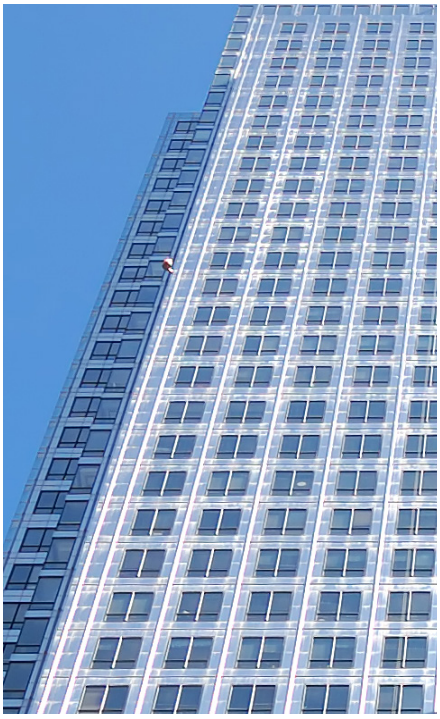
CORPORATE UPDATE JANUARY 2017

Welcome to our January 2017 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.

Six months after the EU Market Abuse Regulation came into force, we look at emerging market practices now that issuers have implemented the regulation into their internal practices and procedures and are operating under the new regime. On a domestic level, we look at the continuing implementation of the Small Business, Enterprise and Employment Act 2015, including the new prompt payment reporting regulations and the effect of the EU Fourth Money Laundering Directive on the regime for the register of people with significant control, as well as recent guidance on electronic signing under English law.

On the corporate governance front, we consider the Green Paper published by the Department for Business, Energy and Industrial Strategy on corporate governance reform. The Green Paper contains proposals for reform around the thorny issue of executive pay, considers options for ensuring wider stakeholder concerns are heard by the board and seeks views on how to improve corporate governance in privately-held businesses.

We also take a look at the first ever "post-offer undertakings" given by a bidder on a takeover offer under the Takeover Code, the Financial Conduct Authority's final report on its investment and corporate banking market study, the lessons to be learnt from the recent record-breaking gun-jumping fine issued by the French Competition Authority and the UK Government's plans to introduce foreign investment rules for critical infrastructure.



No. 1 Law Firm (3rd consecutive year)
Chambers Global 2016, Chambers Top 30

European M&A Legal Adviser of the Year
Mergermarket European Awards 2016

TMT Legal Adviser of the Year
TMT Finance World Awards 2016

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COMPANY LAW UPDATE

The Market Abuse Regime six months on

The Market Abuse Regulation (EU) No 596/2014 (**MAR**) has now been in force for over six months. As market participants become more familiar with MAR and its related implementing and delegated regulations, and further guidance is published by ESMA (and, in some cases, national regulators), some of the initial concerns about how MAR would operate in practice are being laid to rest and we are beginning to see certain market norms emerge. We expect MAR will continue to be a hot topic throughout 2017 as the new regime continues to bed down and the detection, prevention and prosecution of market abuse remain areas of focus for the Financial Conduct Authority (**FCA**). Below, we consider some of the market practices and trends that have emerged since the implementation of MAR in July 2016.

A greater focus on the identification and control of inside information

Undoubtedly, the introduction of MAR has been an opportunity for many issuers to update and refresh their practices and procedures for the identification and handling of inside information. Whilst the definition of what constitutes inside information remains unchanged under the new regime, other changes to the regime, such as a new requirement to notify the regulator where an issuer has delayed the announcement of inside information (and the potential for the regulator to then request a detailed explanation of the circumstances surrounding the delay) have prompted issuers to examine and, in many cases, update their internal procedures relating to the management of inside information. This has included taking action such as formalising the role and function of the "disclosure committee", the body of key executives with responsibility for monitoring the existence of inside information and determining when any such information must be announced. In addition, we have seen issuers adopt a practice of maintaining a "disclosure record", a detailed written register which provides a clear record of when inside information came into existence and who knew what and when. This record will form the basis of any written explanation requested by the FCA following a notification of delayed disclosure of inside information or other request from the regulator for information. In addition, the introduction of MAR has provided an opportunity for many issuers to provide updated training to those employees with access to inside information about the manner in which such information must be handled.

Financial results announcements

As we move into a period where the bulk of listed issuers are beginning to prepare their final year results, the question of whether such results give rise to inside information comes into sharper focus.

Since the implementation of MAR, we have seen a mixed approach from issuers regarding whether financial results should be treated as inside information. Note that where issuers do treat such results as inside information, MAR requires them to include rubric in the announcement to that effect.

Broadly speaking, in the months that followed MAR's implementation, the majority of issuers appeared to take the view that where their interim results were in line with market expectations, those results did not give rise to inside information. However, there were some issuers that took a different view and included the inside information rubric on their interim results even where those results appeared to be in line with market expectations. This may have resulted from an abundance of caution, given issuers were operating under a new market abuse regime. To date, the majority of final year results announcements that are in line with market expectations have not included the inside information rubric, indicating that issuers continue to take the view that where results are in line with market expectations no inside information exists in relation to those results.

As practice develops, and pending any further guidance from the regulators on this area, issuers will need to exercise particular care; each case must be assessed on its facts and the views of brokers and legal advisers should be sought to assist in determining whether any particular development or piece of information should be treated as inside information. It is important to ensure relevant discussions and decisions are properly documented in the event of a future investigation by the FCA. Where information comes to light during the preparation of the final results that indicates that the issuer's results will not be in line with market expectations, then the issuer must take immediate action to investigate such information and its likely impact. If the outcome of that investigation is such that the issuer believes that its results may not be in line with market expectations, then the issuer will need to consider its announcement obligations, including in the context of its due reporting date, the Upper Tribunal's decision[1] in connection with Ian Charles Hannam's appeal against an earlier decision of the FCA and any other relevant factors.

Ability to delay disclosure of inside information

As was the case under the previous market abuse regime, MAR permits issuers to delay the announcement of inside information provided that certain conditions are met: (i) immediate disclosure is likely to prejudice the legitimate interests of the issuer; (ii) delayed disclosure is not likely to mislead the public; and (iii) the issuer must be able to maintain the confidentiality of the information.

In October 2016, ESMA published its final guidelines on the delay in disclosure of inside information (ESMA/2016/1478). These guidelines establish a non-exhaustive list of the legitimate interests of issuers to delay the disclosure of inside information and situations in which delaying disclosure of inside information is likely to mislead the public. In particular, delay is likely to mislead the public in circumstances where:

- the inside information in question is materially different from previous public announcements of the issuer on the subject; or
- the inside information regards the fact that the issuer's financial objectives are not likely to be met, where such objectives were previously publicly announced; or
- the inside information is in contrast with the market's expectations, where such expectations are based on signals that the issuer has previously communicated to the market, such as interviews, roadshows or any other type of communication organised by the issuer or with its approval.

This latter limb has resulted in issuers and their disclosure committees needing to monitor very closely whether, where inside information arises, such information could be said to contrast with signals already given by the issuer to the market.

The FCA is intending to comply with these guidelines and has consulted on amendments to DTR 2.5 (delay in the disclosure of inside information) in order to bring it in line with the ESMA guidelines. As with previous amendments to the DTRs in relation to MAR, the FCA intends to delete material that conflicts with or duplicates the ESMA guidelines and to cross-refer to the ESMA guidelines where appropriate. The consultation closed at the beginning of January 2017 and we expect the amendments to DTR 2.5 to come into effect in the first quarter of this year.

Announcing inside information

As referred to above, where an issuer is announcing inside information to the market it must include rubric to that effect, and include the identity of the person making the notification and their position within the issuer. The form of rubric varies slightly but most announcements include the following wording – "This announcement contains inside information" – which is usually found in a prominent position at the top of the announcement.

Announcements of inside information must be located in an easily identifiable and freely accessible section of the issuer's website for five years. There is no need for a separate website section – these announcements can be included along with the other regulatory announcements but should be in chronological order.

Insider lists

Issuers should have amended the form of their insider lists to ensure that they comply with the prescribed format laid down in the MAR Implementing Regulation (EU) No 347/2016. In addition, they should have updated systems in place to capture the additional information required, such as each insider's date of birth, birth name and personal mobile number. A number of issuers are now using bespoke software solutions to create and update their insider lists.

There is a divergence in approach to permanent insider lists. A permanent insider is someone who has "access at all times to all inside information". This is quite a high bar. Some issuers are taking the view that they have no permanent insiders and instead are drawing up project/event specific lists each time there is clear potential for a new piece of inside information to come

1 [2014] UKUT 0233 (TCC)

into existence, such lists then become insider lists at the time the project or event is considered to have become inside information. Other issuers (often smaller companies with fewer compliance staff) are keeping permanent insider lists which may include the board of directors, the executive committee and the company secretary. Each employee of an issuer on the insider list must provide written acknowledgement of the legal and regulatory duties that being on the insider list entails and the related sanctions – we are seeing some issuers requesting this acknowledgement from all potentially relevant employees (even if they are not an insider at the time) and other issuers refreshing this acknowledgement annually.

Professional advisers are continuing to maintain their own separate insider lists. Issuers should inform advisers when they are sharing inside information with them and check that all relevant adviser engagement letters require advisers to maintain MAR-compliant insider lists. When issuers share inside information with professional advisers who are not likely to be familiar with the requirements of MAR (such as surveyors), we suggest issuers remind such advisers of their obligations under MAR.

One area of confusion that does appear to have arisen under the new regime is that we are seeing some issuers seeking to impose an obligation to put in place and maintain an insider list on counterparties to a transaction with the issuer. Whilst an issuer should put in place confidentiality arrangements with a counterparty, MAR does not require an issuer to impose an obligation on third parties who are not acting on behalf of the issuer to maintain an insider list.

Share dealing codes

Whilst the express requirement in the Listing Rules to put in place a share dealing code was deleted and there is no MAR requirement for issuers to have a share dealing code, given the restrictions in MAR on persons discharging managerial responsibilities (**PDMRs**) dealing during a closed period, the majority of issuers have adopted the ICSA, GC100 and QCA specimen share dealing code or a bespoke version of this. A number of issuers have chosen voluntarily to extend their closed periods beyond the required 30-day period and others have imposed an additional requirement on PDMRs to use best endeavours to prevent those persons closely associated (**PCAs**) with them from themselves dealing during closed periods.

Notification of PDMR transactions

Whilst MAR enables PDMRs and their PCAs to notify transactions in the issuer's securities only once the value of the transactions has exceeded €5,000 in any calendar year, our experience is that many issuers in the UK have ignored this requirement and require PDMRs and their PCAs to notify all transactions in order to avoid the additional administrative burden of having to establish if/when this threshold is reached. However, we understand that this is not the case in all European countries and the Central Bank of Ireland, for example, will not accept notifications under the €5,000 threshold.

The Small Business, Enterprise and Employment Act 2015 – the latest

The Small Business, Enterprise and Employment Act 2015 (**SBEEA 2015**) received royal assent in March 2015 and since then it has been implemented in stages. Over the last few months we have seen the following developments.

EU Fourth Money Laundering Directive (4MLD)

As covered in previous editions of Corporate Update, the SBEEA 2015 (and subsequent statutory instruments) brought in a requirement for certain UK companies, LLPs and Societates Europaeae (**SEs**) to keep a register of people with significant control over them (**PSC register**) from 6 April 2016 and provide this information from 30 June 2016 to the UK Companies House in their first confirmation statement. By 30 June 2017, the PSC register information of all companies, LLPs and SEs in scope should be publicly available at Companies House. This information needs to be checked and confirmed or updated on a yearly basis with every subsequent confirmation statement.

The 4MLD, which needs to be implemented by 26 June 2017, also requires Member States to use a central register to hold information on beneficial ownership for corporate and other legal entities incorporated within their territory. Both HM Treasury and the Department for Business, Energy and Industrial Strategy (**BEIS**) have consulted on what changes need to be made to the PSC register regime in order to bring it into line with the 4MLD. The main points from the consultations are:

- **Broadening the scope of the entities required to keep a PSC register:** The 4MLD requires the central register to hold information for corporate and other legal entities. The PSC register regime currently only applies to companies, LLPs and SEs. The Government has identified other legal entities that should be brought into scope, including Scottish partnerships, Scottish limited partnerships and open-ended investment companies.

- **Requiring companies listed on prescribed markets to keep PSC registers:** The PSC register regime currently exempts all UK companies subject to Chapter 5 of the DTRs from keeping a PSC register (as Chapter 5 already requires them to comply with equivalent disclosure standards). This includes UK companies listed on prescribed markets such as AIM and the ISDX Growth Market. The 4MLD allows an exemption for companies listed on regulated markets (with equivalent disclosure requirements) but does not expressly provide an exemption for companies listed on prescribed markets. The Government therefore may require companies listed on prescribed markets to keep a PSC register.
- **Information held in the central register needs to be current:** PSC register information at Companies House is required to be checked and confirmed or updated at least once every 12 months via the confirmation statement. The Government believes that this may not meet the 4MLD's requirement for the information to be "current". It proposes to introduce a new obligation to update the information at Companies House within six months of any change to an entity's person(s) with significant control, which will apply alongside the confirmation statement. However, we understand that there have been discussions that this filing period will be shorter.

Both consultations have now closed. The responses will be used to draft the regulations necessary to bring the PSC register regime into line with the 4MLD.

Payment practices reporting

The draft regulations on reporting payment practices and performance are now expected to come into force on 6 April 2017 for financial years starting on or after this date, giving effect to section 3 of the SBEEA 2015. 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 regulations will require large companies and LLPs[2] to publish specified information about the payment of their suppliers, including the average time taken to pay supplier invoices. Reporting is expected to be required on a six-monthly basis to a government website. Further guidance on these reporting requirements is expected in early 2017.

Further delay to the ban on corporate directors

The SBEEA 2015 contains a ban on corporate directors that has not yet come into effect. The ban was expected to come into force in October 2016 with a one-year transitional period but we are still waiting for BEIS to confirm the implementation date, together with the list of limited exceptions to the ban.

Electronic signing

The use of electronic signing is becoming increasingly common, particularly in commercial transactions, and we expect this trend to continue. Electronic signatures can take a number of different forms, for example typing a name into a contract or an email, electronically pasting a pre-saved pdf signature into an electronic version of a contract, signing by way of a "click-through" or using a finger, light pen or stylus to sign on a touchscreen. Recent focus has been on cloud-based e-signature platforms, such as DocuSign or Adobe, which are becoming increasingly popular, particularly for executing commercial contracts.

Against this background, a joint working party of The Law Society Company Law Committee and The City of London Law

2 Individual companies and LLPs which exceed two or all of the following thresholds on both of their last balance sheet dates: (i) over £36m annual turnover; (ii) over £18m balance sheet total; and (iii) over 250 employees.

Society Company Law and Financial Law Committees published a note on the execution of a document using an electronic signature including advice from Leading Counsel, Mark Hapgood QC. The purpose of this note is to assist parties who wish to execute commercial contracts under English law using an electronic signature or who wish to enter into a commercial contract under English law with one or more other parties executing that contract using an electronic signature. The note concludes that simple contracts, documents subject to statutory requirements on execution (such as being "in writing" or "signed") and deeds can all be validly executed by electronic signature.

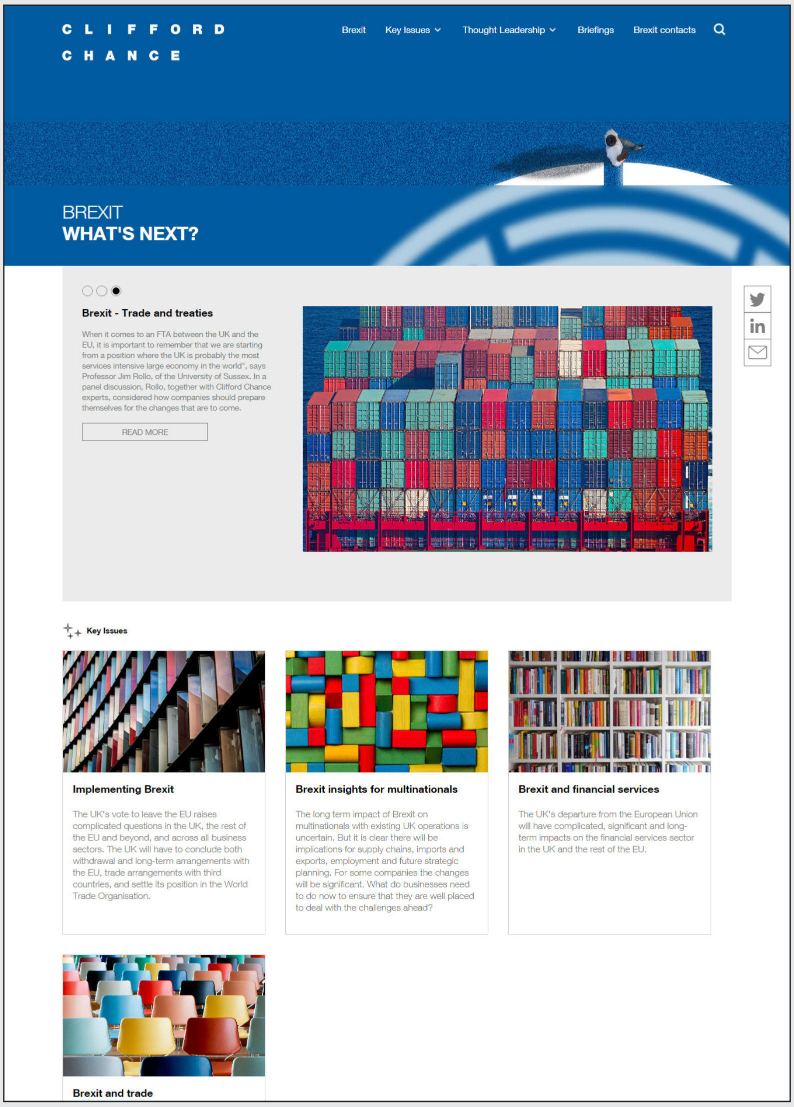
The note sets out the legislative background and a number of other issues for consideration. For example, parties should consider, and may wish to take legal advice on, whether electronic signature is appropriate where the document to be executed must be filed with an authority or registry – currently the Land Registry and the Land Charges Registry require a "wet ink" signature on hard copy documents submitted for registration and HMRC would normally expect a "wet ink" signature on hard copy documents required to be "stamped" for stamp duty. As such, the electronic signature of a document required to be submitted to one of these authorities may not be advisable. Similarly, in circumstances where legal or tax consequences are dependent on the place where a document is physically signed, parties will need to consider what factors might determine where a document signed electronically is deemed to have been signed.

Brexit: What's Next?

The UK's vote to leave the EU raises complicated issues in the UK, the rest of the EU and beyond, and across all business sectors. The long term impact of Brexit on companies with UK operations is uncertain and there are many questions. But it is clear there will be implications for supply chains, imports and exports, employment and future strategic planning. For some companies the changes will be significant. What do businesses need to do now to ensure that they are well placed to deal with the challenges ahead?

Our experts across all legal areas are working together with our UK public policy unit and global trade group to help businesses identify the risks and opportunities that Brexit presents.

We have a growing collection of materials to help you navigate the uncertainty, which you can find on our Brexit hub. If you would like to be included on our distribution list for Brexit materials and events, please let us know: Emily.ReadShaw@cliffordchance.com.



CORPORATE GOVERNANCE UPDATE

Your 2017 AGM and beyond

In December 2016 we published our AGM Update for the 2017 AGM season, which highlights key considerations for listed companies to be aware of as they prepare for their 2017 AGM and move forward into a new financial reporting season. Key areas covered in the update include:

- the hot topic of executive remuneration and the need for many companies to put their remuneration policies to their shareholders for approval this AGM season;
- the Pre-Emption Group's template resolutions for the disapplication of pre-emption rights;
- the increasing trend to include disclosures in annual reports of the impact of the UK's vote to leave the EU and Brexit;
- the gender pay gap reporting regulations and the payment reporting regulations that are expected to come into force in April 2017;
- the draft regulations for new non-financial reporting requirements for certain large undertakings and groups – since our 2017 AGM Update was printed, these regulations have come into force; and
- the recent reviews on diversity on boards: the Hampton-Alexander review on gender diversity and the Parker review on ethnic diversity.

If you have not yet received a copy of our 2017 AGM Update, you can access a copy here.

Green Paper on corporate governance reform

In November 2016, BEIS published a Green Paper on corporate governance reform. The Green Paper focuses on three main themes: (i) executive pay; (ii) strengthening the employee, customer and wider stakeholder voice; and (iii) corporate governance in large, privately-held businesses. BEIS sets out a range of options in respect of each theme and does not have any preferred options at this stage. The consultation closes on 17 February 2017 and we expect many businesses and industry bodies will respond to it.

Executive pay

Executive pay continues to be subject to much scrutiny by, and widespread concern from, the press, the general public and the investor community. Following on from the 2013 executive pay reforms for "quoted companies"[3], the Green Paper consults on a wide range of options to strengthen shareholder influence over director remuneration, increase transparency and simplify and strengthen long-term incentive plans. It invites views on further changes to the UK's executive pay framework for quoted companies in the following five areas:

- increasing shareholder voting and other rights in relation to pay;
- increasing shareholder engagement on pay;
- improving the effectiveness of remuneration committees;
- additional pay disclosure and reporting; and
- better alignment of long-term incentive plans with the long-term interests of companies and shareholders.

A variety of options are offered as ways of addressing these issues, including giving shareholders a binding vote on some or all elements of pay and/or the remuneration report, requiring disclosure of fund managers' AGM voting records and requiring the remuneration committee to consult shareholders and the wider workforce in advance of preparing the remuneration policy – see our 2017 AGM Update for further details.

The Pensions and Lifetime Savings Association published a revised version of its Corporate Governance Policy and Voting Guidelines this January, reflecting the general concerns on executive pay and the need for more accountability on pay packages.

Strengthening the employee, customer and wider stakeholder voice

UK company law recognises the importance of wider stakeholder interests: directors have a statutory duty to promote the success of the company for the benefit of the members as a whole and in doing so must have regard (amongst other matters) to a number of

3 UK-registered companies whose equity share capital is: (i) included on the Official List of the London Stock Exchange; (ii) officially listed in an EEA state; or (iii) admitted to trading on the NYSE or Nasdaq.

other stakeholders and wider issues, including employees, suppliers and customers (s.172(1) Companies Act 2006). In addition, the purpose of a company's annual strategic report is to inform a company's shareholders and help them assess how the directors have discharged this statutory duty.

Having initially attracted much press attention with the idea of putting workers on company boards, BEIS has backtracked from this option, recognising that the UK unitary board structure does not lend itself well to employee representative directors (unlike other European countries, such as Germany, where a two-tier board system operates with worker representatives sitting on the supervisory board). There are a number of issues with employees as directors on UK unitary boards, including the fact that all directors have the same directors' duties – an employee representative director would be constrained by the overriding statutory directors' duty to promote the success of the company and unable to put the interests of employees ahead of this duty and he/she would also be bound by the same rules of confidentiality as the other directors, limiting how much he/she could report back to the employees.

The Green Paper instead suggests a number of options to strengthen the voice of employees, customers and other interested parties at boardroom level. These options could work in combination and could be implemented by legislation, amendments to the Corporate Governance Code or an industry-led, voluntary approach. The options include: (i) creating stakeholder advisory panels (comprising employees/suppliers etc) that could provide views directly to the board; (ii) designating existing non-executive directors to provide a voice for key interested stakeholder groups to ensure the board hears the voices of key stakeholders; and/or (iii) strengthening reporting requirements around directors' duties under s.172 Companies Act 2006. The FRC, in its response to the Green Paper, has highlighted its intention to amend the Corporate Governance Code to require companies to disclose in their annual report how they have taken into account the interests of stakeholders.

The Institute of Chartered Secretaries and Administrators (**ICSA**) and the Investment Association announced, in January 2017, that they intend to identify best practice and produce procedural guidance to assist boards of directors with understanding and engaging with their employees and other stakeholders. The guidance is expected to be published in the second quarter of 2017.

Corporate governance in large privately-held businesses

The UK's corporate governance and reporting standards are largely focused on public companies (in particular, the Corporate Governance Code followed by premium listed companies and the QCA's Corporate Governance Code followed by most AIM-listed companies). However, there are approximately 2,500 private companies and 90 LLPs in the UK with more than 1,000 employees (according to the Green Paper) – they are not subject to the same corporate governance and reporting standards as public companies, even though the consequences of their failure can be very severe for other stakeholders (such as employees, suppliers, customers and pension funds). The Green Paper suggests applying the Corporate Governance Code more widely to cover large, privately-held businesses (although it recognises that, as the Corporate Governance Code is written for listed companies, some of the provisions will not apply to private businesses) or developing a separate governance code for such businesses. It also suggests applying reporting standards on the basis of size of the entity, rather than its legal form. The Government has already started adopting this approach with some of the more recent reporting requirements being drafted in this way, such as the requirements for a modern slavery statement (triggered by size of turnover), reporting on gender pay gaps (triggered by number of employees) or payment practices (triggered by turnover, balance sheet size or number of employees).

In its response to the Green Paper, the FRC has already indicated its proposal that it should take forward the development of a governance code for large private companies.

Editor Comment:

A crackdown on corporate governance and executive pay were high on Theresa May's agenda in 2016. Her promises to "get tough on irresponsible behaviour in big business" came in the wake of the failings of Sports Direct and BHS. This Green Paper is not as tough as the promises that preceded it – it presents a wide range of options without going into very much detail on practicalities or implementation. There will be no requirements for workers to be appointed to boards, binding votes on remuneration reports are just one of a number of options and no large-scale executive pay reform is anticipated. However, whilst businesses may be reassured to see that changes in legislation or voluntary governance codes are not imminent, there is no doubt this is a key area of focus for the Government and that changes are on the horizon.

ICSA guidance on board minutes

Following a consultation and conference earlier in 2016, ICSA published a new guidance note on minute taking in September 2016 (available to download by ICSA members on ICSA's website). ICSA noted that despite the importance of board minutes, there is very little regulation or formal guidance on minuting board meetings and a variety of practice exists across sectors and business as a whole. Recognising there is "no one-size fits all approach for minute writing", this guidance note is principles-based rather than prescriptive. It contains guidance on issues that drafters may face, the risks of certain practices and common pitfalls, and addresses a range of areas, including 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 guidance note will be helpful for company secretaries and anyone who regularly drafts board minutes.

FRC changes and publications

Corporate culture

In July 2016, the Financial Reporting Council (**FRC**) published the results of its study, carried out in collaboration with a number of other bodies, on the relationship between corporate culture and long-term business and economic success in the UK. This report aims to stimulate thinking around the role of boards in relation to corporate culture and encourage boards to reflect on what they are currently doing. The FRC now intends to review its Guidance on Board Effectiveness (last updated in March 2011) taking into account feedback it receives on this report – we expect the FRC to suggest amendments to this guidance, which relates primarily to sections A (Leadership) and B (Effectiveness) of the Corporate Governance Code, this year.

Corporate reporting

In October 2016, the FRC consulted on its revised operating procedures for reviewing corporate reporting. The FRC's Conduct Committee reviews companies' published reports and accounts to monitor and enforce (through the courts and the FCA) accounting and reporting requirements. Its review process is undertaken in accordance with these operating procedures. The changes to its operating procedures were driven in part by a demand from stakeholders (particularly investors) for more transparency of the review process and its outcomes. To address this, the FRC is planning to publish lists of companies whose accounts and reports have been the subject of a review by the FRC, where there has been communication with the company and where the case has closed – it intends to start publishing lists of closed cases in 2017, beginning with December 2015 reporters.

In December 2016, the FRC launched a consultation on corporate reporting research activities which closes in March 2017. The purpose of the FRC's corporate reporting research activities is to identify and assess opportunities for improving the quality of financial reporting. This consultation seeks to obtain the views of FRC stakeholders on the corporate reporting issues that the FRC should consider researching in the immediate future.

Also in December 2016, the FRC's Financial Reporting Lab published an implementation study entitled Disclosure of Dividends: Policy and Practice. This study follows on from the Lab's study on dividend disclosures in

November 2015. It summarises its findings in November 2015, shows how practice is changing (based on its review of dividend disclosures in 120 annual reports of FTSE 350 companies published between December 2015 and July 2016) and gives examples of good practice (for example, where a company defines its dividend strategy by reference to a payout ratio, there should be clarity on the basis and calculation of the ratio) and areas for further improvement. Following its review of these 120 annual reports, the Lab notes that it is encouraged by the enhanced disclosure on dividends made by 28 companies. However, it notes that there is still a large number of companies that might benefit from implementing the Lab's findings, thereby improving their communication with investors.

Annual report on corporate governance and stewardship

In January 2017, the FRC published its annual report Developments in Corporate Governance and Stewardship 2016. The report gives an assessment of current corporate governance and stewardship in the UK, reports on the quality of compliance with, and reporting against, the Corporate Governance Code and the Stewardship Code, details the FRC's findings on the quality of engagement between companies and shareholders and indicates where the FRC would like to see changes in corporate governance behaviour or reporting going forward.

REGULATORY UPDATE

FCA fines Cenkos Securities for breaches of rules on provision of sponsor services

In August 2016, Cenkos Securities plc (**Cenkos**), an approved sponsor and a nominated adviser for AIM, was fined £530,500 by the FCA for breaches of the Listing Rules in relation to its provisions of sponsor services. This fine would have been £757,800 but was discounted by 30% on the basis that Cenkos agreed to settle at an early stage with the FCA.

Cenkos was fined because it failed to put in place adequate systems and controls to ensure appropriate oversight of its sponsor services business and to ensure that its deal teams were adequately supervised when carrying out sponsor services mandates. These issues crystallised when Cenkos acted as sponsor for Quindell plc (the insurance outsourcing firm) in connection with its failed attempt to move from AIM to a Premium Listing on the LSE's Main Market. The FCA held that Cenkos had represented that its client was eligible for a Premium Listing when it had not carried out adequate due diligence to support its submissions. The fine was imposed for breaches of LR 8.3.3R (sponsor to act with due care and skill), LR 8.3.1AR (sponsor to take reasonable steps to ensure communication and information provided to the FCA is, to the best of its knowledge and belief, accurate and complete in all material respects and to provide the FCA with any further information that materially affects the accuracy or completeness of previous information) and LR 8.6.6R (failure to comply with the continuing obligations for sponsors).

Editor Comment:

The role the sponsor plays in ensuring the integrity of the premium listed equity market by providing expert guidance to issuers and providing assurances to the regulator is seen by the FCA as crucial. This fine follows a £231,000 fine issued by the FCA in 2015 to Execution Noble & Company Limited for failings as a sponsor. This latest fine serves as a warning to all providers of sponsor services to ensure that their internal sponsor processes, systems and procedures are watertight.

New regulated information filing requirements

In December 2016, the FCA issued its quarterly consultation, CP16/39, including changes to DTR 6.2 that on implementation, will require issuers to obtain a Legal Entity Identifier (**LEI**) in order to file regulated information.

Under DTR 6.2, where an issuer discloses regulated information (for example, information required to be notified to the market pursuant to the Market Abuse Regulation, the Listing Rules or the DTRs), it must also file that information with the FCA.

DTR 6.2 applies to issuers with transferable securities admitted to trading on a regulated market and whose home state is the UK. UK companies with equity admitted to trading on a regulated market in the EU will therefore be subject to this requirement. Other listed issuers that are required by the Listing Rules to comply with DTRs 4, 5 and 6 as if they were an issuer for the purposes of the DTRs will also need to comply with this new requirement.

The FCA is proposing to add a new rule to DTR 6.2 to require issuers to supply a LEI when they file regulated information with the FCA. Issuers will also be required, when filing regulated information, to categorise it using set classes and sub-classes of information (which will be set out in DTR 6 Annex 1R) – these will distinguish between periodic regulated information (e.g. annual reports) and ongoing financial information (e.g. DTR 5 disclosure).

What is a LEI?

A LEI is a 20 character reference code to uniquely identify legally distinct entities that engage in financial transactions.
The issuer itself must apply for a LEI through an authorised local operating unit. For the UK, this will be the London Stock Exchange: *http://www.lseg.com/LEI*

Why is a LEI needed?

This is part of a development to ensure that regulated information is more easily accessible and searchable. Under amendments to the Transparency Directive, ESMA is required to set up a web-based portal (the **EEAP**) by 1 January 2018 through which users will be able to search for regulated information via the official appointed mechanisms (**OAM**). Typically, the competent authorities have been designated OAMs and are required to store regulated information. In the UK, the National Storage Mechanism is the OAM. The obligation is on the OAM to ensure that it uses a LEI for all issuers as of 1 January 2017 with the intention that once the EEAP goes live the previous year's regulated information will be fully searchable.

Timing

CP16/39 was published on 2 December and the proposals described above are the subject of a short one-month consultation period. Whilst the rule changes did not come into effect on the proposed implementation date of 1 January 2017, issuers may now provide LEIs and classify regulated information when they file it with the FCA. Even though the regulatory obligation on issuers to send LEIs or classify regulated information will not apply until the proposed rule comes into effect, the FCA now encourages issuers to do so as it will ensure that regulated information which they file will be searchable through the EEAP when it becomes operational.

FCA publishes final report on investment and corporate banking market study

The FCA has published the findings of its review of the investment and corporate banking market which concludes that, while many clients feel well served by primary capital market services, a targeted package of remedies is required to encourage competition, particularly for smaller clients. The FCA is also continuing to look at how the IPO process can be improved.

Background

A market study was launched in May 2015 following the FCA's review of competition in the wholesale sector in 2014. The study covered debt and equity capital markets, mergers and acquisitions, and acquisition financing (primary market) services carried out in the UK. Links with related services such as corporate lending and broking, and ancillary services, were also in scope.

The FCA focused on (i) the choice of banks and advisers faced by clients

when selecting services, (ii) transparency, and (iii) cross-selling, bundling and cross-subsidisation. The FCA's final report, published in October 2016, confirms the findings set out in the FCA's interim report, published in April 2016.

Choice and cross-subsidies

The FCA's analysis indicated that most, particularly larger, clients are well served by banks and advisers. However, the FCA considered that under the universal banking model, lending and broking services are usually provided at a low rate of return or below cost in exchange for more lucrative primary market transactional business. The FCA cited concerns that:

- clients may not always be able to award primary bank mandates to the bank that best suits their needs;
- it is difficult for new entrants to break into primary market services without also offering lending and/or broking services; and
- banks seek to use contractual provisions, such as right of first refusal and right to act clauses in engagement letters, to restrict a client's choice in future transactions.

Following its interim findings, the FCA gathered further evidence on the effects and benefits of restrictive contractual provisions, however on balance the FCA has decided that there is no justification for continuing to allow the provisions.

League tables

The FCA considered that certain practices employed by banks can make league tables misleading and reduce a client's ability to compare providers. It noted, for example, that some banks carry out loss-making transactions purely to generate a higher position in league tables, and many banks routinely present league tables to clients in a way that inflates their own position.

The IPO process

The FCA cited concerns that the 'blackout period' between publication of research by syndicate banks and circulation of the pathfinder prospectus, combined with lack of access to the issuer's management, leaves analysts from independent research providers with little or no information. As such, the diversity of information available to investors during the investor period is limited. The FCA considered these concerns in a separate discussion paper published at the time of its interim report, and plans to publish a further consultation paper with proposals to address its concerns in early 2017. You can read about the FCA's proposals on reform of the IPO process in our briefing FCA opens debate on reform of the UK equity IPO process.

Allocation of shares in IPO book-building

The FCA identified the potential for conflicts of interest to arise in the IPO allocation of shares, as banks may seek to reward favoured investor clients where this is not necessarily in the issuing client's interest. The FCA's analysis showed that IPO allocations are skewed towards buy-side investors from whom banks derive greater revenues from other business lines (for example, trading commission). The FCA also found some allocation policies and practices which are potentially not consistent with its existing guidance or the relevant requirements in the MiFID II delegated regulations.

Remedies

In order to address its concerns, the FCA has developed a targeted package of remedies:

- Banning banks from using restrictive contractual provisions. The FCA has published a separate consultation paper alongside its final report setting out its proposals for banning such provisions. Depending on responses to the consultation paper, the FCA expects to publish the final rules in early 2017.
- Ending league table misrepresentation in banks' pitches to clients. The FCA is working with the British Banking Association and Association for Financial Markets in Europe so that they can develop and adopt industry guidelines to improve the way in which banks present this information to clients.
- Removing incentives for loss-making trades to climb league tables. The FCA has asked league table providers to review their recognition criteria so as to reduce the incentives for banks to undertake these league table trades.
- Supervisory programme for IPO allocations. The FCA will carry out supervisory work in the run-up to the implementation of MiFID II with firms where it has identified shortcomings in their allocation policies or a skew in their allocation practices.
- Revised IPO process. The FCA is continuing to consult on and develop changes to the IPO process and, as noted above, expects to publish a further consultation paper with policy proposals in early 2017.

Editor Comment:

At the time of its interim report, the FCA emphasised the need for any remedies to be proportionate and did not consider that widespread or "highly interventionist" measures, such as separation of lending and transactional services, would be warranted.

The FCA's final report confirms its interim findings as well as the proposals on remedies set out in its interim report. The FCA's Director of Strategy and Competition has stated that the FCA has developed a package of remedies designed to address the problems it has identified, and this sends a signal that it expects firms to compete on their merits.

While the remedies appear measured, the FCA's final conclusions and remedies are awaited in relation to the ban on restrictive contractual provisions and the IPO process.

Market participants should also bear in mind the potential for individual enforcement action arising from FCA market studies. This recently occurred with the issuance of two "on notice letters" to firms in respect of specific competition law infringement concerns identified during the course of the FCA's retirement income study.

TAKEOVERS UPDATE

Softbank gives first-ever post-offer undertaking

The first ever post-offer undertakings, introduced into the Takeover Code in 2014 (following Pfizer's failed offer for AstraZeneca), were given by Japanese company, SoftBank, in relation to its £24bn takeover offer for UK technology company, ARM Holdings plc, in the summer of 2016.

A post-offer undertaking is a statement made by the bidder or target in any document/announcement/information it publishes committing it to take (or not take) a particular course of action after the end of the offer period. Consent of the Takeover Panel (**Panel**) is required for such undertakings, strict disclosure requirements apply and the party making the statement will be bound by it (unless an express qualification or condition applies and the Panel consents to the invocation of such qualification/condition). The Panel has powers to monitor compliance with post-offer undertakings and can require written reports and/or the appointment of an independent supervisor to monitor compliance. The undertakings are enforceable by the Panel and, ultimately, through the Courts.

Until now, bidders elected to make post-offer intention statements under Rule 19.6 (previously Rule 19.8) rather than enter into post-offer undertakings under Rule 19.5 (previously Rule 19.7). A post-offer intention statement is a statement regarding the action that the bidder or target *intends* to take (or not take) after the end of the offer period and it must be (i) an accurate statement of that party's intention at the time that it is made, and (ii) made on reasonable grounds. If in the twelve months following the date on which the post-offer intention statement takes effect, a party decides to take a different course of action (or non-action) to that which it stated that it intended to take, it must consult the Panel. The Panel will generally require an announcement from that party describing the course of action it has taken (or not taken) and explaining the party's reasons for this.

Softbank's post-offer undertakings relate to the five-year period following completion of its acquisition of ARM and include commitments to (i) maintain ARM's global headquarters in Cambridge, (ii) at least double the number of ARM's UK employees, (iii) increase the number of ARM's non-UK employees, and (iv) maintain the proportion of ARM's technical employees to non-technical employees "broadly in line with historical trends experienced by ARM". Further detail, including historical data, was given in the scheme document published by Softbank to assist with the interpretation of the undertakings relating to the UK employees and technical and non-technical employees.

Editor Comment:

Coming shortly after the UK's vote in June 2016 to leave the EU, the Chancellor of the Exchequer hailed the takeover of ARM Holdings as a sign that the "UK has lost none of its allure to global investors – Britain is open for business". However, the deal was not without its critics, who were concerned that a strategic British business was being sold to a foreign investor without due consideration of the wider national interest – we expect these undertakings were entered into in part to address these concerns. Undoubtedly, no bidder/target would enter into a post-offer undertaking lightly, given that it will be tied into a future course of action, with the threat of Panel intervention, and ultimately, sanction by the Courts for non-compliance. However, in certain circumstances, we do anticipate some bidders employing post offer undertakings as a tool to both gain support and address concerns in respect of takeover offers, particularly against the backdrop of the Government's renewed focus on protecting British industry from foreign takeovers (see the *Antitrust Update* below).

Cold-shouldering by the Panel

In January 2017, the Panel published a rare statement (2017/1) cold-shouldering two individuals for a breach of the Takeover Code. This is the most serious disciplinary power exercisable by the Panel and as such has only been used twice before in the Panel's history. It involves the Panel declaring the offending person to be a person who, in the opinion of the Panel, is not likely to comply with the Takeover Code. While the sanction is in effect, banks, brokers and other members of certain professional bodies, including any FCA-regulated entity (see the FCA's statement in this respect), are obliged not to act for that person on a transaction subject to the Takeover Code.

The two individuals, Bob Morton and John Garner, were found to have breached section 9(a) of the Introduction to the Takeover Code – the rules for interactions with the Panel requiring people to act in an open and cooperative way with the Panel and not to provide incorrect, incomplete or misleading information to the Panel. Mr Morton and Mr Garner were found to have repeatedly and systematically lied to the Panel during the Panel's investigation into a potential breach by Mr Morton under Rule 9 of the Takeover Code. Mr Morton's dishonesty in his dealings with the Panel was found to be "particularly sustained and serious", especially given that he had been disciplined on three previous occasions for breaches of the Takeover Code. Mr Garner was found to have collaborated with Mr Morton in order to mislead the Panel (including by signing and dishonestly backdating a promissory note acknowledging a fictitious transaction and providing it to the Panel in an attempt to mislead it). Mr Morton is subject to this sanction for six years and Mr Garner for two years.

ANTITRUST UPDATE

Record-breaking gun-jumping fine

The French Competition Authority (**FCA**) has issued a landmark decision on gun-jumping: a world record fine of €80 million in the first case where early implementation of a concentration prior to merger clearance has been sanctioned in France. The FCA imposed the fine in November 2016 on Altice Luxembourg and SFR Group for early implementation of a concentration prior to merger clearance ("gun-jumping") in relation to two mergers involving telecom operators: the acquisition by Altice (through its subsidiary Numericable) of (i) the SFR Group and (ii) OTL.

The FCA decision

The FCA found that, although the transactions were not formally completed prior to clearance (i.e. ownership of the assets had not been transferred), Altice effectively started exercising decisive influence over SFR and OTL before antitrust clearances had been obtained. The FCA found that this had occurred in three different ways:

- Altice had interfered with SFR and OTL's management since a number of strategic decisions of SFR/ OTL became subject to Altice's approval or influence, including negotiation of a network-sharing agreement, the duration of a promotional campaign and participation in a tender for the development of fibre optics. Altice's influence over some of the relevant decisions was expressly envisaged in the corporate documentation relating to the acquisition of OTL and, in addition, Altice and SFR had exchanged a significant amount of commercially sensitive information, which was made available to senior management, in order to prepare for the implementation of the transaction before clearance was granted;
- Altice and SFR had coordinated their strategies in advance of the merger decision. In particular, SFR and Altice closely coordinated in preparing the launch of a new range of high-speed broadband offers, on aspects such as the connection of SFR shops to Altice's Numericable network and adjustments to internet boxes. This coordination was considered to breach the prohibition on implementation despite the fact that the relevant offers were in fact launched shortly after obtaining clearance. SFR and Altice also coordinated their offers in the context of the acquisition of OTL and shared information on the price to be offered by SFR (which was at the time itself considering the acquisition of OTL); and
- Altice's very close monitoring of OTL's economic performance through a mechanism of weekly reporting resembled, in the FCA's view, "the monitoring that a controlling shareholder would undertake".

This latter point merits particular attention and raises the question of where the line should be drawn between generally accepted monitoring of the target's economic performance in order to preserve its value during the acquisition process, and excessively close monitoring which amounts to gun-jumping.

Editor Comment:

This is the first decision by the FCA regarding the practical implementation of a transaction before authorisation has been granted. It is also the highest reported gun-jumping fine that has ever been imposed by any competition authority (and would have been even higher had the parties not agreed to settle the case and refrain from challenging the FCA's decision).

This decision highlights the need for caution during the interim period between notification and closing. The risk of gun-jumping fines should be taken into account when considering the scope of any provisions in the transaction documents that are designed to preserve the target's value prior to closing, such as restrictions on the target's pre-closing conduct, and any corresponding rights of information and/or consultation for the buyer. This holds even more true for deals involving multi-jurisdictional merger control requirements, as other competition authorities across the globe are showing a renewed interest in "gun-jumping" or early implementation of transactions which are subject to a suspensory merger control review.

UK to introduce foreign investment rules for critical infrastructure

The Government will significantly reform its approach to the ownership and control of critical infrastructure to ensure that the national security implications of foreign ownership are scrutinised. This will include a review of the public interest regime in the Enterprise Act 2002 and the introduction of a national security requirement for the continuing government approval of the ownership and control of critical infrastructure.

The announcement was made in the context of the Government's decision to proceed with measures to support the construction of the new nuclear power station at Hinkley Point C (**HPC**), which was taken on the basis of confirmation that the Government will be able to prevent the sale of EDF's controlling stake prior to the completion of construction, without the prior notification and agreement of ministers.

By the time the HPC plant is operational, the Government plans to have a new foreign investment regime in place, under the Enterprise Act 2002, which would provide the Government with the powers to intervene in the sale of EDF's stake. Specifically in relation to future new nuclear power stations, there will also be special share arrangements and new requirements will be introduced to require developers or operators of nuclear sites to provide notice of changes of ownership to the Office for Nuclear Regulation. These new arrangements appear to place multiple overlapping approval requirements on developers of new nuclear power stations. The implications for other types of critical infrastructure are as yet unclear.

Dawn of a new industrial strategy?

The Government has stated that the planned changes will bring the UK's rules on the ownership and control of critical infrastructure into line with other major economies. However, it is not yet clear how far-ranging the changes will be in practice or whether they will be limited to national security issues. The Prime Minister has previously suggested that the UK should have a "clear industrial strategy" which would not automatically stop the sale of British firms to foreign entities, but would provide the Government with powers to step in to "defend a sector" that is strategically important to the UK.

It is likely that the Government will implement the new rules on foreign ownership of critical infrastructure through an expansion of the public interest considerations under the Enterprise Act 2002. It is as yet unclear how the new public interest test will be defined and which government department will advise the Secretary of State on national security issues in relation to critical infrastructure.

The Government already has certain powers to influence foreign takeovers. It can issue intervention notices under the Enterprise Act 2002 on grounds of national security (to date, this has been limited to mergers in the defence sector) or public interest issues relating to the media. It also has national security powers under the Industry Act 1975 (which have never been used), golden share arrangements in a small number of companies (such as BAE, Rolls-Royce and NATS) and can seek post-offer undertakings from bidders that are subject to the Takeover Code (such as those offered by Softbank in connection with its acquisition of ARM Holdings plc – see the *Takeovers Update* above for further information).

Given the existence of these powers and the historical reluctance of the Government to exercise them, a real question is whether the announcement heralds a shift in government policy towards foreign investment. The Government has been at pains to point out that "the UK will remain one of the most open economies in the world" but has sought to provide reassurance to the public that foreign direct investment "works in the country's best interests". It is as yet unclear how this will be objectively assessed.

While the UK remains part of the EU, foreign investors will be able to take a significant degree of comfort from the fact that EU law restricts the UK's ability to limit free movement of capital and foreign direct investment, both from other EU countries, and countries outside the EU. However, while EU law imposes significant constraints on the ability of EU member states to adopt foreign investment rules, it does not preclude it.

In designing the new regime for critical infrastructure, the Government will also need to consider WTO rules and other international treaties which apply to the UK, such as the Energy Charter Treaty and bilateral investment treaties. It will also need to consider the likely terms of any future trade agreements it enters into with the EU and other countries.

Further details will become available when the Government publishes its review of the public interest regime in the Enterprise Act 2002. The Prime Minister stated on 24 January 2017 that a formal consultation on the proposed changes will be published "in due course".

CMA proposal to increase the number of mergers that are treated as de minimis

The UK Competition and Markets Authority (**CMA**) has a duty to refer mergers for an in-depth, phase 2 investigation if they could lead to a substantial lessening of competition in the UK. However, there is an exception to this duty if the CMA believes that the relevant market in which the parties operate is of insufficient importance (the "de minimis" exception). This exception is designed to avoid investigations where the costs involved would be disproportionate to the size of the market concerned.

The CMA is consulting on proposed changes to the guidance that explains how it applies the de minimis exception. The changes would raise the threshold for markets that are generally considered as sufficiently important to justify a merger reference to above £15 million from the current £10 million. It also proposes changing the figure for markets that are generally considered de minims from below £3 million to below £5 million. Where the size of the market is between these two thresholds, the CMA will continue to assess whether the expected harm resulting from the merger would be greater than the cost of an investigation.

The CMA expects that the changes will reduce the number of mergers that are subject to investigations, including those subject to initial phase 1 examination. However, the new guidance would not alter the substance of the way that the CMA exercises its discretion to apply the de minimis exception to mergers falling below the relevant thresholds. Consequently, even when it is accepted that a merger affects only de miminis markets, the CMA may still insist on remedies as a condition of refraining from a Phase 2 investigation (provided a 'clear cut' solution to the competition concern is available) and may decide not to apply the exception in certain circumstances (e.g. where the merger is potentially replicable across a number of similar markets in a particular sector).

The consultation is open until 13 February 2017.

European Commission invites comments on possible changes to its merger control rules

In October 2016, the European Commission (**EC**) launched a public consultation on several procedural and jurisdictional aspects of EU merger control, including the possible introduction of filing requirements based on transaction value and block exemptions from the filing obligation for certain types of transaction.

The consultation aims to assess:

- the treatment of certain categories of cases that are currently subject to the EC's simplified procedure;
- the possibility of introducing a "transaction value" threshold in order to capture highly valued acquisitions of target companies that have not yet generated substantial revenue; and
- the functioning of the case referral mechanisms and certain technical aspects of the framework for the assessment of mergers.

Proposals that were included in the 2014 White Paper – to extend the jurisdiction of the EU Merger Regulation to cover acquisitions of non-controlling minority interests – are not included in the current consultation. While not expressly stated in the consultation, it is almost certain that these proposals

Editor Comment:

That the CMA can review mergers due to concerns in markets that are entirely insignificant is a common source of frustration for merging parties, so any proposal to expand the scope of the de minimis exception is welcome. Post-Brexit, it is likely that the CMA will assume jurisdiction over a significant number of large mergers that are currently reviewed by the European Commission. If the CMA does not receive a corresponding increase in its resources to deal with those mergers, the de minimis thresholds may need to rise even further in the future.

have been dropped, following the serious doubts that the current Competition Commissioner, Margrethe Vestager, has expressed about them.

Currently, the simplified procedure applies to the transactions resulting in a combined market share of less than 20% in markets where the parties compete, or less than 30% in markets where one of the parties sells an input to a market where the other one is active. Further, a simplified procedure is applied to transactions leading to "no reportable" markets (i.e., where there are no horizontal or vertical overlaps).

In an effort to reduce the administrative burden and to cut costs for businesses, the EC is inviting views on proposals to replace the current regime by:

- the exemption of some categories of cases from the prior notification obligation;
- the introduction of lighter information requirements, i.e. replacing the notification form with a short information notice; or
- the introduction of a self-assessment system for certain categories, leaving it up to the parties to decide whether or not to notify.

Types of transaction that the EC has suggested might be particularly suitable for such treatment include acquisitions of joint control over targets with minimal sales in the EU, creation of extraterritorial joint ventures, and transactions in which the parties have no horizontally or vertically related activities.

Subjecting high-value transactions that might otherwise not be caught to EU merger control

The EC has also raised the issue of new jurisdictional thresholds in order to capture high-value acquisitions that do not currently fall under its jurisdiction due to the revenue-based thresholds. It is considering the introduction of additional notification requirements, based on alternative criteria, such as the value of the transaction (which are not specified in detail in the consultation document). According to the EC, such a threshold could fill a possible enforcement gap of EU merger control.

If transaction value-based thresholds are introduced, the EC wants to ensure that such a complementary threshold would only cover transactions that have a significant economic link with the EEA. It has suggested two options for doing so: (i) a general requirement that transactions must be likely to have a "measurable impact" in the EEA; or (ii) some "industry specific" (but otherwise unspecified) criteria.

According to the EC, the issue of high-value transactions escaping EU merger control is of particular importance for companies active in the digital economy (where services are often launched to build up a significant user base before a business model is adopted that generates significant revenues) and the pharmaceutical sector (where major companies may acquire smaller ones which focus on the research and development of new treatments with high commercial potential but little or no revenue to date).

The consultation closed on 13 January 2017. It is anticipated that the responses to the consultation will be published during the first quarter of 2017 and will be taken into account by the EC when drafting a Staff Working Document, which is expected to be published in the second half of 2017.

Editor Comment:

The EC's proposals to reduce administrative burdens on businesses engaging in no-issue transactions are welcome. Although fairly straightforward, even simplified notifications often unnecessarily call on the resources of the parties and delay the implementation of the transaction. Financial investors, such as private equity houses, in particular will welcome the EC's consideration of the simplification of notification requirements, as they are frequently required to file simplified notifications even though they have no overlapping business with the target. Similarly, filing requirements for joint acquisitions of real estate assets have proved to be particularly wasteful of business and regulatory resources.

The EC's proposals to extend its merger review to high-value transactions that would otherwise not have triggered a notification on the other hand would appear to increase administrative burdens on companies on the basis of what may at least in some cases be purely speculative concerns. For every successful tech-sector acquisition of a fast-growing start-up, one is likely to find transactions for which the buyer overpaid and rosy market forecasts did not come to pass. Whether there are enough high-value transactions escaping EC merger review to justify the introduction of entirely new jurisdictional criteria, and whether such transactions are not sufficiently adequately reviewed under national competition law as opposed to EU law, is a question on which the consultation will hopefully help to shed light.

C L I F F O R D

C H A N C E

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