a significant effect on price if, and only if, it is information of a kind which a reasonable investor would be likely to use as part of the basis of his investment decisions. The relationship between these two tests has been an area of fertile and longstanding debate in the UK and will continue to be important under the new EU Market Abuse Regulation scheduled to apply from mid 2016.

However, the FCA accepted that the "reasonable investor" test did not altogether supplant the test of whether the information is "likely to have a significant effect on price". The Tribunal held that the "likely to have a significant effect on price" test must be borne in mind in construing or must inform the meaning of the "reasonable investor" test as the reasonable investor is an investor who would take into account information which would be likely to have a significant effect on price. Conversely, he is an investor who would not take into account information which would have no effect on price at all or, as the FCA itself argued, information which would have no prospect of significantly affecting the price of the investment.

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The Tribunal made clear that the "reasonable investor" will take account of anything which may have a "non-trivial" effect on price. Just as other courts and tribunals which have considered this issue have done, the Tribunal stopped short of seeking to quantify "significant" in numerical terms.

2. Is intent necessary for a finding of improper disclosure?

No. It was common ground throughout the proceedings that Mr Hannam did not intend to engage in market abuse. Instead, arguments focused on whether he should have known that the disclosures would amount to market abuse.

The FCA has been careful from the outset of its action not to seek to impugn Mr Hannam's honesty and integrity and has not taken action under any other provisions of the Handbook or FSMA. However, this should not be seen as an indication that it is softening its line on approved persons who engage in market abuse (whether deliberately or otherwise). Other cases (such as the fine of £662,700 and prohibition order imposed on Mark Stevenson in March 2014 for market manipulation) illustrate its readiness to take action using the full array of tools available to it in this area.

3. Can information be "inside information" even if it is inaccurate?

Yes. The key issue is how information is perceived by the recipient. As in this case, statements containing factual inaccuracies may be considered to be accurate by the person receiving them, and may inform the actions subsequently taken by them. The Tribunal confirmed that, provided a particular piece of information indicates some circumstances or events which actually exist or have occurred or which may reasonably be expected to come about or occur, it may still be sufficiently precise to constitute "inside information" even if it contains inaccuracies. The Tribunal also stated that the fact that a communication, or even a particular sentence, may contain some inaccurate information does not prevent other information contained in the same communication or sentence from being "inside information" provided "the correct facts are still recognisable despite the inaccuracies".

4. When is there a "realistic prospect" of circumstances coming into existence?

The question of whether there is a "realistic prospect" of circumstances coming into existence or events occurring in the future is important when determining whether information is "precise" and therefore whether it can constitute "inside information". Adding some colour to existing European case law and guidance, the Tribunal indicated that there is a "realistic prospect" where that prospect is more than merely "fanciful". It declined to quantify the concept in terms of percentage chances of circumstances coming into existence or an event occurring, but made clear that the line is drawn at a relatively low level and that it is not necessary for it to be more likely than not. Accordingly, even a less than 50% likelihood of an event occurring can still be considered a "realistic prospect".

5. Is it necessary to know how information will affect price?

Yes, although the threshold for information to be regarded as "specific enough to enable a conclusion to be drawn as to the possible effect of … facts or circumstances or [an] event on…price" is also relatively low. The Tribunal held that it is only necessary for an investor to be able to ascertain that, if the information were made public, the price of the instruments in question "might move and, if it [were to move], the movement will be in a known direction". In other words, it is only necessary to know that the information may either cause the price to increase or that it may cause the price to decrease. It is not necessary to know by how much the price would change or even for the investor to have a high degree of confidence that the price will in fact move.

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6. What are the characteristics of the "reasonable investor"?

It is now clearer what the mythical "reasonable investor" looks like. The Tribunal has made clear that the term is not necessarily synonymous with the typical investor to be found in the market (or in other words "the regular user of the market"), and that the "reasonable investor" does not necessarily have relevant knowledge of the market in which he is operating or the instrument in respect of which he is dealing. Instead, a "reasonable investor" is assumed to know all publicly available information, and to be a rational and economically motivated investor with some experience of investing in company shares, but not an investment professional.

7. Can you "improperly disclose" information to someone who already knows it?

Yes. Reiterating that the focus of "improper disclosure" must be on the actions of the person disclosing information rather than the state of knowledge of the recipient of that information, the Tribunal confirmed that information can be "improperly disclosed" to a recipient who already knows that information from a separate source. In this case, information was held to have been "disclosed" in emails because it added materially to information already provided at previous meetings.

8. Can one act in the client's best interests but not "in the proper course of the exercise of employment, profession or duties"?

Yes. Although it accepted that he intended to act in his client's best interests, the Tribunal held that Mr Hannam was not acting "in the proper course of the exercise of his employment, profession or duties" as he did not impose any confidentiality requirements on the recipient of the information he disclosed. Although it did not provide any detailed indication of the steps to be taken to avoid improper disclosure, the Tribunal did express its view that "it could never be in the proper course of a person's employment for him to disclose inside information to a third party, where he knows that his employer and client would not consent to the public disclosure of that information, unless he knows that the recipient is under a duty of confidentiality and that he knows that the recipient understands that to be the case".

European market abuse legislation progresses towards implementation

June 2014 saw the publication of a raft of new legislation in the EU Official Journal, marking the start of the period within which Member States have to take steps to implement the various new requirements.

The Market Abuse Regulation (Regulation No. 596/2014 on market abuse) ("**MAR**") updates and strengthens the existing framework on market integrity and investor protection provided by the existing Market Abuse Directive (2003/6/EC) ("**MAD**") which is to be repealed. The new measures are aimed at ensuring that regulation keeps pace with developments in technology and market practice and will apply from July 2016.

MAR will extend the current market abuse regime to financial instruments admitted to trading on EEA multilateral trading facilities ("**mtfs**") and EEA organised trading facilities in addition to EEA regulated markets (unlike MAD which only applies to instruments traded on EEA regulated markets). The current UK market abuse regime is wider than the existing EU MAD regime as it applies to instruments admitted to prescribed markets which includes mtfs that are recognised investment exchange markets e.g. AIM and unlisted ISDX markets.

It is understood that the super-equivalent provisions in s.118(4) and s.118(8) of the Financial Services and Market Act 2000 (misuse of information and misleading impressions/distortion) will lapse at the same time as MAR takes effect. It seems likely that EU guidance on MAR will replace FCA guidance in the Code of Market Conduct.

The Directive on Criminal Sanctions for Market Abuse (Directive 2014/57/EU) complements MAR by providing for harmonised criminal offences of insider dealing and market manipulation, and the imposition of criminal penalties of not less than four and two years imprisonment for the most serious market abuse offences. Member States implementing its provisions (which will not include the UK as it has opted out of the Directive), will have to make sure that such behaviour, including the manipulation of benchmarks, is a criminal offence, punishable with effective sanctions. Member States implementing its provisions have two years to transpose them into their national law.

For full details, see our Clifford Chance briefing.
https://onlineservices.cliffordchance.com/online/freeDownload.action?key=OBWIbFgNhLNomwBl%2B33QzdFhRQAhp8D%2BxrIGReI2crGqLnALtlyZe4DHh7FS7sAo4f%2BYyqobPZTp%0D%0A5mt12P8Wnx03DzsaBGwsIB3EVF8XihbSpJa3xHNE7tFeHpEbaelf&attachmentsize=519079

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ABI publishes best practice recommendations in relation to lock-up agreements

On 14 April 2014, the ABI published its recommended best practice approach in relation to lock-up agreements.

Lock-up agreements are often entered into at the time of an IPO or secondary market placing (for example, a rights issue) as a matter of market practice with investors with significant shareholdings. Under the terms of the lock-up the investor commits to the company and the underwriting banks not to dispose of some or all of its shares for a prescribed period, save in a limited set of circumstances. The wider investor community places importance on the existence of lock-ups as they help regulate the supply of shares in the company and so are relevant to price formation.

Some lock-ups may be waived at the sole discretion of the banks (a "**soft lock-up**"). Others may only permit the shareholder to dispose of shares in a very limited set of circumstances for a set period of time (a "**hard lock-up**"). The ABI has noted that it had become market practice that, increasingly, lock-ups are being waived by the banks before the stated expiry date and views this as an unwelcome development.

In the recommendations, the ABI distinguishes between hard and soft lock-ups. In particular, it recommends that:

- both the period of the lock-up and the circumstances in which any sale may take place prior to its expiry (in particular the extent to which any period of the lock-up is "soft" i.e. at the discretion of the banks) should be clearly disclosed; and
- whilst acknowledging that the appropriate period and terms of a lock-up are a matter for the investor and the banks and the particular circumstances of the deal, the ABI notes that generally:
  - soft lock-ups are only appropriate for periods of relatively short duration;
  - where the lock-up is of a longer duration, it is appropriate for the lock-up agreement to specify an initial period of hard lock-up; and
  - any waiver at the sole discretion of the banks should only be given after careful consideration, taking full account of the overall merits from the perspective of investors and the need to maintain market integrity. The ABI would generally only expect any such waiver to be granted at a time close to the stated expiry of the lock-up.

For a copy of the ABI recommendations, see https://www.abi.org.uk/~/media/Files/Documents/Publications/Public/2014/investment/ABI%20Position%20on%20Lock%20Up%20Agreement%20April%202014.ashx

Stamp duty and SDRT no longer chargeable on transactions in securities admitted to trading on a Recognised Growth Market: impact for AIM issuers

On 24 April, the London Stock Exchange confirmed that HMRC had granted "Recognised Growth Market" status for AIM and the High Growth Segment, as a result of which, stamp duty and stamp duty reserve tax is no longer chargeable on transactions in eligible securities admitted to trading on those markets, provided the security in question is not also listed on a Recognised Stock Exchange, such as the Main Market of the London Stock Exchange. This change came into effect on 28 April 2014.

In order to take advantage of this change the London Stock Exchange requires issuers on these markets to certify to Euroclear UK & Ireland ("**EUI**") that their securities are admitted to trading on AIM or the High Growth Segment (as applicable) and that they are not also listed on a Recognised Stock Exchange (if appropriate). If EUI has not received a certification for an eligible security, EUI will continue to collect stamp duty reserve tax on transactions in the relevant securities of that issuer.

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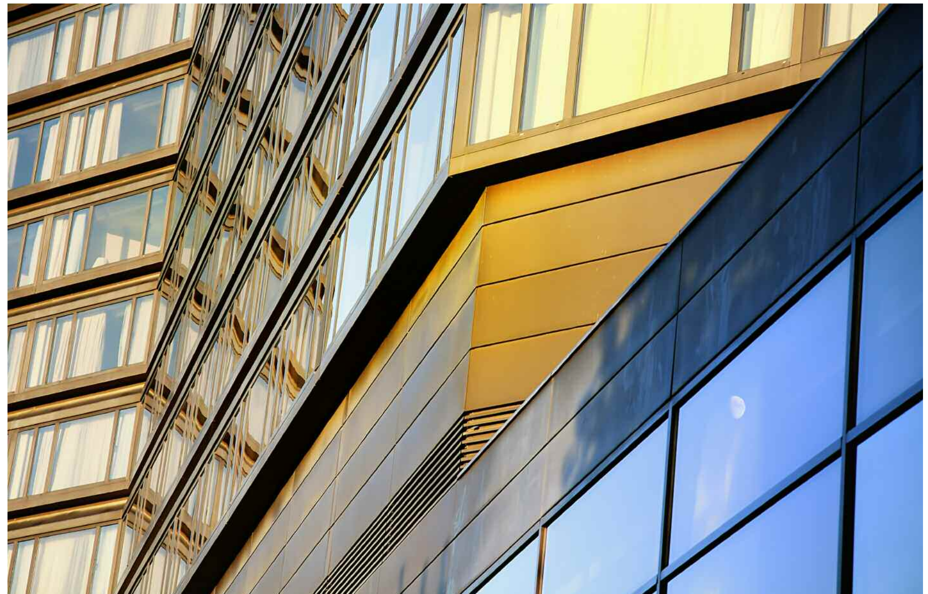
Corporate Governance Update

FRC consultation on Corporate Governance Code



On 24 April 2014, the FRC published a consultation document on proposed revisions to the Corporate Governance Code ("**Code**") which will apply to reporting years beginning on or after 1 October 2014. The consultation builds on two earlier consultations on directors' remuneration (October 2013) and risk management, internal control and the going concern basis of accounting (November 2013). As a result of these earlier consultations, the FRC is proposing that:

- greater emphasis be placed on ensuring that remuneration policies are designed with a view to the long term success of the company. Responsibility for meeting this objective will rest with the remuneration committee;
- companies should put in place "clawback" arrangements to enable them to recover or withhold variable pay;
- Schedule A of the Code (The design of performance related remuneration for executive directors) should be updated to encourage companies to review their existing arrangements for deferred remuneration, in particular, vesting and holding periods for shares;
- Code Provision C.1.3 should be amended to recommend that companies state in their annual and half yearly financial statements whether they consider it appropriate to adopt the going concern basis of accounting and to identify any material uncertainties to their ability to continue to do so over a period of at least 12 months from the date of approval of such statements;
- Code provision C.2 should be expanded to recommend that (1) the directors confirm in the annual report that they have conducted a robust assessment of the company's principal risks and explain how such risks are being managed and mitigated (C.2.1); (2) taking account of the company's current position and principal risks, the directors should explain in the annual report that they have assessed the prospects of the company, over what period they have done so and why they consider that period to be appropriate (C.2.2); and (3) the directors should state that they have a reasonable expectation that the company will be able to continue in operation and meet its liabilities as they fall due over the period of their assessment (C.2.3); and
- boards should monitor their risk management and internal control systems and, at least annually, carry out a review of their effectiveness and report to shareholders on the same.

The FRC is also consulting on extracts from its proposed merged guidance on risk and going concern which is intended to assist companies in applying the proposed revised Code. Full guidance is expected to be published at the same time as the revised Code.

The FRC is intending to defer making any changes to the section of the Code dealing with audit committees and the appointment of the external auditor until the Code is next reviewed in 2016. This is to allow time for the Competition and Markets Authority to finalise its proposals for changes to audit services for FTSE 350 companies (see the article entitled "Audit Tender – latest position" on page 3 for details).

The consultation closed on 27 June 2014. A copy of the consultation document in available at: https://www.frc.org.uk/Our Work/Publications/Corporate Governance/Proposed Revisions to the UK Corporate Governance File.pdf

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Editor Comment:

The changes to Code provision C.2.2 have raised some concerns. The FRC consultation paper appends draft guidance which indicates that, except in rare circumstances, the period covered by the disclosure pursuant to C.2.2 should be significantly longer than 12 months from the approval of the financial statements. Given the difficulties of predicting future uncertain events, there are concerns that this disclosure would need to be accompanied by heavily caveated statements from directors and, therefore, this would provide only limited value to investors. However, directors may equally be concerned that a heavily caveated statement may convey an unduly negative message to the market which could be reflected in investor sentiment towards the company.

The suggestion in the draft guidance that the disclosure required by C.2 should also set out any significant failings or weaknesses identified from the risk management review is also of concern. Various respondents to the FRC consultation, including the City of London Law Society and the ICAEW, have raised concerns about requiring companies to make disclosures of this kind on the basis that they may prejudice a company's interests. The ICAEW expresses particular concern that, in its view, there is insufficient time to prepare new risk management and going concern guidance by 1 October 2014 if market participants are to be allowed time to review and comment on it.

It is unclear how the statement required by C.2.2 will interact with any working capital statement required to be included a prospectus or class 1 circular as the FCA does not permit a company to qualify its working capital statement in any way. It is hoped that the FRC will work with the FCA on this issue in order that companies and their advisers can understand how these two requirements will interact with one another.

FRC publishes Guidance on the Strategic Report

The FRC has published non-mandatory, principles-based guidance for directors that is intended to serve as best practice for all entities preparing strategic reports.

Background

The Companies Act 2006 was amended last year to require a company to prepare a standalone strategic report as part of its annual report in place of the business review which previously formed part of the directors' report. This requirement took effect for financial periods ending on or after 30 September 2013. The overriding objective of the strategic review is to provide information to a company's shareholders to enable them to assess how the directors have performed their duty to promote the success of the company. In the FRC's view, it should reflect the directors' views of the company and provide context for the related financial statements.

Key focus of the Guidance

The purpose of the Guidance is to (i) ensure that information relevant to shareholders is presented in the strategic report, (ii) encourage companies to experiment and be innovative in the drafting of their annual reports, presenting narrative information in a way which best enables a company to "tell its story" and (iii) promote greater cohesiveness in the annual report through improved linkage between the information in the strategic report and in the rest of the report.

Placement of information, cross referencing and voluntary information

The FRC notes that the Companies Act 2006 envisages each of the component parts of the annual report (e.g. the strategic report, remuneration report, directors' report, corporate governance report and financial statements) to be separately identifiable parts of the annual report and therefore, it follows that information required to meet the requirements of the strategic report should generally be placed in a separate section constituting the strategic report.

However, the FRC acknowledges that, in certain circumstances, it may be helpful to group together similar or related disclosures arising from legal or regulatory requirements that apply to different component parts of the annual report, in order to reduce duplication and enable linkages to be highlighted. Where information satisfying a disclosure requirement that applies to the strategic report is present outside of that report, then the guidance recommends that there should be clear and specific cross referencing.

In the view of the FRC, complementary information not required to be included in the annual report (i.e. because it is being disclosed voluntarily) should generally be published separately (e.g. on the company's website). The FRC accepts however that the directors may sometimes wish to include some complementary information in the annual report and the guidance suggests such information could be included either in a separate non-statutory section of the annual report or in the directors' report. Signposting should then be used to enable shareholders to find complementary information which relates to a matter addressed elsewhere in a different component part of the annual report.

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Editor Comment:

Companies will wish to refer to the FRC Guidance on the Strategic Report when they begin to prepare their next annual accounts. The comments in the Guidance regarding the inclusion of voluntary information and cross referencing should, however, be read in the light of a statement published by BIS at the same time as the Guidance was published. In a letter dated 30 April 2014, BIS stated its concerns about the "overly cautious" placing inappropriately large volumes of information, including that not required to meet a specific legal requirement, in the strategic report, directors' report and remuneration report in order to benefit from the "safe harbour" in section 463 of the Companies Act 2006. If the inclusion of such information manifests itself in a way that detracts from clear and concise reporting then BIS states that it may revisit the operation of the safe harbour provision. The Guidance is clear that the inclusion of immaterial information should be avoided. Companies will need to give detailed consideration as to the extent of any disclosures required to meet the specific disclosure requirements of the strategic report.

With regard to cross referencing, BIS is of the view that information incorporated by cross referencing into any of the strategic report, directors' report or remuneration report (i.e. one of the reports benefiting from the safe harbour) from other parts of the annual report and where this is necessary to meet the requirements of any of those reports, will be covered by the safe harbour provision. Information placed outside of the annual report, for example on the company's website, even where cross referenced to it in the annual report, will not however benefit from the safe harbour.

The Guidance replaces the Accounting Standards' Reporting Statement: Operating and Financial Review and is intended to be aligned with the requirements of the UK Corporate Governance Code. A copy of the Guidance is available at: https://www.frc.org.uk/Narrative-Reporting

A "safe harbour" for directors

Section 463 Companies Act 2006 provides a safe harbour for directors from liability to compensate the company for any loss incurred by it for the contents of the strategic report, directors' report and remuneration report provided that a director (i) does not make a deliberately untrue or misleading statement in any of these reports, (ii) is not reckless as to whether any such statement is misleading or untrue, and (iii) does not dishonestly conceal a material fact by way of an omission.

ICSA Registrars Group publishes guidance note on facilitation of electronic payment of dividends

In March 2014, the ICSA Registrars Group published a guidance note on the practical issues around articles of association relating to dividend distributions.

Whilst most companies currently pay dividends via cheque or BACS, some companies also use CREST and, as technology develops, the Group believes that it is important that companies' articles of association are flexible enough to enable them to adopt new payment mechanisms where it is believed to be desirable to do so without having to revert to shareholders for approval on each occasion. As such, the guidance note contains suggested language[10] which companies might wish to consider using if they feel the need to change their articles in order to give themselves flexibility to decide:

- which payment method is used;
- which payment method is to be the default method;
- whether or not shareholders may make an election for a distribution method other than the default or not.

The Group have requested guidance from the FCA that any circular explaining such amendments to the articles would not be treated as a circular containing any "unusual features", and, as such, would not require FCA approval under the Listing Rules. Pending such confirmation, the Group states that companies and their advisers should form their own view on whether any circular relating to such changes would require approval.

Editor Comment:

Given the ever increasing variety of means by which people can now make payments, such as by way of mobile phone, companies may want to give themselves greater flexibility in this regard if their articles do not currently provide this. This looks like one to put on the list of issues to revisit when considering the agenda items for the company's next AGM.

A copy of the guidance note can be accessed here: http://www.capitaassetservices.com/assets/media/ICSA_Guidance_Articles_and_dividends.pdf

[10] Prepared by a joint working party of the City of London Law Society's Company Law Sub-Committee and the Law Society of England and Wales' Standing Committee on Company Law.

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Women on Boards: progress report published

On 26 March 2014, Lord Davies published the third annual progress report into Women on Boards. When Lord Davies first published his review on this issue in 2011, he set a target of 25% of women on all FTSE100 boards by 2015.

The figures show that progress continues to be made with more women than ever before on the boards of the UK's top companies. Key statistics are set out below:

As of 3 March 2014, in the FTSE100 women now account for:

- 20.7% of overall board directorships, up from 17.3% in April 2013. Of this, however, women account for 25.5% of non executive directorships and only 6.9% of executive directorships.
- 28% of all board appointments in 2013/14.

There are no longer any all-male boards in the FTSE100 following Glencore Xstrata's appointment of a female director in June 2014.

In the FTSE 250 women now account for:

- 15.6% of overall board directorships, up from 13.2% in 2013. Of this, women account for 19.6% of non executive directorships and just 5.3% of executive directorships.
- 33% of all board appointments in 2013/14.

There remain 48 all-male boards in the FTSE 250.

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Takeovers Update

Practice Statement No.27 – Rule 21.2 – Directors' irrevocable commitments and letters of intent

In January 2014, the Panel Executive published Practice Statement No.27 reminding parties involved in an offer or potential offer of the way in which it interprets and applies Rule 21.2 of the Takeover Code to irrevocable commitments and letters of intent given by target director shareholders.

Rule 21.2

Under Rule 21.2(a) of the Code, except with the Panel's consent, neither the target nor any person acting in concert with it (which includes target directors, who are presumed to be acting in concert with the company) may enter into any "offer-related arrangement" with the bidder or its concert parties during an offer period or when an offer is reasonably in contemplation. An "offer arrangement" is, broadly speaking, anything which might inhibit a competing offer from being made. Irrevocable commitments and letters of intent are excluded from the definition of "offer-related arrangements" (Rule 21.2(b)(iv)) provided they simply deal with accepting the offer.

Although the Panel had previously made clear how it interprets Rule 21.2 of the Code in relation to irrevocables, as recently as November 2013, the Panel had to ask target directors to re-execute irrevocables without the inclusion of a non-solicit undertaking which had previously been included in breach of Rule 21.2 (General Sales and Leasing's £24.3m bid for Xenetic Biosciences).

Practice Statement No. 27

The Executive has reiterated that, although Rule 21.2(b)(iv) permits a target director shareholder to enter into an irrevocable commitment or letter of intent to accept an offer (or vote in favour of a scheme) in relation to his shares, the Rule does not permit such a person to enter into any other type of offer-related arrangement with the bidder or the bidder's concert parties.

The Executive highlighted that it would view the inclusion of any of the following provisions in an irrevocable undertaking as breaching Rule 21.2:

- not to solicit a competing offer; to recommend an offer to target shareholders; and to notify the bidder if the director becomes aware of a potential competing bid;
- to convene board meetings and/or vote in favour of board resolutions that are required to implement the offer;
- to provide information for due diligence or other reasons in relation to the target;
- to assist the bidder to satisfy its offer conditions;
- to assist the bidder in preparing the offer documentation; or
- to conduct the target's business in a particular way during the offer period.

The Executive has confirmed that it would still regard these types of commitment to be in breach of Rule 21.2 even if they were stated to be subject to the director's fiduciary or statutory duties.

Provisions that are aimed solely at giving effect to a commitment to accept the offer or vote in favour of the scheme are however permitted under Rule 21.2(b)(iv). These could include an undertaking not to dispose of the shares or withdraw acceptance of the offer; an undertaking to elect for a particular form of bid consideration; and/or representations as to title to the relevant shares.

If there is any doubt over the inclusion of a particular provision in an irrevocable undertaking or letter of intent to be given by a concert party of the target, the Executive should be consulted.

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Antitrust Update

Commission adopts revised safe harbour rules for minor agreements

The European Commission has issued a revised De Minimis Notice (the "**Revise Notice**") which sets out the rules for assessing whether minor agreements are exempt from the general prohibition of anticompetitive practice under Article 101 of the Treaty on the Functioning of the European Union.

General prohibition

Article 101 prohibits agreements between undertakings and decisions by associations of undertakings which have as their object or effect the prevention, restriction or distortion of competition within the common market. However, the EU Courts have consistently maintained that agreements with no appreciable effect on competition are outside the scope of Article 101. First published in 2001, the De Minimis Notice (the "**2001 Notice**") defines what the Commission considers not to be an appreciable restriction of competition by reference to market share thresholds and creates a 'safe harbour' for companies whose market shares do not exceed 10% for agreements between competitors or 15% for agreements between non-competitors.

Key changes made by the Revised Notice

The Revised Notice has made three main changes to the 2001 Notice, although there is no substantial departure from the existing approach and principles:

- in accordance with current EU caselaw, the Revised Notice clarifies that an agreement aimed at restricting competition 'by object' cannot be considered minor and will always constitute an appreciable restriction of competition in breach of Article 101;
- the Revised Notice states that the Commission will not apply the safe harbour to agreements containing any restriction "by object" or those listed as "hardcore" restrictions in current or future Commission block exemption regulations. In contrast, the 2001 Notice listed a specific set of 'by object' or 'hardcore' restrictions excluded from the safe harbour; and
- the Revised Notice no longer contains an explanation of the 'effect on trade' and instead makes specific reference to the rule in the Commission's Guidelines on the effect on trade that excuses agreements between parties with an aggregate market share equal to or below 5% and an annual turnover equal to or below €40 million.

The Revised Notice is accompanied by a Staff Working Document. This is a guidance paper describing various categories of restrictions of competition that are described as restrictions "by object" or "hardcore", supplemented by examples which refer to decisions of the Court and the Commission. However, the document does not prevent the Commission from finding restrictions "by object" that are not identified in the document.

The Revised Notice and Staff Working Document are available at http://ec.europa.eu/competition/antitrust/legislation/deminimis.html

Editor Comment:

The changes to the 2001 Notice are unlikely, in themselves, to make a significant difference to companies' antitrust risks or compliance policies. Most categories of "by object" restriction were already listed in the 2001 Notice and for those that were not, many companies and practitioners had already cautiously assumed that such restrictions would not benefit from the *de minimis* safe harbour.

However, the changes could create difficulties for companies in the future, if the Commission and the EU Courts create new (and unpredictable) categories of " by object" restriction. There are some examples of this having already happened in recent years, such as the Commission's treatment of certain pharmaceutical patent litigation settlements (so-called "pay-for-delay" agreements) and the *Allianz Hungaria* judgment of the Court of Justice, where a vertical reciprocal supply relationship was found to be an object restriction following an unusually extensive assessment of the market context.

This concern should not be overstated, however. The Commission's guidance omits any description of the *Allianz Hungaria* object restriction, implying that it views that judgment's implications as being limited to the specific facts of the case. Moreover, in his recent opinion in *Cartes Bancaires*, Advocate General Nils Wahl expressed the view that a "restrictive" and "cautious" approach should be applied to identifying object restrictions. In the AG's view, only conduct that is injurious in character in the light of experience and economics, and proven and readily detectable, should be considered to restrict competition by object. Agreements which, in their context, have an ambivalent impact on the market or have an ancillary restrictive effect necessary to the pursuit of a main objective that is not restrictive of competition should not be considered a restriction by object. If followed by the Court of Justice, AG Wahl's approach should reduce the risk that companies with small market shares face enforcement action in respect of agreements not previously considered to be object restrictions.

European Commission consults on improving merger control

The European Commission is consulting on proposals to reform the EU merger control regime. The plans include an eye-catching proposal to extend the Commission's powers of review to acquisitions of non-controlling stakes where there is a competitive link.

The reforms would also make case referrals between the Commission and EU Member States more effective, and make certain procedures less onerous (including exempting review of joint ventures that operate only outside the EEA).

While the Commission's willingness to streamline its procedures should be welcomed, businesses will be concerned at plans to extend the Commission's powers of review to non-controlling interests.

Key points

- The Commission is seeking power to review certain acquisitions of minority shareholdings as low as 5%
- Only those minority acquisitions featuring competitive overlaps would be caught
- Nonetheless, for many businesses this could lead to a marked increase in filing obligations
- Conversely, all deals with no overlaps(and non-EEA joint ventures) would be exempted from review entirely, which is to be welcomed
- Case referral procedures between the Commission and EU Member States would also be streamlined

Context

The Commission's EU Merger Regulation was last overhauled in 2004, but has been reviewed twice since (2009 and 2013).

While the Commission considers that the current Merger Regulation is still generally fit for purpose and contributes to the smooth running of the internal market, it recognises that there is room for improvement – singling out non-controlling stakes and case referrals as areas ripe for reform.

The Commission has outlined its proposals in a White Paper and accompanying documents, and is seeking views on the plans in a consultation window running until 3 October 2014.

Non-controlling interests

The plans would give the Commission power to review acquisitions of non-controlling stakes – essentially those that allow the exercise of material influence over commercial policy or access to commercially sensitive information – even where the shareholding acquired is as low as 5%.

Although the Commission notes that this is similar to the tests used in the UK, Germany, Austria and several ex-EEA jurisdictions, it is nevertheless a considerable widening of the Commission's remit, and the 5% threshold is actually lower than that typically applied in those other jurisdictions.

The proposed requirement for a "competitively significant link" means that only minority acquisitions that appear to be problematic from a competition perspective need to be notified. This requires a competitive relationship between the buyer and target, i.e. where they are nominally active in the same market or in vertically related markets – a surprisingly broad test that could easily be met by financial buyers with a diverse portfolio of interests, even where there are no conceivable competition concerns.

Parties to such a deal would be required to submit an Information Notice to the Commission. It is not yet clear exactly how much detail this would require, but the Commission has already indicated that it should include transaction structure and some market share information. Parties would also be obliged to wait for a period (e.g. three weeks) for the Commission to decide whether a full notification was required (in which case the parties would of course still need to prepare the Form CO, pre-notify and wait for the Commission's formal review to take place).

Case referrals

The Commission also seeks to limit the number of cases reviewed by multiple EU Member States. The proposals are designed to encourage greater use of the existing case referral provisions, particularly from Member States up to the Commission.

For example, the plans would allow parties who qualify for review in three or more Member States to file in full directly with the Commission, without having to request permission first, reducing the paperwork and time involved under the current system. The proposals also mean that where one Member State asks the Commission to review a deal, the Commission would automatically take jurisdiction for the whole EEA (unless another competent Member State objected), meaning there should be less scope for multiple parallel – and potentially divergent – reviews.

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Other proposals

The Commission has also suggested a number of other simplifying and streamlining measures, including exempting entirely from review:

- full-function joint ventures located and operating outside the EEA with no effect on EEA markets; and
- deals leading to no "reportable markets", i.e. where there are no horizontal or vertical overlaps (or at least requiring only an Information Notice).

The Commission has also stated that there should be greater coherence and convergence with the merger control rules of EU Member States. Its aim is to enhance cooperation and to avoid divergent decisions where there are parallel reviews. The Commission makes particular reference to some national laws that allow governments to overrule a competition authority's decision on public interest grounds (as seen in the UK with the Lloyds / HBOS merger in 2008).

Editor Comment:

The proposed reforms should be welcomed insofar as they alleviate the workload for businesses and streamline existing procedures and requirements, e.g. making case referral mechanisms more efficient. Exemption from review for non-EEA joint ventures and deals with no overlaps would be particularly good news for financial investors such as private equity houses.

However, it is already apparent that the plans could produce a number of undesirable effects or fall short of the intended aims.

Increased burden for businesses

For businesses, any extension of the merger control regime to cover non-controlling acquisitions means adding more delay and cost to those deals. By effectively seeking to lower the test for "control" where there is a competitive link, the Commission will require businesses to notify it of transactions that currently pass unbothered by merger control.

The proposed additional waiting period (while the Commission decides whether a full Form CO is required) may mean in practice that parties to time-sensitive deals feel forced to opt for a full Form CO in the first place, increasing the workload for both businesses and the Commission itself.

Effect on case referrals

It is unclear whether all of the Commission's proposals to make case referrals to and from Member States more effective will hit home. While the changes to make referrals more efficient for parties should be welcomed, the "nudge" style proposal requiring Member States to actively object to the Commission's automatic seizure of sole jurisdiction in some cases may not have a great effect where the Member State remains minded to examine the deal itself.

A European Merger Area

The Commission indicated that its long term aim is to develop a European Merger Area with a single set of rules used by itself and Member States. This would be a step change that would seemingly require unanimous support of national governments and majority support at the European Parliament, and would be a major departure from the current system of national regulation informed by, but not necessarily identical to, the EU regime.

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Private equity liability for EU antitrust fines

The European Commission has imposed a €37 million fine on Goldman Sachs ("**GS**") for antitrust breaches committed by a portfolio company that was formerly owned by its private equity arm, GS Capital Partners ("**GSCP**").

The European Commission held GS jointly and severally liable for €37 million of a fine of €104.6 million imposed on the Milan-based company Prysmian for its participation in a cartel for submarine and underground power cables.

GS' liability stems from the Commission's finding that its private equity arm, GSCP, owned a controlling stake in Prysmian between 2005 and at least 2007: part of the period in which Prysmian was involved in the cartel.

Under EU competition rules, liability for an antitrust breach attaches not to the individual legal entities that committed the infringement, but rather to the entire "undertaking" or "economic unit" of which they form part. Following this logic, the EU courts allow the Commission to hold a parent company liable for the antitrust infringements of a subsidiary or portfolio company if the parent exerts "decisive influence" over it. In practice, such influence need only relate to the high level strategy and commercial policy of the portfolio company. Consequently, a parent company's liability can be triggered even if it had no involvement in, or awareness of, the breach and did not in any way encourage the subsidiary to commit it – as was the case for GS.

Moreover, such influence is presumed where a parent company owns all or almost all of the subsidiary's shares. Rebutting that presumption – i.e. proving a negative, that no such influence was ever exercised – is extremely difficult, and no parent company has succeeded to date (although the EU courts have overturned some decisions in which they found the Commission had not properly considered parents' arguments in this respect).

Liabilities that linger

Parental liability can arise even if the infringing portfolio company has been sold. The fact that GSCP no longer owned Prysmian was no obstacle to the Commission fining GS, as it was the owner during part of the period of the alleged breach.

Attributing liability to parent companies in this way can allow the Commission to increase the fine that it imposes. This is partly because the maximum fine that can be imposed by the Commission – 10% of worldwide turnover – will be calculated on the basis of consolidated group turnover. A finding of parental liability can also result in increased fines in the future, as companies that are deemed to be "repeat offenders" (including in respect of breaches committed by other portfolio companies) are subject to a 100% increase in the fine for each past breach.

In the Commission's eyes, imposing parental liability also creates incentives for the board and senior management of a corporate group to drive antitrust compliance from the top down, which tends to be more effective.

Piercing the corporate veil

The approach under EU law is replicated in the national laws of most EU countries and, in some cases, taken further. In the UK, for example, the

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Competition and Markets Authority can seek an order prohibiting an individual from assuming any board level responsibilities for a UK company (even if not formally appointed as a director), if it considers that he or she turned a blind eye to cartel conduct within their corporate group.

By allowing the corporate veil to be so readily pierced, EU law stands in stark contrast to that of the US, where parent companies are in most cases only liable for antitrust breaches of their portfolio companies if they are deemed not to have separate corporate existences. The EU approach is not widely followed in other non-EU countries either. However, this is often because the approach to parental liability has not yet been firmly established in those jurisdictions. When it is, the EU position could be influential.

Mitigation strategies

In principle, there are a number of ways that a PE house can seek to mitigate these antitrust risks.

The first and most effective mitigation strategy is prevention and detection. After all, if portfolio companies are free of antitrust liabilities, then there is nothing that can be attributed to their PE parents. Moreover, some antitrust regulators, such as those in the UK, the US, Australia, Canada and the Netherlands offer discounts on antitrust fines for firms that can show the existence of a compliance regime which is not only effective on paper, but also rigorously implemented.

A theoretical second (but unattractive) strategy would require ensuring that there is comprehensive and compelling evidence that the PE house and related staff exercise no commercial, strategic or operational influence over its portfolio companies. In practice, however, this will be incompatible with the management strategies of many PE houses (except possibly in relation to minority interests), particularly as arguments relating to the absence of exercise of “decisive influence” are rarely successful.

Third, contractual structures might be put in place so that in the event of a fine on the basis of parental liability, the ultimate financial burden rests within the portfolio company and, failing that, the underlying fund:

- **The portfolio company.** Fines are imposed jointly and severally on the parent and the infringing company, so if the portfolio company pays the entire fine, the PE house will have no liability. Judicial precedents for how liability should be allocated between infringers and jointly liable parents have not yet been established (although there are ongoing cases), but a contractual allocation may be possible. Such a mechanism would need to survive beyond exit by the PE house of its investment in the portfolio company and would still leave the PE house with a potential credit exposure.
- **The underlying fund.** Most funds will grant a wide indemnity in favour of the management company and its group provided it has not acted negligently or in breach of any of its duties. As such, depending on the wording of the indemnity, and assuming the portfolio company has been unable to pay, the management company may ultimately seek to recover the loss from the fund itself.

However, in certain circumstances indemnities and other risk-shifting contractual mechanisms (such as insurance) may be unenforceable in some jurisdictions, for public policy reasons.

In addition, the relevance of negligence for indemnity claims may well lead to a

discussion over the extent to which PE houses are responsible for ensuring a compliance culture at portfolio company level – and whether they have been negligent if they fail to do so. Consequently, ensuring that an effective antitrust compliance regime is in place has the benefit of not only reducing the risk of any issues arising in the first place, but also helping to ensure that the PE house cannot be seen as culpable for the loss, thereby mitigating risks not only to its reputation but also to its indemnity position under the fund documents.

Finally, there are a number of examples of portfolio companies that have been subjected to antitrust fines in respect of the period before they were bought by a PE house. While issues of parental liability will not arise for the PE house, it still faces a loss of value in its portfolio company. This highlights the importance of a thorough due diligence, and potential value of antitrust warranties and indemnities when buying a new portfolio company.

The Prysmian case also serves as a reminder that liability can be incurred after the disposal of the portfolio company. Investors and managers alike will need to give appropriate consideration to claw-back and escrow arrangements when devising and negotiating fund structures and implementing post-exit distribution strategies. However, once the fund has closed, and monies have been distributed, a PE house may have little choice but to bear the brunt of a fine.

Editor Comment:

As with all legislation that seeks to pierce the corporate veil and impose liabilities on parents, groups or controllers, the implementation of antitrust rules is complicated by the difficulties of applying typical parent/group/controller analyses to the wide range of highly sophisticated and bespoke fund structures seen across the industry. Nevertheless, the Commission's actions against GS show that these complexities will not deter antitrust regulators from seeking to attribute liability to PE houses.

This is not the first time that the Commission has sought to impose a fine on a financial investor. Nor does it necessarily represent a new, more aggressive policy of the Commission towards PE houses. However, it is a reminder that private equity firms are not immune from EU antitrust liabilities of their portfolio companies, and that having appropriate mitigation strategies in place can be a valuable safeguard.

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This Corporate Update has been produced by the London Corporate Practice and edited by David Pudge.

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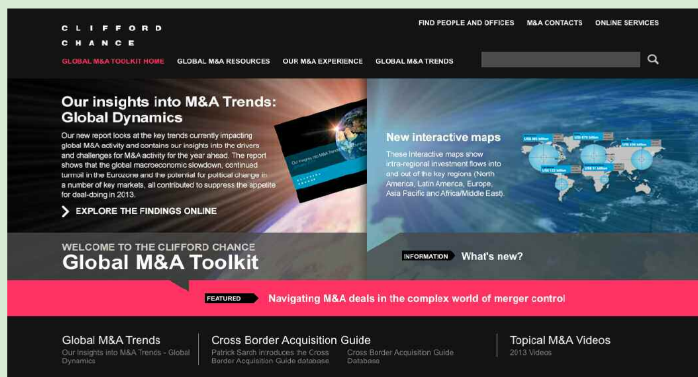

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