UK Quoted Company Newsletter

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CORPORATE / LISTING RULES / CORPORATE GOVERNANCE

Payment practices and performance - new reporting

On 6 April 2017, the Reporting on Payment Practices and Performance Regulations 2017 (SI 2017/395) and the LLP equivalent (SI 2017/425) came into force. For a detailed update on the new mandatory, bi-annual reporting disclosure obligation, including timing for businesses in scope, see our March 2017 newsletter.

Companies and LLPs that are subject to the new reporting requirement will therefore need to consider if they should do any of the following in preparation for their reporting:

- Review their payment terms and policies.
- Ensure their payment control systems and procedures enable them to collect the necessary data on their performance metrics (remembering that there is no consolidated reporting and reporting is on an individual entity basis).
- Consider what that data is likely to show and whether it could be improved in any way before their first report.

Although it is now possible to access the Department for Business, Energy and Industrial Strategy (BEIS) BETA (test phase) website on which the information will have to be posted, the final website still does not appear to have been formally launched.

New Prospectus Regulation

A new Prospectus Regulation was published in the Official Journal of the European Union on 30 June 2017. It will repeal the current Prospectus Directive regime and replace it with a new European prospectus regime on 21 July 2019, although some aspects of the regime will come into effect earlier (see below).

The most important change for listed companies relates to the admission to trading exemptions. Currently, an issuer whose shares are admitted to trading on a regulated market such as the Main Market of the London Stock Exchange is not required to publish a prospectus if the issue of new shares represents over a period of 12 months less than ten per cent of the number of shares of the same class already admitted to trading on the same market.

From 20 July 2017, the percentage will increase to 20 per cent and the exemption will relate to all securities fungible with securities already admitted to trading, for example debt.

Although the changes appear to benefit issuers, it should be noted that any issuance of new shares by an issuer (wherever incorporated) whose shares are listed on the premium segment of the Official List will be subject to the pre-emption guidelines issued by the Pre-Emption Group.

Prospectus Regulation – other key changes

Other key issues (coming into effect on 21 July 2019):

- New simplified content requirements for secondary issuances.
- New universal registration document.
- Shorter summaries and different format but prescriptive content remains.
- Risk factors to be presented in a limited number of categories and in order of materiality.
- Changes to the "necessary information" test including a requirement for the information in a prospectus to be concise.

How Brexit affects the proposed changes is unclear. The new Prospectus Regulation will have become effective before the United Kingdom leaves the European Union but it remains to be seen to what extent the Great Repeal Bill will transpose the Prospectus Regulation into English law after the United Kingdom ceases to be a member state.

We have published an article in PLC magazine on the detail of these key issues.

The article first appeared in the July 2017 issue of PLC magazine

UK businesses required to disclose information about their controllers within tighter timescales

The existing law requiring UK companies and LLPs to record details of individuals and legal entities exercising significant control over them (controllers) in a statutory register (PSC register) and to disclose that information at Companies House was amended with effect from 26 June 2017 by the implementation of the Information about People with Significant Control (Amendment) Regulations 2017 (the Regulations). The implementation of the Regulations coincided with the transposition deadline for the EU's Fourth Money Laundering Directive (the Directive) which, among other things, required the UK Government to implement certain changes to the PSC regime by 26 June 2017.

More timely disclosure and notification. Companies and LLPs previously updated information about their controllers by completing and filing a confirmation statement (Form CS01) at Companies House. The Directive requires the PSC register to be "accurate and current". Therefore, with effect from 26 June 2017, the Regulations require all UK companies, LLPs and other entities obliged to keep a PSC register to update their register within 14 days of notification of any changes to the details or nature of control of the controllers and to notify Companies House within a further 14 days on new Companies House forms PSC01 to PSC09.

More UK businesses required to disclose information. Publicly traded companies whose shares are admitted to trading on AIM and the NEX Exchange were previously exempt from the requirement to keep a PSC register. However, the exemption was removed with effect from 26 June 2017, meaning that such companies need to keep a PSC register from

that date and notify Companies House of any changes to their controllers. AIM companies incorporated in the United Kingdom will need to continue disclosing shareholder information in accordance with Chapter 5 of the Financial Conduct Authority's Disclosure Guidance and Transparency Rules ("DTR5").

Continuing exemption. UK companies listed on the Main Market of the London Stock Exchange, regulated markets in other EEA states and certain markets in the USA (such as NYSE and NASDAQ), Japan, Switzerland and Israel continue to be exempt from the requirement to keep a PSC register.

Pre-Emption Group report and best practice

On 12 May 2017, the Pre-Emption Group published its annual monitoring report on implementation of its 2015 statement of principles for disapplying pre-emption rights and its 2016 template resolutions, which are for use where companies seek to disapply pre-emption rights up to 5 per cent generally and up to a further 5 per cent for an acquisition or specified capital investment. The report highlights that the statement of principles and resolutions have generally been adhered to, although examples of poor consultation and disclosure are noted. The group has issued an Appendix of Best Practice in Engagement and Disclosure to assist companies.

Appendix of best practice in engagement and disclosure – some key points

- Investors consider that the additional 5 per cent disapplication authority should only be sought when appropriate for the company's circumstances.
- Where possible, companies should signal an intention to undertake a non pre-emptive issue at the earliest opportunity and establish dialogue with shareholders.
- Consultation about a proposed issuance should be specific and unequivocal and with a wide range of shareholders.
- When the additional 5 per cent disapplication authority is used, it must only be for an acquisition or specified capital investment as described in the statement of principles. Issuances for other reasons are not consistent with the statement of principles (including cash box placings).

Corporate governance developments

BEIS Committee final report on corporate governance. We still await the Government response to its Green Paper on Corporate Governance reform and also the Financial Reporting Council (FRC) consultation on its fundamental review of its UK Corporate Governance Code (the Code), both of which we noted in our last newsletter. However, on 5 April 2017, the BEIS Committee issued its report following its corporate governance inquiry. Recommendations are numerous and whether or not any are adopted by either the Government when it issues its response to the Green Paper or by the FRC when it consults on its review of the Code, remains to be seen.

The BEIS Committee report considers: whether the UK corporate governance framework is still fit for purpose; whether it provides the right structures to assist business in making high quality decisions for the long term; and how good behaviour can be embedded in business through cultural change and persuasion.

BEIS Committee report – some key recommendations

- The FRC should amend the Code to require narrative reporting on the fulfilment by directors of their duty under section 172 (duty to promote the success of the company) of the Companies Act 2006. This should require boards to explain how they have considered each of the stakeholder interests and reflected them in decisions, and also had regard to the consequences of their decisions for the longer term.
- The FRC should be given additional powers to engage with directors and hold them to account as regards their duties. Where engagement is unsuccessful or companies do not respond satisfactorily, this may include reporting publicly to shareholders on any failings of the board and the FRC should have the authority to initiate legal action for breach of section 172.
- A rating system should be developed to annually publicise examples of good and bad corporate governance practice by companies, with the rating to be published in a company's annual report.

ICSA revised terms of reference for audit committees. On 18 April 2017, the Institute of Chartered Secretaries and Administrators issued a revised version of its terms of reference for audit committees. These have been updated for the 2014 and 2016 Codes and also for the 2016 FRC guidance on audit committees.

PIRC 2017 shareowner voting guidelines. Pensions & Investment Research Consultants Ltd (PIRC) has published its 2017 UK Shareowner Voting Guidelines setting out its views on what constitutes good corporate governance practice.

Changes to the guidelines from the previous version include that PIRC will oppose the re-election of an executive chairman except in exceptional circumstances; that it will oppose the election of a finance director as chairman at the same company in the same way it would oppose a chief executive becoming a chairman (i.e. only as an interim measure and with a compelling argument and adequate safeguards); that it supports the Hampton-Alexander Review recommendations of 33 per cent. of board positions in FTSE 350 companies to be held by women by 2020; and that it will not support the re-election of a nomination committee chairman of a FTSE 350 company where current female representation on its board falls below these expectations with no clear and credible proposals for reaching these objectives.

Narrative reporting developments

FRC revised operating procedures. The FRC has published a revised version of its operating procedures for reviewing company reporting together with its feedback statement and some revised frequently asked questions. The revised operating procedures took effect from 1 April 2017 and permit the naming of those companies whose reports and accounts the FRC has reviewed, once the case is closed.

FRC observations in its feedback statement include: encouraging boards to be transparent about the extent of any interaction with the FRC's Corporate Reporting Review function and to make related disclosures in the audit committee report in the next annual reports and accounts. The FRC also notes that it will monitor the quality of statements including the extent to which they are fair and balanced.

FRC discussion paper on preliminary statements. On 27 April 2017, the FRC published a paper intended to stimulate discussion about the use and value of preliminary announcements and on the role of auditors as regards them. Comments were requested by 23 June 2017. The FRC will use the comments it receives to assist it in revising auditor guidance and will consult formally on any changes. The paper considers, for example, requiring audits to be completed and the auditors' report to be signed before preliminary results can be released and requiring a bespoke auditor's report to be included.

Investment Association guidance on long-term reporting. On 9 May 2017, the Investment Authority (IA) published guidance on long-term reporting which follows on from its position statement in October 2016 calling for companies to cease quarterly reporting. It is intended to complement the Companies Act 2006 strategic reporting regime and the FRC's Guidance on the Strategic Report. The guidance is for companies with a premium listing, but companies with a standard listing or AIM or High Growth Segment companies are encouraged to adopt it. It sets out detailed recommendations in the key areas noted below:

IA guidance on long-term reporting - key areas:

- Business model and long-term reporting
- Productivity
- Capital management
- Material environmental and social risks
- Human capital and culture

The Institutional Voting Information Service, the corporate governance research arm of the IA, will start monitoring implementation of the guidance for annual reports for year-ends on or after 30 September 2017, and will outline to IA members those companies that continue to adopt short-term reporting models.

EU Developments

Shareholder Rights Directive. The directive amending the Shareholder Rights Directive has been adopted and published in the Official Journal of the EU – the Directive Amending Directive 2009/36/EU as regards The Encouragement of Long-term Shareholder Engagement (2017/828/EU) (the Directive).

Since many of the amending Directive's measures are already catered for in the UK, such as "say-on-pay" voting and identification of shareholders, it is likely to have little impact. That said, there may be a few areas where the Directive's provisions do need amendment of, or addition to, UK rules, for example, on related party transactions.

Member states have until 10 June 2019 to implement the Directive although, given Brexit, it remains to be seen whether or not the UK Government chooses to do so.

EU questionnaire on cross border mobility. On 10 May 2017, the European Commission published an online questionnaire to inform the scope of a future company law initiative in the areas of:

- **Use of online tools throughout a company's lifecycle.** This looks at the use of digital processes and tools by companies when interacting with national business registers and shareholders (for example, use of email, audio/visual conferencing, electronic signatures and blockchain voting facilities).
- **Cross-border mobility of companies.** This looks at cross-border mergers, divisions and conversions.
- **Conflicts-of-law rules for companies.** This asks questions on: problems when national conflict-of-law rules differ for companies with operations in several member states; which law should apply; and what matters a new law should cover and whether it should cover companies incorporated outside the EU with operations in the EU.

The questionnaire is open until 6 August 2017.

Collective shareholder action - Takeover Panel Statement

On 15 June 2017, the Takeover Panel issued Panel Statement 2017/10 looking at, amongst other things, whether a group of shareholders who had requisitioned AGM resolutions proposing changes to the board of a company should be considered as acting in concert. The Panel was requested to look into the matter by the company. Ashurst advised one of the shareholders on the requisition and prepared the submission by the shareholder group to the Takeover Panel.

Note 2 on Rule 9.1 of the Takeover Code provides that the Panel does not normally consider the actions of shareholders voting together on a particular resolution as action indicating they are acting in concert. However, if the resolutions requisitioned or threatened are "board control-seeking", the Panel will presume the shareholders to be acting in concert with each other and the proposed directors. In this instance, the Panel ruled that three of the four proposed directors are independent of the shareholders proposing their appointment while the fourth is not as he is employed by one of the shareholders. The Panel concluded that: these were not "board control seeking" resolutions for the purposes of Note 2 on Rule 9.1; the new directors and shareholders are not acting in concert; and no mandatory bid needs to be made.

CONTRACT UPDATE

Exemption clauses – Court of Appeal

The Court of Appeal has upheld a blanket exclusion of liability for asbestos-related claims at a development site. Although the parties were sophisticated commercial entities and the clause was part of a wider mechanism dealing with risk and insurance, this case clearly reinforces the message that courts should leave contracting parties free to decide such matters for themselves where possible and that plain wording will be effective even where the outcome operates harshly on one party. Comments from the Court of Appeal also confirm the shift away from the traditional narrow construction of exemption clauses and the need to look, first and foremost, at the natural and ordinary meaning of the words.

(1) Persimmon Homes Ltd (2) Taylor Wimpey UK Ltd (3) BDW Trading Ltd –v- (1) Ove Arup & Partners Ltd (2) Ove Arup & Partners International Ltd [2017] EWCA Civ 373 concerned a regeneration project for dockside land in Barry in South Wales. The respondents ("Arup") had been engaged by Associated British Ports to provide environmental and consultancy services in 1996 in respect of the project and were later appointed by the appellants (the "Consortium") in 2009 to provide engineering services, including contamination investigation and environmental input, in the same location.

The 2009 agreement included several provisions regarding liability and insurance. One clause read as follows:

"The Consultant's aggregate liability under this Agreement (other than for death or personal injury caused by the Consultant's negligence) shall be limited to £12,000,000… with the liability for pollution and contamination limited to £5,000,000…. Liability for any claim in relation to asbestos is excluded."

Unfortunately, during excavation works, large amounts of asbestos were discovered and the Consortium took the view that Arup had been negligent in not notifying them earlier. The Consortium claimed that they had paid too much for the site and also sought to recover their costs for dealing with the late discovery of the asbestos.

Arup relied on the exclusion clause to exempt them from liability altogether. Deciding that Arup's view was correct, the Court of Appeal commented that a lot of older case law was no longer relevant and the language of the clause in question was sufficiently clearly worded to be effective. Added to this, it was very common in the sector for contracting parties to agree how they should allocate risks between them and who would be required to insure, and this is very much a matter for them, and not the court, to decide. Acceptance of risk and insurance costs tends to be reflected in the fees which contractors and consultants charge and this had been the case here.

CORPORATE CRIME

Serious Fraud Office's challenge to litigation and legal advice privilege succeeds

The Serious Fraud Office (SFO) has been in the headlines with regard to its successful privilege challenge which entitled it to disclosure of a number of documents created by lawyers during the internal investigation that preceded the SFO's criminal investigation (*The Director of The Serious Fraud Office v Eurasian Natural Resources Corporation Limited*). The decision highlights the difficult privilege issues surrounding fact finding investigations, particularly in relation to interviewing employees. The documents ordered to be disclosed included the interview notes made by the external lawyers. The decision also makes it more difficult to claim that litigation privilege applies in an investigations context. ENRC has applied for permission to appeal. Further detail is provided in our briefing.

Proposals to abolish the SFO dropped

In their manifesto the Conservatives had include a pledge to incorporate the SFO into the National Crime Agency, a move which had proven controversial and attracted much criticism. However, these proposals were not included in the Queen's Speech delivered on 21 June.

TAX

Failure to prevent the facilitation of tax evasion

The new criminal offence of failing to prevent the facilitation of tax evasion was enacted in the Criminal Finances Act 2017, bringing with it the potential for unlimited financial penalties for those found guilty. It is not yet confirmed when the offence will come into force, but it is expected to be in September 2017 to coincide with the first information disclosures received by HMRC under the Common Reporting Standard rules.

A business will have committed the offence if a person, or entity associated with it, criminally facilitates tax evasion (tax avoidance is not sufficient to trigger the offence) while acting on behalf of the business.

This offence is intended to stop businesses claiming that the senior management of the business were unaware of the criminal actions of their employees or associates. In other words, "turning a blind eye" to such actions no longer suffices to avoid corporate liability. However, businesses have a defence against the offence if they put in place reasonable prevention procedures.

Preventing tax evasion - reasonable prevention procedures

Businesses should:

- Carry out a full risk assessment, following the risk criteria set out in HMRC guidance (which mirrors that found in the equivalent Bribery Act provisions) to identify where employees and associates might have the opportunity to facilitate tax evasion.
- Put in place procedures to minimise the chances of this happening.

While this will clearly be of particular interest to banks and financial services firms, all businesses are potentially affected and need to review their position.

Corporate interest restrictions and loss relief reform

The proposed new restrictions on the deductibility of corporate interest expense and use of carried forward losses were dropped from the Finance Bill when a truncated version of the Bill was rushed through Parliament prior to the General Election. However, it is expected that these rules will still be enacted, broadly in the same form as in the March Finance Bill, and probably from the same effective date of 1 April 2017.

By way of reminder, the new interest rules further restrict the tax deductibility of corporate interest expense, over a threshold of £2 million, to 30% 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 reforms to the use of losses prevent carried-forward losses over a threshold of £5 million being set against more than 50 per cent of a company's profits (25 per cent in the case of certain losses carried forward by banks), although this is tempered by increased flexibility which will allow such losses to be relieved against the profits of any activity and also to be group relieved.

See our September 2016 newsletter for more detail.

Guidance on VAT recovery for holding companies

HMRC has recently updated its guidance in respect of VAT recovery by holding companies.

Following recent case-law, HMRC has now accepted that a holding company providing only management services to its subsidiaries can recover the entirety of input VAT on acquisition costs, and does not need to apportion in respect of the non-economic investment activity of holding the shares. The focus is now very much on the services provided (which constitute the economic activity necessary for VAT recovery) and the guidance is clear that there must be genuine and non-contingent consideration payable for the services.

We recommend therefore that management service agreements are reviewed to ensure that the payment provisions – when, how much and for what specific services – are sufficiently certain to give comfort on this point, and also to ensure that such services are being provided in respect of all companies within an acquired group.

EMPLOYMENT

Gender pay reporting

The regulations on mandatory gender pay gap reporting came into effect on 6 April 2017 for employers with 250 or more employees. Final non-statutory guidance on the regulations was published in April 2017. The deadline for publishing the first set of data is 4 April 2018 and some employers have already begun to upload their gender pay gap data onto the UK government website.

Please see our briefing on the top five issues for employers as well as an updated version of our more detailed briefing on the regulations.

Indirect discrimination

Employers should be aware of a recent Supreme Court decision which may now make it easier for employees to bring successful claims for indirect discrimination.

Indirect discrimination

Employees with certain "protected characteristics" have a legal right not to be discriminated against at work. Protected characteristics include age, disability, race, sex and sexual orientation.

Discrimination at work may be direct or indirect. Indirect discrimination is where the employer does not directly mean to treat an employee less favourably but:

- adopts a "provision, criterion or practice" (PCP) which puts an employee with a protected characteristic at a disadvantage compared with employees who do not share that protected characteristic; and
- the employer is not able to justify that PCP objectively.

The Supreme Court held that it is not necessary to establish the reason why a PCP in the workplace causes a disadvantage to a group sharing a protected characteristic; it is enough to show that the PCP does in fact cause that disadvantage to the group and the individual making a discrimination claim shares that same disadvantage. It is important, therefore, for employers to consider whether workplace PCPs are likely to have the practical effect of discriminating against a particular group of employees who share a protected characteristic.

Notice to terminate

Companies may wish to review notice provisions in their service contracts in light of a recent Court of Appeal decision.

This held that, where an employee's contract does not specify when a notice of termination served by an employer takes effect, it only takes effect when the employee personally takes delivery of the letter with the notice. The exact date when notice takes effect is not usually significant but may be in some circumstances, particularly where, as in this case, the date of the notice made a stark difference to the employee's pension rights.

Finance Bill 2017

Some provisions relevant to employers and employees were dropped from the Finance Act 2017 because of the limited time available to obtain royal assent for the Act prior to the general election. They include changes to taxation of termination payments due in force from 2018, the reduction in the Money Purchase Annual Allowance and the increased income tax exemption for employer-provided pension advice. It is possible that they may be reinstated in a post-election Finance Bill.

Shared parental pay rates

Employers who pay enhanced maternity pay to female employees but do not match this when paying shared parental pay may wish to review this policy following a recent Employment Tribunal decision.

In this case, an employer paid employees on shared parental leave at the statutory rate of shared parental pay but paid women employees on maternity leave at a higher rate than statutory maternity pay. A male employee who was deterred by this differential from taking shared parental leave was successful in claiming direct discrimination on the grounds of his sex; he could compare himself with a woman taking maternity leave.

Unhelpfully, this decision conflicts with an earlier employment tribunal decision on a similar point. It is expected that both decisions will be appealed which may then result in a more authoritative statement of the position.

Dividend payments and the employer covenant

The Pensions Regulator (TPR) has recently published its annual funding statement for defined benefit pension schemes. Of particular interest to sponsoring employers is TPR's hardened stance regarding dividend payments where such payments have an adverse effect on the covenant supporting the pension scheme.

"We are likely to intervene where we believe schemes are not being treated fairly."

TPR states that where an employer's total distribution to shareholders is more than the deficit reduction contributions being paid to the pension scheme, it expects a relatively short recovery plan to be in place supported by an investment strategy which does not rely excessively on investment outperformance. If this is not the case, TPR will consider investigating whether the shareholder payments suggest that the employer can pay more into the pension scheme. In these circumstances TPR *"will take steps to ensure that an appropriate balance is struck between the interests of the scheme and shareholders by the employer."*

The British Airways case

The High Court has recently given its lengthy decision in the well-publicised dispute between British Airways and the trustees of its defined benefit pension scheme. The case centred around a trustee amendment to the scheme rules to introduce a discretionary power to grant pension increases and the subsequent exercise of that power.

The Court found in favour of the trustees. The decision will not be welcomed by employers as it reaffirmed the position that it is extremely difficult to challenge a trustees' decision where that decision has been made properly. This case highlights the importance of scheme employers being familiar with the governing documents of their pension schemes and understanding where the balance of powers lies within those schemes.

Employer debt

In April 2017, the Department for Work and Pensions published a consultation proposing a new deferred debt arrangement to the employer debt regulations. The arrangement would enable an employer in a multi-employer scheme in certain circumstances to defer the payment of an employer debt on ceasing to employ an active member in the pension scheme.

Clearly such an arrangement would give employers an additional means to deal with any employer debt. An employer, however, will need to carefully consider the implications of the conditions which attach to these arrangements, for example, the employer will continue to be treated as if they were the employer in relation to the pension scheme and will retain all their previous responsibilities to the pension scheme.

Share schemes filing deadline

The normal deadline for filing online returns with HMRC in relation to employee share schemes operated in the previous tax year is 6 July. However, because of problems with the online service (now rectified), HMRC has announced that the deadline for the tax year 2016/17 has been extended to 24 August 2017.

COMPETITION

Inwards investment

The Queen's Speech of 21 June 2017 confirmed the Government's intention to introduce controls on foreign investment in critical infrastructure in the UK. This was first announced by BEIS in September 2016. Proposals will be made "to ensure that foreign ownership of companies controlling important infrastructure does not undermine British security or essential services". Much remains unclear about the scope and the form of such controls (as outlined in our briefing on this issue). However, reading between the lines of the Queen's speech, the uncertainties of a hung Parliament and the challenging legislative timetable for Brexit may mean that a minimalist approach will be taken, implementing the controls through the existing public interest protection provisions in the UK merger control regime. It does not appear that a stand-alone regime akin to the Committee on Foreign Investment in the USA, the Foreign Investment Review Board in Australia or the Canada Act protections is likely to be introduced in the near future, which would require new primary legislation

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