UK Quoted Company Newsletter

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CORPORATE/ LISTING RULES / CORPORATE GOVERNANCE

MAR round up

Proposed changes to FCA guidance on delay in disclosure of inside information

The UK Financial Conduct Authority (FCA) has published a consultation paper (CP 16/38) proposing changes to DTR 2.5 which provides guidance on the circumstances in which listed issuers can delay disclosing inside information.

As set out in our September 2016 newsletter, the European Securities and Markets Authority (ESMA) has issued guidelines setting out a non-exhaustive list of issuers' "legitimate interests" (the Guidelines).

The FCA has now confirmed that it will comply with the Guidelines. Accordingly, certain changes to DTR 2.5 are proposed, including adding a hyperlink to the Guidelines at the beginning of the section. The most significant change (which was expected) is the deletion of the following sentence from DTR 2.5.5G:

"*However, the FCA considers that, other than in relation to impending developments or matters described in DTR 2.5.3G or article 17(5) of the Market Abuse Regulation, there are unlikely to be other circumstances where delay would be justified*."

This sentence reflects the FCA's view prior to the Market Abuse Regulation (MAR) coming into force. The Guidelines are referred to several times in MAR as setting out a "non-exhaustive list" and therefore this sentence is incompatible with the Guidelines.

The CP notes that the FCA does not expect the proposed changes to extend the scope for non-disclosure or the quality or amount of disclosure. The consultation closes on 6 January 2017.

Notification of PDMR dealings

Article 17(8) of MAR provides that PDMR dealings only need to be notified in accordance with Article 17(1) once a threshold of 5,000 euros is reached. In practice, many UK listed companies have chosen to continue the previous UK practice of disclosing all dealings. However, in response to questions about how to work out the threshold where the currency concerned is not denominated in euros, ESMA has published a question and answer which states that the exchange rate to be used to determine if the threshold has been reached is the official spot foreign exchange rate which is applicable at the end of the business day when the transaction is conducted. Where available, the daily euro foreign exchange reference rate published by the European Central Bank on its website should be used.

In response, the City of London Law Society and Law Society Company Law Committee's Joint Working Party on market abuse has amended its MAR Q&A to reflect the above – see the revised answer to question 6.

ESMA has also published questions and answers in relation to the following:

- persons closely associated with PDMRs (PCAs) – clarifying that PDMRs and PCAs each have separate 5,000 euro thresholds;
- calculation of price of gifts, donations and inheritance – for the purpose of calculating the 5,000 euro threshold, until MiFIR comes into force, for shares admitted to trading on a regulated market this should be the last published price in accordance with MiFID post trade transparency requirements on the date of acceptance of the gift, donation or inheritance (for shares admitted to trading on an MTF, it is the last traded price on the trading venue). However, when filling in the notification form, the price field for a gift, donation or inheritance should be zero;
- Shares received as part of a remuneration package – these only need to be notified by the PDMR once any conditions have been satisfied.

Legal entity identifiers

Key points

- Issuers should obtain an LEI as soon as possible if they do not already have one.
- Encouragement to use the new classifications from 1 January 2017.
- Issuers should be aware that regulated information will now need to be filed under new classifications and that more than one classification may apply.

Introduction

The FCA has published proposals in relation to legal entity identifiers (LEIs) and classification of regulated information.

The Transparency Directive (TD) requires ESMA to develop and operate a European electronic access point (EEAP) to enable end users to access regulated information filed by issuers under the TD on a non-discriminatory basis. The EEAP will be a web portal accessible through ESMA's website and will offer end users the ability to search by LEI, home member state or type of regulated information. The EEAP must be established by 1 January 2018. Member states must ensure access to their national central storage mechanisms (known as officially appointed mechanisms or OAMs) through the EEAP so that that EEAP can access the regulated information. The OAM for the UK is the FCA. It is intended that regulated information which has been filed in the year prior to the EEAP going live on 1 January 2018 will be fully searchable from that date.

What is an LEI?

OAMs are required to use LEIs as unique identifiers for all issuers. A LEI is a 20 character reference code to uniquely identify uniquely legally distinct entities that engage in financial transactions. However, there is currently no obligation for an issuer to obtain an LEI.

Classification of regulated information

OAMs must classify regulated information in accordance with prescribed classifications. However, there is currently no obligation on the issuer to provide the necessary information.

FCA proposals

Chapter 6 of Quarterly Consultation No 15 sets out the FCA proposals. It proposes to amend DTR 6.2 to require issuers to supply a LEI and classify regulated information in a set format. Although the obligation to provide LEIs and classify regulated information in this way will not take effect until the rule change does, the FCA is encouraging issuers to do this from 1 January 2017. If more than one classification applies, all relevant classifications should be used for the notification. The changes will apply to companies with a standard listing as well as a premium listing. The consultation closes on 2 January 2017.

How is a LEI obtained?

Application is made to the London Stock Exchange who will allocate the LEI.

Cyber-hoax risk for issuers

Background

In December 2016, the Financial Times reported on a cyber-hoax perpetrated on the French construction company, Vinci. A sham press announcement was published claiming that the company's CFO had been fired following the discovery of accounting irregularities. The announcement wiped almost a fifth off the value of Vinci's shares. Within 30 minutes, Vinci responded by issuing a statement explaining that it had been the subject of a hoax following which Vinci's shares moved back to within three per cent of their undisturbed price. Issuers in the US, including Google, Fitbit and Avon Products, have also fallen victim to hoax announcements.

Regulatory announcements

Article 17 of MAR requires that an issuer must inform the public of inside information which directly concerns the issuer as soon as possible in a manner which enables fast access and complete, correct and timely assessment of the information. This is achieved in the UK by disseminating the information via a regulatory information service (RIS). UK issuers are not permitted to disseminate regulatory news via social media. An issuer can, however, post information on social media once the information has been published via RIS. AIM Regulation has recently published some advice on use of social media which may also be helpful for companies listed on the Official List.

RIS providers

RIS providers in the UK are required to have extensive security and validation procedures in place which should generally safeguard issuers against deceptive announcements designed to create a false market in the issuer's shares being sent down the wire. The checks and balances will normally include:

- strict procedures around setting up new users and close scrutiny of non-issuer users, which are only permitted in very limited circumstances (for example, a non-issuer bidder required to make announcements under the Takeover Code);
- strict validation protocols at issuer level before an announcement can be submitted for publication;
- automated and human checks of content prior to publication;
- full audit trail of all announcements and announcement activity.

Could a UK issuer be vulnerable to a cyber hoax?

A hoax of this nature could occur in the UK in the following circumstances:

- via the submission of an announcement to an RIS provider following a breach of security allowing a hacker access to an issuer's IT systems (the sophisticated RIS validation process and/or the content checks might still protect an issuer even in these circumstances);
- via an announcement that is not sent down the wire but that is somehow picked up in the financial press;
- via an announcement using a fake social media account which is disseminated sufficiently widely to move the market in the issuer's shares.

Listing Principle 1 requires an issuer to take reasonable steps to establish and maintain procedures, systems and controls to comply with its obligations as a listed company. Arguably, a listed issuer may be in breach of this Listing Principle if it fails to prevent a third party hacking into its system as set out above and disseminating false information likely to move the market.

What should an issuer do to protect itself against cyber-hoax risk?

There is no regulatory requirement for an issuer to monitor newsfeeds for false information issued about the company. That being said, IR and PR teams within issuers generally monitor company news and procedures should be in place to escalate any matter involving a hoax announcement about the company. The AIM advice referred to above also reminds AIM issuers that they should be kept informed about social media posts, for example on internet discussion forums in the context of enabling the nominated adviser to be alerted to potential disclosure issues such as whether a false market might be developing as well as potential leaks of confidential information. This is also useful advice for companies listed on the Official List.

Whilst issuers are not generally required to scotch false rumours, in any of the circumstances listed above, an issuer would be advised to seek professional advice immediately, issue a correcting announcement to eradicate the false market in the company's securities and notify the FCA (this would be a particular priority for issuers that are also regulated firms pursuant to Principle 11 of the FCA Handbook).

Issuers with secondary listings overseas should assess the risk of hoax announcements in any jurisdictions with less robust regulatory dissemination services. In these circumstances, issuers may wish to consider whether additional safeguards should be put in place.

Although issuers will not be able to protect themselves entirely from liability to investors in the event of them trading during a false market, the risk should be mitigated where the issuer was not culpable in the circumstances leading up to the publication of the hoax announcement and takes rapid remedial action.

FCA enforcement

Unless there has been a breach of an issuer's IT systems or an issuer fails to take swift remedial action to correct the misapprehension in the market in the company's shares, the FCA is unlikely to take action against an issuer following the publication of a hoax announcement. Listed issuers should, however, be aware that the FCA now has the power to require an issuer to publish a corrective statement to the market in certain circumstances.

The FCA would investigate the perpetrators behind the hoax and seek to bring an action for market manipulation in breach of Article 12 MAR and also insider dealing to the extent that any dealing occurred in anticipation of the manipulation of the issuer's share price.

Action:

- Maintain strong cyber security protocols to prevent unauthorised access to the company's IT systems.
- Respond rapidly in the event of a hoax announcement to issue a correcting announcement in order to eradicate the false market in the company's shares and notify the FCA.
- Monitor the company's social media channels and other media outlets for fake announcements designed to mimic the company's own communications.
- Consider whether additional protections are required in jurisdictions in which the company has a secondary listing.

Large UK businesses to report on payment practices and performance

In our September 2016 newsletter, we noted that the Department for Business, Energy and Industrial Strategy (BEIS) had signalled progress in this area following its consultation back in 2014. BEIS has now published its response and updated draft regulations on the proposed new mandatory duty to report on payment practices and performance. Broadly, large UK companies and LLPs, namely those not qualifying as medium-sized or smaller under standard Companies Act 2006 definitions, will be required to submit a report, every six

months, onto a (freely-accessible) government web-based service, giving certain information on their payment terms and performance metrics. This new reporting requirement aims to:

- increase transparency and public scrutiny of the payment practices and performance of large businesses; and
- give small business suppliers better information so that they can: make informed decisions about who to trade with; negotiate fairer terms; and challenge late payments.

The response mentions the following key changes from what we have seen before, some of which were signalled in a Ministerial Statement in March 2015 and others which are new: (i) not all listed companies are automatically in scope, instead the test is a size test; (ii) reports are to be submitted every six months onto a government web-based service; (iii) there is no consolidation of reports for whole groups - each company or LLP in scope publishes its own individual and non-consolidated report; and (iv) in relation to parent companies or LLPs which head large groups, they are only required to report if they qualify as large in their own right.

For more information, see our December 2016 client update.

Corporate governance Green Paper and related developments

As we noted in our September 2016 newsletter, Prime Minister Theresa May had suggested a number of changes in corporate governance and, in a separate but related development, the BIS Committee had launched an inquiry into corporate governance. Since then, in November 2016, BEIS has published its Green Paper on corporate governance. It is a wide-ranging consultation, designed to frame a discussion of options for updating the UK's corporate governance framework in the areas of:

- executive pay;
- strengthening the employee, customer and wider stakeholder voice in the board room; and
- corporate governance in the UK's largest privately-held businesses.

Businesses will be glad to note that in the Green Paper the Government states that it has no preferred options. It has also rowed back on some areas including that it will not be mandating individual stakeholder representatives on boards and that it is considering a number of alternatives to a universal annual binding vote on pay. The Green Paper is open for responses until 17 February 2017.

The BIS Committee (now the BEIS Committee) inquiry is still open and taking oral evidence on a number of areas with much cross-over with the Green Paper. Please see our December 2016 client update for more.

Diversity on boards – various developments

Parker review: consultation on the ethnic diversity of boards. In November 2016, Sir John Parker and the Parker Review Committee published a consultation version of their report on the ethnic diversity of UK boards, having been invited back in late 2015 to conduct an Official Review of the ethnic diversity of UK boards, with the aim of suggesting ways of encouraging businesses to increase the ethnic diversity of boards.

Recommendations include:

- Increase the ethnic diversity of boards. Each FTSE 100 board should have at least one director of colour by 2021 and each FTSE 250 board should have one director of colour by 2024.
- Develop candidates for the pipeline and plan for succession. FTSE 350 companies should develop mechanisms to identify, develop and promote people of colour within their organisations to ensure that there is a pipeline of capable board candidates.
- Enhance transparency and disclosure. The description of the board's policy on diversity in its annual report should include, among other things, a description of the company's efforts to increase ethnic diversity in its organisation and on its board. Companies that do not meet the board composition recommendations by the relevant date should explain why not.

The consultation period is currently scheduled to end on 28 February 2017.

Hampton-Alexander Review – FTSE Women Leaders. In November 2016, Sir Philip Hampton and Dame Helen Alexander (tasked with building on the work of Lord Davies and his Women on Boards goals), published their report on improving gender balance in FTSE Leadership. The next stage of the journey focuses not only on board appointments but also on executive committee composition and on direct reports to the executive committees of FTSE 350 companies.

Recommendations include:

- FTSE 350 companies to aim for a minimum of 33 per cent of women on their boards by 2020.
- FTSE 100 companies to aim for a minimum of 33 per cent of women across their executive committees and their direct reports by 2020 and to publish information regarding this.
- The Financial Reporting Council to amend the UK Corporate Governance Code to require FTSE 350 companies to disclose more on the gender balance of their executive committees and their direct reports.

Investment Association - recent publications

The Investment Association (IA) has published a number of new papers and revised its annual principles of remuneration.

Quarterly reporting and quarterly earnings guidance, November 2016. This is a new position paper in which the IA, among other things, calls for companies to cease quarterly reporting and refocus reporting on a wider range of strategic issues.

Whilst noting recent related changes in regulation and that some 30 FTSE 100 companies and 139 FTSE 250 companies have stopped quarterly reporting since those changes, the IA says companies should focus on improvements in reporting on the long-term drivers of sustainable value creation and shift resources away from quarterly reporting and towards improved reporting on long-term strategy and capital management. The paper notes that the IA's corporate governance arm. IVIS, will now monitor each company's approach to reporting and outline to its members which companies continue to report on a quarterly basis and their explanations.

Guidelines on viability statements, November 2016. This is a new set of guidelines setting out the expectations of investors as regards viability statements given the ones seen in the past year. The guidelines note that the IA's corporate governance research arm, IVIS, will continue to monitor viability statements, now on the basis of these guidelines.

Principles of remuneration, October 2016. As the IA does annually, it has published its updated principles of remuneration alongside an open letter to remuneration committee chairs. The principles include significant changes, mostly made in response to the final report of the independent Executive Remuneration Working Group that the IA established to look into executive remuneration.

For more on this, please see our November 2016 client update.

2017 AGM and narrative reporting season client briefing

We will, as usual, in early 2017 publish our 2017 AGM and narrative reporting briefing and cover developments throughout 2016 that impact on 2017 AGMs and on the narrative parts of annual reports, as well as looking ahead to forthcoming developments.

Confirmation statement – updated guidance

As most recently reported in our July 2016 newsletter, all UK companies and LLPs with an annual return date falling on or after 30 June 2016 are required to file a confirmation statement at Companies House instead of an annual return. We also highlighted that the former requirement for a company to specify the amount paid up and unpaid on each of its shares in the annual return has been removed, the new obligation being to state the aggregate amount unpaid on the company's shares (if any)

in the confirmation statement. Companies House has updated its guidance to clarify that a company filing its first confirmation statement must file a full statement of capital with the confirmation statement as it will not have previously disclosed the aggregate amount unpaid on the total share capital of the company.

CONTRACT UPDATE

Interpreting exclusion clauses

Summary: In a case concerning the construction of a solicitors' professional indemnity insurance policy, the Supreme Court has confirmed that the correct approach to exclusion clauses is to establish the meaning of the words "in their documentary, factual and commercial context". This involves construing such clauses in a way which is consistent with the purpose of the contract as a whole and any regulatory background. Clear wording is needed where a party seeks to exclude or limit its potential liability. However, the narrow interpretation known as "contra proferentem" has no part to play unless it is needed to help resolve an ambiguity. This is an interesting case for anyone following the Supreme Court's recent decisions on contract construction and judicial treatment of exclusion clauses generally.

Background: *Impact Funding Solutions Ltd –v- AIG Europe Insurance Ltd* [2016] UKSC 57 relates to a professional indemnity policy taken out by a firm of solicitors, Barrington, in accordance with the Solicitors' Indemnity Insurance Rules 2009 made by The Law Society in exercise of a statutory power under section 37 of the Solicitors Act 1974. Barrington, which specialised in industrial deafness litigation, entered into an arrangement with Impact under which Impact entered into loan agreements with Barrington's clients, and in this way Barrington was provided with funds to cover disbursements.

Barrington breached its duty of care to its clients and, by doing so, breached a warranty in its contract with Impact relating to the performance of its duties. Barrington's clients were unable to repay their loans, and Impact sought to recover its losses from Barrington's insurers, AIG. The insurance policy did not cover claims or losses "*…arising out of, based upon, or attributable to any…breach by any Insured [i.e, Barrington] of terms of any contract or arrangement for the supply to, or use by, any Insured of goods or services in the course of providing Legal Services…*"

The importance of context: contractual and regulatory. There was no doubt that the correct approach to construction was to focus on the meaning of the words in their documentary, factual and commercial context. The "contra proferentem" rule was not relevant here as the words used in the clause were unambiguous and the principle ought to be used solely where needed to resolve a doubt, not to create one or to magnify a lack of clarity (*Cornish –v- Accident Insurance Co Ltd* (1889) 23 QBD 453). Moreover, the wording ought to be construed in the context of the contract as a whole in a way which is consistent with and not repugnant to, its overall purpose. The Supreme Court also noted, as part of the contextual background, that it is compulsory for solicitors to have professional indemnity insurance to protect themselves, their own clients and third parties to whom they might owe a duty of care. The words above had to be seen through this lens.

The nature of the agreement between Impact and Barrington. It was held - Lord Carnwath dissenting - that the funding arrangements were essentially an agreement for the supply of services to Barrington within the meaning of the exclusion. It formed part of a scheme by which clients who did not qualify for legal aid and could not otherwise afford to bring a claim were allowed to do so without financial risk. Barrington breached the terms of those arrangements by failing to give advice and assess the merits of claims properly. Barrington contracted as principal, received a benefit, and paid a fee. (Lord Carnwath disagreed, taking the view that Impact provided a facility for the firm under the contract but the essential purpose was to provide loans to the clients.) Therefore, the majority view was that the exclusion defeated Impact's claim against AIG. Barrington's liability to Impact was a trading or operational one which the insurance policy was not designed to cover.

Test for implication not met. The Supreme Court was also asked whether a restriction should be implied on the exclusion to limit its scope. Following *Marks and Spencer PLC –v- BNP Paribas* [2016] AC 742 a term will be implied only if necessary to give the contract business efficacy, or if it is so obvious that it goes without saying. It was not the case that this contract lacked commercial or practical coherence without any such restriction. Impact's claim against Barrington, as an independent cause of action, was separate from the clients' claims and excluding it did not lead to any incoherence in the policy.

LITIGATION

Legal advice privilege: new cases applying *Three Rivers*

The 2003 Court of Appeal decision in *Three Rivers (No 5)* and, in particular, its restrictive view of who constitutes the client for the purposes of legal advice privilege, has been controversial. It has been criticised by academics, and other common law jurisdictions have departed from it, insofar as it restricted legal advice privilege to lawyers' communications with the few employees tasked with seeking and receiving legal advice (i.e. the "client"). This limitation meant that lawyers' discussions with other employees, albeit to enable them to give legal advice, would not be privileged (in a non-litigation context).

Since *Three Rivers (No 5)*, however, the English courts have not had an opportunity to consider its implications. But in the space of a month, two cases have come before the High Court in which the issue of who constitutes the "client" for the purposes of legal advice privilege has been addressed. In both, the restrictive *Three Rivers (No 5)* test was upheld and applied.

For more information, please see our detailed briefing.

Key points

- Claims to privilege are increasingly being challenged, particularly in relation to documents created during internal investigations, and will be closely scrutinised by the English courts and regulators.
- The "client", for the purposes of legal advice privilege, consists only of those individuals authorised to seek and receive legal advice on behalf of a corporate. Authorising employees to talk to the corporate's lawyers in order to enable those lawyers to advise the corporate will not, of itself, suffice. Any employee who is not actively involved in instructing the lawyer, or does not form part of a specially designated unit set up by the corporate to work with the lawyers, will fall outside the definition of "client".
- Consequently, unless litigation privilege applies, none of those lawyer/employee communications, or documents produced by those employees and sent directly to the lawyers, will be privileged, even if they are necessary to provide information to the lawyers to obtain legal advice.
- Likewise, any verbatim note, transcript, or recording of any discussions or interviews by lawyers will also not be privileged.
- Non-verbatim interview notes produced by the lawyers will only be privileged if it can be shown that they betray the trend of advice being given to the client. The fact that the note is not a verbatim note, or includes the lawyers' "mental impressions", will not of itself be sufficient to pass that test.
- In cross-border investigations, consider which other privilege laws could apply. The law of the jurisdiction in which the underlying investigation is conducted or with which it is most closely connected will not always apply.

TAX

Interest deductibility and loss relief reforms confirmed for next year

As discussed in detail in our September 2016 newsletter, the UK is introducing new rules to further restrict the tax deductibility of corporate interest expense, over a threshold of £2 million, to 30 per cent of tax-based EBITDA for the UK group or, if higher, a group ratio based on the net interest to EBITDA ratio for the worldwide group.

The draft Finance Bill 2017, published earlier this month, confirms that this will be introduced as from 1 April 2017, despite widespread concern that this gives businesses little time to prepare for such a significant change.

Also confirmed with effect from 1 April 2017 are new corporate loss relief rules. These reforms are double-edged. On the one hand, businesses have welcomed increased flexibility on the use of carried-forward losses which will enable such losses to be relievable against the profits of any activity and against profits in other group companies. However, it will in future only be possible to set carried-forward losses against 50 per cent of a company's profits (25 per cent in the case of certain losses carried forward by banks) over a threshold of £5 million. In-year and carried-back losses are unaffected by this legislation.

Both of these measures have been through an extensive consultation process and draft legislation for the "core" rules has now been published, with the remainder to follow by the end of January 2017.

Changes to the substantial shareholdings exemption

The UK's participation exemption for capital gains (the substantial shareholding exemption or SSE) is to be reformed and simplified, making it easier for UK companies to claim a complete exemption from UK tax on gains from the disposal of shares.

One of the main issues currently preventing use of the SSE is the requirement that the selling company be a trading company or part of a trading group both before and after completion of the share sale in question. Helpfully, this requirement has been removed so the exemption will now also be available for companies in investment groups selling out trading subsidiaries. In brief, the other two main requirements will remain:

- at least a ten per cent holding has been held for over 12 months; and
- a "trading" test in relation to the target company or group being sold.

This should very materially improve the efficiency and robustness of the exemption and, by extension, the use of UK incorporated holding companies.

Separately, a new form of the SSE is being introduced for companies owned as to 80 per cent by certain institutional investors, such as pension schemes, charities and investment trusts, or where the acquisition cost to any given investor exceeds £50 million. A partial exemption is available where the interest of the qualifying institutional investors is between 25 per cent and 80 per cent.

This form of the exemption takes no account of the activities of either the company making the disposal or the company being sold and will therefore be available in respect of investment companies and property holding companies, neither of which have previously been able to take advantage of the exemption.

Salary sacrifice

The tax and employer NICs advantages of salary sacrifice schemes will be removed from April 2017, except for arrangements relating to pensions (including advice), childcare, Cycle to Work and ultralow emission cars. Most existing arrangements will continue to benefit from tax-advantaged treatment until April 2018, while arrangements involving cars, accommodation and school fees will continue to benefit until 2021.

Salary sacrifice arrangements have become a hugely popular and important feature of an employee's overall benefit package in recent years and these changes will inevitably mark the beginning of the end for many such arrangements. Employees will be relieved that pension contributions in particular have escaped the clampdown for the time being, but

a reversal in the near future cannot be ruled out.

EMPLOYMENT

Gender pay reporting

As previously reported, the Government is introducing significant new regulations on gender pay reporting by employers in Great Britain with at least 250 employees. The final regulations were published on 6 December 2016.

Key changes from the original proposal

- The "snapshot" date at which gender pay data must be determined has been brought forward slightly from 30 April to 5 April, with the first snapshot date being 5 April 2017.
- Employees on reduced or nil pay as a result of being on leave (maternity, parental, sick leave etc) at the snapshot date may be excluded from reports on hourly pay and quartile pay bands. This change will remove the potential distortion that those, say, on maternity leave might have on the figures.
- Differences in median bonus pay must now be included as well as differences in mean bonus pay.
- The Government has confirmed that employees not based in Great Britain could still be included within the reporting requirements where they have a strong connection to Great Britain.

For more information, please see our detailed briefing.

Cases update

Holiday pay

Earlier this year, we reported on an Employment Appeal Tribunal (EAT) case concerning a British Gas salesman who earned a low basic salary but substantial sales commission. He claimed that his commission should have been taken into account in calculating his holiday pay and the EAT agreed.

British Gas appealed to the Court of Appeal which upheld the EAT's decision. It found that, as his commission was contractual and results-based, it should have been taken into account when calculating his holiday pay for the minimum four-week period of holiday required by EU law. There are, however, two caveats to this ruling. First, British Gas has sought leave to appeal to the Supreme Court and, secondly, the Court of Appeal emphasised that its decision was based on the particular facts of the case and is not a general ruling that all commission payments should be factored into the holiday pay calculation.

For more information, please see our updated briefing.

Worker status

Worker status hit the headlines last month with the Employment Tribunal's decision that Uber drivers are not self-employed but are in fact "workers" and therefore entitled to rights such as holiday pay and the national minimum wage. Uber has appealed to the EAT and we await the outcome with interest.

It is important to note that the decision impacts not only on the gig economy but also on all sectors engaging "self-employed" individuals. Jane Ellison MP, financial secretary to the Treasury, has also recently stated that HMRC is setting up a new "Employment Status and Intermediaries Team" to focus on worker status. HMRC's executive chairman has stated that if companies are found to have misclassified individuals as self-employed, steps will be taken to ensure that they pay the appropriate tax, national insurance, interest and penalties.

Equal pay

The Employment Tribunal recently ruled that female employees based within Asda supermarkets may compare themselves with male staff working in the retailer's distribution centres for the purposes of their claim that they are paid comparatively less than their male co-workers. This is a preliminary decision as to the available comparators and the claimants still have to prove their case; nevertheless the decision that staff performing different roles in different locations are suitable

comparators may have far-reaching implications.

Knowledge imputed to employers

In a recent case, the EAT drew a distinction between knowledge imputed to employers in whistleblowing cases and that imputed to employers in direct discrimination cases. In this case, despite the fact that the individual dismissing an employee did not know about the protected disclosures the employee had made, those disclosures were found to be the reason for the dismissal. This case highlights how important it is that any decision-maker responsible for investigating an employee has all the relevant facts.

Shared parental leave

A Scottish Employment Tribunal claim was recently brought by a father who claimed that his employer's policy under which he was entitled to statutory pay during his portion of shared parental leave was indirectly discriminatory as mothers were entitled to enhanced pay during shared parental leave. The employer did not contest the claim and there is therefore no substantive judgment which considered the various issues that would otherwise have been due to be determined. This area is, however, one to watch for potential future claims.

Right to rest breaks

The EAT has held that an employer has a duty to afford a worker the right to a rest break, regardless of whether one has been requested, and that there can be a denial of the right to a rest break through the way in which the working day is arranged. Many workers in high-pressured environments do not take rest breaks and will not complain that the right has been denied to them. However, an employer will not be able to use that as a defence if the employee later complains and seeks to enforce their rights.

Autumn Statement 2016

Please see our briefing which summarises the key employment, incentives and pensions announcements from the Chancellor's Autumn Statement.

VAT on pension fund management costs

HMRC's traditional view has been that an employer could sometimes deduct input VAT incurred on services provided to trustees of a defined benefit pension scheme established by the employer. HMRC has previously allowed employers to deduct input VAT incurred in relation to establishing and administering the pension fund but did not allow input VAT incurred in relation to investment management services to be deducted. As a pragmatic compromise, where invoices related to a mixed supply of both administration and investment management services, HMRC has allowed the employer to recover 30 per cent of the VAT charged on the invoice (the "70:30 split"). The viability of this approach has been put in doubt by a European court decision. HMRC has issued a number of briefs following the decision and on 5 September 2016 HMRC further extended the transitional period in which employers can rely on the 70:30 split until 31 December 2017. HMRC's latest briefing indicates that further guidance will be published.

Equalisation of guaranteed minimum pensions

In November the Department for Work and Pensions issued a consultation and draft regulations proposing a method to deal with equalising guaranteed minimum pensions in defined benefit schemes. There has remained a question mark over whether guaranteed minimum pensions accrued from 17 May 1990 (the date when the ECJ ruled that pensions fall within the term "pay" for the purposes of equal treatment) to 5 April 1997 (when guaranteed minimum pensions ceased to accrue) needed to be equalised and if so how this would be done. This consultation closes on 15 January 2017. Action is likely to be required to equalise benefits in the near future which will unfortunately increase many defined benefit schemes' liabilities.

COMPETITION

Cartel executive banned from acting as UK director for five years

The UK Competition and Markets Authority (CMA) has used its powers for the first time to secure the disqualification of the director of a business found to have engaged in illegal price fixing.

Daniel Aston was the managing director of Trod Limited. In August 2016, the CMA fined Trod £163,371 for breach of competition law. It had used price-fixing software to align the prices of its posters and frames sold online through Amazon with those of a competitor. The CMA further announced on 1 December 2016 that it had obtained undertakings from Mr Aston such that he would not act as a director of any UK company for 5 years. The use of this sanction underlines the current trend of the CMA pursuing simpler cases and smaller businesses in order to raise awareness of competition law and to secure the deterrence effect of headlines, fines – and now director disqualifications. However, there is no doubt that the case is clearly intended as a wake-up call to businesses of all sizes.

Mr Aston was personally involved in the price fixing cartel. However, the threshold for the CMA's use of the disqualification sanction is potentially very low.

The business concerned must have infringed competition law and:

- the director concerned contributed to the breach; or
- the director was not involved but had reasonable grounds to suspect that the conduct constituted an infringement and took no steps to prevent it; or
- the director did not know but ought to have known that the conduct of the business was illegal.

The last of these requirements is clearly a very low threshold for a potentially career-changing sanction.

The power of the CMA to seek the disqualification of a director (either by court order or through undertakings given by the individual concerned) for involvement in a civil competition law infringement has been available since June 2003, but never previously used. The only other UK directors to have been disqualified were three executives involved in a cartel involving marine hoses. However, they were convicted of the UK criminal cartel offence, and their disqualifications followed on from their personal criminal convictions rather than, as here, from their businesses' civil infringement.

This case also emphasises the benefits to be gained from a leniency application. Trod's co-cartelist GB eye Ltd blew the whistle. Not only did it escape any fine but the leniency has protected Mr Aston's opposite number from disqualification steps. Trod, by contrast, is now in administration while Mr Aston has been disqualified in the UK and is facing the possibility of extradition to the US to face criminal cartel charges.

The benefits of confessing must, however, be balanced against the risk of exposing the business to potentially costly damages actions by third parties. This disqualification action highlights that competition law must be taken seriously, but the dynamics of how to manage competition risk remain nuanced and finely balanced.

First fine for gun-jumping in France

For the first time, the French competition authority has used its powers to fine merging businesses which start to co-ordinate their strategy and commercial activities ahead of receiving formal merger clearance.

Altice, parent company of mobile phone operator Numéricable, was fined €80 million on 8 November 2016 for jumping the gun and starting to implement its acquisition of two other mobile phone businesses, SFR and OTL (which markets Virgin Mobile in France).

The merger control rules in France (and most other countries around the world, including the EU and US) require the parties to a qualifying merger first to notify the planned merger and then to wait for clearance before implementing it. The concept of "implementing" the merger has a wide meaning for these purposes. It is not restricted to completing or closing the

transaction, but includes practical steps whereby the merging parties start to co-ordinate their businesses as if the merger had already happened. The authorities impose this standstill so that the clearance process and the scope for designing remedies for competition concerned is not undermined by the parties starting to integrate their businesses ahead of clearance.

Although the two mergers were cleared at the end of October 2014, subject to conditions, the French authority went on to investigate the conduct of Altice, SFR and OTL pending the clearance decision. It found a series of examples of illicit premature co-ordination and co-operation. The gun-jumping involved co-ordination and liaison over general commercial strategy as well as in relation to specific contracts, tenders and promotions, with regular exchanges of sensitive commercial information. Altice even discussed SFR's proposed public offer for OTL and took its place as the bidder. The most senior level executives of Altice were often involved. Finally, the authority noted that OTL's managing director took on responsibilities within SFR ahead of clearance, became involved in SFR's new projects and received commercially sensitive information. The gun-jumping co-ordination therefore occurred not only as regards the parent and each of the target businesses, but also between the target businesses themselves.

One final interesting aspect of this case is that third party competitors in the French mobile telephony sector are reported to be planning to bring an action for damages against Altice for their losses resulting from the pre-clearance co-ordination. This is an innovative step and emphasises the degree to which companies are now alert to the potential for redress where the competition rules are breached.

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