CLIFFORD CHANCE

CORPORATE UPDATE JULY 2017

Welcome to our July 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.

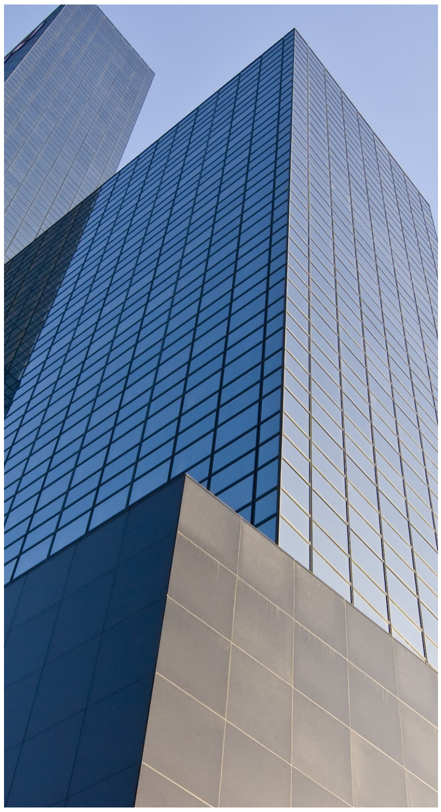
There is an important new piece of domestic legislation which will come into effect later this year – the Criminal Finances Act 2017 – which introduces two new criminal offences for corporates relating to facilitating tax evasion. We examine the implications of this legislation for corporates. We also look at a number of major new pieces of European legislation – the Shareholder Rights Directive, the General Data Protection Regulation, the Prospectus Regulation and the Fourth Money Laundering Directive – and we consider what changes these will introduce in the UK prior to Brexit and how companies should be preparing for these changes. At the same time we also consider how this legislation may continue to have effect following Brexit.

We analyse the High Court's recent cases on when a UK parent company can be liable for the actions or omissions of its subsidiary and the first ever case to consider share-splitting on a takeover by way of scheme of arrangement.

On the corporate governance front, we assess some of the trends emerging from the 2017 AGM season, we look at corporate governance reform, recent reports on ethnic diversity in the workplace and some of the shortcomings of the Modern Slavery Act 2015.

We also take a look at the Takeover Panel's first ever enforcement action through the courts and the Financial Conduct Authority's first ever use of its administrative powers to require restitution for losses arising from market abuse.

In our antitrust section, we reflect upon the Government's proposals for new controls on foreign investment in the UK telecoms and energy infrastructure sectors and the European Commission's investigation of pre-closing conduct clauses for breach of gun-jumping provisions and Facebook's recent fine.



Corporate Team of the Year
Legal Business Awards 2017

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

TMT Legal Adviser of the Year
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COMPANY LAW UPDATE

UK enacts new corporate criminal offences of failing to prevent the facilitation of tax evasion

The UK has enacted two new corporate criminal offences of failing to prevent the facilitation of tax evasion by employees and other associated persons[1]. It is highly extra-territorial, applies to both companies and partnerships worldwide, and can apply to the evasion of non-UK taxes as well as UK taxes. There is only one defence to the offence: that the organisation has put reasonable procedures in place to prevent the facilitation of tax evasion.

Previously, in order to attribute criminal liability to an organisation, prosecutors had to show that the senior members of the organisation (typically directors) were involved in and aware of the illegal activity. The Government concluded that this made it hard to hold multinational organisations to account and internal reporting of suspected illegal tax activity was not sufficiently incentivised – the new corporate offences seek to overcome these issues.

Which businesses are in scope?

All businesses (companies or partnerships) worldwide are in scope if their employees or other associated persons facilitate UK tax evasion, whether or not the businesses themselves have any connection to the UK.

If a business's employees facilitate foreign tax evasion, the business is in scope if it is established in the UK, carries on business in the UK (for example through a UK branch or representative office), or any of the conduct which facilitated tax evasion took place in the UK.

What are the offences?

There is an offence of failing to prevent facilitation of UK tax evasion and another offence of failing to prevent facilitation of foreign tax evasion.

There are essentially three stages to both offences:

- **Stage one:** Criminal tax evasion of UK or non-UK taxes by a taxpayer (who can be an individual or a legal entity). For the UK offence, this includes the offence of cheating the public revenue or being knowingly concerned in, or taking steps with a view to, the fraudulent evasion of tax. For the non-UK offence, the tax evasion must be a criminal offence in the taxpayer's home jurisdiction and under UK law.
- **Stage two:** Criminal facilitation of the tax evasion by an "associated person" of the organisation who is acting in that capacity. The definition of "associated person" is very wide and includes an employee, an agent of the organisation or any other person who performs services for, or on behalf of, the organisation, such as accountants, lawyers or financial advisers, in each case acting in that capacity when he/she is knowingly involved in the tax evasion. Potential tax evasion facilitation offences include: invoicing procedures allowing tax evasion by misrepresenting the transaction or the supplier/recipient; paying employees, agents or suppliers in a way that means they can evade paying tax; or joint venture transactions or payment structures that, while legitimate, allow a joint venture partner to evade tax. For the non-UK offence, the facilitation of the tax evasion must be criminal in both the UK and the jurisdiction where it is committed.

1 Criminal Finances Act 2017 and The Criminal Finances Act 2017 (Commencement No.1) Regulations 2017

- **Stage three:** Failure by the organisation to prevent the facilitation of the offence. This is a strict liability offence so if the stage one and stage two offences are committed then the organisation will have committed the new corporate offence, regardless of whether the organisation knew what was going on or was otherwise involved, unless it can show it has put in place reasonable preventative procedures (see **Are there any defences?** below).

The penalty for being successfully prosecuted under one of these offences is an unlimited fine.

Are there any defences?

Yes, one defence – that the organisation has reasonable prevention procedures in place when the offence is committed (or no such prevention procedures if it was not reasonable in all the circumstances to expect the organisation to have them in place).

HMRC has published draft guidance explaining the policy behind the new offences and in order to help businesses understand the types of processes and procedures that can be put in place to prevent associated persons from criminally facilitating tax evasion. We expect final guidelines to be published in the next couple of months but we do not expect them to be very different to the draft.

Editor Comment:

These offences will come into force on 30 September 2017 and businesses should start preparing for them now. Businesses should conduct a risk assessment, review their current policies and procedures and have an implementation plan ready. This may result in additional controls, policies, procedures or training being required to cover these offences. All these steps should be documented.

Changes to the PSC register must be notified to Companies House within 14 days

Since 6 April 2016 certain UK companies and LLPs have been required to keep a register of beneficial ownership, known as the PSC register. On 26 June 2017 regulations came into force in order to bring the UK PSC regime into line with the Fourth Money Laundering Directive. The key changes are:

- **14 day time limits:** As of 26 June 2017, companies/LLPs are required to: (i) update their PSC registers within 14 days of confirming/obtaining the required details of any individual/legal entity that has "significant control" over them (or any changes to such details recorded on their PSC registers); and (ii) file the PSC register information at Companies House within 14 days of making any entry in, or updating, their PSC registers. These new obligations and event driven filings will ensure that PSC register information at Companies House is current. Forms are available at Companies House for these purposes.
- **More UK entities required to disclose who controls them:** As of 24 July 2017: (i) UK companies listed on prescribed markets, such as AIM, are required to keep a PSC register and file PSC register information at Companies House; and (ii) all Scottish limited partnerships and certain Scottish general partnerships will need to file their PSC information at Companies House.

For further details, please read our briefing.

Editor Comment:

Non-compliance with the UK PSC regime is a criminal offence. It is, therefore, important that you ensure that UK companies/LLPs in your group that are required to keep a PSC register have one in place and that updates to the register and PSC information filings at Companies House are dealt with in a timely manner.

Are you prepared for the new payment practices and gender pay gap reporting requirements?

New regulations on reporting on payment practices and gender pay gap[2] came into force on 6 April 2017. Both sets of regulations are also accompanied by guidance[3].

Large companies and LLPs meeting certain thresholds[4] must, for financial years starting on or after 6 April 2017, report on their payment practices and performance for all contracts (whether verbal or written) for goods, services (other than financial services) or intangible property (including IP) which have a significant connection with the UK. These regulations require detailed reporting twice a year. Reports must be published on a central Government website and will be publicly

2 Reporting on Payment Practices and Performance Regulations 2017 and the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017

3 BEIS's guidance to reporting on payment practices and performance and Acas's guidance on gender pay gap reporting

4 Reaching two or more of the following thresholds: £36 million annual turnover; £18 million balance sheet total; or 250 employees.

available. Failure to file a report within the relevant period constitutes a criminal offence by both the company and each of its directors.

The gender pay gap regulations apply to any employer with a headcount of 250 or more employees on 5 April each year. The first gender pay gap reports must be published on or before 4 April 2018 based on a snapshot of pay data on 5 April 2017. Employers are required to publish, on their own website and on a central Government website, data for the gender pay gap (mean and median averages), the gender bonus gap (mean and median averages), the proportion of men and women receiving bonuses and the proportion of men and women in each quartile of the organisation's pay structure.

Editor Comment:
It is likely that many businesses' internal processes will not currently capture all the information that is required to be reported, particularly in relation to payment practices. As both these reporting obligations are now in force and reports will have to be published next year (or before), large companies, LLPs and employers should be engaging now with the regulations and establishing how they will collect and report on the relevant data.

Strengthening shareholder rights and engagement

The Shareholder Rights Directive, implemented into UK law via the Companies Act 2006, relates to the exercise of certain shareholder rights in general meetings of companies with a registered office in the EU and shares admitted to trading on a regulated market

situated or operating within an EU member state. Amendments to the Shareholder Rights Directive came into force in June 2017 as part of the European Commission's response to the many shortcomings it identified in listed companies' corporate governance contributing to the 2008 financial crisis. The amendments focus on encouraging long-term shareholder engagement and enhancing transparency between companies and investors, including in particular:

- **Identification of shareholders:** Given that shares in listed companies are often held through complex chains of intermediaries potentially making shareholder engagement and direct communication with shareholders more difficult, the amending directive enables companies to identify their shareholders, including by requesting identification information from any relevant intermediary. EU member states may choose to implement a threshold before such requests can be made of a minimum holding of shares or voting rights not exceeding 0.5%. UK public companies already have similar rights to require ownership information from their shareholders[5].
- **Facilitation of exercise of shareholders rights:** EU member states must ensure that intermediaries facilitate the exercise of shareholders' rights, including the right to participate and vote in general meetings. Intermediaries must either make arrangements for shareholders (or their nominees) to exercise the rights themselves or the intermediary must exercise the rights for each shareholder's benefit following explicit authorisation and instructions from such shareholder. Companies will be required to confirm voting records at the request of a shareholder (or its nominee).
- **Transparency for institutional investors, asset managers and proxy advisers:** Given the important role that they play in the corporate governance of listed companies, institutional investors and asset managers are required by the amending directive to be more

5 Part 22 of the Companies Act 2006

transparent by developing and publicly disclosing a shareholder engagement policy, reporting annually on the policy's implementation and publically disclosing how they have voted at general meetings. If they do not comply with these requirements, they must publicly disclose why they have chosen not to comply. To ensure reliable and high quality recommendations from proxy advisers and to enhance trust in their services, proxy advisers must apply a code of conduct and report on its application or explain why they have not done so. This is the main area of change for the UK market. The UK government has consistently supported these proposals throughout the legislative process for the amending directive.

- **Remuneration:** Shareholders will have a binding vote at a general meeting on the directors' remuneration policy every four years and whenever there is a material change (although EU member states may provide for this vote to be advisory). Shareholders of UK quoted companies already have a binding vote on the remuneration policy every three years or whenever there is a material change.
- **Related party transactions:** The amending directive requires material transactions (to be defined by each EU member state) with related parties to be publically announced and approved by shareholders or the board. EU member states may require the announcement to be accompanied by a report assessing whether the transaction is fair and reasonable from the company and unrelated shareholders' perspective from an independent third party, the board, the audit committee or a committee composed of a majority of independent directors. These requirements are unlikely to affect premium listed companies who are subject to more onerous requirements on related party transactions under Listing Rule 11. However, they will affect standard listed companies.

Editor Comment:

These changes must be implemented into national law by EU member states by 10 June 2019. There is no clear idea yet as to whether the UK will be implementing the changes into UK law or not. If, as expected, Brexit occurs on 29 March 2019, the UK will not be required to do so but may elect to do so. However, as noted above, given many of the areas addressed are already covered by UK law, even if the amending directive is implemented into UK law, it is unlikely to substantially increase the regulatory burden on UK listed companies.

Major changes to data protection laws coming in 2018

The EU General Data Protection Regulation (**GDPR**) brings about the biggest change in data privacy law for a generation and it comes into effect in less than a year's time, on 25 May 2018. It seeks to modernise the EU law on data protection and achieve greater legal consistency across the EU and the EEA and at the same time it introduces a raft of new aggressive and intrusive rules.

Any company based in the EU, and other companies which sell to or monitor individuals within the EU, will need to comply with the new rules.

Increased reporting and compliance

The GDPR will introduce a series of new "accountability" requirements, intended to encourage businesses to take data protection seriously and build it into their processes and systems, and to improve compliance with the existing regime's data protection principles.

The GDPR requires businesses employing 250 or more persons to maintain detailed documentation recording their data processing activities.

Data controllers and processors processing sensitive data on a large scale, or whose core activities require regular and systematic monitoring of data subjects on a large scale, will have to appoint data protection officers (**DPO**). There are complex rules on the role of the DPO. Businesses must consider now whether they should appoint a DPO and how they will structure the role.

There is no general "security breach notification" concept under the existing EU regime. However, the GDPR will introduce a requirement for data controllers to report all security breaches affecting personal data to their data protection authority without undue delay and where feasible within 72 hours of becoming aware of the security breach. The data controller must inform the affected data subject (i.e. individuals) if the breach is likely to result in a "high risk" to their "rights and freedoms". Data processors must inform their controllers when they become aware of security breaches affecting personal data. Businesses should: (i) review and/or develop their incident response plan to enable them to respond quickly to a data breach, including where any data processing is outsourced; and (ii) build compliance into the contracting process for the engagement of new service providers processing personal data.

Enhanced rights for individuals

Individuals, i.e. data subjects, are given enhanced rights by the GDPR. Data controllers relying on consent to justify processing activities will be required to demonstrate that a data subject's consent has been obtained and that the consent is "unambiguous", "freely given", clearly distinguished from other terms and conditions, and (in some circumstances) "explicit". The right for the individual to withdraw their consent is also emphasised (and the individual must be informed of this right). It will therefore be harder for businesses to justify processing personal data based on an individual's consent – we expect businesses to move away from some of their current practices (e.g. blanket consent obtained in terms and conditions or pre-ticked boxes) and to consider whether consent is the appropriate basis for data processing.

Other new rights for individuals include the right to request the return of data from a data controller, object to the processing of their data, or require the transfer of their data to a new replacement data controller (the "data portability right").

Businesses should consider the impact of these enhanced rights and prepare for them by, for example, updating their data protection notices, preparing a response package to address data subject objections and preparing for how they will facilitate data portability requests.

Extra-territorial scope

The GDPR will significantly extend the extra-territorial effect of the EU data protection regime, catching overseas controllers and processors who currently have no expectation that they will be caught by EU law. The GDPR extends the current regime so that it also applies to a controller or processor who carries out processing outside the EEA if that processing is carried out in order to offer goods or services to, or monitor the behaviour of, individuals within the EEA.

Businesses outside the EEA should consider whether the GDPR will apply to them and global organisations should consider whether to apply standards based on the GDPR worldwide.

Severe new sanctions

The GDPR substantially increases the risks associated with failure to comply with the EU data privacy regime by increasing the potential sanctions for breach. There are four types of sanctions: administrative fines, civil sanctions, regulatory action and criminal penalties.

Fines under the current UK data protection regime are capped at £500,000. The GDPR increases fines to up to 4% of group global turnover or €20m (whichever is greater) for serious breaches or up to 2% of group global turnover or €10m (whichever is greater) for more minor infringements. For large organisations these fines are potentially huge. Currently only data controllers can be fined but under the GDPR both data controllers and data processors can be fined.

The GDPR also allows data subjects to nominate not-for-profit organisations to bring claims on their behalf, opening the possibility of class actions for breach.

Impact of Brexit

The Government has confirmed that the GDPR will apply in the UK before Brexit and the recent Queen's Speech contained proposals for a new Data Protection Bill. The Government proposes that the Data Protection Bill will:
(i) implement the GDPR to meet the UK's data protection obligations while it remains an EU member state; and
(ii) help to put the UK in the best position to maintain its ability to share data with other EU member states and internationally post-Brexit. We therefore expect that the GDPR will continue to apply in the UK in substantially the same form post-Brexit.

There may however be some issues with the GDPR post-Brexit. The UK may be regarded by the EU as "inadequate" for data transfer purposes until the European Commission determines that UK law ensures an adequate level of protection for EU personal data, notwithstanding the positive intentions of the Data Protection Bill. Such an "adequacy" decision is not guaranteed and may take some time. Unless a transitional or permanent solution is found, businesses will need to find alternative means (most likely standard form data transfer agreements or binding corporate rules) to justify data sharing between the EU and the UK post-Brexit.

Visit our Talking Tech website for more information and GDPR resources.

Editor Comment:

Businesses need to focus their attention now on how the GDPR will affect them. There is no transitional or grace period for the GDPR so businesses need to be ready to comply with the GDPR from 25 May 2018. Most businesses will need to make radical changes before this date.

CASE LAW UPDATE

When can a UK parent company be liable for the actions or omissions of its subsidiary?

It is a fundamental principle of UK company law that a UK company has separate legal personality and is a distinct legal entity from its members. This applies to companies in the same group. This concept, known as the "corporate veil", can only be challenged or "pierced", so that the members can be held responsible for the actions of the company, in very limited circumstances. However, a parent company should be aware that it could be held responsible for the actions or omissions of its subsidiary if it can be established that the parent company owes a duty of care in respect of those acts or omissions. This liability in tort has recently been considered by the High Court[6] and the decisions serve as a useful reminder of the tests that the courts will apply.

The claim against Royal Dutch Shell plc was brought by citizens of the Niger Delta in respect of environmental damage in the Niger Delta allegedly caused by oil spills from pipelines operated by Shell Petroleum Development Company of Nigeria Limited (a subsidiary of Royal Dutch Shell). The claim against Unilever plc was brought by employees of Unilever plc's Kenyan subsidiary in respect of the ethnic violence suffered by those employees that followed the 2007 general election in Kenya.

Duty of care test

The courts will apply the three-fold test in *Caparo Industries plc v Dickman*[7]: (i) the damage should be foreseeable; (ii) there should exist between the party owing the duty and the party to whom it is owed a relationship of proximity; and (iii) the situation should be one in which it is fair, just and reasonable to impose a duty of a given scope upon the one party for the benefit of the other.

The courts will also consider the four factors identified by the Court of Appeal in *Chandler v Cape plc*[8] that indicate that a duty of care exists: (i) the companies were operating the same business; (ii) the parent had, or ought to have, superior or specialist knowledge compared to the subsidiary; (iii) the parent had, or ought to have had, knowledge of the subsidiary's system of work; and (iv) the parent knew, or ought to have forseen, that the subsidiary was relying on it to protect the claimants. These factors are descriptive rather than exhaustive; the higher the number of these four factors that are present, the more likely that a duty of care is owed.

In *Royal Dutch Shell* the High Court held that when considering the four factors in *Chandler* a two-fold approach[9] should be taken and the court should consider: (i) whether the parent company is better placed, because of its superior knowledge or expertise, than the subsidiary is in respect of the harm; and (ii) if it is, whether it is fair to infer that the subsidiary will rely upon the parent

6 *His Royal Highness Emere Godwin Bebe Okpadi and others v Royal Dutch Shell plc* [2017] EWHC 89 (TCC) and *AAA & Others v (1) Unilever PLC (2) Unilever Tea Kenya Limited* [2017] EWHC 371 (QB)

7 [1990] 2 AC 605

8 [2012] EWCA Civ 525

9 Set out in *Thompson v The Renwick Group plc* [2014] EWCA Civ 635

deploying its superior knowledge in order to avoid the harm.

Royal Dutch Shell outcome

The High Court held that it was not arguable that Royal Dutch Shell plc owed a duty of care to the citizens in respect of its subsidiary's operations. The High Court held that limbs (ii) and (iii) of the *Caparo* test were not satisfied and not one of the four factors identified in *Chandler* were present. Some of the key considerations were that Royal Dutch Shell plc was purely a holding company, it did not, and was not permitted to, conduct operations in Nigeria and the activities in Nigeria were carried out by the subsidiary as part of a joint venture with the Nigerian state.

Unilever outcome

The High Court held, albeit with some hesitation, that the claimants just about made out a good arguable case that Unilever owed a duty of care under the test laid down in *Chandler*. It held that, in theory, a claim against Unilever plc as the parent of the Kenyan subsidiary might succeed based on the documents by which Unilever had sought to exercise control over the management of its subsidiary and its subsidiary's various policies. It based this conclusion on documents in which Unilever plc laid down rules about policies and procedures (including for health, safety and risk management) which its subsidiaries across the world should adopt and documents about monitoring and auditing those policies and procedures. Ultimately, however, the High Court held that a claim that it would be fair, just and reasonable to impose the duty pleaded by the claimants on Unilever plc was bound to fail as the claims were too wide. It was however unarguable that Unilever could have a duty to anticipate the violence and to protect the claimants from it.

Editor Comment:

Whether a duty of care can be established will very much depend on the facts of the case. It is unclear to what extent a parent company puts itself at risk of being imposed with a duty of care where it imposes group policies in relation to matters such as health and safety and risk management. However, it appears from these cases that establishing a duty of care will be difficult where the UK parent company is a multi-national parent company. Leave to appeal has been granted in both cases so we wait to see what the Court of Appeal has to say on this area of law.

CORPORATE GOVERNANCE UPDATE

Trends from the 2017 AGM season

The 2017 AGM season is coming towards an end – so far this season, we've noted the following interesting trends:

- **Directors' remuneration:** Against a background of increasing public dissatisfaction with executive remuneration, we had expected to see some listed companies struggle or fail to pass resolutions on their directors' remuneration this AGM season. So far we've seen a fair amount of shareholder dissatisfaction but probably less than anticipated. 119 companies have put their remuneration policy to a binding shareholder vote so far this season. Listed companies are required to seek approval of their remuneration policies every three years and most listed companies last had their policies approved by shareholders in 2014. 17 of these companies received a substantial vote against this resolution but no companies failed to pass it. Three companies withdrew the resolution prior to their AGM in order to allow for more time to engage with shareholders. Rather than vote against remuneration policies, shareholder dissatisfaction with pay has tended to be demonstrated through votes against companies' remuneration report resolution (unlike the policy vote, this vote is only advisory and not binding). Two companies (one FTSE 100 and one FTSE 250) failed to receive sufficient votes for the resolution to be approved and 34 companies have received a substantial vote against the resolution.[10] These voting trends may suggest that companies are addressing some shareholder concerns over pay, reducing pay packages and interacting more with investors prior to AGMs. Nonetheless, we still expect directors' remuneration to remain in the public eye particularly given the various Government reviews on executive pay and governance that have been well-publicised (see the section on **Corporate governance reform** below).
- **Disapplication of pre-emption rights:** This has been the first AGM season in which companies have been expected to use the Pre-Emption Group's new template resolutions for the disapplication of pre-emption rights. In May 2017, the Pre-Emption Group published its Monitoring Report, looking at the use of these template resolutions and the implementation of its Statement of Principles (last revised in 2015) – it concludes that both the template resolutions and the Statement of Principles have generally been adhered to. It notes that the second resolution (the additional 5% disapplication authority) generally receives less support than the first resolution. Figures so far from this year's AGM season reflect this: 184 companies have proposed a resolution to authorise the general disapplication of pre-emption rights; 129 of these companies followed the Pre-emption Group's template with the additional 5% disapplication authority as a separate resolution; 27 of these companies received a substantial vote against the additional 5% resolution and one company received insufficient votes for the additional 5% resolution to be passed.[11] Companies should consider the Pre-Emption Group's advice when proposing the additional 5% resolution and note that the general investor view is that this additional authority should only be proposed when appropriate for the company's

10 Figures taken from Practical Law's report (June 2017) entitled "Directors' remuneration voting trends". The report analyses voting trends from the FTSE 350 companies that held their 2017 AGM on or before 31 May 2017, i.e. 186 companies (59 FTSE 100 and 127 FTSE 250).

11 Figures taken from Practical Law's What's Market and its analysis of AGM notices for 187 FTSE 350 companies for AGMs held on or before 31 May 2017.

individual circumstances and not applied for automatically.

- **Changes to articles of association to permit virtual general meetings:** Following on from Jimmy Choo plc who held the first ever virtual AGM in 2016, six companies (three FTSE 100 and three FTSE 250) have this season proposed, and had approved, resolutions to change to their articles to permit virtual general meetings[12]. We expect that we may see more virtual AGMs in the 2018 AGM season.

Corporate governance reform

Corporate governance and executive pay were high on Theresa May's agenda when she came into power in 2016. September 2016 saw the launch of the BEIS House of Commons Select Committee (the **Select Committee**) inquiry into corporate governance and this was followed by BEIS's Green Paper on corporate governance reform. This year has so far seen the publication of the Select Committee's report and, later this year, we expect to see BEIS publish the outcome of its Green Paper (see below) and the Financial Reporting Council (the **FRC**) publish a formal consultation on a fundamental review of the UK Corporate Governance Code (the **Code**). However, the Queen's Speech in June 2017 made no mention of corporate governance so it may be that this is no longer a priority area for the Government, particularly given the demands of Brexit on Parliamentary time.

BEIS Green Paper on corporate governance reform

The BEIS Green Paper on corporate governance reform is separate to the Select Committee's report on corporate governance. This Green Paper was published in November 2016 and the consultation closed in February 2017 – see our January 2017 edition of Corporate Update for more detail. We expect BEIS to publish the outcome of the public feedback it has received on this Green Paper in due course.

BEIS Select Committee report

In April 2017, the Select Committee published its report following its inquiry into corporate governance launched in September 2016. The inquiry focussed on three key areas: directors' duties, executive pay and the composition of boards. The Select Committee's inquiry and report cover similar material to BEIS's Green Paper but they are separate. The Government will consider the Select Committee's report when deciding what the outcome of the Green Paper is to be but it is not bound to follow the Select Committee's recommendations.

The Select Committee does not believe that a radical overhaul of the law in relation to directors' duties or a change to the "comply or explain" approach under the Code is necessary but it does believe that there is scope for "significant improvements in order to address the changing nature of company ownership in a globalised economy". The Select Committee believes that more specific and detailed reporting on how boards have fulfilled their duties together with robust enforcement by regulators will ensure directors take seriously their legal duties and the provisions of the Code. In light of this, the Select Committee makes the following recommendations to the Government:

- **Reporting on the section 172 duty:** The FRC should amend the Code to require informative narrative reporting on the fulfilment of the section 172 Companies Act 2006 duty (duty to promote the success of the company for the benefit of the members, having regard to various factors, including the interests of certain other stakeholders (e.g. employees) and the likely long-term consequences of any decision). The Select Committee is not proposing any amendments to section 172 itself.
- **Additional powers for the FRC:** The Government should give the FRC additional powers to engage and hold directors to account, including public reporting to shareholders of any board or individual director failings and the authority to initiate legal action for a breach of the section 172 duty.
- **Annual corporate governance rating system:** In order to encourage greater compliance with best practice, the FRC should work with business to develop metrics for an annual rating system on corporate governance compliance, publicising good and bad practice and using a simple traffic light assessment system. These ratings would be included in annual reports.
- **Corporate governance code for large private companies:** A new voluntary corporate governance code for large private companies should be developed, to be overseen by a new body. If it fails to raise corporate governance standards after three years, or reveals high rates of unacceptable non-compliance, it should become a mandatory regulatory regime.
- **More transparency on advisers:** The Government should consult on new requirements for listed and large private companies to provide information on advisers engaged in transactions above a "reasonable" threshold, including

12 Figures taken from Practical Law's What's Market and its analysis of AGMs notices for 187 FTSE 350 companies for AGMs held on or before 31 May 2017.

amount and basis of pay, and method of engagement.

- **More effective engagement and disclosure of asset management voting:** The Investor Forum should become a more pro-active facilitator of a dialogue between boards and investors and companies should consider establishing stakeholder advisory panels. The FRC should include in its revised Stewardship Code stronger provisions to require the disclosure of voting records by asset managers and name those that subsequently do not vote.
- **Addressing concerns about executive pay:** Greater control should be exerted on executive pay with reforms on the structure of executive pay, the process by which it is agreed and pay reporting. LTIPs should be phased out as soon as possible (with no new LTIPs agreed from the start of 2018) and deferred stock should become best practice for incentivising long-term decision making. The FRC, in consultation with stakeholders, should develop guidelines for the structure of executive pay, including simplification and clear criteria for bonuses. The FRC should also revise the Code, and legislation should be passed, to require a binding shareholder vote on executive pay the following year if there has been a vote against executive pay of over 25% of votes cast. The chair of the remuneration committee should normally have served on the remuneration committee for at least one year previously and should resign if remuneration proposals do not receive the backing of 75% of voting shareholders. The Code should also be amended to require publication of pay ratios between the CEO and senior executives. Employee representation on remuneration committees is also encouraged and should be reflected in the Code.
- **Improving the composition of boards:** The FRC should have the issue of board diversity as a key priority in its revised version of the Code, it should embed the promotion of ethnic diversity in the Code (giving it as much prominence as gender diversity) and require detailed narrative on board diversity in annual reports. The Government should set a target that from May 2020 at least half of all new appointments to senior and executive management level positions in the FTSE 350 and all listed companies should be women. The Government should legislate for all FTSE 100 companies and businesses to publish their workforce data, broken down by ethnicity and pay band. The Select Committee also recommends that companies are encouraged to recruit directors from the widest possible net of suitable candidates but does not recommend any compulsory requirement to include "worker" representatives on the board.

At this stage these proposals are presented as recommendations of the Select Committee to the Government and the FRC in light of the responses to the Select Committee's inquiry. Some of these recommendations would require legislative change (such as the binding vote on executive pay) and others represent significant changes to current practice (such as the abolition of LTIPs).

FRC fundamental review of the UK Corporate Governance Code

In February 2017, the FRC announced that it would undertake a fundamental review of the Code prior to a formal consultation later this year. The FRC are planning for this review to take account of the work it has done on corporate culture and succession planning, and the issues raised by the Green Paper. The FRC is very supportive of the proposals for it to be given additional enforcement powers and for there to be a corporate governance code for large private companies which it could administer (as it already does with the Code).

Race in the workplace

Following hot on the heels of Sir John Parker's report on ethnic diversity in the UK, the McGregor-Smith Review on race in the workplace was published in February 2017. The report is an independent review into the issues faced by businesses in developing black and minority ethnic talent in the workplace, and it sets out a list of recommendations for employers in both the public and private sectors to improve diversity within their organisations. It highlights that the potential benefit to the UK economy from full representation of black and minority ethnic individuals across the labour market, through improved participation and progression, is estimated to be £24 billion a year, which represents 1.3% of GDP.

Following this report, the Business Minister, Margot James, wrote to CEOs of FTSE 350 companies encouraging them to take up key recommendations from the McGregor-Smith review and increase ethnic diversity, including by publishing a breakdown of their workforce by race and pay, setting aspirational targets on race and nominating board members to deliver those targets. The Government has, however, made it clear that they are not currently intending to require mandatory reporting on race instead preferring a voluntary, business-led approach, similar to the approach taken with increasing the number of women on boards.

Modern Slavery Act – some shortcomings identified

In April 2017, the House of Lords and House of Commons Joint Select Committee on Human Rights (the **Joint Committee**) published a report following its inquiry (announced in June 2016) on human rights and business. It applauds the Government for passing the Modern Slavery Act 2015 and raising the issue of modern slavery in the boardrooms of large companies while also highlighting some of the Act's shortcomings. In particular, it notes inadequate reporting requirements in the Act leading to a variety in the quality of companies' modern slavery statements, in particular the absence of a central repository of statements hampers monitoring and enforcement; a general lack of awareness among businesses of the Act and its requirements; and the fact that the Act does not apply to public bodies and only focuses on slavery and not on other human rights issues that may arise in supply chains.

The Joint Committee recommends that the Act be amended in order to address these shortcomings and urges the Government to facilitate the passage of the Modern Slavery (Transparency in Supply Chains) Bill proposed by Baroness Young of Hornsey. The first reading of the bill in the House of Lords took place in July 2017. The date of the second reading (the general debate on the bill) has not yet been announced.

The Joint Committee also recommends the Government bring forward legislative proposals to make reporting on due diligence for all other human rights (not just modern slavery) compulsory for large businesses, with a monitoring mechanism and enforcement procedure.

Editor Comment:

The Joint Committee's report makes it is clear that amendments to the Act are required. We expect that there will be additional obligations in this area for large businesses in due course when Parliamentary time allows.

REGULATORY UPDATE

LEI: New regulated information filing requirements

In our January 2017 edition of Corporate Update, we reported on the consultation by the Financial Conduct Authority (the **FCA**) amending DTR 6.2 in order to require issuers with securities admitted to a regulated market to obtain a Legal Entity Identifier (**LEI**), a 20-character reference code used to identify legally distinct entities that engage in financial transactions. This requirement follows amendments to the EU Transparency Directive aimed at making regulated information more easily accessible and searchable.

DTR 6.2 has now been updated and the FCA has confirmed that the changes will come into force on 1 October 2017 (this is later than originally anticipated as the FCA received feedback that market participants needed six months to prepare for these changes). For every regulated information filing with the FCA, an issuer will also need to give its LEI and classify all the regulated information according to the legal obligations under which that information is disclosed (DTRs 6.2.2AR and 6.2.2BR). The FCA is encouraging issuers to obtain their LEI before 1 October 2017 – UK issuers should visit http://www.lseg.com/LEI to obtain their LEI, if they have not already done so.

An update on the Prospectus Regulation

The new Prospectus Regulation was published in the Official Journal in June 2017 and will enter into force on 20 July 2017. As it is a regulation, it will be directly applicable and apply automatically to all EU member states 24 months after its entry into force (i.e. 20 July 2019) without any need for implementation by the EU member states. As this date is after the planned date for Brexit, it is unclear at this stage whether the new regulation will apply in the UK.

Some provisions however apply before Brexit and are applicable in the UK from 20 July 2017. The FCA is amending the Prospectus Rules to reflect these provisions. Listed companies should be aware in particular of the following two areas:

- **Prospectus exemption for placings:** Previously, the obligation to publish a prospectus did not apply to the admission to trading on a regulated market of new shares that are of the same class as those already trading on that regulated market, provided that the new shares represented less than 10% of the existing shares over the course of a year. The new regulation increases this 10% threshold to 20% and extends the exemption to cover a wider range of securities than just shares. This threshold has effectively operated as a cap on placings with placings being limited to below 10% in order to avoid the requirement for a prospectus. While the increase in this threshold would allow placings for up to 20% of an issuer's share capital, we do not expect that the investor protection committees in the UK will change their current recommendations of a 10% threshold for placings so it is unlikely that we will see placings of over 10% in the near future.
- **Convertible securities cap on the prospectus exemption:** A prospectus was previously not required for shares resulting from the conversion or exchange of other securities or from the exercise of rights conferred by other securities, provided that the resulting shares are of the same class as the issuer's shares already admitted to trading on the same regulated market. Under the new regulation, a 20% cap will also apply to such convertible securities such that a prospectus will be required if the resulting shares represent more than 20% of the shares of the same class already admitted to trading on the same regulated market (subject to some limited exemptions).

FCA requires restitution for market abuse

In March 2017, the FCA issued a Final Notice against Tesco plc and Tesco Stores Limited (**Tesco**) stating that Tesco had committed market abuse on 29 August 2014 when Tesco plc issued a trading update containing an overstated profit forecast. The FCA found that the update created a false market in Tesco plc shares until 22 September 2014 when Tesco plc made a further announcement identifying the overstatement.

Instead of imposing a financial penalty on Tesco, the FCA has, for the first time, used its administrative powers to require Tesco to pay restitution. Tesco must compensate purchasers of Tesco plc shares and listed bonds between 29 August 2014 and 22 September 2014 where they have suffered a genuine economic loss (i.e. if the loss was mitigated by hedging then that shareholder/bondholder will not be eligible). The total amount of compensation payable under this redress scheme is estimated by the FCA to be approximately £85 million plus interest.

The redress scheme is being administered by KPMG, with oversight from the FCA, and launches on 31 August 2017.

In parallel, Tesco Stores Limited reached an agreement with the UK Serious Fraud Office (**SFO**) to enter into a Deferred Prosecution Agreement (**DPA**) regarding its accounting practices between February 2014 and September 2014. This is a voluntary agreement and Tesco Stores Limited will not be prosecuted, provided it fulfils certain requirements including paying a financial penalty of £129 million to the SFO.

For further information see our briefing on this.

Editor Comment:

The FCA's decision not to impose a financial penalty on Tesco was based on Tesco Stores Limited agreeing to the SFO penalty pursuant to the DPA, Tesco's "exemplary co-operative approach" with both the FCA and SFO, the "exemplary conduct" of Tesco plc's board and the steps that Tesco has taken since the misconduct to ensure similar misconduct does not occur in the future. This case is an example of the FCA working alongside the SFO and shows the FCA's willingness to cooperate with other regulators in its investigations and decisions. The case also constitutes the first time that the FCA has used its administrative powers (under section 384 Financial Services and Markets Act 2000) to require restitution – its use is in keeping with the FCA's stated intention to exercise the full suite of its enforcement powers and to seek alternatives to financial penalties in appropriate cases.

FCA's policy statement prohibiting banks' use of restrictive contractual clauses

Following the FCA's market study into investment and corporate banking (for more detail, see our January 2017 edition of Corporate Update) and its consultation (CP16/31) on the prohibition of restrictive contractual clauses, the FCA has now published a Policy Statement (PS17/13) setting out its final rules on the use of such clauses.

With effect from 3 January 2018, firms providing primary market services (both equity and debt capital markets services) will be prohibited from entering into agreements with their clients including a provision that gives the firm a right to provide future primary market or M&A services to a client or a right of first refusal in relation to such services. The ban applies only to unspecified and uncertain future services and written agreements. It applies irrespective of the size of the client. Prohibiting these clauses is intended to give clients greater choice of providers for future services and more competitive terms.

FCA's review of the effectiveness of the UK primary equity markets

As part of its 2016/2017 business plan, the FCA has carried out a review of the structure of the UK's primary markets to ensure they continue to serve the needs of issuers and investors.

Based on this review, and its interactions with advisers and issuers, in February 2017, the FCA published a consultation paper "Enhancements to the Listing Regime" (CP17/4) and a discussion paper "The UK Primary Markets Landscape" (DP17/2).

The consultation paper proposes a number of primarily technical amendments to the Listing Rules relating to the premium listing segment and associated technical guidance notes. Notable changes include: clarifications to premium listing eligibility requirements; changes to the profits test used to classify transactions by premium listed issuers; a new concessionary route to premium listing for certain property companies; and the removal of the rebuttable presumption that a suspension of listing is required on a reverse takeover due to insufficient information in the market about the target. The consultation has now closed and we expect the FCA to publish amended rules in a policy statement in the second half of 2017.

The discussion paper seeks to prompt a broad discussion about the effectiveness of the UK primary markets in providing access to capital for issuers and investment opportunities for investors. Notable themes include: whether the standard listing regime is fit for purpose; whether a new listing category should be introduced to facilitate dual-listings for international companies with an existing listing; whether exchange traded funds should be required to list on the premium segment; and what structural changes could be made to better support the growth of science and tech companies in their "step-up" and pre-revenue phases. The discussion period has now closed. If the FCA has any specific policy proposals as a result of the feedback to this paper, it will issue a further consultation paper.

For further information on the contents of these papers, see our briefing on this.

TAKEOVERS UPDATE

First ever enforcement action taken by the Takeover Panel

The Takeover Panel announced in April 2017 that it had initiated proceedings, under section 955 of the Companies Act 2006, in the Court of Session in Edinburgh against Mr David King, the Chairman of Rangers International Football Club plc. The proceedings were initiated to compel Mr King to comply with a decision of the Takeover Appeal Board in March 2017, following rulings from both the Takeover Panel Executive and the Hearings Committee that Mr King should announce an offer pursuant to Rule 9 of the Takeover Code because he had acted in concert with three other football fans in 2014 when he bought shares along with them totalling more than 30% of the voting rights in Rangers International Football Club plc. Under Rule 9 of the Takeover Code, any group of shareholders that builds up a 30% shareholding in a public company must make an offer to buy the rest of the shares in the company for cash at the highest price they have paid over the past 12 months.

Editor Comment:

This is the first time that the Takeover Panel has ever brought action under section 955 of the Companies Act 2006 to seek enforcement of the Takeover Code. It shows that the Takeover Panel is prepared to be robust and take action through the courts when its rulings are not complied with.

High Court rules share splitting cannot be used to prevent a takeover by way of scheme of arrangement

In *Re Dee Valley Group plc*[13], the High Court considered share-splitting in the context of a takeover by way of scheme of arrangement for the first time in the UK. A single employee of Dee Valley plc acquired a block of shares and subsequently transferred single shares to 443 individuals by way of gift who then delivered (in a single act) proxy forms voting against the scheme. The effect of the transfers was to increase the head count of target shareholders by approximately 50% with a view to defeating the majority in number test on the scheme of arrangement and therefore the takeover.

Dee Valley applied to the court to establish whether the votes of the shares acquired through share-splitting should be counted (i.e. the takeover would fail) or whether they should be disregarded (i.e. the takeover could proceed). The court held that the chairman of the shareholder meeting could disregard the votes of the shares acquired through the share-splitting. The chairman therefore rejected the votes and the court sanctioned the scheme notwithstanding that the statutory majority would not have been obtained had he not done so. Permission to appeal was not pursued by the objectors.

The court made it clear that share-splitting is "objectionable" and "manipulation" and held that a chairman has the power (irrespective of whether the court has expressly granted the power) to reject votes which are the subject of share-splitting. It also reiterated that members voting at a class meeting must vote in good faith for the benefit of the class as a whole and not merely as individual members.

Editor Comment:

It may now be harder for activist shareholders to manipulate the result of the court-convened shareholder meeting on a scheme of arrangement through share-splitting. Nevertheless, this case is likely to focus companies' and advisers' attention on suspicious movements on a target company's share register when it is subject to a takeover – in this case, the share-splitting was relatively obvious, in other instances it may not be so obvious or so clearly manipulative. Bidders may also refocus on the terms of a scheme of arrangement which allow it to switch to an offer from a scheme of arrangement.

13 [2017] EWHC 184 (Ch)

ANTITRUST UPDATE

Proposals for controls on foreign investment in UK telecoms and energy infrastructure

The Government is pressing ahead with significant reforms to its approach to the ownership and control of critical infrastructure – including telecoms, defence and energy assets – to ensure that foreign ownership "does not undermine British security or essential services".

Proposals to control foreign investment in critical infrastructure were announced in September 2016, but it has only recently become apparent that, in addition to the nuclear sector, assets in the telecoms and the wider (non-nuclear) energy sector would also be considered critical. Mergers involving defence sector businesses have long been covered by the existing regime for national security interventions.

What will the proposals look like?

The strengthened scrutiny is likely to come in the form of changes to the merger control regime under the Enterprise Act 2002. A Government briefing paper on the Queen's Speech indicates the proposals "will enable the UK Government to scrutinise significant foreign investment only for the purposes of protecting national security" (emphasis added). As the Government already has the power to scrutinise national security aspects of mergers that meet the jurisdictional thresholds of the Enterprise Act, it is possible that the only substantive change will be to extend those powers to mergers that fall below the relevant thresholds.

Amendments to the merger control regime might be complemented by certain other tools, such as "golden share" arrangements, or powers to prohibit the carrying out of regulated activities in certain circumstances (e.g. through withdrawal of a licence or authorisation). For details of these legal tools, and the constraints on their use that are currently imposed by EU law, see our briefing on this.

Amendments to the Takeover Code

The Conservative Party's election manifesto also included proposals to amend the takeover rules to require bidders to be clear about their intentions from the outset of the bid, to make all promises and undertakings made in the course of takeover bids legally enforceable and to allow the Government to require a bid to be "paused" for scrutiny. The status of these proposals is uncertain, as they were not expressly referred to in the Queen's Speech. If progressed, the proposed reforms would not be restricted to critical infrastructure and may lead to the Takeover Panel revisiting the existing regime for binding post-offer undertakings and post-offer intention statements under Rules 19.5 and 19.6 of the Takeover Code. While that regime ostensibly governs commitments made to secure the support of shareholders and other stakeholders in the target, it has also led to bidders offering up commitments to obtain governmental support. Such commitments (e.g. to maintain jobs or facilities in the UK, as seen with the undertakings given on Softbank's takeover of ARM Holdings) may go beyond those that would be required for a clearance under the Enterprise Act. Strengthening that regime is likely to increase the risk of bidders coming under political pressure, as appears to be implicitly recognised in the manifesto statement which precedes the proposal: that the Conservative Party "welcome overseas investment and want investors to succeed here but not when success is driven by aggressive asset-stripping or tax avoidance".

Editor Comment:

The Conservative Party's election manifesto stated that it "will ensure that foreign ownership of companies controlling important infrastructure does not undermine British security or essential services" and that there will be strengthened ministerial scrutiny and control in a limited range of sectors, "such as telecoms, defence and energy". In the Queen's Speech that marked the opening of the new Parliament in June, the Government confirmed that it will proceed with these proposals which are explicitly aimed at foreign investors. Whether they deter overseas investment will depend on the details of their implementation. In the past, mergers raising issues of national security have invariably been dealt with through behavioural commitments (e.g. information barriers and supply obligations) rather than more intrusive divestment remedies or outright prohibitions. This suggests that, if implemented sensibly, the reforms may have only a limited impact on the value of UK assets that are deemed to be critical infrastructure.

Other developments

The Government is already using its existing powers to intervene in mergers on national security grounds more widely than before. Having previously intervened only in mergers between defence businesses, it recently intervened in the acquisition of Sepura plc by the Chinese-owned Hytera Communications Corporation: two civilian suppliers of walkie-talkie equipment to customers that include emergency services such as the police. There are indications that this broader interpretation of national security is likely to be a continuing policy.

In contrast, at a European Council meeting at the end of June, EU member states are reported to have rejected a recent Franco-German proposal for more powers under EU law to veto foreign acquisitions of important technologies or strategic businesses. The conclusions of the meeting referred only to an initiative of the European Commission to "analyse investments from third countries in strategic sectors, while fully respecting Members States' competences". This reflects the European Commission's stated preference, set out in its "Reflection Paper on Harnessing Globalisation", of pushing for reciprocal access for European investors to acquire foreign assets, instead of a formal veto mechanism.

European Commission investigates pre-closing conduct clauses for breach of gun-jumping prohibition

The European Commission has sent a statement of objections (**SO**) to Altice setting out its preliminary finding that Altice implemented its acquisition of PT Portugal before obtaining clearance from the European Commission, in breach of the standstill obligations imposed by the EU Merger Regulation.

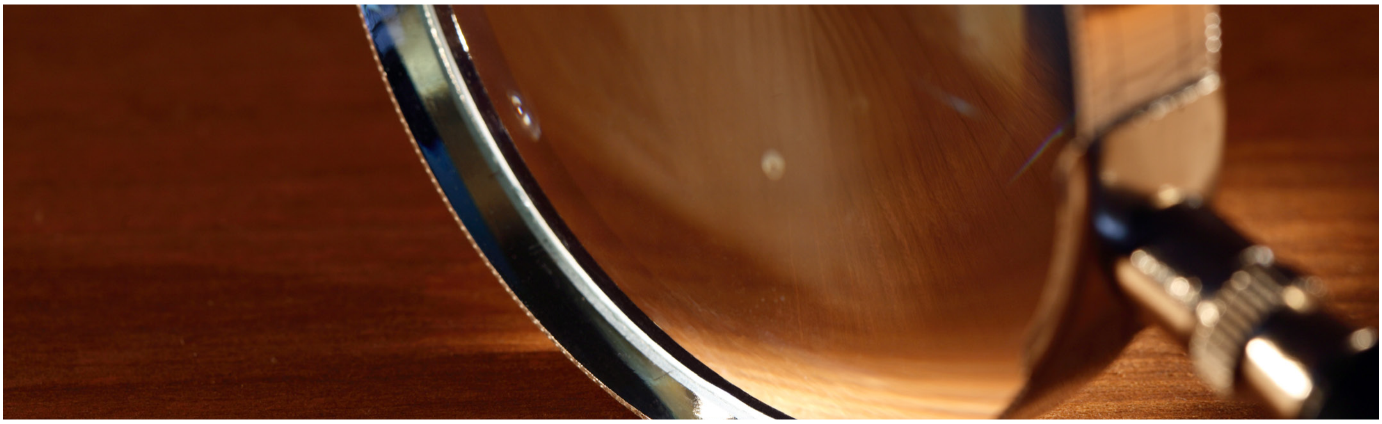
In February 2015, Altice's proposed acquisition of PT Portugal was notified to the European Commission, which subsequently cleared the transaction in April 2015, subject to the condition that Altice sell its Portuguese subsidiaries, Cabovisão and ONI. While the procedural infringement decision does not affect the European Commission's clearance of the transaction, the European Commission may impose fines of up to 10% of worldwide turnover for breaches of procedural obligations.

The European Commission's SO sets out its preliminary conclusion that Altice's purchase agreement with Oi (the seller of PT Portugal) allowed Altice to exercise decisive influence over PT Portugal before the European Commission's clearance decision, and that Altice did in fact exercise that influence. Margrethe Vestager, the EU Competition Commissioner, commented that it appeared that "Altice had already been acting as if it owned PT Portugal" and that "it seems that it gave instructions on how to handle commercial issues, such as contract negotiations".

Altice, together with its subsidiary SFR, was fined €80 million by the French competition authority in November 2016 for failing to comply with the standstill obligation in relation to two separate transactions which were cleared in 2014. The French competition authority concluded that Altice had obtained strategic information on the targets and intervened in their operational management before the acquisitions were approved. In a notable parallel with the European Commission's current allegations, the French competition authority found that contractual provisions in the sale and purchase agreement granted Altice excessively wide powers to approve the pre-closing conduct of the target businesses. See our January 2017 edition of Corporate Update for further details.

Editor Comment:

It is generally accepted that pre-closing conduct restrictions may be justified if necessary to maintain the value of the target, and proportionate to that aim. Such restrictions are increasingly being applied for very long periods, due to the extended duration of many merger review and pre-notification procedures. However, it can be difficult to distinguish between strategic commercial conduct over which the buyer should have no decisive influence pre-closing and conduct (such as unusually large investments) that risks devaluation of the target company and in which a buyer may have a legitimate interest. The French competition authority has further complicated that analysis by suggesting that pre-closing conduct clauses may include mechanisms for adjusting the purchase price in the event that the target engages in value-destructive conduct, but not a right for the buyer to approve such conduct in advance. That approach could cause target businesses to refrain from making pro-competitive investments, because they are unable to confirm with the buyer that those investments will not trigger a price adjustment. It is therefore hoped that the European Commission's investigation will yield some useful guidance for businesses on the acceptable scope of pre-closing restrictions that buyers may place on the conduct of targets that is outside the ordinary course of business.



Facebook's €110 million fine for providing misleading information under the EU Merger Regulation

On 17 May 2017, the European Commission fined Facebook €110 million for providing misleading information to the European Commission during its 2014 investigation of Facebook's acquisition of WhatsApp under the EU Merger Regulation.

According to the European Commission, Facebook had stated in its merger filing and in a subsequent response to an information request, that the parties would be unable to establish reliable automated matching between Facebook users' accounts and WhatsApp users' accounts. However, in August 2016, WhatsApp announced updates to its terms of service and privacy policy, including the possibility of linking WhatsApp users' phone numbers with Facebook users' identities.

The European Commission took the view that, contrary to Facebook's submissions, it was already possible in 2014 for Facebook and WhatsApp user accounts to be matched in this way, and that Facebook's staff were aware of this technical possibility. Facebook had therefore acted at least negligently, if not intentionally, in providing the incorrect information.

The European Commission clarified that its decision to fine Facebook for this procedural breach had no impact on its October 2014 decision to clear the

transaction. Indeed, the European Commission had at the time considered the competitive effects of automated user account matching (despite Facebook's assertion that it was impossible) and concluded that the transaction should be cleared even if it was possible. Consequently, the misleading information did not have any impact on the European Commission's clearance decision.

Editor Comment:

Facebook's fine is the first penalty for providing false or misleading information under the current version of the EU Merger Regulation, which allows for fines of up to 1% of group worldwide turnover for such breaches (the maximum fine under previous regimes was €50,000). The European Commission indicated that Facebook's fine would have been even higher, but for its cooperation with the European Commission's investigation, its admission of the infringement and its decision to waive certain procedural rights.

Extensive information requests are now the norm for complex mergers. The larger the volume of information provided, the greater the risk that some of it is considered subsequently to have been incorrect or misleading. As Facebook's €110 million fine shows, that can have significant consequences. Merging parties can mitigate these risks by implementing rigorous vetting by internal technical experts of factual assertions made in filings and submissions.

C L I F F O R D

C H A N C E

This Corporate Update has been produced by the London Corporate Practice and edited by Nicholas Rees.

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