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July 2016

Corporate Update July 2016

Welcome to our July 2016 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. We consider how these might impact your business and, in addition, look ahead to forthcoming legal and regulatory change.

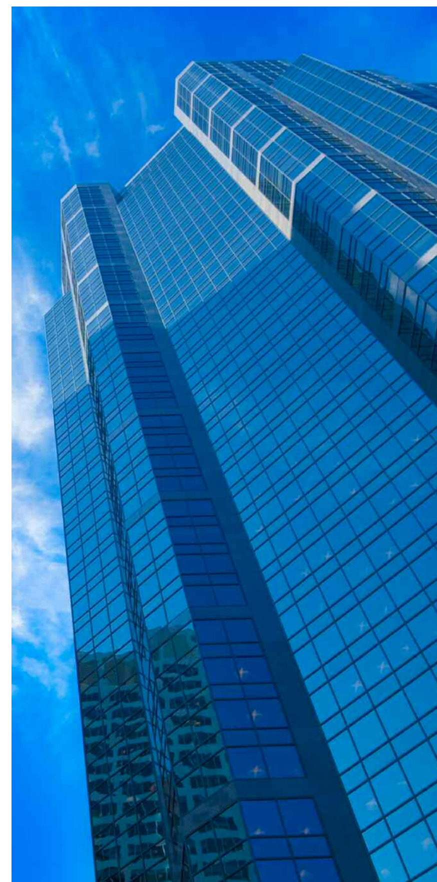
Since the UK's vote to leave the EU on 23 June 2016, Brexit has dominated the press and the minds of many corporates and their advisers. However, despite the political uncertainty and market volatility, business continues as usual for both domestic and international corporates. With this in mind, in this edition we are concentrating on key developments in other areas of company law and corporate finance regulation. You can, however, find details of where to access our key Brexit related resources on page 6.

In particular, we look at the EU Market Abuse Regulation which came into force on 3 July 2016 and substantially changed the market abuse regime across Europe, focusing on the key changes affecting UK listed companies.

On a more domestic level, we review the progress of the implementation of the Small Business, Enterprise and Employment Act 2015 so far this year, which includes the introduction of the PSC register and confirmation statements (replacing annual returns), and we look ahead to the further changes that this act is expected to introduce for corporates. We also review a number of interesting cases on points of contract law that have been decided recently in the Court of Appeal, as well the first ever criminal prosecution under section 7 of the Bribery Act 2010.

We cover a range of recent updates in the sphere of corporate governance, including in relation to recent audit reform, new template resolutions from the Pre-Emption Group for the disapplication of pre-emption rights, ICSA's consultation on minuting board meetings and the upcoming requirements for gender pay gap reporting.

We also consider the latest amendments to the Takeover Code in relation to the communication and distribution of information and opinions during a takeover offer and from the Government in relation to reforms to UK competition law.



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Deal of the year
Mergermarket European M&A awards 2015

TMT team of the year
TMT Finance Awards 2015

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Company Law Update

A new regime for market abuse

On 3 July 2016, the EU Market Abuse Regulation (2014/596/EU) (**MAR**) came into force. MAR, which repealed and replaced the former EU Market Abuse Directive (**MAD**) and its implementing legislation, has direct effect across EU Member States and has been supplemented by a series of supporting regulations, which set out the detailed measures applicable to a number of the broad obligations in MAR itself. The most significant change from the market abuse regime that applied under MAD is that a broader range of financial instruments are now affected – MAR not only applies to financial instruments admitted to trading on a regulated market or those where a request for admission to trading on a regulated market has been made but also to (i) financial instruments admitted to trading on a multilateral trading facility (**MTF**) (such as AIM) or where a request for admission to trading on an MTF has been made, (ii) financial instruments traded on an organised trading facility (this limb applies from January 2018), and (iii) financial instruments not covered by the above, where the price or value of which depends on, or has an effect on, the price or value of any of the above instruments.

Set out in the graphic below is an overview of the key changes that apply to UK issuers.

Overview of key changes for UK issuers

Disclosure of inside information/ FCA notification obligation

- Can still delay announcement of inside information so as not to prejudice issuer's legitimate interests, provided delay does not mislead public and confidentiality maintained. DTR 2 guidance likely to be amended now that ESMA has finalised its guidance on delay of disclosure of inside information
- Where the issuer has delayed, new requirement to inform FCA, upon announcement, of decision to delay and, if so requested, explain in writing why it determined delay was permissible and the date of decision to delay
  - New template for notification of delay to FCA to include specified information, including: (i) identification of the inside information; (ii) date and time of the disclosure; and (iii) identity of persons/body with responsibility for decision to delay
  - Written explanation of rationale only required on request by FCA
  - Any disclosure would be to FCA (and not the market)
  - Will require enhanced record keeping and possibly earlier and more frequent consultation with advisers – maintaining a disclosures register is recommended
- New requirement that announcement of inside information must clearly identify that inside information is being announced

Insider lists

- The issuer must use a standard format insider list (in electronic form) which requires more extensive and prescriptive information than was previously the case
- Single insider list with a different section for each project/piece of price sensitive information (to be retained for 5 years), which can include a section for permanent insiders
- FCA indicated during consultation that pre-MAD practice of advisers maintaining a separate list may continue but policy statement did not confirm this (such practice is expected to continue)
- Employees must provide written acknowledgement that they are aware they are on the insider list, the regulatory duties that this entails and the sanctions (can be via email)

Share dealing/ Closed periods

- Model Code has been removed from the Listing Rules but most issuers have retained a dealing code
- MAR expressly prohibits PDMRs from dealing during a "closed period"
- Under MAR a "closed period" is 30 calendar days before the announcement of an interim financial report or year-end report which the issuer is obliged to make
- FCA indicated preliminary announcement will still end the "closed period" in respect of year-end period (ESMA has since confirmed this position)
- Persons closely associated are not covered by this "closed period" restriction (but still need to have regard to insider dealing concerns/reputational issues, etc.)
- Issuers should have put in place a revised share dealing code – ICSA/QCA/GC100 have published an industry wide specimen share dealing code

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Topic	Key points
Notification of transactions by PDMRs and their persons closely associated	■ Time limit for notification reduced from 4 to 3 business days (the issuer must notify the market within the same 3 business day timeframe, and, as such, many issuers have reduced the PDMR notification deadline to 2 business days) ■ Transactions only notifiable if in excess of *de minimis* threshold of €5,000 per calendar year (but no guidance as to how threshold is calculated and many issuers are disregarding threshold and requiring disclosure of all transactions) ■ The issuer must notify PDMRs of their obligations in writing and draw up a list of PDMRs and persons closely associated with them ■ PDMRs must notify persons closely associated (including spouse and children) of disclosure obligation in writing and retain a copy of the notification (no need to obtain acknowledgement) ■ New FCA online form for notification of transactions
Share buybacks	■ Regime for buy-backs not materially different from the MAD regime. In practice, the requirements can be addressed if and when a buy-back programme is established ■ MAR safe harbour relates only to buybacks of shares (i.e. not derivatives) ■ Certain key requirements for the issuer to benefit from MAR safe harbour, including: • certain prescribed disclosures prior to trading • must notify trading information to FCA and make public disclosures ■ Reliance on safe harbour not compromised by trading during a closed period if programme is either (i) independently lead-managed by an investment firm or (ii) a time-scheduled buy-back programme
Market soundings	■ Onerous new requirements for conducting market soundings (advance disclosure of major transaction/equity issue to investors in confidence to gauge interest/reaction) – disclosing market participant to assess whether market soundings involve disclosure of inside information, keep written record of assessment and rationale for conclusions drawn, obtain recipient's consent to receive inside information and provide specific warnings ■ Market soundings to be made on recorded lines where disclosing party has access to them ■ If information ceases to be inside information after wall crossing, discloser to notify disclosee ■ Records to be kept for 5 years in electronic format and to be provided to FCA on request ■ For joint market soundings, record keeping obligations apply to both issuer and its financial advisers

However, not only has the detail of the market abuse regime changed, but so has its architecture.

The key prohibitions on insider dealing and market manipulation are now set out in MAR rather than the Financial Services and Markets Act 2000 (**FSMA**), as are many of the key disclosure requirements (e.g. requirement on an issuer to disclose any inside information to the market as soon as possible) that were previously contained in the DTRs. While, as an EU regulation, MAR has direct effect in the UK, that does not mean that our national legislation and regulation remains unchanged. A number of changes have been made to FSMA, in particular to delete those provisions in section 118 relating to market abuse, given those offences are now set out in MAR itself. Changes have also been required to FSMA to provide the Financial Conduct Authority (**FCA**) with the necessary investigatory and enforcement powers in relation to breaches of MAR.

In addition, parts of the FCA Handbook now look very different. The parts most affected by MAR are the Disclosure and Transparency Rules (**DTRs**), the Listing Rules (in particular, the Model Code) and the Code of Market Conduct.

- *Disclosure and Transparency Rules:* The Disclosure Rules have been renamed the Disclosure Guidance. The bulk of the existing Disclosure Rules has been deleted and readers are signposted to the relevant provisions in MAR. Where possible, the FCA has retained those parts of the former Disclosure Rules (in the form of Disclosure Guidance) which offer continued assistance on the interpretation and application of MAR.
- *Listing Rules:* The primary change to the Listing Rules has been the deletion of the Model Code. ICSA, the GC100 and the QCA have published a specimen share dealing code which is MAR compliant. The specimen code provides for a short document to be given to PDMRs and any employees telling them of the restriction on dealings that applies to

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them and attaching a "Consent to Deal" request form. Accompanying this is a separate Dealing Procedures Manual for the issuer's use in order to assist the issuer in determining whether consent to deal at any particular time may be given.

- *Code of Market Conduct:* The Code of Market Conduct has been renamed MAR 1 and large sections of it have been deleted and/or amended in order to ensure consistency with MAR. It now has the status of general guidance on MAR.
- *FCA Technical Notes:* The FCA is in the process of amending a number of its technical notes to ensure that they are consistent with the requirements of the new regime.

On 13 July, the European Securities and Markets Authority (**ESMA**) published its final report containing guidance on the circumstances in which it is legitimate for issuers to delay the announcement of inside information and identifying the circumstances in which delay would be likely to mislead the public. The FCA now has two months in which to notify ESMA as to whether it will adopt the guidance. If the FCA chooses to do so then it is likely changes to DTR 2.5 will be required to ensure consistency with ESMA's guidelines.

In order to help market participants navigate their way around the new regime, we have collated the legislation, along with a series of other useful MAR resources prepared by Clifford Chance on our Market Abuse Regulation Topic Guide on our Financial Markets Toolkit. You can access the Topic Guide at: https://financialmarketstoolkit.cliffordchance.com/en/topic-guides/market-abuse-regulation.html

Small Business, Enterprise and Employment Act 2015: the current status

The Small Business, Enterprise and Employment Act 2015 (**SBEE**) received Royal Assent in March 2015. Despite its name, it contains provisions that affect all UK companies. Some have the aim of increasing transparency of UK company ownership and others have the aim of reducing red tape around company administration. Secondary legislation has applied some of these changes to LLPs.

What has happened so far this year?

The PSC register

The most significant and complex change brought in by the SBEE has been the new requirement for companies and LLPs (other than certain exempt listed companies) to keep a register of people with significant control over them (the **PSC register**). Such companies and LLPs have been required to keep a PSC register since 6 April 2016 along with their other statutory registers. The purpose of the PSC register is to increase the accountability of companies and LLPs by making it easier to see who actually owns and controls them and who might be making decisions about how they are run. This information will eventually be available to check at Companies House for all such companies and LLPs (and has already been available to check for some companies and LLPs since 30 June 2016) because when an affected company or LLP files its first confirmation statement (see below) at Companies House, it must contain information on the people with significant control over it (the **PSC information**). In addition, any company or LLP incorporated after 30 June 2016 needs to provide its PSC information on incorporation.

For more information and a practical guide on the PSC register requirements, see our client briefing published in March 2016 on our Global M&A Toolkit: http://globalmandatoolkit.cliffordchance.com/The-PSC-register-requirements-14-march-2016.

Confirmation statements...no more annual returns

On 30 June 2016, the annual return that companies and LLPs have been required to file on a yearly basis was abolished and replaced with the confirmation statement. The aim behind this change is to allow companies and LLPs to simply "check and confirm" information at Companies House and let it know if there have been any changes (rather than to file all the information that was previously required). The confirmation statement broadly covers the same information as the annual return with some amendments that reflect other changes brought in by the SBEE (ie the new PSC register requirements and the option for private companies to keep their statutory registers at Companies House (see below)).

A company's or LLP's first confirmation statement must be filed within 14 days of the anniversary of: (i) the company's or LLP's incorporation, for new companies/LLPs; or (ii) the made-up to date of the company's or LLP's last

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annual return, for existing companies/LLPs. However, there is no fixed date for giving a confirmation statement. Instead, it must be given once in every 12 month period. This means every time a confirmation statement is delivered to Companies House it starts another 12 month period. Be aware that companies and LLPs will now only have 14 days (rather than 28 days) from the anniversary of the date of the previous confirmation statement to deliver the confirmation statement to Companies House.

New option for private companies to keep their statutory registers at Companies House

From 30 June 2016, private companies and LLPs may choose to keep their statutory registers at Companies House. That means any (or all) of the register of members, directors, directors' residential addresses, secretaries and people with significant control for a private company, and any (or all) of the register of members, members' residential addresses and people with significant control for an LLP.

If you are considering whether to do this, be aware that there are some privacy issues as a director's/person with significant control's full date of birth and a shareholder's/member's address will be available on the public register at Companies House. You must also provide any changes in the information on the registers to Companies House and this is likely to slow down the process of updating registers which may be problematic for time critical updates (such as the register of members during a reorganisation). As a consequence, we do not think many private companies or LLPs will take up this option.

What happens next?

Ban on corporate directors

The SBEE contains a ban on corporate directors that has not yet come into effect. We are still waiting for a response to the consultation that closed at the end of April 2015 on what the limited exceptions to this ban will be. Once the ban comes into effect, transitional provisions apply so that any existing corporate director (not falling within one of the exceptions) will cease to be a director one year afterwards.

Reporting payment practices

The SBEE contains a power for the Secretary of State to make regulations that will require larger companies to report on their payment practices and policies. The aim of these regulations 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 take the lead by example in paying their suppliers promptly and fairly, with 30 day terms being the norm and 60 days the maximum.

Regulations were published in draft form by the Department for Business, Innovation and Skills along with the consultation that closed in February 2015; however, no subsequent draft regulations have been published. The Government has indicated that the report will include details of standard payment terms; the average time taken to pay; and the proportion of invoices paid in 30 days or less ("good practice") and between 31 and 60 days and beyond 60 days ("bad practice"). Reporting is expected to be required on a six-monthly basis and to be provided in open data format to a single central location.

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Brexit: the implications for corporates

Following the UK's vote to leave the EU on 23 June 2016, what are the potential implications for corporates based in the UK or corporates with a UK subsidiary, branch or business in the UK?

While the markets have experienced some volatility since the vote to leave, nothing has changed legally. The UK remains part of the EU and the referendum has no effect as a matter of UK law or EU law. When the Government serves the Article 50 notice on the European Council, the process for Brexit will start and the Government will have a two year period to negotiate a withdrawal agreement with the EU.

There is currently considerable uncertainty as to how the process for Brexit will work and what Brexit will look like. It is entirely possible that after two or more years of negotiation, the UK could reach a constructive and positive accommodation with the EU that would allow most businesses to continue with limited disruption. Alternatively, the UK may not be in such a position, exit from the EU may be disorderly and access to the EU single market could be severely disrupted.

Businesses need to address the immediate repercussions and implications of the vote to leave. The Financial Reporting Council (**FRC**) has now published a reminder for directors of matters that they, along with their company's auditors, should consider when preparing half-yearly and annual financial reports. These matters include the need for clear disclosure of the company's business model to enable readers to assess the company's exposure to Brexit; detail on the nature and extent of the company's Brexit related risks and uncertainties focusing on specific facts and effects on the company (rather than general 'boilerplate' disclosures) and an explanation of any steps being undertaken to manage or mitigate those risks; and considering the effect of market volatility on the company's balance sheet values and cash flows and whether assets need to be impaired and/or disclosures made. For more information, see the FRC press release: https://frc.org.uk/News-and-Events/FRC-Press/Press/2016/July/Reminders-for-half-yearly-and-annual-financial-rep.aspx

Businesses also need to assess the medium and longer term legal implications of Brexit on their businesses. We have developed a red flag legal review questionnaire to help you with this assessment, and also to help in planning to mitigate any adverse repercussions and take advantage of possible opportunities. If you would like to discuss this with us, please contact your usual contacts at Clifford Chance.

We have also published a number of briefings on the implications and likely impact of the UK's vote to leave the EU and Brexit – see the Brexit section of our Global M&A Toolkit which is designed for corporates: http://globalmandatoolkit.cliffordchance.com/Hot-topic-Brexit.

Case Law Update

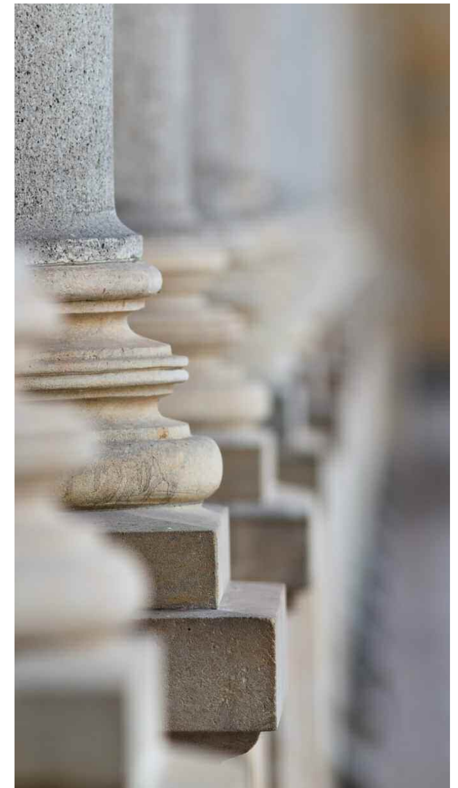
There have been a number of cases over the last few months raising interesting contract law points and in some instances clarifying the law where there were conflicting authorities.

Words deleted from a contract may sometimes be used to understand the contract in the future

The Court of Appeal[1] considered the admissibility of deleted words in a contract as an aid to construction. It held (clarifying inconsistent case law on this issue) that deleted words are generally inadmissible but there are two valid exceptions: (i) deleted words are admissible if they are in a printed form and are able to resolve the ambiguity of a neighbouring paragraph which has not been deleted, and (ii) "if the fact of deletion shows what it is the parties agreed that they did not agree and there is ambiguity in the words that remain".

Detailed drafting can reduce the uncertainty of an "all reasonable endeavours" obligation

The Court of Appeal[2] considered an "all reasonable endeavours" obligation in an agreement to sell the Bristol Rovers' football stadium site to Sainsbury's supermarkets. Sainsbury's was obliged to "use all reasonable endeavours" to procure the required planning permission for the conversion of the site from a football stadium into a supermarket as soon as reasonably possible, prior to completion of the sale. Planning permission was not granted on terms satisfactory to Sainsbury's and Sainsbury's terminated the contract, refusing consent to Bristol Rovers to lodge a further planning appeal (Sainsbury's having already lodged two appeals, withdrawing the second). The agreement contained detailed drafting in relation to the circumstances in which Sainsbury's was obliged to appeal the planning permission. The Court of Appeal held that this drafting, which did not oblige Sainsbury's to make a further planning appeal, curtailed Sainsbury's "all reasonable endeavours" obligation to procure the planning permission.



Editor Comment:

An "all reasonable endeavours" obligation sits between the more onerous "best endeavours" obligation and less onerous "reasonable endeavours" obligation – there is a substantial body of case law around the meaning of each of these terms. In short, a "best endeavours" obligation is understood to require the party to take all the steps that the other party, as a prudent, determined and reasonable obligee, would take acting in its own interest desiring to achieve the result and this can include the obligor incurring significant expenditure. "All reasonable endeavours" means that the party should explore all avenues reasonably open to it but is not obliged to disregard its own commercial interests or continue trying to comply if it is clear that all further efforts would be futile. "Reasonable endeavours" means that the party should adopt and pursue one reasonable course of action in order to achieve the result, bearing in mind its own commercial interests and the likelihood of success. This case illustrates that detailed drafting, such as steps that must (or must not) be taken to fulfil the obligation or achieve the objective, can reduce the uncertainty that often surrounds the wide scope of an "all reasonable endeavours" obligation.

1 In *Narandas-Girdhar and another v Bradstock* [2016] EWCA Civ 88.
2 In *Bristol Rovers (1883) Ltd v Sainsbury's Supermarkets Ltd* [2016] EWCA Civ 160.

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A contract can be varied orally or by conduct despite a provision to the contrary

The Court of Appeal[3] held (*obiter* and clarifying inconsistent case law on this point) that a contract containing a clause requiring variation of the contract to be in writing can be varied by an oral agreement or by conduct. The court held that the parties should have freedom to agree whatever terms they choose to undertake and can do so in a document, orally or by conduct. The court acknowledged the difficultly of proving that a contract had been made/varied orally or by conduct and stated that such variation should only be found where the evidence on the balance of probabilities established that such variation had occurred. Be aware, therefore, that a contract may be varied orally or by the conduct of the parties even when it expressly provides that it can only be amended in writing.

Editor Comment:

We still consider that it is advisable to include a no oral variation clause in agreements as one of the judges held that these clauses still have some value, particularly as they may make it more difficult to evidence that both parties intended that what was said or done should alter their written contract.

There have been a number of cases this year which have acted as useful reminders of the importance of parties' conduct and its ability to make or amend contracts. This case was followed in a subsequent Court of Appeal case this year[4] and the courts have also considered shareholders' conduct leading to an amendment of a company's articles of association[5] and parties' conduct constituting acceptance of the terms of a "deal memo" as a binding contract[6].

3 In *Globe Motors, Inc and others v TRW Lucas Varity Electric Steering Ltd and TRW Ltd* [2016] EWCA Civ 396.
4 In *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553.
5 In *The Sherlock Holmes International Society Ltd v Mr John Aidiniantz* [2016] EWHC 1076 (Ch).
6 In *Reveille Independent LLC v Anotech International (UK) Ltd* [2016] EWCA Civ 443.

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Corporate Governance Update

Audit reform: updated FRC guidance on audit committees, changes to the UK Corporate Governance Code and the DTRs

On 17 June 2016, EU legislation[7] was implemented in the UK in relation to statutory audits. This legislation amends the existing EU Statutory Audit Directive and is intended to reflect lessons learned from the 2008 financial crisis and to address weaknesses in the audit system. The new regulation lays down provisions for the audit of public interest entities (companies whose transferrable securities are admitted to trading on a regulated market in the EU, credit institutions and insurance undertakings). Our January 2016 edition of Corporate Update set out the key changes for these companies in detail.

Since January, the FRC has published its updated guidance on audit committees (in April 2016) and announced its related changes to the UK Corporate Governance Code (**Governance Code**) (dated April 2016 and applying to financial years starting on or after 17 June 2016) and the FCA has announced a number of related changes to the DTRs. Companies subject to the Governance Code and/or the DTRs should take the following points into consideration:

- *Audit committee competence:* While the board must continue to satisfy itself that at least one member of the company's audit committee has recent and relevant financial experience, it will also need to satisfy itself that the audit committee as a whole has competence relevant to the sector in which the company operates (amended Governance Code provision C.3.1). This amendment has also been reflected in the DTRs (amended DTR 7.1.1).
- *Audit retendering plans:* The section in companies' annual reports relating to the work of the audit committee should also set out advance notice of any retendering plans for auditors (amended Governance Code provision C.3.8). This overlaps with a separate regulatory requirement[8] for FTSE 350 companies to detail their retendering plans for auditors where they have not completed a competitive tender process for auditors in the last five consecutive financial years.
- *Chairman of the audit committee:* The chairman of the audit committee is required to be independent and to be appointed by the members of the audit committee or the board as a whole (new DTR 7.1.2A). This is consistent with the requirements of the Governance Code that the audit committee be comprised of independent non-executive directors[9].

Editor Comment:

A company with a December year end will not need to report its compliance with the updated Governance Code until 2018. However, in order to ensure that its audit committee satisfies the requirements of amended provision C.3.1 requiring sector competence, the board should assess the composition of its audit committee and, where necessary, take action now. Companies should also take the opportunity to review their audit committee terms of reference to ensure they reflect the updated Governance Code, DTRs and FRC guidance.

The updated FRC guidance on audit committees is available at: https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Guidance-on-Audit-Committees-(2).pdf

The revised Governance Code is available at: https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-April-2016.pdf

The FCA instrument amending the DTRs (2016/40) is available at: https://www.handbook.fca.org.uk/instrument/2016/FCA_2016_40.pdf

7 EU Directive 2014/56/EU and Regulation (EU) No. 537/2014.
8 Part 4 of The Statutory Audit Services for Large Companies Market Investigation (Mandatory Use of Competitive Tender Processes and Audit Committee Responsibilities) Order 2014.
9 Note that for smaller companies, the Governance Code permits the company chairman to be a member (although not the chair of the committee) in addition to the independent non-executive directors, provided he or she was considered independent on appointment (Governance Code provision C.3.1).

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Investment Association letter to boards regarding oversight of profit expectations and dividend policy

In May 2016, the Investment Association (which represents UK investment managers) wrote to the chairs of FTSE companies highlighting its concern about numerous instances where companies have made significant changes to profit expectations, written down the value of assets and/or cut dividends following the appointment of new management. The Investment Association noted that in many cases the reasons for rebasing expectations have been evident for some time but due to insufficient oversight by management, independent directors and/or the audit committee they do not get addressed until the arrival of new management. In response to this issue, the Investment Association announced that, from August 2016, it will "amber top" the re-election of non-executive directors of companies where this situation arises following the appointment of new management.

A copy of this letter is available at: https://www.ivis.co.uk/media/12237/Board-Oversight-Letter.pdf

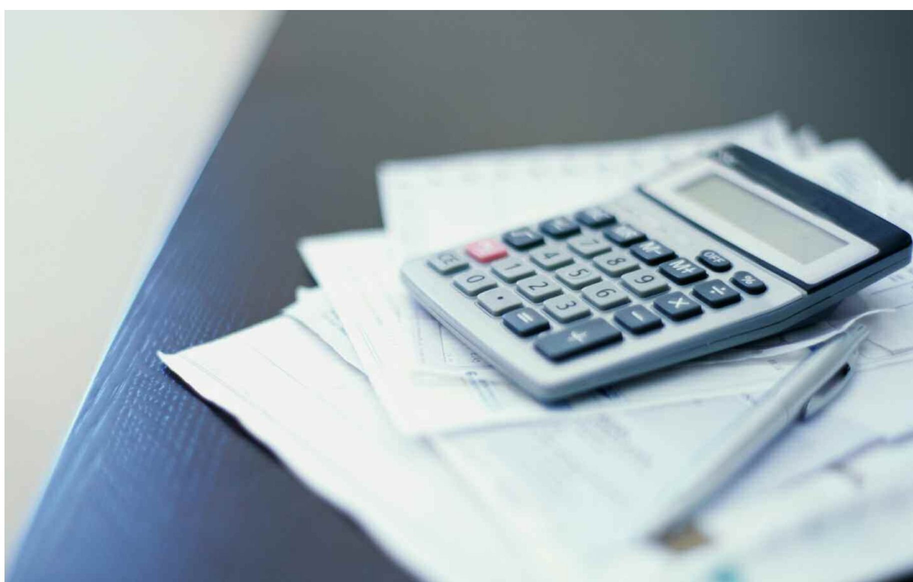
UK board succession planning: FRC feedback

The FRC published a feedback statement in May 2016 on its October 2015 discussion paper on succession planning for executive and non-executive directors of UK boards. The feedback statement details the responses and suggestions for improvement in the six areas covered by the discussion paper: how effective board succession planning is to business strategy and culture; the role of the nomination committee; board evaluation and its contribution to board succession; identifying the internal and external pipeline for executive and non-executive directors; ensuring diversity and the role of institutional investors.

The FRC noted that an active nomination committee is key to promoting effective board succession and stated that nomination committees should consider carefully the future membership of their boards and ensure that this is aligned to the current and future company strategy.

The FRC is now considering publishing nomination committee guidance as part of its revision of the Guidance on Board Effectiveness later this year. For the current reporting season, the FRC will review and analyse nomination committee disclosures and comment on its findings in its 2016 Developments in Corporate Governance and Stewardship Report. The FRC has committed to avoiding further updates to the Governance Code until at least 2019 so no amendments will be made to the Governance Code in this respect.

The FRC's feedback statement is available at: https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Feedback-Statement-Succession-Planning-Discussion.pdf



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Board responsibilities: PRA statement

The Prudential Regulation Authority (**PRA**) issued a supervisory statement (SS5/16) in March 2016 on corporate governance, focusing on board responsibilities, and an accompanying policy statement (PS13/16). The supervisory statement identifies, for the boards of firms regulated by the PRA (ie banks, insurers, designated investment firms, building societies, friendly societies and credit unions etc), the aspects of governance to which the PRA attaches particular importance and to which the PRA may devote particular attention in the course of its supervision.

The statement covers the following areas: the role of the board in setting the firm's strategy and articulating and maintaining a culture of risk awareness and ethical behaviour; the need for a clear and measurable statement of risk appetite, effective oversight of risk management and internal controls; board composition; the roles of executive and non-executive directors and board committees; the knowledge and experience of non-executive directors; the need for management information and transparency and succession planning; the oversight of remuneration by the board; and the governance of subsidiary boards.

The PRA's supervisory statement is available at: http://www.bankofengland.co.uk/pra/Documents/publications/ss/2016/ss516.pdf

The PRA's accompanying policy statement is available at: http://www.bankofengland.co.uk/pra/Documents/publications/ps/2016/ps1316.pdf

Disapplication of pre-emption rights: the Pre-Emption Group's template resolutions

The Pre-Emption Group published a monitoring report in May 2016 looking at the implementation of its Statement of Principles for disapplying pre-emption rights (as revised in 2015). The report shows that the principles were generally adhered to. Having considered the results of its monitoring exercise and investor representatives' views on best practice, it also published template resolutions for companies to use when requesting a disapplication of pre-emption rights.

The template resolution recommends that companies propose two separate resolutions to shareholders to authorise disapplication of pre-emption rights: (i) for up to 5% of the issued ordinary share capital to be used on an unrestricted basis; and (ii) for an additional 5% of issued ordinary share capital to be used for "an acquisition or specified capital investment" as defined by the Statement of Principles.

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The second resolution relating to the additional 5% should only be proposed when appropriate. When the additional 5% is used, companies are expected to disclose the circumstances that have led to its use and describe the consultation process undertaken. For general meetings that occurred after publication of the template resolutions, companies were encouraged to use the resolutions. However, as from August 2016, the Pre-Emption Group expects all companies to use the resolutions.

In July 2016, the Investment Association published a revised version of its share capital management guidelines in which it states that it is supportive of the Pre-emption Group's two separate resolutions and expects any company seeking a disapplication of pre-emption rights equal to 10% of the issued capital to follow the template resolutions. From this August, the Institutional Voting Information Service will "amber top" any company seeking such a disapplication of pre-emption rights and not following the two template resolutions and, from January 2017, it will "red top" any such company.

The Pre-Emption Group's monitoring report is available at: http://www.pre-emptiongroup.org.uk/getmedia/09343697-051a-440c-acd1-dbb3a6ca4d00/PEG-Monitoring-Report.pdf.aspx

The template resolutions are available at: http://www.pre-emptiongroup.org.uk/getmedia/963da194-742f-45b2-84d9-d1ee83b786bb/PEG-Template-resolution-for-disapplication-of-pre-emption-rights.pdf.aspx

The Investment Association's revised share capital management guidelines are available at: https://www.ivis.co.uk/media/12250/Share-Capital-Management-Guidelines-July-2016.pdf

Editor Comment:

Structuring the disapplication of pre-emption rights as two separate resolutions will make it easier for shareholders to vote down the second 5% – it was more difficult for shareholders to vote it down when the disapplication was structured as a single resolution as to do so would leave the company with no ability to issue any shares on a non pre-emptive basis. The board commitment to use the additional 5% for an acquisition or specified capital investment is arguably more binding on the board now that it is written into the resolution – previously that commitment appeared in a note to the disapplication resolution.

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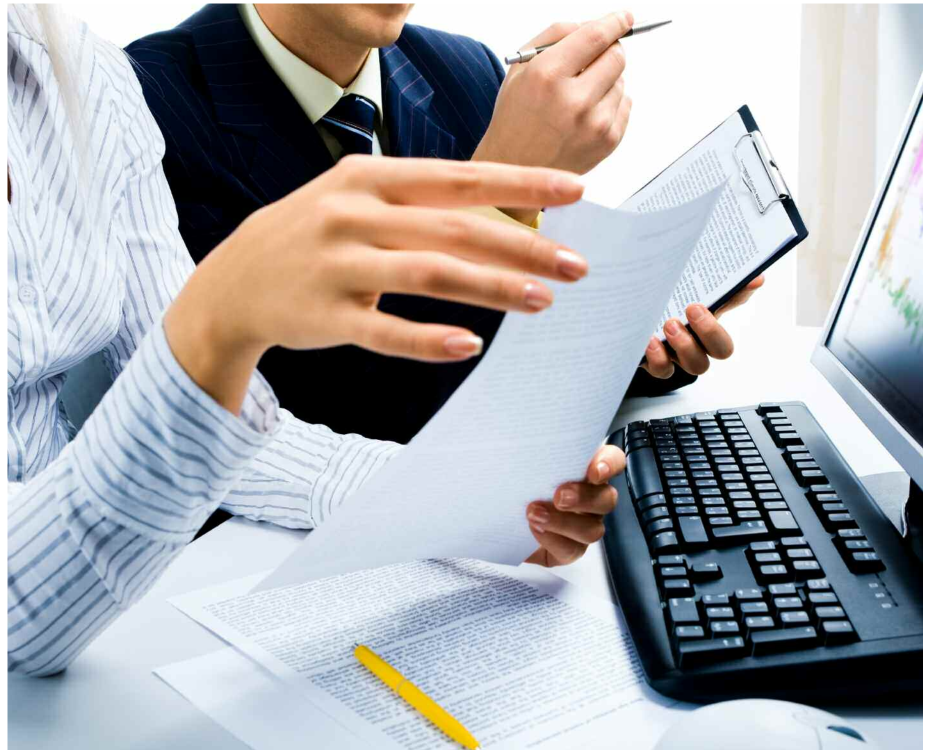
Best practice for preparing minutes of board meetings: ICSA consultation

The Institute of Chartered Secretaries and Administrators (**ICSA**) published a consultation on the practice of minuting board meetings. The consultation was published in May 2016 and closed in June 2016 and, following a review of the responses, ICSA intends to publish guidance on minuting meetings which will reflect the modern market practice on a cross-sectoral basis.

ICSA noted that despite the importance of board minutes, there is very little regulation or formal guidance on minuting board minutes and a variety of practice exists across sectors and business as a whole.

The consultation set out ICSA's views, and sought opinions, on a range of matters regarding minuting board meetings including the principal function of minutes, the role of the company secretary in preparing minutes, the content and style of minutes, the level of detail to be used (eg whether to name individuals, document the reasons for decisions and dissenting views, or include board papers), dealing with directors' conflicts of interest and subsequent access to minutes (eg publishing on websites or access for auditors or regulators).

The ICSA consultation is available at: https://www.icsa.org.uk/assets/files/Policy/Consultations/Consultation-FINAL-16-05-23(1).pdf



Editor Comment:

This consultation paper is a helpful reminder of the importance of board minutes and ICSA's views on the practice of minuting board minutes. In a world of increasing accountability for boards of directors, companies may find that the minutes of their board meetings come under increasing scrutiny. Auditors, some regulators (eg the FCA) and insolvency officeholders are all entitled to inspect board minutes and they may be disclosable in legal proceedings. Company secretaries will want to familiarise themselves with the ICSA guidance on minuting board minutes once it is published later this year.

Gender pay gap reporting: draft regulations published

The Government published the draft Equality Act 2010 (Gender Pay Gap Information) Regulations 2016 in February 2016.

These regulations require private and voluntary sector employers with at least 250 UK employees to publish the difference in mean and median gross hourly pay and in mean bonus pay between male and female employees and the proportion of male and female employees who receive bonuses.

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Employers must also report the number of male and female employees in each quartile of their overall pay range.

The regulations are expected to come into force in October this year. Employers will then have 12 months from 30 April 2017 to publish the required information for the first time and must then publish it annually thereafter. The information must be published on the employer's website and uploaded to a government sponsored website. There is no requirement for this information to be included in annual reports.

The Government is not proposing any enforcement mechanisms or sanctions in relation to these regulations at this stage. However, it has stated that levels of compliance will be closely monitored and it is intending to publish the data it receives with non-compliant employers possibly being identified publicly.

The draft regulations are available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/504398/GPG_consultation_v8.pdf

Editor Comment:

Tackling the gender pay gap (reported by the Office for National Statistics to be 19.2% for UK full and part-time employees last year) has long been a priority of the Government. Following the minimal uptake of the Government's voluntarily reporting initiative in this area, the Government has turned to a mandatory reporting regime.

Employers should make sure their systems are ready to report this data and they may also want to start reviewing the data in order to establish any major gaps which could have implications, for example, on reputation, recruitment and retention, when made public from 2017 onwards.

The data required to be reported is not very detailed and will not take into consideration information such as part-time employees, age or seniority of employees which could significantly affect the gender pay gap – while there is no requirement for additional narrative to accompany the data, companies should consider including context or explanations of the figures when published, particularly where the figures reveal substantial gaps between male and female pay.

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Regulatory Update

Prospectus Directive regime

What is happening with the proposal for a new regime?

In November 2015, the European Commission published its proposals to amend the current regime for the approval of prospectuses. The EU legislative process requires each of the European Council and European Parliament to adopt their own positions on the proposal which will then be discussed and agreed with the Commission in the trilogue process. The Council published its agreed position on the Commission's proposal in June. The Parliament has yet to finalise its proposal although its Economic and Monetary Affairs Committee and Internal Market and Consumer Protection Committee have published a number of draft reports, which indicate some of the Parliament's views on the proposed new regime. The Parliament is likely to finalise its position over the summer and current indications suggest that the trilogue process will begin in September. It is therefore possible that the final text of the new Prospectus Regulation will be published in the Official Journal in the first quarter of 2017.

Implementation could take place as quickly as 12 months following publication in the Official Journal as set out in the Commission's proposal but both the Council and the Parliament seem to be in favour of a 24 month implementation period.

Key areas we expect to be negotiated in the trilogue process are:

- the maintenance of the minimum denomination exemption;
- a differentiated disclosure regime for wholesale debt;
- the requirements relating to length and number of risk factors;
- the definition of home member state; and
- the rules relating to summaries.

It is difficult to predict at this stage what the final agreed text will look like. The position is also muddied due to uncertainty over the likely terms of the UK's exit from the EU. As these proposals take the form of a regulation, it would have direct effect in the UK from the date of implementation, assuming that the UK was still part of the EU at that time. However, if the regulation took direct effect shortly before the UK left the EU, it is unclear what view the UK would take towards requiring compliance with it.

Meanwhile the existing regime continues to evolve...

Although there is a new regime in the pipeline, the existing Prospectus Directive regime continues to evolve. In March, a delegated regulation from ESMA[10] was adopted adding two noteworthy requirements to the current prospectus regime. Issuers and their advisers will now need to be particularly vigilant when dealing with:

- *Advertisements:* If an advertisement becomes inaccurate or misleading, because information in a prospectus has been supplemented, an amended advertisement must be published, highlighting the information that has changed. Issuers will therefore need to monitor where information in advertisements has become

10 Commission Delegated Regulation (EU) 2016/301 of 30 November 2015 supplementing Directive 2003/71/EC of the European Parliament and of the Council with regard to regulatory technical standards for approval and publication of the prospectus and dissemination of advertisements and amending Commission Regulation (EC) No 809/2004.

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out-of-date. This obligation only applies until closing of the offer or after trading on a regulated market has commenced.

- *Speeches, roadshow presentations and Q&A:* Caution will be required to ensure that selective presentation of information or data about the offer to the public or admission to trading on a regulated market, whether in advertisements or elsewhere, does not 'distort' the position described in the prospectus, even where the information is extracted from the prospectus.

First criminal prosecution under s7 of the Bribery Act 2010

The Serious Fraud Office (**SFO**) has ordered the Sweett Group plc (**Sweett**) to pay over £2.25m in penalties after it pleaded guilty to failing to prevent an act of bribery, contrary to section 7(1)(b) of the Bribery Act 2010.

The Bribery Act provides that a commercial organisation is guilty of an offence if a person associated with it (eg employee, agent, associate or subsidiary) bribes another person intending to obtain or retain an advantage in the conduct of business for the commercial organisation. There is a defence available to the commercial organisation if it can prove that it had in place adequate procedures designed to prevent persons associated with it from undertaking such conduct.

The SFO opened a criminal investigation into Sweett in July 2014 relating to suspected bribery in 2014 in the Middle East. The SFO then charged Sweett in December 2015 and Sweett pleaded guilty. The SFO found that between December 2012 and 2015 Sweett had failed to prevent the bribing of Khaled Al Badie by its subsidiary, Cyril Sweett International Ltd. The bribery had been intended to obtain or retain business, and/or an advantage in the conduct of business, for Sweett by securing and retaining a contract with Al Ain Ahlia Insurance Company for project management and cost consulting services in relation to the building of a hotel in Abu Dhabi.

Editor Comment:

This case can be contrasted with the ICBC Standard Bank plc (**Standard Bank**) case in 2015. Standard Bank was also found to have failed to prevent bribery under section 7 of the Bribery Act 2010. However, instead of facing a formal criminal prosecution, Standard Bank entered into the first ever deferred prosecution agreement (**DPA**) with the SFO. The SFO stated that this was due to Standard Bank's high level of cooperation with the SFO. The SFO entered into its second ever DPA with an unnamed company in July 2016 – again this company was found to have failed to prevent bribery under section 7 of the Bribery Act 2010 but to have cooperated fully with the SFO. In this instance, Sweett was found to be uncooperative by the SFO and was therefore prosecuted instead.

The case also highlights the need to ensure appropriate procedures are put in place, particularly when contracting in those jurisdictions considered higher risk, and that such procedures are embedded into the organisation.

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Takeovers Update

The communication and distribution of information and opinions

The Panel on Takeovers and Mergers (the **Panel**) published a response statement on 14 July 2016 (RS 2016/1) following its consultation in February (PCP 2016/1) on the communication and distribution of information and opinions by, or on behalf of, a bidder or target. The amendments to the Takeover Code (the **Code**), introduced as a result of this response statement, will take effect on 12 September 2016.

There have been considerable advances in the use of the internet, social media and other forms of electronic communication since the Code was last amended for the use of electronic communications and websites in 2009. The consultation and subsequent response statement seek to bring the Code up to date in this respect as well as clarifying a number of requirements in the Code on the communication and distribution of information which the Code Committee had identified as unclear or inconsistently applied or interpreted.

What are the changes?

Some of the changes include:

- *New rules on videos and social media:* Under these new rules, videos published by or on behalf of a target or bidder in relation to information or opinions relating to an offer, or the financial performance of a party to an offer, must comprise a director or senior executive reading from a script or participating in a pre-scripted interview. A video may only be published with the Panel's consent and it must be published on a website at the same time as an announcement is made via a RIS in relation to its publication. The rules on videos also apply to webcasts and audio-only communications. Social media can only be used to publish information if the full text has already been published via a RIS or if it has already been published on a website in accordance with the Code.
- *Equality of information to shareholders:* Rule 20.1 (equality of information to shareholders) is substantially amended and extended with the intention of clarifying that the rule applies to "information and opinions relating to an offer or a party to an offer" (ie not just "information about parties to an offer") and providing in greater detail how to satisfy the requirement for such information and opinions to be made equally available to all target shareholders.
- *Bidder/target meetings with shareholders, analysts and brokers:* The current Note 3 on Rule 20.1, in relation to safeguarding meetings between the bidder/target or their respective advisers with shareholders, analysts or brokers, is given greater prominence as a new Rule 20.2 of the Code. Currently such meetings are required to be supervised by a financial adviser/corporate broker and no material new information or significant new opinions may be included in them. The Rule is extended to telephone calls and video conferences. There are also some relaxations to the Rule. These include the possibility of a Panel dispensation for meetings following the announcement of an uncompetitive, recommended, firm offer – for such meetings, a suitably briefed senior representative of the bidder/target could act as a supervisor instead of a financial adviser/corporate broker.

The Panel's consultation paper is available at:
http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/PCP201601.pdf

The Panel's response statement is available at:
http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/RS201601.pdf

Editor Comment:

These reforms bring the Code up to date with the forms of communication that bidders and targets are typically using in the course of a takeover. They also codify the approach that the Panel has been taking in practice in this area. There are substantial amendments to the Code (including the consolidation, deletion and renumbering of several Rules) and the response statement contains a table of origins and destinations to assist with navigation around the new version of the Code.

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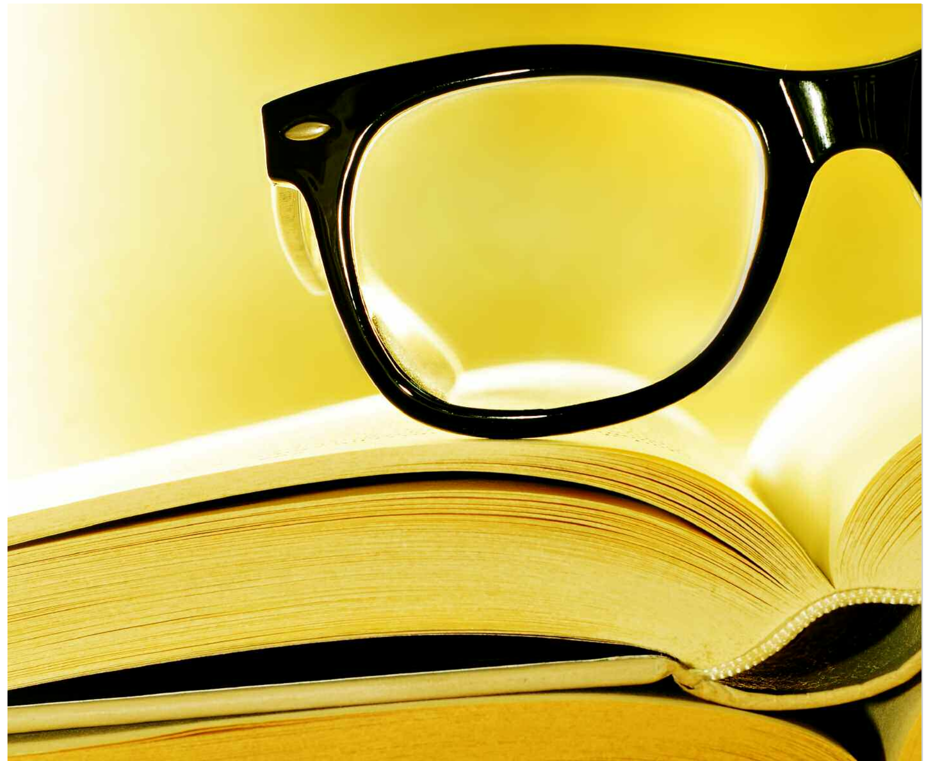
Antitrust Update

Proposed refinements to UK competition law

The Government has published a consultation on a range of proposed reforms to UK competition law. These are, for the most part, refinements to the existing competition law regime, intended to strengthen the impact of the last round of reforms in 2013, to correct oversights in those reforms or to address certain issues that have arisen as a result of them.

Nevertheless, the proposals – which are summarised below – are extensive, covering market investigations, mergers, civil and criminal investigations of antitrust infringements, appeals of decisions of sectoral regulators and competition litigation.



The key proposals are as follows:

- Greater oversight by the Competition and Markets Authority (**CMA**) Board of resources used in phase two merger and market investigations.
- A more streamlined CMA panel, with members required to commit to availability, shorter periods of appointment and the possibility of ad-hoc appointments or inclusion of senior CMA officials. The CMA panel consists of independent experts with business, legal and academic backgrounds who decide (in "inquiry groups" made up of three to five panel members) on phase two merger and market investigations.
- Tighter statutory deadlines for market investigations and possibilities to "revisit" failed remedies.
- Obligations on the CMA to ensure proportionality of merger information requests.
- New powers for the CMA to impose civil fines for breaches of commitments and higher maximum fines for procedural infringements.
- Greater scope for the CMA to incentivise cooperation in criminal cartel proceedings, through its designation as a prosecutor, for the purposes of the criminal cartel offence, under sections 72-74 of the Serious Organised Crime and Police Act 2005.
- Jurisdiction for the Competition Appeal Tribunal (**CAT**) to hear judicial review applications relating to procedural issues in civil investigations and to issue declaratory judgments.
- Introduction of a two month statutory time limit for appeals to the CMA against certain decisions of the Payment Systems Regulator (such as decisions to require granting of access to a payment system and decisions to require disposal of an interest in the operator of a payment system).

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- Correcting anomalies so that the CAT (and not just the High Court) has jurisdiction to hear claims for damages based on antitrust infringements of the European Economic Area Agreement (i.e. those affecting competition in Norway, Iceland and/or Liechtenstein) and so that the Government can make rules governing the supervision by the CAT of warrants to enter premises during competition law investigations.

Following an unusually short consultation exercise, the Government is expected to announce its decision on the proposed reforms shortly, in order that they can be incorporated into the Better Markets Bill for the next Parliamentary session.

The consultation is available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/525462/bis-16-253-options-to-refine-competition-regime.pdf

Editor Comment:

While many of the reforms appear to be broadly sensible, some could have adverse impacts. For instance, allowing ad-hoc experts or senior CMA officials to be appointed to inquiry groups might undermine the prized independence and impartiality of those groups. Revisiting market investigation remedies that are perceived to have failed may cause significant prejudice to legal certainty. Moreover, as the Government recognises, limiting the timescales for phase two market investigations "may not be desirable for carrying out a full diagnosis and proposing remedies", and could simply result in more work being done during or before the phase one market study, with no change to the overall length and burden of investigations.

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