C L I F F O R D
C H A N C E

July 2015

Corporate Update July 2015

Welcome to the July 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 look ahead 12 months to the implementation of the EU Market Abuse Regulation in July 2016 which will bring about changes to the current market abuse regime. We highlight the key issues that will affect UK premium and standard listed companies and address the changes that they will need to get to grips with in order to be ready for the implementation of the new legislation.

In March this year, the Small Business, Enterprise and Employment Act 2015 came into force. We review the progress in implementing some of the key provisions of that Act, namely the requirement for certain companies to establish a register of people with significant control, the ban on corporate directors (in respect of which implementation in October 2015 has now been delayed) and the requirement for certain companies to report on payment practices.

We also take a look at the recent £4.6m fine issued by the FCA to Asia Resource Minerals for breach of the Listing Principles, Listing Rules and the Disclosure and Transparency Rules. Like the fine issued to Reckitt Benckiser in January this year, this case highlights yet again that it is not sufficient for companies simply to put in place compliance policies without ensuring that they are properly implemented, with relevant staff training where necessary, and their effectiveness monitored going forward to ensure due compliance.

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Company Law Update

The countdown begins: 12 months to implementation of a new market abuse regime

The current UK market abuse regime is derived from the EU Market Abuse Directive (**MAD**) which established an EU-wide framework for tackling market abuse and market manipulation. However, since MAD's adoption in 2003, the financial markets have seen both the creation of new forms of financial instruments and the emergence of new trading platforms. This has been coupled with a poor track record for the prevention and enforcement of market abuse in some Member States. Against this backdrop, the Market Abuse Regulation (**MAR**) was negotiated and is intended to update and strengthen the existing EU market abuse regime. Companies will need to start planning now to ensure they are ready for the implementation of MAR in July 2016.

Structure of the new regime

MAR will have direct effect in Member States from 3 July 2016, and will be supplemented by supporting regulations (in the form of technical advice and standards) which are currently being prepared by the European Securities and Markets Authority (**ESMA**) for the European Commission. There is also likely to be further Q&A guidance issued by ESMA, and finally, national implementation via changes to the Financial Services and Markets Act 2000 and the Listing Rules and the Disclosure Rules. A FCA/HMT consultation paper on these changes is expected in late summer 2015.

MAR is complemented by the Directive on Criminal Sanctions for Market Abuse[1] (**CSMAD**), although the UK has chosen not to opt-in to CSMAD on the basis that criminal sanctions for insider dealing and market manipulation already exist in the UK under the Criminal Justice Act 1993 and the Financial Services Act 2012. Note however that, whilst the UK has not opted into CSMAD, there may well be further changes to the sanctions that apply to the criminal offences of insider dealing and market manipulation. On 10 June 2015, the Bank of England published its Fair and Effective Markets Review. The review recommends that the maximum sentence in the UK for both insider dealing and market manipulation be extended from seven years to ten years, in line with other fraud or bribery offences. It remains to be seen whether the government acts on this recommendation.

Key changes being introduced by MAR

Until all of the regulatory changes referred to above are put in place, it is not possible to fully understand the changes in detail, but key points to note include:

- MAR will apply to a wider range of securities and derivatives than the current regime e.g. it will also apply to financial instruments on other trading platforms including MTFs (multilateral trading facilities, such as AIM) and OTFs (organised trading facilities) and will cover the trading of emissions allowances.
- The definition of "inside information" and the insider dealing offence will be largely unchanged, although there will be a new offence of cancelling or amending orders whilst in possession of inside information.
- An issuer will still be able to delay announcing inside information so as not to prejudice its legitimate interests, but if it does so, there will be a new obligation on announcement to inform the regulator of its decision to delay and to explain in writing why it thinks the delay was permissible (note that the FCA has a discretion on implementation to require that such an explanation need only be provided if requested by the FCA).
- As a result of the wider scope of MAR, more issuers will be required to keep insider lists and issuers will be required to ensure insider lists follow a prescribed format, the detail of which is still under review.
- The introduction of a de minimis threshold for notification by persons discharging managerial responsibility (**PDMRs**) of transactions in the issuer's securities of €5,000 per calendar year (to be calculated by adding without netting all relevant transactions). The FCA has the power to raise this threshold to €20,000 if it so chooses.
- The time limit for notification of dealings by PDMRs will be reduced to three business days, although, in practice, the obligation is generally satisfied more quickly than this.
- New rules will cover market soundings which are undertaken to gauge investor interest in offerings of securities or in connection with proposed takeovers and mergers.

Planning ahead

There are a number of issues that directors, in-house legal teams and company secretaries will need to think about in advance of MAR taking effect in July 2016.

1 EU Directive 2014/57/EU

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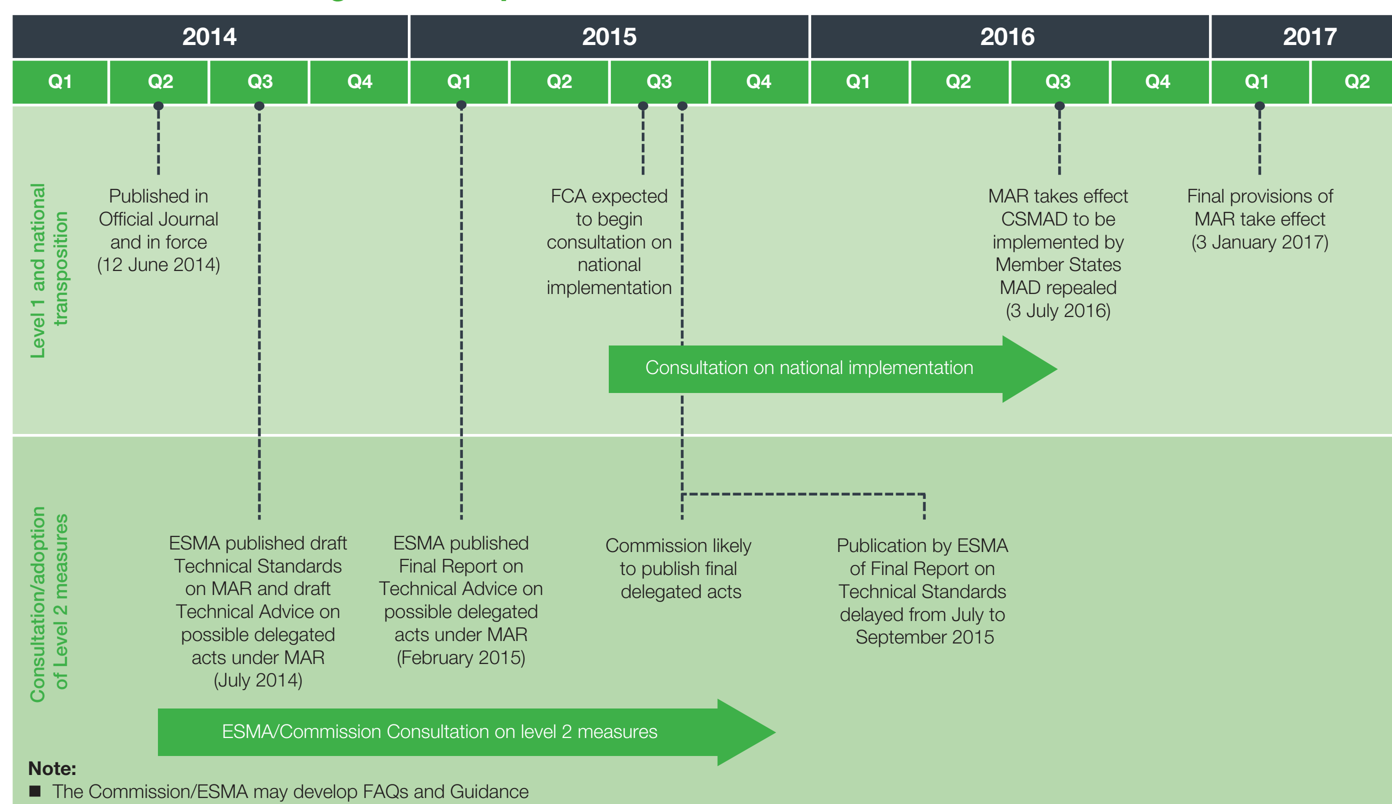
EU Market Abuse Regulation Implementation Timeline



Record keeping

The introduction of a new requirement to notify the FCA of any decision to delay the announcement of any inside information at the same time as the information is announced to the market will require some thought. In particular, companies will need to consider the nature of the records that they will need to maintain during the period of the delay in order to demonstrate, if asked by the FCA to provide an explanation in writing, why they believed the delay was legitimate. This is likely to mean that a company will need to keep detailed records of the reasons why it initially believed it was legitimate to delay announcing inside information and, as the situation progressed, how it continued to satisfy itself that it remained legitimate not to announce such information. Companies will need to update their disclosure policies to reflect the new procedures for delaying disclosure of inside information.

In addition, when providing a written explanation to the FCA, care will need to be taken to ensure that, where legal advice has been sought about the company's ability to delay announcing inside information, the substance of that advice is not disclosed in a manner which would result in legal privilege being waived.

Changes to share dealing code

Companies will also need to amend their share dealing code. The time limit for notification to the company of PDMR dealings is to be shortened to three business days (currently four business days under DTR 3) and a de minimis threshold is to be introduced meaning that, helpfully, fewer PDMR notifications are likely to be required. Relevant dealings should, in any event, be notified as soon as possible and the current four (and the new three) day deadline is, in effect, a long stop date.

In a change to the current position under MAD, MAR will prohibit trading by PDMRs in close period, a concept that already exists under the FCA's Model Code. However, under MAR the prohibition only applies during the 30 day period before the announcement of an interim financial report or a year-end

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report which the company *is obliged to make public* according to the rules of the trading venue on which the company's shares are admitted to trading or national law[2]. For companies admitted to trading on the main market of the London Stock Exchange, they are required, pursuant to DTR 4, to publish half-year and full year results. They are not required, although they may chose, to publish a preliminary results announcement. Under the Model Code, there would currently be a close period prior to publication of a preliminary results announcement, but upon publication of the preliminary results announcements, the company would no longer be treated as being in a close period and PDMRs would not be prevented from dealing in the company's shares unless it or they were otherwise in possession of inside information. Under MAR, publication of a preliminary results announcement would not bring a close period to an end and the close period would continue to apply up to publication of the company's annual financial report. This could have the practical effect of significantly reducing the "open" period in which PDMRs can deal during the course of a year.

There are also differences between the circumstances in which the Model Code would currently permit dealings during close periods and those in which PDMRs would be permitted to deal during a close period under MAR. For example, MAR does not include exemptions for the acceptance of a takeover offer or the take up of entitlements pursuant to a rights issue during a close period. To reflect these changes, companies will need to issue revised versions of their dealing codes, as well as ensuring that their PDMRs receive training in advance of the new rules coming into effect in order to ensure they fully understand the changes and are able to ensure compliance with them.

Prescribed format for insider lists

MAR also prescribes a detailed format for insider lists. This has caused much debate since the format of the proposed insider list was published by ESMA. It is believed by many to be too detailed and requires, at best, superfluous information and, at worst, information that may put a company in breach of its data protection obligations. ESMA's proposals in this regard have not yet been finalised and we are not expecting their final report on this issue until September 2015. In any event, companies will need to publish revised guidance on the maintenance of insider lists and ensure existing lists are amended to meet the prescribed format.

Editor Comment:

We are still waiting for ESMA to finalise its technical standards and we are not expecting the FCA and HM Treasury to begin consultation on the national implementation of MAR until late summer 2015. Until we have the complete picture, it is difficult to be definitive about the extent of the changes that companies will need to make. For now, companies should keep a watching brief and plan to make time during the coming year to consider and implement the changes that they will, inevitably, need to make in advance of July 2016. Ensuring that their management teams are fully aware of the new requirements should also be a key area of focus.

Small Business, Enterprise and Employment Act 2015 now in force

As anticipated, the Small Business, Enterprise and Employment Act 2015 (**SBEE**) received Royal Assent on 26 March 2015 and the provisions dealing with the prohibition/abolition of bearer shares came into force two months after that date. Other provisions of the SBEE, which are not yet in force, but which are of interest to corporates include the requirement for companies (other than DTR 5 issuers) to keep a register of people with significant control over the company, the ban on corporate directors and the requirement for large companies to report on their payment practices.

Creating a Register of People with Significant Control

As discussed in previous editions of Corporate Update, one of the most significant elements of the government's transparency and trust agenda has been the creation of a central public register of people with significant control (**PSCs**) over UK companies (sometimes referred to as a register of beneficial owners). The purpose of such a register is, in the government's view, to increase the accountability of companies by making it easier to see who actually owns or controls them and who might be making decisions about how they are run.

The government legislated for this in the SBEE. The SBEE includes a new

2 Article 19(11) MAR

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obligation on companies to maintain a register of people with significant control over them (the **PSC register**). Companies will then have to provide this information to Companies House, where it will be made publicly available in a central searchable register. The SBEE also sets out the duties on companies to obtain and on PSCs/relevant legal entities to supply information to be included in the PSC register (and to keep such information up to date); provisions dealing with the consequences of failure to obtain/supply such information (a criminal offence for the company/officers in default; and which may result in the PSC's/relevant legal entity's interest in the company being frozen); rights to inspect the PSC register and detailed provisions as to whether a person/legal entity is a PSC (or, in the case of a legal entity, would be a PSC if it were an individual) in relation to a company. These provisions are due to come into force in January 2016. However, much of the additional detail has been left to be included in regulations.

On 19 June 2015 BIS published the first draft of one set of such regulations as part of a consultation paper in relation to the Register of People with Significant Control covering the scope, nature and extent of control, the fees companies can charge for providing copies of the entries in their PSC register, the protection regime and warning and restrictions notices (see below for more on each of these). On 23 June 2015 BIS updated this consultation paper to state that it had decided not to implement the ban on corporate directors in October 2015, and that it would announce its intentions for implementing these provisions shortly (see below for further discussion of this).

Overview of the PSC regime

The consultation contains a helpful overview of the PSC regime. The first step is to determine whether an individual or legal entity satisfies one or more of the following conditions:

1. directly or indirectly owns more than 25% of the shares in the company;
2. directly or indirectly holds more than 25% of the voting rights in the company;
3. directly or indirectly has the power to appoint or remove the majority of the board of directors of the company;
4. otherwise has the right to exercise (or actually exercises) significant influence or control over the company (statutory guidance on what this means is currently being prepared); or
5. has the right to exercise or actually exercises significant influence or control over a trust or firm that is not a legal entity, which in turn satisfies any of the first four conditions over the company.

A PSC is defined in the SBEE as a person (i.e. an individual) who meets one or more of the conditions. For many corporate groups, it will often be a legal entity (i.e. another group company) rather than an individual that fulfils one or more of the conditions set out above. Entities that satisfy one of the conditions **and** are required to hold a PSC register themselves or are a DTR 5 issuer (or similar) are called relevant legal entities.

Once you have identified a PSC or a relevant legal entity, the next step is to work out whether the PSC or the relevant

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legal entity is registrable or non-registrable. In the case of a corporate chain of companies, each of which is a relevant legal entity, only the first entity in the chain will be registrable. The entities further up the chain are non-registrable. This is to avoid having to include all of the entities in the chain in the PSC register given it is possible to track the information through the chain by looking at the PSC register of each entity in the chain. A similar approach is adopted with regard to individuals who hold their interests in a company through a chain of relevant legal entities, so that only the first relevant legal entity in the chain needs to be entered in the relevant company's PSC register. In order for the relevant legal entities to be part of a chain of legal entities for SBEE purposes, each company in the chain (other than the last) must have a majority stake in the entity immediately below it in the chain. A "majority stake" is defined as holding or controlling a majority of the voting rights, having the right to appoint or remove a majority of the board of directors or otherwise having the right to exercise or actually exercising dominant influence or control (similar to the subsidiary undertaking test in the Companies Act 2006).

All UK incorporated companies, other than DTR 5 issuers or other companies that are subject to similar disclosure regimes, must hold their own PSC register from January 2016. DTR 5 issuers have been exempted from the new regime (and the government is proposing to exempt companies subject to similar disclosure regimes) on the basis that they already have to provide a substantial amount of information about their major owners and the government felt that it was an unnecessary duplication to require these companies to provide information about their controlling owners in different formats to different authorities. Further regulations will apply the regime to LLPs and UK Societas Europaea (SEs), and adapt it for foreign limited partnerships (so that only the general partner/manger and not the limited partners are caught) as well as implementing it for corporations sole and government bodies etc. From April 2016 onwards, companies (and other entities within the scope of the regime) will need to send the information to Companies House with their confirmation statement (which replaces the annual return), which will then be included in the central public register.

Details contained in the draft regulations

The draft regulations and the consultation paper cover the following areas:

- *Which companies should not be required to keep a PSC register* – the government is proposing to add an exemption for companies that have voting shares admitted to trading on a regulated market in any EEA state (on the basis that they are subject to similar disclosure/transparency requirements to those in DTR 5).
- *Recording the nature and extent of control* – the SBEE sets out the information that should be recorded in the PSC register, which, for individuals or relevant legal entities, includes their name, residential or registered address (which will not be made publicly available), a service address, date of birth (for individuals) and information about how they have significant control. To address this last point, the draft regulations propose requiring a statement to be included in the PSC register indicating which of the conditions (1 to 5 above) are met and to what extent i.e. over 25% to 50%; over 50% to 75%; and over 75% in the case of holdings of shares or voting rights. The consultation paper seeks views on this approach and in particular whether it would be helpful to have another category of 100%. It also suggests requiring companies to include certain other statements in the register e.g. that there is no PSC/relevant legal entity or where the company has been unable to identify a PSC/relevant legal entity.
- *The fees that companies can charge for providing copies of entries in their PSC register*.
- *The protection regime* – the regulations propose that an application for "protection" can only be made in "exceptional" circumstances i.e. where the applicant reasonably believes that there is a serious risk that the PSC (being an individual), or a person who lives with them, will be subjected to violence or intimidation broadly as a result of the activities of the companies of which they are PSCs or directors.
- *Warning and restrictions notices* – if a company identifies a person or entity that should be included in its PSC register, or who might have knowledge of such a person or entity, it may be required to contact them (by serving a notice under s.790D or E of the Companies Act 2006 (as amended by the SBEE)) in order to obtain the details needed for its PSC register. If a person or entity fails to respond to such a notice within one month the company may send them a warning notice, which will inform them that the company is proposing to issue them with a restrictions notice. Failure to respond to the warning notice within a further one month period will entitle

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the company to issue a restrictions notice, freezing the person or entity's interest in the company until the company obtains the information its needs and lifts the restrictions. Whilst the shares or rights are frozen in this way, the holder of the interest will not be able to sell, transfer or receive any benefit from the shares or rights. The draft regulations set out proposals for what information must be included in the warning and restrictions notices, and what might constitute a valid reason for not responding. The government is seeking views on these points.

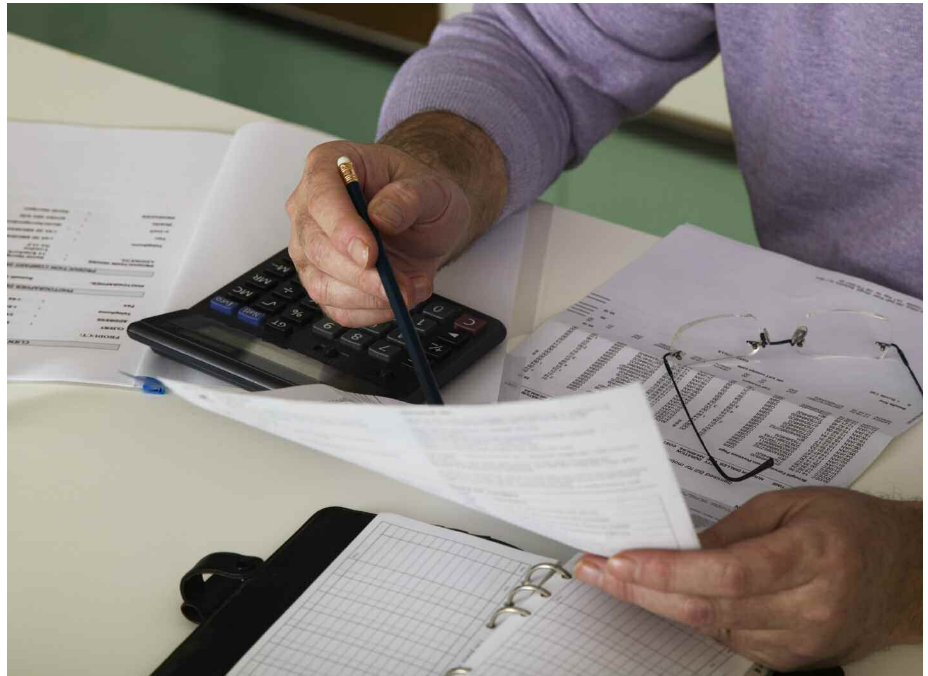
Further changes ahead

It is worth noting that the EU Fourth Money Laundering Directive, which was adopted in June 2015, will require all Member States to hold central registers of company beneficial ownership information from 2017. These requirements are similar in many respects to those contained in the SBEE. Any additional requirements will not be implemented until 2017 and will be the subject of separate consultations by HM Treasury.

The BIS consultation closes on 17 July 2015 and a copy can be obtained from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/395478/bis-14-1145-the-register-of-people-with-significant-control-psc-register-register-final-1.pdf.

Exception to the ban on corporate directors

As mentioned in the January 2015 edition of Corporate Update, in November 2014 BIS consulted on whether the Secretary of State should make exceptions to the ban on corporate directors contained in the SBEE. In response to the feedback received, it published a questionnaire in March 2015 seeking views on whether a "principles based" exception should be introduced. This "principles based" exception proposes that a company may only appoint a corporate director if all of the directors of the corporate director are themselves natural persons and the law under which the corporate director is established (if overseas corporate directors are to be permitted) requires certain details of the directors of the corporate director to be included in a publicly available register. The questionnaire also covered whether the corporate director could be something other than a UK incorporated company e.g. an LLP, European or overseas company; if it were an LLP, whether all of its members would have to be natural persons; if it were an overseas company who would be the equivalent of the directors who would have to be natural persons and what details of these persons would have to be publicly available. The deadline for responses was 27 April 2015 and we are currently awaiting the outcome. However, as mentioned above, BIS has announced that it intends to postpone the implementation of the ban on corporate directors beyond the previously announced date of October 2015.



Reporting on payment practices

The SBEE also contains a power for the Secretary of State to make regulations requiring certain types of (large) company to report on their payment practices and policies. On 20 March 2015 BIS published a statement setting out its plans for implementing this regime and an indicative format for the report; as a result, large companies will be required to report on their payment practices and policies from April 2016.

The stated purpose of these new provisions is to tackle the UK's late payment culture, which the government perceives to be a significant problem for the UK economy and small businesses in particular. The government wants large businesses to lead by example in paying their suppliers promptly and fairly, with 30 days terms the norm and 60 days the maximum. Whether these reforms will achieve these aims remains to be seen.

The government has concluded that the reporting duty should only be mandated for large organisations, by which they mean large quoted companies, large private companies and large LLPs. Small and medium sized quoted companies will not be caught. The definitions of small, medium and large to be used are those set out in the Companies Act 2006 i.e. a company is large if it satisfies two or more of the following conditions: turnover of more than £25.9m; balance sheet total of more than £12.9m; or more than 250 employees. Interestingly, previous provisions requiring disclosure around a company's policy and practice on payment of creditors in the Large and Medium Sized Companies and Groups (Accounts and Reports) Regulations 2008 were revoked back in October 2013.

The types of payment which are caught by the regulations are in respect of business to business contracts (for example contracts for goods, services or intangible assets (such as intellectual property) and which are connected to the carrying on of a business). Financial services contracts are specifically excluded. The report will include, amongst other things, details of standard payment terms; the average time taken to pay; and the proportion of invoices paid in 30 days or less ("good practice"), between 31 and 60 days and beyond 60 days ("bad practice"). Reporting will be on a half-yearly basis and the reports will need to be provided in open data format to a single central location. The government has said that it is going to work with stakeholders in the coming months to design and implement a system that is as business- and user-friendly as possible, and that the purpose of publishing the statement in March 2015 was to give those affected as much notice as possible of their future obligations.

Companies to be required to make "slavery and human trafficking" statement

The Modern Slavery Act received Royal Assent on 26 March 2015 and 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 Act consolidates offences relating to slavery and human trafficking and, in particular, section 54 will require 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, or, where the organisation has taken no such steps, to provide a statement to that effect.

The statement will not be required to be included in a company's strategic report. The Act 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.

BIS is currently consulting on the size of businesses that will be required to comply with the requirement to make a slavery and human trafficking statement and the content of that statement. No date has been set for section 54 of the Act to come into force.

EU proposals to reward long term share ownership

In our July 2014 edition of Corporate Update we reported on the EU Commission's proposals to amend the EU Shareholder Rights Directive, a directive that was first adopted back in July 2007 with the aim of improving corporate governance for companies in the EU with shares admitted to trading on regulated markets.

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Draft legislation is currently making its way through the European legislative process. One particularly interesting provision has been inserted into the draft directive by the Legal Affairs Committee of the European Parliament that would require member states to introduce specific mechanisms to reward long-term shareholders. These mechanisms should include one or more of the following:

- additional voting rights;
- tax incentives;
- loyalty dividends;
- loyalty shares.

It would be up to member states to define "long term", but it should not mean less than two years. The concept of "long term" shareholders having additional voting rights would go against the FCA's listing principles, applicable to premium listed companies, that state that all equity shares must carry an equal number of votes on any shareholder vote (Premium Listing Principle 3). Interestingly, in France, double voting rights for long-term investors is a long-established principle, although concerns have been expressed that this practice enables entrenched investors to use their powers to disenfranchise minority shareholders and undermine corporate governance.

Editor Comment:

The proposals for an amended Shareholder Rights Directive still have some way to travel through the European legislative process and it may be that this proposal does not make it into the final directive. If it does however, it would signal a significant redistribution of power in favour of long-term shareholders in UK listed companies. There are a number of significant challenges that will need to be addressed if this proposal were to become law, not least, how companies can identify who is a truly long-term shareholder given the use of nominees and corporate vehicles to hold shares. In addition, in an environment where institutional investors are encouraged to disclosure the way in which they vote, the introduction of loyalty shares will distort, rather than assist, transparency of voting behaviour. Whether such proposals will actually result in improved corporate governance is very much up for debate.

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Case Law Update

Contractual interpretation: commercial common sense does not over ride the importance of the actual words

By a majority decision (4:1), the Supreme Court has confirmed that where the meaning of a particular contractual provision is clear, commercial common sense is not a relevant consideration and the court will not step in to prevent a party from being bound by a bad bargain[3].

Facts

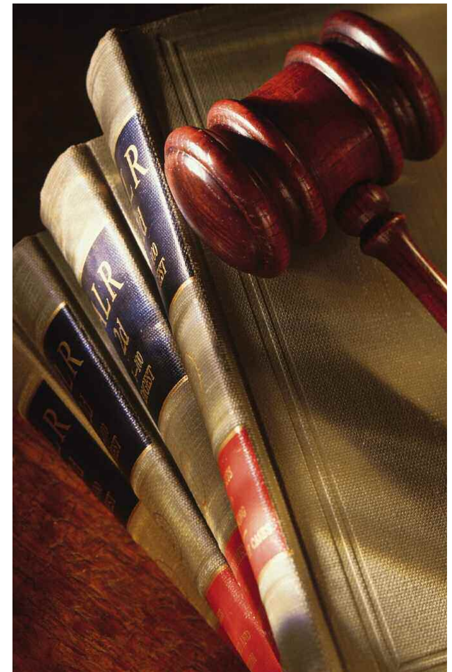
A dispute arose between the landlord of Oxwich Leisure Park and the tenants of 21 of the 91 chalets at the Park, each of which was let on a 99 year lease, under the terms of which tenants were required to pay an annual service charge to cover maintenance expenses. The leases in relation to the other 70 chalets had all been granted in the early 1970s, with the 21 leases which were in dispute having been granted after 1977.

The disputed leases each contained a covenant (in varying formulations) for the lessees to pay "*a proportionate part of the expenses and outgoings incurred by the Lessor in the repair maintenance renewal and the provision of services hereafter set out in the yearly sum of Ninety Pounds…for the first Year of the term hereby granted increasing thereafter by Ten Pounds per hundred for every subsequent year or part thereof*". This would mean that by the end of the lease each tenant would be paying an annual service charge of over £1million. In the other 70 leases, the leases provided for an initial service charge of £90 which increased at a compound rate of 10% every three years, rather than annually.

The tenants under the disputed leases argued that the figure that they would eventually have to pay under the relevant service charge clause was so absurdly high that it could not possibly be right and that they should only be liable for a fair proportion of the lessor's costs of providing the maintenance services and that the clause should be read as if the words "up to" were inserted before "Ten", so that the £90 duly compounded acted as a cap rather than an absolute sum due.

Majority view of Supreme Court

The court was of the view that the natural meaning of the wording was that the lessees had to pay £90 a year, compounded annually at 10%. The unfortunate escalation in payments was not enough to allow the court to depart from that meaning. In context, there was no obvious mistake because, between 1974 and 1981 (the time at which many of the disputed leases were entered into) inflation had been well over 10% a year and the lessor took the risk that inflation



would continue at that kind of level for the remainder of the term while the lessees took the risk that it would drop, as in fact it did.

Of more far-reaching importance are Lord Neuberger's comments about the importance of the language used by the parties (with which the majority agreed). In particular, he was of the view that:

- the reliance placed in some cases on commercial common sense and the surrounding circumstances should not be invoked to undermine the importance of the language of the provision which is to be construed;
- when it comes to considering the key words to be interpreted, the less clear

3 **Arnold v Britton and others** [2015] UKSC 36

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they are or, put another way, the poorer the drafting, the more ready the court should be to depart from their natural meaning;

- commercial common sense should not be invoked retrospectively, in other words, it is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable persons in the position of the parties, at the date the contract was made; and
- the court should be slow to reject the natural meaning of a provision simply because it appears that one of the parties has made a bad bargain.

For more information on contractual interpretation, see our briefing *Contractual Interpretation: shades of grey* which is available at http://www.cliffordchance.com/briefings/2015/06/contractual_interpretationshadesofgrey-jun.html

Editor Comment:

Over recent years we have seen a move by the courts away from applying a strict literal approach to the interpretation of commercial contracts to a much more purposive approach. In this decision, the Supreme Court has signalled a clear reversal of this position, placing greater emphasis on the words in the contract, emphasising that interpretation should focus on the words the parties have chosen to express their bargain and should not involve the court creating a deal that the parties might have reached if they had anticipated the events that transpired. The decision reinforces the need to get the drafting right at the outset and, in reaching agreement, to look ahead and consider the possible outcomes and consequences that might arise in the future.

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Corporate Governance Update

New flexibility to undertake non pre-emptive share issues in connection with acquisitions/specific capital investments

In March 2015, the Pre-Emption Group published an updated Statement of Principles (**2015 Principles**) which set out the institutional investor community's views on the disapplication of pre-emption rights by premium listed companies and issues of shares for cash on a non pre-emptive basis. The Principles were last published in 2008 (**2008 Principles**).

The general principle, which was set out in the 2008 Principles, is that companies may seek an annual disapplication of pre-emption rights in respect of 5% of issued share capital for general corporate purposes. The 2015 Principles introduce a new flexibility which enables companies to seek a disapplication for up to a further 5% of issued ordinary share capital for use in connection with either an acquisition or a specified capital investment. In the circular for the AGM at which such additional authority is sought, the company should confirm that it intends to use the additional 5% disapplication only in connection with an acquisition or specified capital investment which is either announced contemporaneously with the issue or which has taken place in the preceding six-month period and is disclosed in the announcement of the issue. Since the publication of the 2015 Principles, approximately 20% of FTSE 250 companies have sought authority for the additional disapplication.

Other key changes to the 2008 Principles include:

- A statement that companies with a standard listing or admitted to trading on AIM are encouraged to adopt the 2015 Principles.
- Confirmation that the 2015 Principles apply to cash box structures. Many companies have utilised a cash box placing structure (treated as an issue for non-cash consideration thereby removing the need to seek a disapplication of pre-emption rights) to issue new shares of up to 9.9% of existing issued share capital. The 2008 Principles did not expressly cover the use of the cash box structure, although the ABI wrote to the chairmen of listed public companies in 2009 stating its concerns about the use of cash boxes as a means to circumvent pre-emption rights and stating that, in its view, the 5% limit should apply to cash box placings of shares. Despite this, many companies have continued to utilise the cash box structure for issues of up to 9.9% (the issue is always kept below 10% to avoid the need to prepare a prospectus). It is now clear that cash box issues should, for the purposes of the 2015 Principles, be treated as an issue of shares for cash and therefore subject to the limits set out in the 2015 Principles.
- A requirement for greater transparency about the discount at which equity securities are issued on a non pre-emptive basis. Companies are expected to disclose any discount at which equity is issued in the pricing announcement. In line with the 2008 Principles, the discount should continue to be limited to 5% of the middle market price at the time of pricing.

ICSA expects companies to give 14 *working* days' notice of general meetings

A new version of the UK Corporate Governance Code was introduced in September 2014 which applies in respect of accounting periods starting on or after 1 October 2014. A company with a calendar financial year-end, will be reporting against the new Code in respect of its financial year starting on 1 January 2015.

In the 2014 version of the Code, the FRC amended provision E.2.4 to require that not only should companies give not less than 20 working days' notice of an AGM, but that 14 working days' notice should be given for all other general meetings. The requirement to give 14 working days' notice is of course longer than the statutory requirement to give 14 days' notice of a general meeting.

The introduction of this amended provision was not consulted upon at the time and it was widely thought that the FRC might retract it. This has, however, proved not to be the case and ICSA has now published guidance that, regardless of the legal requirement to give only 14 days' notice of a general meeting, it is of the view that it is helpful for shareholders to receive as much notice as possible and that, where companies are not in a position to satisfy provision E.2.4, they should explain such non-compliance with the Code in their annual report. ICSA's expectation is that the shorter statutory notice period should only be used where there is a need for urgency.

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A copy of the ICSA Guidance Note is available at https://www.icsa.org.uk/assets/files/free-guidance-notes/uk-corporate-governance-code-provision-e24.pdf

What is good practice for annual reports?

In May 2015 ICSA published a guidance note on what it considers to be good practice for annual reports. In its guidance note, ICSA lists those features that it believes set the best reports apart from the others. In particular, the "best" reports demonstrate the following:

- an understanding of the links between governance, shareholder value creation, and the avoidance of value destruction;
- responding to the opportunities created by reporting requirements rather than seeing them as obligations;
- innovative and creative forms of disclosure, which move away from 'boilerplate' reporting that simply repeats the language of the Code and instead explains how the board and company is run;
- explanations of the way the board runs itself and its committees, and how decisions are taken;
- a governance report that demonstrates clear ownership by the chairman and a real desire to use governance to enhance the business rather than treating it as a 'box-ticking' exercise;
- comprehensive explanations of departures from the provisions of the Code;

> **"The best annual reports are easy to read and give an honest appraisal – "warts and all" – of the year under review."**
>
> *ICSA Guidance note on Good Practice for annual reports (May 2015)*

- a full description, and explanation, of the company's business model and the strategy, with key performance indicators, performance against targets, and important information cross referenced to other parts of the report;
- a discussion of the principal risks to the strategy, the company's risk appetite and culture, how the risk profile is changing, and how the risks are being managed;
- joined-up thinking that links strategy, pay, performance and risk;
- evidence of directors having satisfied their statutory duties, including the duty to promote the success of the company over the longer term; and
- recognising and balancing the needs and expectations of different shareholder and stakeholder priorities.

Whilst this guidance may have come too late for most companies to take account of for this year's annual report, it provides a useful reference point for future reports.

ICSA's report on good practice for annual reports is available at: https://www.icsa.org.uk/assets/files/free-guidance-notes/good-practice-for-annual-reports.pdf

Regulatory Update

FCA fines Asia Resource Minerals plc £4.6m for breaches of Listing Rules and DTRs

The Financial Conduct Authority has fined Asia Resource Minerals plc (**ARM**), formerly Bumi plc, £4,651,200 for having inadequate systems and controls to comply with its obligations as a listed company, breaching various rules applicable to premium listed companies and failing to identify related party transactions (**RPTs**) valued at just over £8m.

In a Final Notice published on 17 June 2015, the FCA found that ARM committed serious breaches of Listing Principle 2, Listing Rules 8 and 11 and Disclosure and Transparency Rule 4 over a two year period from 28 June 2011, the date of ARM's admission to the premium segment of the Official List, up to 19 July 2013 (the **relevant period**).

Background

In September 2012, ARM announced it was aware of allegations of potential financial and other irregularities in its Indonesian operations. It commissioned an investigation into these allegations and, in January 2013, announced the investigation was complete and that it was addressing concerns raised. In around October 2012, ARM also commenced a review of the effectiveness of its internal controls, including a review of its RPTs and initiated a further separate review in December of that year of any historic potential RPTs entered into by its Indonesian subsidiary, PT Berau Coal Energy Tbk (**PT Berau**).

On 19 April 2013, the company notified the UKLA that it would be unable to publish its 2012 annual financial report within the deadline set out in DTR 4, due to its ongoing review of the integrity of a number of items on the balance sheet of PT Berau. On 22 April 2013, ARM's shares were suspended from trading.

In May 2013, ARM, via its financial advisers, notified the UKLA of three RPTs that had taken place since 28 June 2011 and had not been identified as RPTs at the relevant time and that, as such, had taken place in breach of the Listing Rules. The value of the three RPTs was approximately £8.05million. In addition, the company was unable to confirm that all previously unknown RPTs had been identified during the course of its review.

FCA findings

The FCA found that, during the relevant period, ARM had failed to take reasonable steps to establish and maintain adequate procedures, systems and controls to enable it to comply with its obligations in relation to the Listing Rules and DTRs, in breach of Listing Principle 2. The FCA also held that ARM had breached LR 11 in respect of its treatment of RPTs and LR 8 with regard to the requirement to consult a sponsor when proposing to enter into a transaction that is, or may be, a RPT. Whilst ARM did have a policy and various procedures relating to the treatment of RPTs, its systems and controls were inadequate, leading to a failure to implement such policy at both company and subsidiary level. These failings were particularly significant as the structure of the group and director relationships gave rise to an increased risk of the occurrence of RPTs.

In the FCA's view, the late discovery and review of these RPT transactions, coupled with other financial irregularities,

led to ARM's failure to publish its 2012 annual financial report within the required timeframe. ARM's shares returned to trading in July 2013.

Steps taken by ARM

Both during the relevant period and subsequently, ARM has taken a number of steps to address its identified failings, including:

- making changes to senior management and the boards of both ARM and PT Berau and its subsidiaries;
- implementing a wide scale training programme in relation to the RPT policy;
- strengthening the oversight and control of the Conflict Committee which had been tasked with establishing and maintaining a process regarding related parties and RPTs;
- formalising the Executive Committee to make it more effective; and
- implementing and supporting an improved culture across the group.

The Final Notice is available at: https://www.fca.org.uk/your-fca/documents/final-notices/2015/asia-resource-minerals-plc

Editor Comment:

This is the second final notice to be issued in relation to a listed company's failure to comply with the Listing Rules applicable to RPTs. The first was Exillon Energy plc which in April 2012 was fined £292,950. The fine here is significantly larger.

In determining the appropriate fine, the FCA's first step is to deprive a firm of the financial benefit derived from the breach. In this instance, ARM derived no benefit and, as such, the FCA used the value of the RPTs (£8.05m) as the appropriate indicator of the seriousness of the breach. This was considered to be a Level 4 breach (Level 5 being the most serious breach) due to the significant failings identified and, accordingly, an initial figure for the fine was held to be 75% of the value of the RPTs. The fine was then increased due to the fact that, after the Exillon Energy final notice was published in 2012, ARM had taken steps to improve its RPT processes but these had not been carried out sufficiently quickly or effectively. As ARM agreed to settle at an early stage in the investigation, it qualified for a 30% reduction in penalty, but for which the size of the penalty would have been £6,644,641.

Consistent with the action taken against Reckitt Benckiser last year for breach of the Listing Principles, Listing Rule 9 and its DTR 3 obligations, this case reinforces that it is simply not sufficient to put compliance policies in place and then fail to ensure they are properly implemented and monitored. Adequate training must also be given to relevant staff and companies should ensure that their culture reinforces the importance of compliance with relevant company policies.

Deadline for publication of half-yearly financial statements to be extended to three months

The FCA and HM Treasury have issued a joint consultation on changes to the DTRs and the Financial Services and Markets Act 2000 which must be implemented by 26 November 2015 as a result of the introduction of the EC Transparency Directive (Amending Directive) (**TDAD**).

TDAD focuses on regulated information that has to be disclosed periodically, shareholder disclosures and the dissemination of regulated information. Broadly, the changes proposed include amending the DTRs to include:

- a requirement to disclose voting rights arising from holdings of financial instruments having a similar economic effect to holding shares (DTR 5); and
- extending the deadline for publishing half-yearly accounts to three months after the end of the relevant period (from the current two months) and increasing the period for which annual and half-yearly reports must be publicly available from five years to ten years (DTR 4).

The UK has a super-equivalent regime for the disclosure of voting rights and already requires the disclosure of contracts for difference and voting rights arising from holdings of financial instruments having a similar economic effect to holding shares. As such, the proposed changes to DTR 5 in this regard are minimal.

The UK has already implemented certain provisions of TDAD early, including the removal of the requirement to publish interim management statements.

The consultation closed on 20 May 2015.

Fewer circulars to require FCA prior approval

On 1 April 2015 changes to Chapter 13 of the FCA's Listing Rules took effect which limit the type of circulars that require prior approval by the FCA to the following types:

- Class 1 acquisition (including reverse takeovers) and disposal circulars;
- Related party circulars;
- Circulars relating to a buyback of more than 25% of the company's equity shares (thereby requiring the inclusion of a working capital statement);
- Reconstruction and refinancing circulars where a working capital statement is required; and
- Circulars seeking cancellation of a premium listing or a transfer into or out of the premium listing (investment company) segment or a transfer from a premium listing to a standard listing.

For details of the changes to LR 13 see: http://media.fshandbook.info/latestNews/FCA_2015_3.pdf

Editor Comment:

As a result of this change, the number of types of circulars requiring FCA approval has significantly reduced. For example, circulars relating to share buybacks where no working capital statement is required, schemes of arrangement, ratification circulars and shareholder requisitioned general meetings will no longer need prior FCA approval.

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Inside information: when is information "precise"?

The EU-wide market abuse regime regulates the misuse of non-public price-sensitive information which is of a "precise nature" (**inside information**). To be "precise" information must (i) indicate that circumstances exist or that an event has occurred (or may reasonably be expected to come into existence or occur) and (ii) be specific enough to enable a conclusion to be drawn as to the "possible effect" of those circumstances or that event on the price of the relevant investments.

In the July 2014 edition of Corporate Update we discussed the decision in **FCA v Hannam**[4], in which the UK Upper Tribunal held that for information to meet the second part of the precise test, one would need to be able to draw a conclusion as to the possible direction of any price movement. In March this year, the EU Court of Justice (**CJEU**) rejected that approach in its decision in the case of **Lafonta v AMF**[5].

Facts

Mr Lafonta was chairman of a French company, Wendel. Wendel had failed to disclose information concerning a proposed acquisition of a shareholding in another company. The penalties commission of the L'Autorité des marchés financiers (**AMF**) imposed a penalty of EUR 1.5 million on each of Mr Lafonta and Wendel.

Before the CJEU, Mr Lafonta argued that information is precise only if it allows the person in possession of that information to anticipate how the price of the security concerned will change when that information is made public.

Decision of the CJEU

The CJEU held:

- *[36] The increased complexity of the financial markets makes it particularly difficult to evaluate accurately the direction of a change in the prices of those instruments…. In those circumstances – which can lead to widely differing assessments, depending on the investor – if it were accepted that information is to be regarded as precise only if it makes it possible to anticipate the direction of a change in the prices of the instruments concerned, it would follow that the holder of that information could use an uncertainty in that regard as a pretext for refraining from making certain information public and thus profit from that information to the detriment of the other actors on the market.*
- *[37]….. the answer to the question referred is that, on a proper construction of point (1) of Article 1 of Directive 2003/6 and Article 1(1) of Directive 2003/124, in order for information to be regarded as being of a precise nature for the purposes of those provisions, it need not be possible to infer from that information, with a sufficient degree of probability, that, once it is made public, its potential effect on the prices of the financial instruments concerned will be in a particular direction.*

That conclusion is contrary to the conclusion of the Upper Tribunal in Hannam, which held as follows (at 121(b)):

As to the requirements for information to be specific enough to enable a conclusion to be drawn as to possible effect on price, and in particular what the word "possible" means: the information must indicate the direction of movement in the price which would or might occur if the information were made public. The information does not need to indicate the extent to which the price would or might be affected. The information does not need to be such as to enable an investor to know with confidence that the price will move if the information were made public but only that it might move and, if it does, the movement will be in a known direction.

Conclusion

The CJEU decision in Lafonta significantly broadens the definition of "precise" as it was previously understood in this context. It therefore broadens the scope of the definition of inside information and the scope of an issuer's obligations to announce inside information.

That said, as well as being precise, inside information must also be likely to have a significant effect on the price of the relevant securities if made public. However, the Upper Tribunal indicated in the Hannam case that there need only be a "real prospect" of the information having more than a "de minimis" effect on price in order to be regarded as price sensitive information. Therefore, in practice, if non-public information passes the significant effect on price test, it is likely also to be regarded as being precise and thus "inside information" (especially since the case law also indicates that there need only be a "realistic prospect" of future

4 [2014] UKUT 0233
5 Case C-628/13

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events coming into existence for the information to satisfy the first limb of the definition of when information is precise).

The Lafonta decision reinforces the need to consider carefully whether information is inside information and whether an issuer has legitimate grounds to delay disclosure. Notwithstanding the recent Hannam decision, the FCA is likely to apply the Lafonta approach in the future.

Our briefing note on the Hannam decision, *Eight things we now really know about market abuse* (June 2014), is available at www.cliffordchance.com.

FCA chalks up two more successful insider dealing prosecutions

Earlier this year, the FCA announced the successful prosecution of two individuals for insider dealing:

- In February Ryan Willmott, formerly Group Reporting and Financial Planning Manager for Logica PLC, pleaded guilty to three instances of insider dealing. Willmott admitted dealing on the basis of inside information he obtained during the course of his employment relating to the takeover of Logica by CGI Group, as publicly announced on 31 May 2012. Willmott set up a trading account in the name of a former girlfriend, without her knowledge, to carry out the trading. He also admitted disclosing inside information to a family friend, who then went on to deal on behalf of Willmott and himself. Profits from the related dealing exceeded £30,000. Willmot was sentenced to 10 months imprisonment and ordered to pay £6,122 towards prosecution costs and was made subject to a confiscation order in the sum of £23,239.75.
- Paul Coyle, former Group Treasurer and Head of Tax at WM Morrison Supermarkets PLC, pleaded guilty to two counts of insider dealing. Between January and May 2013 Coyle, through his role at Morrisons, was regularly privy to confidential price sensitive information about Morrisons' ongoing talks regarding a proposed joint venture with Ocado Group plc. Coyle took advantage of this information by trading in Ocado shares between February and May 2013 using two online accounts which were in the name of his partner. Profits from the dealing exceeded £79,000. He was sentenced to 12 months imprisonment and ordered to pay £15,000 costs and was made subject to a confiscation order of £203,234.

"Ryan Willmott engaged in insider dealing with no regard for the consequences for himself and others, and with an expectation that he would avoid detection. This prosecution sends a clear message to those who are tempted to abuse their position by disclosing or trading on inside information.

"We will not hesitate to take robust action where individuals threaten the integrity of the UK financial markets."

Georgina Philippou, acting director of enforcement and market oversight, FCA

Editor Comment:

This is part of the FCA's wider crack down on market abuse and insider dealing. Since 2009, the FCA (and previously the FSA) has secured 27 successful convictions for insider dealing and is progressing a further seven such cases. These recent prosecutions come at a time when the Bank of England is calling on the government to increase the maximum sentence for a criminal conviction for insider dealing or market manipulation from seven years to ten years.

FCA proposes changes to Listing Rules and DTRs to reflect UK Corporate Governance Code changes

In its quarterly consultation paper CP15/19, published in June 2015, the FCA has proposed some minor changes to the Listing Rules to reflect the introduction of an updated Corporate Governance Code in September 2014 which applies to companies with financial years starting on or after 1 October 2014.

With regard to the additional information to be included in the annual financial report (LR 9.8.6), the changes will reflect the fact that pursuant to the updated Code, instead of making a going concern statement, companies now need to make both a statement as to the appropriateness of adopting the going concern basis of accounting and as to the longer-term viability of the company.

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The FCA is also proposing to delete the provision in LR 6 that requires the securities of a premium listed company to be capable of electronic settlement (and the corresponding ongoing obligation in this regard in LR 9). This requirement has been superseded by the EU Central Securities Depositaries Regulations which came into force in September 2014 and which requires securities that are the subject of transactions on a trading venue to be capable of being settled in dematerialised form. This requirement is applicable to both standard and premium listed companies.

The consultation closes on 5 August 2015. No date has yet been set for the change to take effect.

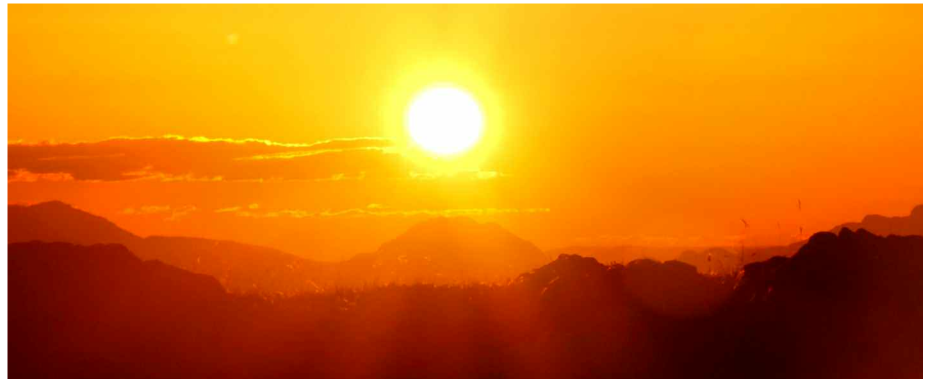
A copy of CP15/19 is available at https://www.fca.org.uk/static/fca/documents/cp1519.pdf

On the horizon…

In February 2015 the European Commission published a consultation paper setting out a number of proposals to amend the current EU Prospectus Directive. The purpose of the consultation is to enable the Commission to gather views on the functioning of the Prospectus Directive and its implementing legislation. The consultation covers a wide range of issues with a view to exploring ways to reduce the administrative burden for issuers and any unnecessary costs, as well as examining whether the regime can be made more appropriate for small and medium-sized enterprises and companies with reduced market capitalisation.

Particular issues being consulted on include:

- Whether a greater number of public offers of securities should be able to be carried out without the need for a prospectus: this would involve increasing the current exemption which allows a public offer of securities to be made to fewer than 150 persons without triggering the requirement to prepare a prospectus.
- Whether an "exemption" should be created for secondary issues of securities (i.e. they would not require a prospectus): the rationale for this proposal is that a company undertaking a secondary issue of securities is, by definition, already listed and therefore already required to comply with the market disclosures regime. Given investors can already buy its securities on the open market, the question arises as to what is the purpose of requiring additional information to be disclosed simply because the company itself is issuing new securities?
- Whether the 10% threshold should be expanded? Currently, where a company issues shares which represent in aggregate less than 10% of shares of the same class admitted to trading on a regulated market in any rolling 12 month period, it is exempt from preparing a prospectus. Increasing the threshold would make it easier for companies to raise larger amounts of capital without incurring the costs of preparing a prospectus.



- Whether a prospectus should be required when securities are admitted to trading on a multilateral trading facility (e.g. AIM)?
- Should there be a maximum limit on the length of a prospectus? Some commentators argue that you cannot impose a maximum limit on the basis that the issuer must be free to satisfy the legal requirement to include all relevant information required by investors to make an informed decision about the issuer and the securities and that imposing a limit on the length of the prospectus may prevent an issuer from fulfilling this obligation.

The consultation paper is available at http://ec.europa.eu/finance/consultations/2015/prospectus-directive/index_en.htm

Editor Comment:

The Commission is required to assess the application of the Prospectus Directive by 1 January 2016. As part of its wider plans for European Capital Markets Union, it has brought this review forward. In reality, this is the first step in a review of the Prospectus Directive regime and any changes to the regime that might arise from this review are unlikely to take effect for several years. The consultation itself closed in May.

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Takeovers Update

Panel consultation on treatment of payment of dividends by offeree during offer period

On 11 May 2015, the Code Committee of the Panel published PCP 2015/1 which proposes amendments to the Takeover Code in relation to the treatment of dividends paid by an offeree company to its shareholders.

The key proposals are as follows:

- *Reserving the right to reduce offer consideration if a dividend is paid:* Where an offerer has proposed an offer at a specified price, it will usually wish to protect itself against value leakage from the offeree company caused by the payment of a subsequent dividend by the offeree. As an offeror can no longer seek to impose restrictions on an offeree company, an offeror could seek to do this by specifying that any dividend will result in a corresponding reduction in the offer price. The PCP proposes that new Notes to the Code should be introduced to clarify that an offeror that wishes to reserve this right must do so in each of its possible offer announcement (if any), firm offer announcement and its offer document.
- *Effect of a dividend where the offerer has made a "no increase statement":* The Code Committee proposes to introduce new Notes to make clear that where an offeror has made a "no increase" statement and the offeree company subsequently pays a dividend, the offeror will be required to reduce the offer consideration by an amount equal to that dividend in order that the overall value receivable by the offeree company shareholders remains the same. This would not apply where an offeror had included a specific reservation in the "no increase" statement enabling shareholders to receive a specific dividend that was paid in addition to the offer consideration.
- *Impact of dividends on a minimum offer price established by share purchases*: The Code provides that, broadly, the offer consideration must be no less than the highest price paid by the offeror (or its concert parties) for an interest in the offeree company's shares during a prescribed period prior to the offer period or during the offer period. The Code Committee is proposing changes to the Notes to Rules 6, 9 and 11 to clarify how the minimum offer price should be calculated depending on whether shareholders in the offeree company are entitled to receive a dividend in addition to the offer consideration or not.
- *Proposed Practice Statement:* PCP2015/1 contains the text of a new Practice Statement which sets out the Panel Executive's practice in relation to the payment of dividends by an offeree. The Statement has been drafted on the basis that the proposed Code amendments described above have come into force. The Practice Statement addresses the issues described above and also the application of Rule 21.2 of the Code (inducement fees and other offer-related arrangements) and clarifies that the Executive applies Rule 21.2 of the Code so as to prohibit an offeree from entering into an arrangement with an offeror which relates to the payment of dividends by the offeree, including any undertaking by the offeree not to pay a dividend. Any such value leakage should be addressed by the offeror reserving the right to reduce the offer consideration if a dividend is paid, rather than by seeking to prevent the offeree board from paying dividends.

The consultation closed on 12 June 2015. There is no current indication as to when relevant changes are likely to be brought in to effect, although the Executive has confirmed that it intends to publish the new Practice Statement on the same date that any Code changes take effect.

PCP 2015/1 is available at http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/PCP201501.pdf

Editor Comment:

The proposed amendments are intended to clarify the application of the existing provisions of the Code and ensure that the Code is better aligned with the existing practice of the Panel Executive rather than bringing about a substantive change in current practice.

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Antitrust Update

The impact of the new Consumer Rights Act on antitrust litigation

The Consumer Rights Act 2015 (the **Act**) will introduce a number of changes to antitrust litigation in England and Wales, through amendments to the Competition Act 1998 (**CA98**) and the Enterprise Act 2002 (**EA02**). The changes are intended to facilitate damages claims for competition law infringements and, in particular, collective damages actions. They are expected to come into force on 1 October 2015.

Key changes to the CA98

- *Stand-alone claims:* The Competition Appeal Tribunal (**CAT**) will be able to hear stand-alone claims, including claims for damages or an injunction. Currently, it can only hear follow-on claims after a decision by a competition authority has established the relevant infringement.
- *Collective proceedings:* Collective proceedings will be able to be brought before the CAT. These are proceedings that combine two or more claims for damages or injunctive relief for breaches of UK or EU competition law.

  Collective proceedings must be started by a representative, and can only be continued if the CAT makes a collective proceedings order. It will only do this if it considers that it is just and reasonable for the person bringing the proceedings to act as a representative, and it must also be satisfied that the claims raise similar or related issues of fact or law.

  Currently, collective claims can only be made (a) by a specified body (e.g. the Consumers' Association), and (b) on an "opt-in" basis – i.e. with the consent of each individual claimant. Under the amended CA98, collective proceedings will not be limited to such claims and may be opt-in or "opt-out" – i.e. brought on behalf of each class member without specific consent, unless a class member elects to opt-out of the claim. Opt-out proceedings will not include class members outside the UK – they must opt-in to the proceedings. The CAT will decide whether a claim should proceed on an opt-in or opt-out basis, taking into account factors such as the strength of the claims and whether opt-in collective proceedings would be practicable.

  The amended CA98 contains two further safeguards against excessive claims. The first is a ban on exemplary damages in collective proceedings. The second excludes damages-based agreements (under which lawyers' remuneration is based on the amount they recover) for opt-out collective proceedings, although conditional fee agreements (sometimes called "no win no fee") are still permitted. In opt-out collective proceedings, the CAT may order that the damages be paid to the representative on behalf of the represented persons.
- *New powers to grant injunctions:* The CAT will have new powers to grant injunctions in both stand-alone and collective proceedings.
- *Limitation period for claims extended:* At present, the limitation period for claims brought before the CAT is two years from the later of (i) the date on which the substantive infringement decision becomes final and can no longer be appealed; and (ii) the date on which the action accrued.

  This will be extended to six years from the date on which the cause of action accrued. As with High Court proceedings, where there has been deliberate concealment of wrongdoing, the time period will not

begin to run until the claimant discovers, or ought reasonably to have discovered, the concealment.

- *Collective settlements:* In opt-out proceedings, it will be possible for the parties to apply to the CAT for approval of a proposed collective settlement. The CAT can approve the settlement only if it believes the terms to be just and reasonable. The settlement will then bind those domiciled in the UK who did not opt-out and those who opted-in.
- *Voluntary redress schemes:* The CMA will have new powers to approve proposals by infringers to compensate those harmed by their infringements. A proposal can be considered at any time, but only approved after the infringement decision to which the scheme relates has been made or, in the case of an infringement decision of the CMA, at the same time as that decision is made. The CMA may consider discounting any infringement penalty – subject to a proposed maximum of 10% – in exchange for participation in the scheme.

Changes to the Enterprise Act: a new fast-track procedure for SMEs

Lastly, the Act will also amend the EA02 to introduce a fast-track procedure for simpler competition claims in the CAT. The fast-track procedure is outlined in the Draft CAT Rules 2015, which are currently subject to consultation. These provide for the final hearing to be fixed within six months of the CAT ordering the fast-track procedure, a cap on recoverable costs at a level determined by the CAT, and the possibility for an applicant to obtain an interim injunction without providing an undertaking as to damages, or subject to a cap on the amount of the undertaking.

When considering whether a claim should be "fast-tracked", the CAT may take into account all matters including whether one or more of the parties is an individual or a micro, small or medium sized enterprise (**SMEs**), the estimated duration of the hearing, the complexity and novelty of the issues, and the scale and nature of the evidence involved. The introduction of a fast-track procedure is unlikely to be suitable for many follow-on or stand-alone cases which typically involve the consideration of complex economic evidence.

Editor Comment:

The most significant change is likely to be the introduction of opt-out collective proceedings. While there are still concerns that the availability of opt-out proceedings will lead to a US-style class action regime, the safeguards in the Act requiring the approval of class representatives, the certification of proceedings and the ban on exemplary damages and damages-based agreements are likely to limit the excesses of US class actions.

20% of UK businesses have never heard of competition law

Research commissioned by the UK Competition and Markets Authority (**CMA**) indicates a substantial lack of understanding of competition law among UK businesses.

Is it something to do with sport?

The report, prepared by IFF Research, shows a surprisingly widespread lack of awareness of competition law among those with responsibility for sales, both in terms of conduct that infringes the law and the potential consequences of infringement. Over 1,200 UK businesses were surveyed, and the results of the research broken down by region, sector and size of company. Respondents were

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typically sales directors for larger companies and managing directors for smaller ones. 20% of respondents claimed never to have heard of competition law and some of the other more notable findings include the following:

Infringing conduct

- Only 55% of the companies surveyed knew that it is illegal "for competitors to agree prices in order to avoid losing money" (18% thought it was legal and 27% did not know).
- 31% thought "businesses can agree not to sell to the same customers as each other" and a further 28% did not know whether this was legal.
- Only 47% of companies knew it is illegal "to discuss prospective bids with competing bidders".
- 33% thought resale price maintenance was lawful.

Consequences of a breach

- Only 27% of respondents reported a "fair" or "good" awareness of the penalties for non-compliance. Of those, almost half said "don't know" when asked what the penalties are.
- Only 21% of respondents were aware that antitrust breaches could lead to imprisonment.
- 85% of companies were unaware of the existence of the leniency regime.

Market interactions and monitoring

- 83% of businesses had contact with other businesses in their industry, of which 9% did so "to discuss prices". Such contacts were not necessarily anticompetitive, however, as those other businesses may have been sub-contractors or other non-competitors (which might explain the higher 22% figure for the construction sector).
- 7% of businesses monitor prices of their competitors by contacting them to ask what they charge. Again, this is not necessarily anticompetitive if the information requested is publicly available.

Sector specific findings

Some sectors demonstrated significantly lower levels of antitrust awareness than others. In particular, the construction and arts sectors both had the lowest proportion of respondents reporting compliance training in the last year (less than 1%) and some of the highest levels of respondents who had never heard of competition law (24% and 30% respectively), with the accommodation/food sector also scoring poorly in this respect (29%).

Editor Comment:

The research suggests that many companies would benefit from more antitrust compliance training. For larger businesses (those having 250 employees or more), the implications of the research are more nuanced. As might be expected, these businesses generally demonstrated a much better level of antitrust awareness than smaller ones. For instance, 41% had run a compliance training session in the past year.

However, it seems that such companies are more prone to being excessively cautious in ways that risk having serious adverse effects. In particular, 41% of large companies believed that it is illegal to "tell suppliers the prices that other suppliers are quoting" – a misapprehension that could harm their ability to negotiate best prices and, ultimately, their ability to compete. This suggests that companies need to have an effective understanding of competition law, both in order to be competitive and to avoid the risk of behaving in a manner which is anticompetitive.

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

David specialises in corporate finance, domestic and cross-border M&A (including public takeovers), listed company matters and general corporate advisory work.

Recent major transactions include advising National Australia Bank on the proposed demerger and IPO of Clydesdale Bank; Booker Group plc on its acquisition of the Londis and Budgens store businesses and on its recent "B" share scheme; Man Group on its acquisition of Numeric Holdings LLP (a class 1 transaction under the listing rules); and RBS on the sale of its European 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.

David is a member of the City of London Law Society's Company Law Committee and a contributing author to "A Practitioner's Guide to the City Code on Takeovers and Mergers".

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