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January 2015

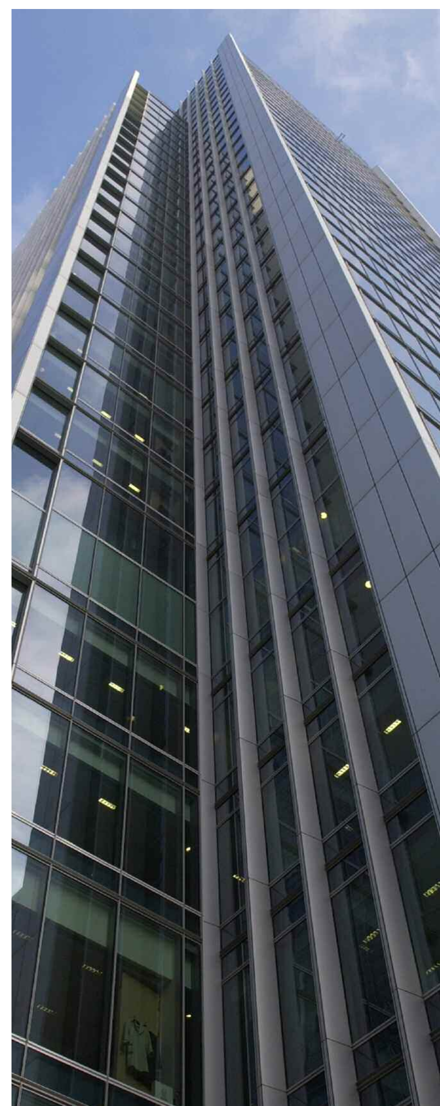
Corporate Update – January 2015

Welcome to our January 2015 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.

In this edition, we consider the potential impact of the Autumn 2014 Budget Statement, the effect of which may reduce the popularity of "B share schemes" as a means of returning cash to shareholders. We also look at the Chancellor's proposals to prevent the use of cancellation schemes to implement takeovers so as to remove a bidder's ability to avoid paying stamp duty on these transactions. These measures, along with the Government's proposals to introduce a new so-called "Google tax", aimed at ensuring multinationals that do business in the UK pay their fair share of UK taxes, might be perceived by cynics as an attempt by the incumbent Government in advance of a May 2015 election to show that it will take a hard line on the taxation of businesses in the UK. Regardless of any electoral propaganda however, these proposals will have a real impact on multinational companies doing businesses in the UK.

We also look ahead to new narrative reporting requirements on the horizon for large companies, in particular, proposals requiring companies to report on anti-corruption and bribery matters in their strategic report, along with proposals for companies to make a statement on their website about the steps they are taking to eliminate slavery and human trafficking from their supply chain and their own business.

In addition, we take a look at the first nine months of operation of the Competition and Markets Authority, and their activity levels with regard to merger control work and market and criminal cartel investigations, as well as looking ahead to what we might expect from them in 2015.



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Company Law Update

Returning cash to shareholders: Autumn Statement casts a cloud over B share schemes

Whilst over recent months we have seen an increase in M&A activity, markets and macro economic conditions still remain challenging. Many companies are sitting on large cash reserves and we have seen an increasing number of companies looking for ways to return cash to shareholders in the most tax efficient manner available.

A particularly popular method of returning value to shareholders has been by means of a so-called "B share scheme". Over the last twelve months, a host of companies, including Booker Group plc, Rolls Royce Plc, Compass Group PLC, Rexam PLC and SOCO International Plc (to name but a few) have all undertaken B share schemes.

B share schemes usually involve the creation and issue of a new class of shares (usually named "B" shares although they can have any name so long as they are distinguishable from the company's existing ordinary shares) to the company's existing shareholders in proportion to their existing shareholding by way of a bonus issue. In order to return cash to shareholders, the company will then either (i) declare a dividend on the B shares and, once paid, reclassify the B shares as deferred shares of negligible value; (ii) redeem (or repurchase) the B shares; or (iii) cancel the B shares by means of a reduction of capital.

One of the key advantages of the B share scheme is that flexibility can be built in to allow shareholders to elect to receive the return of cash as income or capital for tax purposes. In contrast, a return of cash by means of dividend will be treated as income for tax purposes in the hands of the recipient shareholder but, depending on the structure adopted, a share buyback, redemption and reduction of capital may be subject to capital gains tax. The B share scheme typically confers a tax advantage on additional and higher rate taxpayers who can choose how to receive the "return" so that it is taxed at a more beneficial rate.

In his Autumn Statement made on 3 December 2014, the Chancellor of the Exchequer announced his plans to legislate in the 2015 Finance Bill to remove what he perceives to be an unfair tax advantage. Cash received pursuant to a B share scheme or via similar special purpose share schemes will be treated in the same way as dividend income. The draft Finance Bill published on 10 December 2014 includes draft legislation to implement this change. It will apply only where shareholders are given a choice as to the form of the return (although having a default form of return in the absence of an election is treated as a choice for these purposes) and so should not affect a B share scheme which produces only a capital return. The treatment of the return in the same way as a dividend return only applies for income tax purposes and will not affect the company's position. The legislative change will apply to all returns received by shareholders from 6 April 2015. It appears that there will not be any anti-forestalling rules which may lead to companies trying to implement B share schemes before the change takes effect.

This crack down on B share schemes is part of a wider review of corporate structures by the Government. In his Autumn Statement, the Chancellor also announced the Government's intention to publish regulations to prevent the use of "cancellation" schemes of arrangement to implement takeovers so as to remove a bidder's ability to avoid paying stamp duty and SDRT on the transaction (see our Takeovers Update for more information in this regard).

A new "Google Tax": UK diverted profit tax

Following the recent political and media focus on the low levels of tax paid by Google, Amazon and others notwithstanding the volume of business carried out in the UK, the UK Government has announced a new "diverted profits tax" designed to ensure that these and other companies pay a significantly higher amount of tax. The tax, widely referred to as the "Google tax", is much wider than expected. It will be levied at 25% on the diverted profits (which is higher than the normal rate of corporation tax) and will potentially impact foreign companies that do business in or with the UK without a taxable "permanent establishment" here, and UK companies which have arrangements with non-UK affiliates that reduce their UK taxable profits. Most multinationals will potentially fall within one or both of these categories and will need to consider the rules carefully.

The draft legislation indicates that it is the Government's current intention to bring this tax into effect on 1 April 2015.

We have prepared a briefing on the new tax which can be found at: www.cliffordchance.com/briefings/2014/12/the_new_uk_divertedprofitstaxwillitimpac.html.

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Progress of Small Business, Enterprise and Employment Bill

In the July 2014 edition of Corporate Update we discussed the Government's plans to (i) create a new central register of beneficial owners of companies and LLPs; (ii) ban the creation of new bearer shares and to require existing bearer shares to be surrendered; and (iii) ban corporate directors. These proposals, together with others aimed at enhancing transparency of UK company ownership and increasing trust in UK business, are contained in the Small Business, Enterprise and Employment Bill. The Government's intention is that the Bill should receive Royal Assent in March 2015. On 15 January 2015, the Government announced provisional implementation plans for the transparency and company filings parts of the Bill (Parts 7 and 8) as follows:

- *Phase 1:* Two months after Royal Assent of the Bill (May 2015) – Companies will no longer be able to issue bearer shares and the nine month conversion period for companies with existing bearer shares will commence.
- *Phase 2:* October 2015 – The prohibition of corporate directors, with exceptions, will come in to force.
- *Phase 3a:* January 2016 – Companies will be required to keep a register of people with significant control (**PSC register**). They will not however need to file this information at Companies House until April 2016 (see below).
- *Phase 3b:* April 1016 – (i) Reduced record keeping and filing requirements for companies, including changes to statements of capital, will come into effect. (ii) The requirement to file information on people with significant control at Companies House will come into effect. (iii) Private companies will be able to opt 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.

The Government has also announced that it will be setting up working groups to help draft the statutory and non-statutory guidance required to support the implementation of the PSC register and what is meant by the expression "significant influence or control" in the context of the PSC register.

A copy of the Ministerial Statement and Provisional Implementation Plan are available from:
www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2015-01-15/HCWS188/

www.gov.uk/government/uploads/system/uploads/attachment_data/file/394937/BIS_15_34_Provisional_implementation_plan_for_Parts_7_and_8_of_SBEE.pdf

New sentencing guidelines proposed for corporate manslaughter, health and safety and food safety offences

The Sentencing Council has published for consultation draft guidelines covering corporate manslaughter, health and safety offences and food safety and hygiene offences.

The current guidelines were published in February 2010 and cover sentencing for corporate manslaughter and health and safety offences causing death where such offences are committed by an organisation. Only piecemeal guidance exists for sentencing for food safety offences, and the existing guidelines do not cover health and safety offences not resulting in death or offences committed by individuals. Published in November 2014, the proposed new guidelines are intended to address these deficiencies and, once finalised, will supersede the current guidelines.

The consultation is a response to concerns that some sentences, particularly those imposed in relation to large organisations convicted of the most serious health and safety offences, have been too low and it is intended that the proposed guidelines will result in larger fines being imposed. The Sentencing Council intends to ensure that sentences are proportionate to the seriousness of the offence whilst, as required by law, also taking into account the financial circumstances of the offender. The stated aim is that not only should the sentence punish the offender, but it should deter them and others from committing such crimes by removing any financial benefit they have had from offending, for example, as a result of saving costs by failing to maintain proper standards.

The consultation closes in February 2015. A copy of the consultation paper can be found at:
http://sentencingcouncil.judiciary.gov.uk/docs/Health_and_safety_corporate_manslaughter_food_safety_and_hygiene_offfences_consultation_guideline_(web).pdf

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Payment to governments reporting regime: new draft industry guidance published

In our July 2014 Corporate Update we reported on new UK regulations[1] that require large companies in the logging and extractive industries sectors to report all relevant payments to governments (including government bodies at regional and local levels and their related agencies) on an annual basis from the start of their financial year commencing on or after 1 January 2015.

In an earlier consultation on the form of the regulations, BIS indicated that it did not intend to mandate a specific reporting format but intended to develop industry guidance and a recommended template for reporting.

On 25 November 2014, BIS published draft industry guidance for consultation. The guidance has been developed by a working group involving representatives from the International Association of Oil and Gas Producers and the International Council on Mining and Metals and is intended to provide guidance to those entities required to comply with the new reporting regime and to promote consistency in the reporting of payment information.

Matters covered in the guidance that will be of particular interest to affected entities include guidance on:

- Which business activities are within the scope of the regulations?
- Which types of payment have to be included in the report?
- Who is obliged to include payment information in a report in situations where a payment is made on behalf of multiple parties?
- Which government entities that receive payments have to be covered in the reports?
- How should payments be attributed to projects?

Download the draft guidance at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/378081/bis-14-1228-the-reports-on-payments-to-government-regulations-2014-industry-guidance-draft.pdf

For further information see our briefing *BIS confirms early adoption of regulations requiring extractive industries to disclose payments to governments* available at: www.cliffordchance.com/briefings/2014/09/bis_confirms_earlyadoptionofregulation.html

Mandatory Energy Auditing – the Energy Savings Opportunity Scheme

In July 2014, the Government published the final form of its mandatory energy auditing scheme for large companies. The scheme is required under the 2012 European Energy Efficiency Directive and will require group-wide participation for qualifying organisations. The Energy Savings Opportunity Scheme (**ESOS**) will require an audit of participating companies' energy use every four years. It is hoped that, through auditing

[1] The Reports on Payments to Governments Regulations 2014 which took effect on 1 December 2014.

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and the identification of potential energy savings, consumption will be reduced and help towards achieving Europe-wide Energy Efficiency targets.

Which companies must participate? Participation in ESOS is mandatory for "large companies" and is required on a group-wide basis for any group that contains at least one large company. A large company is one which has:

- 250 or more employees (including all contracted staff, owner manager and partners directly employed by the undertaking in the UK or abroad); or
- An annual turnover of over €50m and a balance sheet of over €43m.

Groups will participate together as one participant but ESOS allows reasonable flexibility for groups to "disaggregate" into groupings that make sense to the organisation (e.g. along divisional lines).

ESOS will operate in four year compliance phases (the first phase is partially retrospective running from 6 December 2011 to 5 December 2015). Relevant companies will have to participate in the scheme for a phase if they qualify on the qualification date (the relevant date for the first compliance period being 31 December 2014).

What does the scheme require? The central requirement of ESOS is to carry out an ESOS Assessment (including an energy assessment and an energy audit) in relation to the participant. This will need to be led by a registered assessor, who could be an in-house assessor or an external consultant.

Within the four year compliance period, a participant must carry out an assessment of the total energy supplies made to the participant during a continuous 12 month reference period which straddles the qualification date. For example, a possible reference period for the first compliance period could be 1 April 2014 to 31 March 2015 (making it consistent with the UK CRC Energy Efficiency Scheme reporting year).

Only UK energy supplies are included, and these can be measured by energy units, or energy costs. The energy assessment must cover energy used by the participant for:

- Road and rail transport within the UK, and even company car use will be covered.
- Air and maritime transport nationally, and internationally where it either starts or ends in the UK.
- Industrial processes and, therefore, it must cover energy which might be included within the EU Emissions Trading System or covered by Climate Change Agreements.

Having carried out the energy assessment, participants will then need to ensure that all "significant areas of energy use" (those forming at least 90% of the energy use measured in the assessment) are subject to an energy audit. The energy audit can be carried out specifically for ESOS. Alternatively, other audit-type work will qualify for all or part of the audit, such as energy use covered by an ISO 50001 energy management system, Green Deal Assessment or Display Energy Certificate. Similarly, other types of assessment work may assist in the carrying out of the audit, e.g. Carbon Trust Standard or Green Fleet Reviews as long as the work satisfies minimum standards.

The energy audit will have to analyse energy consumption and identify practical and cost-effective energy saving measures in relation to the significant areas of energy use audited.

Responsibility for Compliance and Notification to Environment Agency: One undertaking within the participant (the **responsible undertaking**) will be responsible for compliance with ESOS and this will normally be the UK parent undertaking. The responsible undertaking will need to notify the Environment Agency, on or before the end of the compliance period (5 December 2015 for the first phase), that the participant is subject to ESOS and has complied with the scheme. This notification will require director level sign-off.

Penalties for non-compliance: The Environment Agency will be the administrator for ESOS, with devolved national regulators taking responsibility for certain aspects. A range of civil penalties will apply to breaches of the ESOS regulations. Most significantly, failure to carry out an ESOS assessment could attract a penalty of up to £50,000, with a daily default penalty of £5,000 until the participant is brought into compliance. Auditing records will need to be kept for the subsequent two compliance periods.

Mandatory disclosure not required: The Government decided not to insist on publication of the ESOS assessment data, either directly by the participants, or indirectly through the Environment Agency, on the basis that this would gold-plate the requirements of the Energy Efficiency Directive. The audit information will, therefore, only be used for participants' own purposes, although existing corporate reporting

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requirements relating to environmental information might require disclosure of the findings in certain cases.

For more information download our briefing *Mandatory Energy Auditing – the Energy Savings Opportunity Scheme* at: www.cliffordchance.com/briefings/2014/07/mandatory_energyauditing-theenergysaving.html

Editor Comment:

In the absence of a requirement to publish ESOS Assessments or to include an energy intensity ratio in them, it remains to be seen whether ESOS will make a significant impact on energy efficiency targets. In any event, ESOS is likely to lead to a significant additional administrative burden for some organisations. Each organisation should consider whether it is, or its group contains, a large company, based on the qualification date of 31 December 2014. They should also consider:

- energy monitoring and reporting structures they have in place;
- energy supply information available covering the period from 6 December 2011 to date; and
- possible sources of existing audit work or certifications that could help in complying with ESOS.

Organisations with operations elsewhere in the EU should also look out for the emergence of analogous schemes requiring energy audits of those operations. The Directive provides some flexibility for Member States to implement the energy auditing requirements and such schemes might, therefore, operate in materially different ways.

Large companies to be required to report on anti-corruption and bribery matters

New European legislation[2] that will require the disclosure in the strategic report of information relating to anti-corruption and bribery matters has come into force and will require implementation into national law by Member States by 6 December 2016.

BIS has indicated that it intends to consult on the UK implementation of the Directive in early 2015. The disclosure requirements will apply to financial years beginning on or after 1 January 2017.

Affected companies will need to disclose information about their policies, risks and outcomes in relation to environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters, to the extent necessary for an understanding of the company's business. Where a company has not implemented policies in relation to one or more of these matters, it will need to provide a clear and reasoned explanation for not doing so. These reporting requirements will apply to large companies with more than 500

[2] Directive 2014/95/EU amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

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employees. The main change for UK companies is the requirement to make disclosures on anti-corruption and bribery matters as the other areas of disclosure are already required to be included a company's strategic report.

For companies with shares admitted to trading on an EEA regulated market, they will also be required to include in their management report a description of their diversity policy, including details of its implementation and outcome.

Modern Slavery Bill: companies to be required to make "slavery and human trafficking" statement

Provisions contained in the Modern Slavery Bill[3] will require certain businesses to disclose what steps they are taking to eliminate slavery and trafficking from their supply chain and their own business.

The Bill consolidates offences relating to slavery and human trafficking. Clause 52 of the Bill requires commercial organisations who supply goods or services and have a prescribed minimum turnover (to be specified in regulations yet to be published) to prepare a slavery and human trafficking statement for each financial year. The statement should outline the steps that the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place in any part of its supply chain or any part of its business. Where the company has taken no such steps then it has to provide a statement to that effect.

Interestingly, the statement will not be required to be included in a company's strategic report and, as such, changes to the Companies Act 2006 will not be required. The Bill mandates that companies make a stand-alone and readily accessible statement on an annual basis that must be published on their website. In addition, a company must include a link in a prominent position to the statement on its website homepage. If a company does not have a website, it is required to provide a copy of the statement to anyone making a written request for it within 30 days of the receipt of the request.

The Bill is currently progressing through the UK legislative process with timing contingent on the passing of the Bill.

[3] Currently being debated by the House of Lords. This article refers to the draft dated 11/12/14.

Case Law Update

Parent company not liable for health and safety breaches of its subsidiary

In the July 2012 edition of Corporate Update, we considered the Court of Appeal decision in **Chandler v Cape plc**[4], in which the Court of Appeal held that the parent company had assumed a duty of care to the employees of its subsidiary, which it had breached, making it liable to pay compensation to the employees of the subsidiary who had been exposed to asbestos dust. This decision was the first of its kind and opened up a new and potentially easier route for employees of a subsidiary to claim against the parent company for health and safety injuries.

However, a more recent decision by the Court of Appeal, in the case of **Thompson v Renwick Group plc**[5] will provide some comfort to parent companies, as in this case the Court held that the parent company had not assumed a duty of care to the employees of its subsidiary.

The facts

Mr Thompson began working at Arthur Wood & Co in 1969, where he was employed to unload raw asbestos from shipping containers and put it onto pallets. The Court described the working conditions as shocking. In 1975 Arthur Wood & Co was acquired by David Hall & Sons Ltd, a subsidiary of the Renwick Group plc. In 1976 Mr Rushton, a director of David Hall & Sons Ltd, came to work at Arthur Wood & Co's premises, eventually taking over the running of the business from Mr Wood himself.

There was no evidence of the nature of any connection or relationship between Mr Rushton and Renwick Group plc (either as a director or an employee) and there was no evidence as to which company employed Mr Rushton whilst he was working at the Arthur Wood depot, although the Court thought it might be legitimate to infer that he was employed by David Hall (as he was a director of that company) and that he was nominated to be a director of that company by Renwick Group plc.

Judgment

The Court of Appeal first considered whether a parent can be held to have assumed a duty of care to employees of its subsidiary in health and safety matters by virtue of that parent company having appointed an individual as director of its subsidiary company with responsibility for health and safety matters. The Court held that the answer to this question was clearly no; in running the day to day operations of David Hall & Son Ltd, Mr Rushton was not acting on behalf of the parent company; he was acting pursuant to his fiduciary duty owed to David Hall & Sons Ltd and no other duty.

Secondly, the Court of Appeal considered **Chandler v Cape** and in particular whether it was appropriate to impose a duty of care on the parent to protect the subsidiary company's employees from the risk of injury arising out of exposure to asbestos at work. In the **Cape** case, the Court believed it

[4] [2012] EWCA Civ 525
[5] [2014] EWCA Civ 635

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might be appropriate to impose such a duty in circumstances where:

- the business of the parent and the subsidiary are in a relevant respect the same;
- the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry;
- the subsidiary's system of work is unsafe and the parent company knew, or ought to have known; and
- the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using its superior knowledge for the employees' protection.

Whilst this list is illustrative rather than exhaustive, the Court of Appeal found that the facts of the two cases were so different that the outcomes should be different. Accordingly, whilst this unfortunately left Mr Thompson without compensation (as both Arthur Wood & Co and David Hall & Sons Ltd were no longer in existence and had no insurance) this was not a case where it was appropriate to impose a duty of care on the parent.

Editor Comment:

Whilst the decision in this case may provide some comfort to parent companies that they are unlikely to be held liable for the health and safety breaches of their subsidiaries, except in extreme cases such as **Chandler v Cape**, it is still important to remember that the separate legal personality of a subsidiary company may not always be sufficient to protect a parent company from liability for the acts or omissions of that subsidiary.

A time limited obligation to attempt to resolve a dispute before commencing arbitration is enforceable

In the recent case of **Emirates Trading Agency LLC v Prime Mineral Export Private Limited**[6], it was held that a clause which sought to impose a time limited obligation to attempt to resolve a dispute before commencing arbitration was enforceable. In doing so the Court distinguished this type of clause from a mere agreement to agree or agreement to negotiate, which is unenforceable following the long established decision of the House of Lords in the 1992 case of **Walford v Miles**[7].

The background

The contract in question contained the following dispute resolution and arbitration clause:

"In case of any dispute or claim arising out of or in connection with or under this [contract] ..., the Parties shall first seek to resolve the dispute or claim by friendly discussion. [...] If no solution can be arrived at between the Parties for a continuous period of 4 weeks then the non-defaulting party can invoke the arbitration clause and refer the dispute to arbitration."

When PMELP served notice of termination on ETA it sought to avoid the need to enter into discussions prior to invoking the arbitration clause, by arguing that the clause was unenforceable as a mere agreement to negotiate.

ETA relied upon Australian authority[8] to support its case that the clause should be enforceable, notwithstanding English authorities to the contrary.

Reasoning of the New South Wales Court of Appeal

In the Australian case, the New South Wales Court of Appeal had held that a clause which provided that the parties to a contract should "*meet and undertake genuine and good faith negotiation with a view to resolving the dispute*" before the dispute could be arbitrated was enforceable.

The Australian judge addressed the reasons for unenforceability cited in **Walford v Miles**, as follows:

- *Does it lack certainty?* No, an obligation to undertake discussions about a subject in an honest and genuine attempt to reach an identified result (or in other words to behave in a particular way) is not incomplete.
- *How can the court police such an agreement?* The conduct of the parties would be judged by reference to a subjective standard, and whilst it might in some cases be difficult to assess whether the parties had complied with such a standard, a difficulty in proving a breach did not mean that the obligation lacked legal content.
- *Is it inconsistent with the position of a negotiating party?* In entering into the contract, the parties had willingly accepted a constraint on how they

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[6] [2014] EWHC 2104 (Comm)
[7] [1992] 2 AC 128
[8] **United Group Rail Services v Rail Corporation New South Wales** (2009) 127 Con LR 202

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would negotiate. The clause required negotiations to be undertaken with a view to resolving the dispute and would therefore not be an open-ended discussion concerning each party's commercial interests without regard to the rights and obligations under the contract. This would require an honest and genuine attempt to resolve differences by discussion and, if thought to be reasonable, by compromise, in the context of showing a faithfulness and fidelity to the existing bargain. The judge noted that examples of behaviour that would not meet such a standard might include: (i) a party threatening a future breach of contract in order to bargain for a lower settlement sum than it genuinely recognised as being due; and (ii) a party pretending to negotiate, having decided not to settle what it had recognised to be a good claim, in order to drive the other party into an expensive arbitration that it believed the other party could not afford.

Judgment

Swayed by the reasoning of the Australian judge, the English judge concluded that he was not bound by existing English authorities. In his view the clause was enforceable for the following reasons (which largely mirrored those of the Australian judge): the agreement is not incomplete; no term is missing, nor is it uncertain; and the obligation has an identifiable standard, namely, fair, honest and genuine discussions aimed at resolving the dispute. Difficulty in proving a breach in some cases should not be confused with a suggestion that the clause lacks certainty. In the context of a dispute resolution clause pursuant to which the parties have voluntarily accepted a restriction upon their freedom to negotiate it is not appropriate to suggest that the obligation is inconsistent with the position of a negotiating party. Enforcement of such an agreement, when found as part of a dispute resolution clause is in the public interest, first, because commercial parties expect the court to enforce obligations which they have freely undertaken and, secondly, because the purpose of the agreement is to avoid what might otherwise be an expensive and time consuming arbitration.

Editor Comment:

In practice, the enforceability of a particular clause is likely to come down to whether the judge thinks that the uncertainties of what is required are so insuperable as to render the obligation meaningless, or whether the judge considers the difficulties alleged by one or other party to be overstated.

A summary of the law as it currently stands is set out below, but each situation does potentially turn on its own facts and the precise wording of the clause. It should also be noted that there are various advocates for change among the judiciary who argue that, in some circumstances, an express obligation to negotiate might be enforceable.

Type of clause	Enforceable: Yes/No
Agreement to agree to another agreement (contained in a non binding letter of intent/subject to contract letter)	No
Agreement to negotiate in good faith (with nothing more) NB: May also be expressed as an agreement to use best or reasonable endeavours to agree in an otherwise complete and enforceable contract	Unlikely to be enforceable for lack of certainty
Agreement to negotiate an outstanding term in an otherwise complete and enforceable contract (e.g. where the parties had contractually agreed that the upgrade works would be done and that one party would pay for the reasonable costs, which it would negotiate in good faith with the other party)	May be "enforceable" where the parties have set out objective criteria, or machinery for resolving any disagreement, but the reality is that the agreement to negotiate is then irrelevant and the court simply completes the agreement by reference to such objective criteria or machinery stipulated[9]
Agreement to negotiate in good faith to attempt to resolve a dispute over a limited time period	Yes

[9] The approach adopted by the Court in **Petromec Inc v Petroleo Basileiro SA Petrobas** [2005] EWCA Civ 891

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Corporate Governance Update

Your 2015 AGM and beyond

Earlier this month we distributed our annual AGM Update for the 2015 AGM season.

Following an unprecedented amount of regulatory changes for listed companies for the 2014 AGM season, this coming season looks to be more settled. The greatest area of change will be for companies with a controlling shareholder that will need to:

- ensure the election/re-election of all independent directors is approved at the AGM by a vote of both the shareholders as a whole and the independent shareholders of the company; and
- include new controlling shareholder disclosures in their annual report.

For further information about the above changes, along with our analysis of the trends emerging from the new remuneration reporting regime and a look ahead to those developments that will impact on your 2015 financial year, see our AGM briefing which is available at: www.cliffordchance.com/briefings/2015/01/your_2015_agm_andbeyond.html

Improving collective engagement: new Investor Forum launched

Following the recommendations of the Collective Engagement Working Group (a group established by the ABI, IMA and NAPF) and the Kay Review, a new Investor Forum was launched in July 2014. The Forum is an investor-led organisation, open to all investors with an interest in UK companies. It is intended that the Forum's participants will be asset managers and asset owners such as pension funds, life assurers and sovereign wealth funds. The Investor Forum has been formed with the objective of promoting a long-term approach to investment and creating a model for collective engagement with UK companies.

In October 2014, the Forum published a discussion paper setting out its key principles and its approach to engagement. The discussion paper sets out various services that the Forum believes that it can provide to asset owners, asset managers and companies. In particular, it intends to offer an Advisory Forum, acting as a sounding board and providing in-confidence counsel to investors and companies. It also intends to provide a Collective Investor Forum to facilitate proactive collective engagement between companies and investors, such engagement to be initiated where shareholders consider that the long-term competitive position of a company is at risk.

A copy of the Investor Forum discussion paper is available at: media.wix.com/ugd/1cf1e4_04e2ecc540f74689a24120445d0fe222.pdf

Editor comment:

Whilst the aims of the Investor Forum are laudable, there are legal and regulatory issues which will have a bearing on how effective any shareholder/company engagement can be, not least concerns about the sharing of information by a company with a small group of shareholders and the risks and restrictions around the sharing of confidential and/or price-sensitive information. Clear guidelines will need to be put in place to ensure that all parties understand the nature of the information that can and, more importantly, cannot be shared, without having to make parties to the discussion "insiders".

IMA republishes Principles of Remuneration and Transaction Guidelines

Following the merger of ABI Investment Affairs with the Investment Manager's Association (**IMA**) in June 2014, the enlarged IMA (which was renamed The Investment Association in January 2015) has republished the ABI's Principles of Remuneration and Transaction Guidelines.

Principles of Remuneration

In October 2014, the IMA wrote to all Remuneration Committee Chairmen notifying them of the republished Principles and confirming that the only change of significance related to the use of "allowances" as part of directors' fixed pay. In the IMA's view, the payment of "allowances" is inconsistent with the principles of clarity and pay for performance and, as such, if a committee considers the payment of an allowance to be necessary, it should be clearly justified and explained in the context of the overall remuneration package.

The IMA also flagged in its letter issues of particular concern to its members:

- *Amounts and gearing of variable pay:* normally basic salary increases should

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not exceed inflation or the increase for general workers and the reasons for any increase to maximum variable pay should be clearly explained (an increase in the size of the company is not of itself a sufficient rationale);

- *Threshold performance:* members will look at the absolute amount paid to an executive director for threshold performance, not just the proportion of the award that vests;
- *Length of performance/holding period:* the performance period for long-term incentives should be linked to the implementation of the strategy of the business and be no less than three years and preferably longer; and
- *Retrospective changes to performance conditions:* the IMA is aware that some companies are considering retrospective changes to performance conditions to take account of recent movements in exchange rates, which may have a significant impact on the outcome of profit-based performance metrics. IMA members do not support any such retrospective changes and consider the management of exchange rate risk to be part of an executive's role.

The IMA's letter to Remuneration Committee Chairmen is available at: www.ivis.co.uk/media/10280/Introductory-letter-2014.pdf

Transaction Guidelines

The IMA has also assumed responsibility for the Transaction Guidelines previously published by the ABI. These guidelines make recommendations in relation to (1) IPOs, including the size of syndicates and the payment of discretionary fees, (2) secondary offerings, including reducing underwriting fees and (3) the role played by independent non-executive directors (**INEDs**) in corporate transactions.

On 10 November 2014, the IMA republished the Transaction Guidelines, although it has not made any substantive changes to the text. Set out below is a reminder of the key provisions of these guidelines as they apply to secondary issues, corporate transactions and the role of INEDs:

Secondary offerings

- Companies should use deep discounts in rights issues to reduce fees paid to primary underwriters and sub-underwriters. Firm undertakings should be sought from sub-underwriters before announcing the transaction. Great care should be taken in wall-crossing ahead of a secondary offering, with recipients of information being subject to confidentiality obligations and restrictions on dealings, and the cleansing strategy being carefully considered. (In addition, it should be noted that wall-crossing requirements are becoming increasingly burdensome as a result of the forthcoming Market Abuse Regulation which will take effect in July 2016 and will require enhanced record keeping and additional safeguards prior to any market soundings).
- Fees should be disaggregated with fees for advice, primary underwriting and sub-underwriting shown separately. Similarly, fees of other advisers such as lawyers, accountants and independent advisers should be shown separately.
- The aggregate fees charged, and discount to the mid-market price at the time of agreeing the placing, should be disclosed in the pricing announcement for non-pre-emptive placings.

Corporate transactions and INEDs

- INEDs should be given sufficient time and information to consider the merits of the proposed transaction and to provide their views to those shareholders who are "insided".
- INEDs should be given a narrative description of discussions with the

target and this narrative should be disclosed in summary form in the circular.

- INEDs should be given direct access to financial and legal advisers and INEDs should consider whether to seek independent advice on the merits of the proposed transaction.
- On certain transactions (e.g. MBOs, transactions with major shareholders) an independent committee of un-conflicted directors should be formed, which should take independent financial and legal advice. In these circumstances, the IMA's view is that "information barriers" within existing advisers will not suffice.
- The independent committee should consider whether the transaction (as opposed to other courses of action) is in the best interests of shareholders as a whole.

Access a copy of the guidelines at: www.ivis.co.uk/media/10296/Transaction-Guidelines-November-2014-.pdf

FRC Corporate Reporting Review

In October 2014 the FRC published its Corporate Reporting Review Annual Report 2014. This Report is of primary interest to those with responsibility for preparing company report and accounts. The Report provides an overview of the corporate reporting review activities of the FRC for the year end 31 March 2014 and its key findings and also identifies areas that are likely to pose future challenges for those tasked with preparing next year's report and accounts. In preparing the Report, the FRC reviewed 271 sets of reports and accounts.

Although the FRC reports that it has seen a good level of corporate reporting by large public companies (in particular, those in the FTSE 350), it continues to be concerned about the number of poorer quality accounts produced by smaller listed and AIM companies. In response to concerns about this, the FRC has begun a three-year project to drive a step change in the quality of reporting by smaller listed and AIM companies. This project is currently in its initial phase, which involves gathering and assessing evidence of the root causes of the issues and exploring ways in which the FRC can support companies to make improvements.

Issues identified by the FRC as likely to be of relevance/concern to companies generally in the near future are:

- *IAS 19 – the revised pensions accounting standard which has changed the way in which companies are required to recognise and measure pension costs, including the means by which financing is calculated.* Boards must now disclose information about the governance of their pension plans and the applicable regulatory framework, including any minimum funding requirements, funding arrangements and maturity profile. The FRC will be reviewing future reports to assess whether disclosures include quantitative, as well as qualitative, information.
- *IFRS 10 (de facto control of subsidiaries).* This revised standard requires companies to consider whether they exert "de facto" control over an entity and, if so, to include it in the consolidated accounts. The concept of "de facto" control reflects where a parent may be able to control a subsidiary through its voting rights although it does not hold a majority of the voting shares. This may be particularly relevant for public companies where a large minority shareholder effectively runs the company. The revised standard reflects a substantive change to prior practice and the FRC will be monitoring how companies first apply IFRS 10.
- *IFRS 13 (acquired intangibles).* As the economy improves and levels of M&A activity increase, the FRC is urging companies to revisit their approach to identifying and recognising intangible assets e.g. brands or customer lists acquired as part of the business consideration. These must be recognised separately from goodwill and measured at fair value when they arise from contractual or legal rights or can be sold or otherwise disposed of fairly. The FRC will challenge companies that undertake business combinations that result in the recognition of material goodwill but few or no separate intangible assets.

A copy of the FRC's report is available at: www.frc.org.uk/Our-Work/Publications/Corporate-Reporting-Review/Corporate-Reporting-Review-Annual-Report-2014.pdf

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Regulatory Update

FCA concerns about breaches of DTR 3 notification obligations

In the FCA Primary Market Bulletin No.9 (November 2014), the FCA voiced its concerns about the non-compliance by persons discharging managerial responsibilities (**PDMRs**) and their connected persons and issuers with their notification obligations pursuant to Disclosure and Transparency Rule 3, noting that a recent review had unearthed breaches of timeliness and content requirements regarding PDMR notifications.

In addition, the FCA raised concerns about situations where PDMRs had entered into arrangements with third parties in which the third party had agreed to make the required notification to the issuer on the PDMR's behalf. As a result of these findings, the FCA is proposing to amend one of its existing technical notes[10] to make clear that, regardless of any such delegation by a PDMR to a third party, the PDMR remains responsible for satisfying its DTR 3 obligation and will be liable if the notification is not made.

DTR 3 requires PDMRs and their connected persons to notify the issuer in writing of the occurrence of all transactions conducted on their own account in the shares of the issuer or derivatives of any other financial instruments relating to those shares within four business days of the transaction occurring. The issuer must notify a RIS of any information notified to it in this regard as soon as possible and by no later than the end of the business day following the receipt of the information by the issuer.

The FCA also highlighted concerns over breaches of DTR 3 by connected persons. Where an issuer is a premium listed company, the company is obliged to require every PDMR to comply with the Model Code and to take all proper and reasonable steps to secure their compliance. Under the Model Code, a PDMR has an obligation to notify all connected persons of their obligation to notify the company immediately after they have dealt in the company's securities.

Editor comment:

The FCA has stated that it has already issued a number of private warnings in respect of these failings. This is clearly an issue that is on its radar and it has made clear that, where breaches arise in this area, it will consider taking public disciplinary action, which may result in a public censure of the relevant party and fines. It would be timely for General Counsel or the Company Secretary to remind directors and any other PDMRs of their obligations in this regard and the need for them to remind their connected persons of their obligations. The recent fine imposed on Reckitt Benckiser for Listing Rules and DTR 3 breaches (see below) also reinforces the need for companies to ensure that they have proper systems in place to ensure that they can satisfy their own obligation to announce any relevant notifications via a RIS as soon as possible, and not later than the end of the next business day following receipt.

FCA fines Reckitt Benckiser for Listing Rule failures

On 20 January 2015, the FCA published details of a £539,800 fine that it has imposed on Reckitt Benckiser for its failure to maintain adequate systems and controls to monitor share dealing by two of its senior executives in its own shares. Such failings were deemed to have contributed to the late and incomplete disclosures to the market by Reckitt of share dealings by these executives.

The FCA found that, during the period between July 2005 and October 2012, Reckitt had breached the Listing Rules by, amongst other failures, not ensuring that its PDMRs understood their responsibilities to comply with the Model Code and failing to have in place adequate systems and controls to monitor such dealings. The FCA was of the view that Reckitt had placed too much reliance on the knowledge and expertise of its PDMRs to comply with the Model Code and that, whilst it had provided a copy of the Model Code to its PDMRs, it failed to follow up with any regular or structured training or reminders, or to consider or identify any areas of risk, where for example PDMRs held shares with custodians or via a nominee or where dealings took place other than through Reckitt's own share plan administrator. Reckitt compounded the situation upon becoming aware of the PDMRs' dealings, by failing both to notify the market of them within the required timeframe and to include the necessary information in the notification, in breach of DTR 3.

By settling at an early stage, Reckitt qualified for a 30% discount, without

[10] UKLA Technical Note UKLA/TN/540.2 (Transactions by persons discharging managerial responsibilities and their connected person)

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which the fine would have been £771,190. Reckitt has also taken remedial action including reminding its PDMRs of their obligations, arranging for markers to be put against the shareholdings of its PDMRs so that movements in their shareholdings are notified to the company secretary immediately for investigation and, in addition, for the company secretary to receive a weekly report of such shareholdings, and requiring PDMRs holding shares other than in their own name to provide contact details for the relevant nominee or custodian and for the company secretary to receive notification of changes in such shareholdings (see paragraph 4.22 of the FCA's Final Notice for further details of other remedial action taken).

Given the size of this fine and the fact that this is clearly an issue on the FCA's radar (see the article above), companies are likely to want to revisit their own systems and procedures for ensuring that PDMRs are aware of, and comply with, the share dealing code and that companies themselves are sufficiently equipped to comply with their DTR 3 notification obligations. A copy of the Final Notice is available at: www.fca.org.uk/your-fca/documents/final-notices/2015/reckitt-benckiser-group-plc

The end of interim management statements – or is it?

Changes to the Disclosure and Transparency Rules which took effect on 7 November 2014 mean that it will no longer be mandatory for listed companies to publish interim management statements. Companies may continue to publish such statements if they wish to do so but will not be constrained by the content requirements previously set out in DTR 4.3.

The demise of the interim management statement may, however, be somewhat exaggerated as anecdotal evidence suggests that companies will largely continue to publish broadly similar information to that which was previously contained in an interim management statement.

FCA proposes to shorten the list of circulars requiring advance approval

In September 2014, the FCA published consultation paper, CP14/18, in which it proposed a number of relatively minor amendments to the Listing, Prospectus and Disclosure and Transparency Rules.

One particular development that will be welcome news to companies is that the FCA proposes to narrow the range of circulars which require prior approval by the FCA to just the following types of circulars:

- Class 1 acquisition (including reverse takeovers) and disposal circulars;
- Related party circulars;
- Circulars relating to a buy back where a working capital statement is required;
- Reconstruction and refinancing circulars where a working capital statement is required; and
- Circulars seeking cancellation of premium listing or a transfer into or out of the premium listing (investment company) segment or a transfer from premium listing to standard listing.

As such, a number of circulars will no longer require FCA approval, including share buybacks where no working capital statement is required, schemes of arrangement, ratification circulars, shareholder requisitioned general meetings, creditors voluntary arrangements, share splits and consolidations that have unusual features and winding up and reconstruction circulars issued by funds.

The consultation closed in November 2014. The FCA has not given a proposed date for implementation. CP14/18 is available at: www.fca.org.uk/your-fca/documents/consultation-papers/cp14-18

The Davis Report – the FCA falls short of the standards it expects of those it regulates

On 10 December 2014, the FCA published a report by Simon Davis, partner at Clifford Chance, who had been appointed to conduct an independent inquiry into the handling of the FCA's announcement of proposed supervisory work on the fair treatment of long standing customers in life insurance.

At 10pm on 27 March 2014, having been briefed by the FCA in advance on an exclusive basis, The Telegraph published an online article, reporting that the FCA was planning a review of 30 million policies, sold by insurance companies between the 1970s and the year 2000. This review was to be announced by the FCA in its Business Plan 2014/2015, which was to be published on 31 March 2014. The following morning, the article appeared on the front page of the print edition of The Telegraph. When the London financial markets opened for trading on 28 March 2014, the shares in a number of companies which specialise in

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pools of potentially affected insurance policies fell in value substantially. The FCA issued a statement at 2:27pm in order to clarify its position and the details of its planned review. The share price of the affected companies recovered to a significant extent following this announcement, although not entirely.

The Report includes an analysis of the events leading up to and immediately after the publication of The Telegraph article on 27 and 28 March 2014. It concludes that the FCA's strategy of giving an advance briefing to The Telegraph was well intentioned: the FCA had sought to avoid the nature and scope of its planned review being misunderstood when it was announced for the first time in the Business Plan. However, the strategy and the manner in which it was pursued was "high risk, poorly supervised and inadequately controlled" and that when it went wrong, the FCA's reaction was "seriously inadequate and fell short of the standards expected of those it regulates". As well as errors by individuals, the report identifies a number of shortcomings in the FCA's systems.

The Report also includes a series of recommendations regarding changes that could be made to the FCA's internal systems and controls, and which could help to avoid a similar situation occurring again. It recommends changes to the FCA's handling of price sensitive information, advance briefings of thematic reviews and the FCA's Business Plan, its external communications strategy and its action plan to be followed in response to similar situations. In its published response, the FCA accepted the findings and recommendations of the Report and stated that it has already begun to implement changes in line with these recommendations. In particular, the FCA has:

- introduced improved procedures for the identification, control and release of price sensitive information, including training for all managers;
- stated that selective media briefing without embargo, on any thematic review or other announcement, will only take place with the express approval of the Chief Executive; and
- stated that its annual Business Plan will be published to all market participants simultaneously.

In addition, the FCA is developing new protocols in relation to communications, which will be benchmarked against those of other regulators.

The Report and the FCA's response are available at: www.fca.org.uk/news/fca-publishes-the-davis-review-and-the-fca-response

Extension of UK-specific market manipulation offence

The Government has published new regulations that extend the prohibition on market manipulation set out in section 118(8) of the Financial Services and Markets Act 2000 (**FSMA**) until 3 July 2016, the date on which the EU Market Abuse Regulation will take effect.

The UK market abuse regime is wider than that prescribed by the current EU Market Abuse Directive. This is because when the Directive was implemented into UK law in 2005, the UK Government decided to retain the scope of its pre-existing market manipulation provisions, meaning that two of the market abuse offences set out in s.118 FSMA were super-equivalent to the requirements of the Directive. These provisions were s.118(4) (misuse of information) and s.118(8) (behaviour likely to give rise to false or misleading impressions or to distort the market). Both of these provisions were due to expire on 31 December 2014.

The regulations mean that the market manipulation offence in s.118(8) FSMA will continue in force until 3 July 2016, but the offence in s.118(4) FSMA has now fallen away. When the new EU Market Abuse Regulation comes into force on 3 July 2016, it will introduce a new concept of market manipulation similar in scope to s.118(8) FSMA. The regulations are available at: www.legislation.gov.uk/uksi/2014/3081/pdfs/uksi_20143081_en.pdf

Securities settlement period reduced to T+2

The EU Central Securities Depositories Regulation, which came into effect on 1 January 2015, is intended to create a common regulatory framework for securities settlement across the EU. The Regulation mandates the introduction of a shorter, harmonised, T+2 settlement cycle. This means that securities transactions will settle two business days after trade date rather than three. Twenty seven markets, including the UK, confirmed 6 October 2014 as an "early" migration date and moved to a T+2 settlement cycle ahead of the 1 January deadline.

As a result of this change, the London Stock Exchange republished its 2014 Dividend Procedure Timetable. Record dates normally fall on Fridays, with the associated Ex date falling one business day prior to the record date, usually on a Thursday. A copy of the updated Timetable is available at: www.londonstockexchange.com/traders-and-brokers/rules-regulations/dividend-procedures-2014.pdf

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Takeovers Update

Government plans to impose stamp duty on cancellation schemes for company takeovers

On 3 December 2014, the Chancellor of the Exchequer announced in his Autumn Statement that the Government intends to bring forward regulations to prevent the use of "cancellation" schemes of arrangement to implement takeovers so as to remove a bidder's ability to avoid paying stamp duty and SDRT on the transaction. This is to be done by amending section 641 of the Companies Act 2006 (circumstances in which a company can reduce its share capital).

On a cancellation scheme, shares in the target company not already owned by the bidder are cancelled by a reduction of capital of the target. The bidder pays the consideration to the target shareholders in consideration for the cancellation of their shares. The reserve created by the cancellation is capitalised and applied in paying up new shares which are issued by the target directly to the bidder. A stamp duty saving of 0.5% of the total consideration arises on a takeover implemented by cancellation scheme as there is no transfer of shares.

Regulations were laid before Parliament on 12 January 2015 which, when they come into force, will amend section 641 so as to prevent a company reducing its share capital as part of a scheme by virtue of which a person, or a person together with its associates, is to acquire all the shares in the company (or all of the shares of one or more classes of shares in the company) other than shares already held by that person or its associates. The amendments to section 641 will take effect from the date on which the regulations come into force. It is currently unclear when this will be but the Government previously said it expected the changes to be implemented by the end of March 2015.

As expected, the regulations will not apply to a scheme that gives effect to, or is proposed in connection with, a "takeover announcement" made in relation to a company before the date on which the regulations come into force. A takeover announcement means a public announcement that concerns a firm intention to acquire all the shares in a company (or all of the shares of one or more classes) which, on the date of the announcement, was made under rules made by the Takeover Panel. There is an equivalent "grandfathering" rule for private companies.

The regulations are also intended not to apply to cancellation and re-issue schemes which are used to interpose a new holding company on a group without a change of ownership. The regulations aim to deal with this by providing an exclusion for schemes under which the company is to have a new parent undertaking, all (or substantially all) of the members of the company become members of the parent undertaking, and the members of the company are to hold proportions of the equity share capital of the parent undertaking in substantially the same proportions as they hold the equity share capital of the company.

Editor comment:

Whilst this legislative change will see the demise of cancellation schemes to implement takeovers, we may still see transfer schemes being used to implement takeovers (on which stamp duty or SDRT will be payable) in order to benefit from (i) the lower approval threshold to acquire 100% of the target company (majority in number representing 75% of target shares in value compared with 90% acceptances on a contractual takeover offer); (ii) the fact that on a securities exchange offer implemented by scheme, a prospectus is only required to be prepared where the bidder consideration securities are to be admitted to a regulated market and/or a mix and match facility is to be offered to target shareholders; and (iii) rather less onerous securities laws considerations (in many countries, a scheme of arrangement either does not constitute an offer of securities or is the subject of an exemption).

Panel proposes new framework for post-offer undertakings and statements of intent

On 15 September 2014, the UK Takeover Panel published PCP 2014/2 consulting on a new framework for the regulation of statements made by bid parties relating to any particular course of action they commit or intend to take, or not take, after the end of the offer period.

This consultation was triggered by the Pfizer/AstraZeneca possible offer in connection with which Pfizer made a number of 5-year commitments relating to AstraZeneca's R&D capabilities. These commitments were said to be binding but were expressed to be subject to the directors' fiduciary duties. The Panel

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noted that Pfizer's statements were unusual in that a bidder will normally express such statements as statements of intention rather than as commitments and the commitments were long-term (as compared to the 12 month period applicable to statements of intention as set out in the current Note 3 on Rule 19.1 of the Code).

The objectives of the proposed new framework are to:

a) provide clarity for shareholders and other stakeholders as to the status of such statements;

b) increase the effectiveness of the enforcement tools available to the Panel when bid parties choose to make voluntary commitments; and

c) enable bid parties to make informative statements of intention.

It is proposed that the new framework will make a clear distinction between:

- "post-offer undertakings" – a statement relating to any particular course of action that a bid party commits to take, or not take, after the end of the offer period and which is described by that party as a post-offer undertaking, with which it will be required to comply for the period of time specified in the undertaking, unless an express and specific qualification or condition set out in the undertaking applies; and
- "post-offer intention statements", – a statement relating to any particular course of action that a bid party intends to take, or not take, after the end of the offer period (other than a post-offer undertaking), which will be required to be an accurate statement of the party's intentions at the time that it is made and based on reasonable grounds.

Separate requirements will apply to post-offer undertakings and to post-offer intention statements. In addition the Panel's ability to police and enforce post-offer undertakings are to be enhanced by:

- requiring a bid party which makes a post-offer undertaking to provide periodic written reports to the Panel; and
- enabling the Panel to require the appointment of an independent supervisor to monitor compliance with a post-offer undertaking.

On 23 December 2014, the Panel published RS 2014/2 announcing that, in most cases, it had adopted the amendments to the Code which were proposed in PCP 2014/2. However, the Code Committee has introduced certain clarifications and modifications.

Under the revised formulation, a bid party will normally be permitted to include a qualification or condition to its post-offer undertaking which provides that the post-offer undertaking will no longer apply where the Panel determines that the party is unable to comply as a result of an event, act or circumstance beyond the party's control (in essence a "force majeure" event). It will be necessary for the party seeking to rely on such a qualification or condition to demonstrate to the Panel that it is no longer able to comply as a result of the event, act or circumstance which has occurred. If the party could have taken steps to avoid such occurrence, or to minimise its impact on the party's ability to comply with the post-offer undertaking, but does not do so, the party will not normally be regarded as free from responsibility for its failure to comply.

The amendments to the Code took effect on Monday, 12 January 2015. Statements made by a bid party before 12 January 2015 will continue to be governed by the provisions of the Code in force immediately prior to 12 January 2015. Statements made by a party to an offer on or after 12 January 2015 are governed by the new framework under the Code.

You can download a copy of Response Statement 2014/2 at: www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/RS201402.pdf

Editor comment:

Commitments of the kind anticipated by the definition of a post-offer undertaking are not common in the public M&A landscape in the UK at present. Given the very strict regime applicable to post-offer undertakings introduced in January 2015, it is likely to remain the case that binding undertakings will be very much the exception rather than the rule. Depending on the circumstances of a particular bid, a target board or other stakeholders may press for binding undertakings in light of the new framework. Bidders will, however, need to exercise caution when considering whether to accede to such requests and should seek advice on the qualifications and/or conditions that should attach to such undertakings. On balance, most bidders will be better served by formulating any comments relating to a particular course of action as a statement of intention.

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Entering into talks during a restricted period: Panel publishes Practice Statement No. 28

On 14 November 2014, the Panel published Practice Statement No. 28 regarding the Panel's practice on consenting to a person who has made a "no intention to bid" statement making a single confidential approach to the target board during the restricted period of six months under Rule 2.8 to determine whether the target board would be interested in re-engaging with the potential bidder. If such an approach is rejected by the target board, the potential bidder will not normally be permitted to make a further approach for the remainder of the six month period. The Code restrictions will be set aside if the target board agrees to re-engage with the potential bidder for the duration of those talks but if either party ends the talks, the potential bidder will again be bound by the restrictions for what remains of the restricted period.

The Panel will normally apply the same approach to Rule 35.1 (12 month restricted period imposed on a bidder following a lapsed or withdrawn bid) as it does in relation to Rule 2.8.

Note that in relation to the private down tools regime (where the Panel allows a potential bidder to walk away without making any announcement to the market), the Panel will not normally allow the target board to request the lifting of restrictions during the first three months of the six month private down tools period. Accordingly, during the second three month period only, the Panel will normally consent to a potential bidder making a single confidential approach to the target board in accordance with the practice described above.

You can download a copy of Practice Statement No. 28 at: www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/PS28.pdf

Miscellaneous changes to Code taking effect on 1 January 2015

On 1 January 2015, the miscellaneous amendments to the Code which were consulted on by the Panel in PCP 2014/1 and set out in final form in RS 2014/2 took effect. The changes include:

- the deadline for a potential competing bidder to clarify its intentions with regard to the target being the 53rd day after publication of the first bidder's offer document (Day 53);
- the codification of a modified version of the Panel's existing default auction procedure (in the absence of agreement of an alternative procedure by the parties), to be included in the Code as a new Appendix 8;
- amendments to the disclosure regime applicable to irrevocable commitments, letters of intent and interests in relevant securities.

Code change to reflect the Bank Recovery and Resolution Directive

The Code Committee of the Takeover Panel has published Instrument 2015/1, which introduces a new Note 19 on Rule 9.1 of the Takeover Code.

New Note 19 provides that, in the case of a company to which the Takeovers Directive applies, Rule 9.1 (the mandatory bid requirement) does not apply in relation to any change in interests in shares or other transaction which is effected by the use of resolution tools, powers and mechanisms (as defined in article 216 of the Bank Recovery and Resolution (No. 2) Order 2014), including the exercise by the Bank of England or the Treasury of a stabilisation power and the application by the Treasury of the public equity support tool described in Article 57 of the Bank Recovery and Resolution Directive.

This change to the Code took effect on 10 January 2015. A copy of Instrument 2015/1 is available at: www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/Instrument-2015-1.pdf

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Antitrust Update

The first nine months of the Competition and Markets Authority and what to expect in 2015

On 1 April 2014, the Competition and Markets Authority (**CMA**) commenced operations, replacing the Office of Fair Trading (**OFT**) and the Competition Commission (see our January 2014 Corporate Update for a summary of the CMA's functions and powers). Overall, it has had a busy nine months, although some areas of its work have been much busier than others.

Mergers: The CMA took 60 Phase 1 decisions in the first nine months. If that work rate continues for the rest of its financial year (31 March) it would represent an increase of around 23% on the previous year. However, its Phase 2 case load has fallen, with four investigations having been launched in the first nine months (one of which was subsequently abandoned). In comparison, there were eight referrals in the 2013/14 financial year and 14 in the year before that. This slight drop in Phase 2 references is likely to be a simple matter of chance, i.e. because fewer anticompetitive mergers have come to the CMA's attention as opposed to being the result of a change in policy.

The drop in Phase 2 merger cases may also suggest that concerns that the CMA's new binding Phase 1 timetable would trigger more Phase 2 references – for lack of time to resolve issues during Phase 1 – may have been misplaced, but it is still too early to draw any firm conclusions. In particular, the CMA appears to be relying on lengthy pre-notification processes to make up for the lack of flexibility over the formal review period with the overall effect that the Phase 1 review period (including pre-notification) is still broadly the same as it was before the introduction of binding deadlines.

Another notable trend in the CMA's merger control work has been a relative increase in cases that were found to give rise to concerns, but were nonetheless cleared on the grounds that the markets concerned were of *de minimis* importance. This is a welcome development, given the disproportionate administrative costs of undergoing a Phase 2 reference for businesses with turnover in the single digit millions. This uptick in *de minimis* cases is also a contributor to the drop off in actual references to Phase 2.

Pre-notification is on average 28 working days from submission of a substantially complete filing (although this figure does not include periods of prior engagement with the CMA to determine the scope of information that is required in the filing). Pre-notification for complex cases are likely to remain significantly longer than the current average.

The number of cases involving interim measures has increased (as expected) with the introduction of the CMA's enhanced powers at Phase 1 although the CMA has not used its powers to prohibit any anticipated mergers from closing; the derogations process remains slow and a likely distraction for case teams. Centralising the role within a dedicated CMA team would be worthy of consideration.

The number of cases found not to meet the CMA's jurisdictional criteria has dropped significantly as a result of a welcome change in policy whereby the CMA now routinely obtains preliminary information about non-notified mergers using information gathering powers which do not trigger any duty to initiate a formal investigation.

Market investigations and studies: Two high profile and complex market investigations have been commenced since the CMA's launch, in the retail banking sector (which it initiated) and the energy sector (which was referred to it by Ofgem). The CMA has also concluded two investigations that it inherited from the Competition Commission, one of which (private healthcare) is now to be reconsidered following a successful appeal to the Competition Appeal Tribunal. However, the CMA has not formally launched any Phase 1 market studies. This dry pipeline may mean fewer (or no) Phase 2 market investigations being commenced in 2015, although work being carried out by the sectoral regulators – the Financial Conduct Authority (**FCA**) in particular – could yet result in some.

Competition Act investigations: The CMA has opened four new Competition Act cases, all of which relate to suspected breaches of the prohibition on anticompetitive arrangements. Of the legacy cases it inherited from the OFT, five are ongoing, and three have been concluded, resulting in two sets of commitments for alleged abuse of a dominant position, and one case closure in the Sports Bra resale price maintenance case. This latter case indicates that the continued use by the CMA of Case Decision Groups – made up of senior officials, and now also CMA

panel members, who were not involved in the decision to bring formal charges against the companies under investigation – is having the desired effect of weeding out cases that fail to meet the high evidentiary standards for a Competition Act infringement finding. The CMA's case portfolio represents a continuation of the trend that was commenced by the OFT in recent years – and is likely to persist in 2015 – towards a more balanced case load of smaller and larger cases, and a greater proportion of cases involving competition issues in "vertical" supply relationships, such as resale price maintenance.

Criminal cartel investigations: The CMA has four ongoing criminal cartel investigations. Two of these have been made public (galvanised water tanks and construction industry products), of which one resulted in two individuals being charged and a third pleading guilty. These cases will be progressed in 2015. The CMA is looking to continue its shift towards intelligence-led crime detection, and away from relying on whistleblowers as a source of evidence, through investments in the CMA's intelligence, investigation and enforcement capacity, and developing closer partnerships with the police and other criminal enforcement agencies.

Looking ahead to 2015: The CMA's Strategic Assessment, which informs its medium–term (one to three year) priorities, places heavy emphasis on online commerce as a focus of the CMA's market and Competition Act enforcement activities, in particular restrictions on online distribution of goods (such as resale price maintenance, internet minimum advertised pricing and online sales bans) and online decision-making tools (search engine results, price comparison websites, peer reviews/feedback and online trusted trader schemes). The wholesale financial services sector is also singled out as an area "where risks are recognised and which may therefore be of interest" for further scrutiny, in liaison with the FCA.

The CMA has also published a draft Annual Plan for its 2015/16 financial year, which sets out a number of aims, including:

- increasing the number and speed of investigations into breaches of the civil antitrust prohibitions and issuing proceedings or concluding the investigation of at least one criminal cartel case. It will also make use of "letters or other contracts" with companies to follow up on potential breaches of competition law, without necessarily leading to an investigation;
- launching at least four new market studies, calls for information or market investigations; and
- starting the Phase 1 statutory clock in merger reviews within an average of 20 working days of a submission of a substantially complete merger notice, and seeking to clear at least 60% of less complex cases within 35 working days.

With a budget increase of around 7% for the coming financial year, and recent increases in senior staff numbers, the CMA should be well placed to meet these targets.

Retail banking market investigation reference

As mentioned above, the CMA has decided to launch an in–depth Phase 2 market investigation in relation to small and medium-sized enterprise (**SME**) banking and personal current accounts (**PCAs**).

Having completed a "market study" into banking services to SMEs, which was conducted jointly with the FCA, and a market study into the provision of PCAs, the CMA has concluded that essential parts of the UK retail banking sector lack effective competition and do not meet the needs of personal consumers or SMEs. So, on 6 November 2014, the CMA decided to open a detailed Phase 2 market investigation in relation to both PCAs and banking services for SMEs.

Particular issues that the CMA has said it will focus on in respect of both markets include high levels of concentration, high barriers to entry and expansion and low levels of switching, with lack of transparency of charging structures and cross–subsidisation of the "free-if-in credit" model also under consideration for PCAs. The CMA has said that it will

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consider a range of potential remedies – both behavioural and structural – for any competition concerns that it decides to be justified.

The CMA has also decided to review the undertakings given by banks following an earlier Competition Commission investigation into SME banking in 2002, which were intended to facilitate switching and improve transparency. The CMA considers that these undertakings may have been superseded by the recently–introduced current account switching service.

Editor comment:

Under the recently–shortened statutory timetable, the CMA has until May 2016 to conduct inquiries and publish its report, although it can extend this period by six months if there are "special circumstances". Getting to grips with the complexities of these markets within this timeframe may be challenging for the CMA.

General Court upholds Intel fine

The EU General Court has dismissed Intel Corp's (**Intel**) appeal against the European Commission's (**Commission**) 2009 decision to fine it for abuse of a dominant position.

On 13 May 2009, the Commission fined Intel approximately €1.06 billion for infringing Article 102 of the Treaty on the Functioning of the EU as it considered that Intel had abused its dominant position by granting rebates to four major computer manufacturers in return for buying all, or almost all, of their x86 CPU computer chips from Intel and paying three computer manufacturers to halt, delay or limit the launch of products incorporating computer chips from Intel's rival, AMD.

Intel appealed to the General Court but its appeal was dismissed and the €1.06 billion fine upheld. The Court found that Intel's rebates were exclusivity rebates and so, by their very nature, were capable of restricting competition and foreclosing competitors from the market. Consequently, the Commission was not required to assess whether the rebates had an actual or potential effect of foreclosing competitors from the market. In particular, it was not required to assess whether an "as efficient competitor" (**AEC**) would have been able to win orders from customers by matching Intel's rebates, without incurring losses (the so-called AEC test).

The payments to computer manufacturers to postpone, cancel or restrict the marketing of products using AMD computer chips were capable of making access to the market more difficult. According to the Court, Intel pursued an anti-competitive object through these restrictions as the only interest that a dominant undertaking could have in these practices would be to harm a competitor

and so it was not necessary to consider the effects of these restrictions.

In some respects, the Court went further than previous case law. In particular, it held that there is no threshold of market coverage below which an exclusivity arrangement will be considered insignificant (and therefore legal) and that, even if there was, an arrangement covering 14% of the market would, in its view, be significant. It also found that exclusivity in respect of a particular segment of a customer's demand (in this case, chips for incorporation into desktop computers sold to corporate customers) was illegal, notwithstanding that it accounted for only around 28% of customers' requirements for such chips.

Editor comment:

The Court's confirmation of its traditional form-based approach to exclusive rebate schemes comes as a disappointment to those advocating a more effects-based approach in line with the Commission's 2009 guidance on applying Article 102 to abusive exclusionary conduct. The Court did consider that rebates that were not expressly conditioned on exclusivity (referred to by the Court as "third category" rebates) must be analysed "in light of all relevant circumstances". However, it also reaffirmed that, even for these rebates, the Commission is not required to apply an AEC test. In a recent speech, Alexander Italianer – the Director–General for Competition of the Commission – did not rule out applying an AEC test in respect of third category rebates, and stated that, for all types of rebates, insignificant market coverage might yet be taken into account by the Commission when assessing which cases to prioritise for enforcement. The Chief Economist for DG Competition has also stated that if the pricing and cost data required for an assessment of the AEC test were available, he would "find it difficult to disregard them" for priority–setting purposes.

€20 million: the going rate for gun-jumping fines under the EU Merger Regulation

The European Commission (**Commision**) has imposed a fine of €20 million on Marine Harvest (**MH**) for implementing its acquisition of Morpol prior to receiving clearance under the EU Merger Regulation (**EUMR**). The amount of this fine is identical to the previous gun-jumping fine, imposed by the Commission on Electrabel in 2009.

The Commission takes a strict approach to breaches of the prohibition on early implementation, also known as the "standstill obligation". It is irrelevant that an implemented transaction had no anticompetitive effects (although this may mitigate the amount of the fine). Similarly, the fact that the gun-jumper's breach was inadvertent and caused by a misunderstanding of the Commission's (sometimes complex) rules on jurisdiction and procedure will not usually prevent a fine from being imposed, as the Commission expects large companies to be familiar with EUMR requirements.

MH is the leading salmon farmer in the EEA. Its breach arose from its acquisition of a 48.5% stake in Morpol – the largest EEA salmon processor – on 18 December 2012. The acquisition was completed eight months before it was formally notified to the Commission, and over nine months before the Commission cleared it.

That shareholding conferred on MH de facto sole control over Morpol, as it enjoyed a stable majority at the shareholders' meetings, because of the wide dispersion of the remaining shares and previous attendance rates at these meetings. Crucially, it is the acquisition of an ability to exercise control which amounts to implementation for the purposes of the EUMR. Consequently, a breach arose notwithstanding the fact that MH had not exercised its voting rights during the nine months between acquisition and clearance.

MH sought to rely on an exception to the standstill obligation, which applies for public bids and series of transactions in securities admitted to trading on a market such as a stock exchange. Purchasers wishing to take advantage of this exception are required to notify the acquisition "without delay" and to refrain from exercising their voting rights except with the express consent of the Commission. However, both the EUMR and previous case law of the Commission are clear that the exception applies only where listed shares are bought from "various sellers", whereas MH acquired its shares in Morpol from a single seller.

MH's fine equates to less than 1% of its 2013 turnover, significantly less than the 10% maximum fine permitted by the EUMR. In setting the amount of the fine at €20 million, the Commission took into account certain mitigating factors, including the relatively short duration of the infringement (nine months), the non-exercise of voting rights by MH and the fact that MH informed the Commission of the transaction, through pre-notification contacts, shortly after having closed it. However, it also considered that the infringement was particularly serious because the transaction raised serious competition concerns and was only cleared after the submission of significant remedies.

This contrasts with the Electrabel case, in which an equivalent fine was imposed for an infringement that was much longer in duration (around five years) but in which the transaction gave rise to no competition concerns.

Editor comment:

MH's fine holds the joint record (along with that of Electrabel) for the highest reported gun–jumping fine imposed by any merger control authority to date. However, numerous other authorities are active enforcers of their respective standstill obligations: the US, Germany, Austria, Spain, Norway and Greece have all imposed fines running into millions of Euros in recent years.

The continuing proliferation of merger control regimes, each with differing jurisdictional and procedural requirements, means that there are increasing inconsistencies between the ways that standstill obligations and exceptions to those obligations are applied. Tentative suggestions recently published by the Commission may, in time, lead to jurisdictional convergence between merger regimes in the EU, but even if that does happen the dominant global trend is likely to be towards growing inconsistencies and greater complexity.

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

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Recent major transactions include advising Man Group on its acquisition of Numeric Holdings LLP (a class 1 transaction under the listing rules); Como Holdings on the sale of its shareholding in the Armani Exchange business to Giorgio Armani SpA; RBS on the sale of its locomotive and electric passenger train leasing business to Alpha Trains and on the sale of its aircraft leasing business to a consortium led by Sumitomo Mitsui Banking Corporation for $7.3bn; and Booker Group plc on its recent “B share scheme”.

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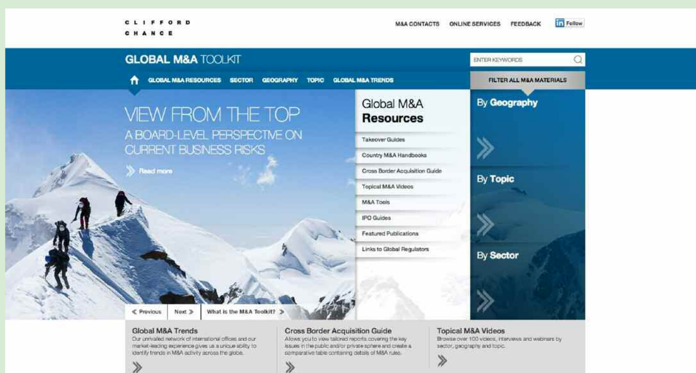

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