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UK Quoted Company Newsletter

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CORPORATE/ LISTING RULES / CORPORATE GOVERNANCE

Delay in disclosure of inside information – updated guidance

The UK Financial Conduct Authority (FCA) has published a policy statement (PS17/2) in response to its recent consultation paper (CP16/38), which we referred to in the last edition of this newsletter. By way of reminder, DTR 2.5 provides guidance on the circumstances in which listed issuers can delay disclosing inside information, and CP16/38 proposed changes to DTR 2.5 which became effective on 24 February 2017. Please click here for our update explaining the background and changes made to DTR 2.5.

One of the conditions set out in Article 17(4) of the Market Abuse Regulation (MAR) that permits an issuer to delay the disclosure of inside information is that "immediate disclosure is likely to prejudice the *legitimate interests* of the issuer". The European Securities and Markets Authority (ESMA) has previously published guidelines setting out a non-exhaustive list of "legitimate interests" (Guidelines) and the FCA's consultation was designed to amend DTR 2.5 to ensure consistency with the Guidelines. Two of the examples given in the Guidelines are:

- the issuer is conducting negotiations where the outcome of the negotiation would be jeopardised by immediate disclosure; and
- the financial viability of the issuer is in grave and imminent danger although not within the scope of the applicable insolvency law, and immediate disclosure

would seriously jeopardise the conclusion of negotiations designed to ensure the financial recovery of the issuer.

In its policy statement, the FCA has reiterated its view that DTR 2.5.4(a) (as amended) is consistent with the Guidelines, although it had been suggested that it should be deleted and that issuers and their advisers should just refer to the Guidelines themselves. In our view, it is not necessarily clear that the amended wording is consistent with the Guidelines and it will be interesting to see how the FCA interprets the Guidelines and DTR 2.5.4G in practice. These provisions are of most relevance to issuers in financial difficulties and in determining the point at which the disclosure of financial difficulties should be made.

The FCA has helpfully confirmed that the ESMA list is indicative and non-exhaustive, whilst stating that it is the expectation of both the FCA and ESMA that Article 17(4) of MAR should be narrowly interpreted, and that all the conditions in Article 17(4) must be met in order to delay the disclosure of inside information.

Changes to the Prospectus Rules and effect on secondary offerings

A draft Prospectus Regulation (the Regulation) is in the process of being finalised and its publication in the Official Journal is expected as soon as it has received formal approval from the European Parliament and the Council.

The Regulation:

- forms part of the European Commission's Capital Markets Union plan (which was launched in September 2015 and centres on the modernisation of the Prospectus Directive);
- has direct effect in the UK (as it is a Regulation and not a Directive); and
- will come into force 20 days after publication in the Official Journal with most aspects becoming effective 24 months later (we will publish a detailed summary of all the changes once the Regulation has been published).

However, certain measures relating to exemptions from the obligation to publish a prospectus when securities are admitted to trading on a regulated market will take effect immediately, that is, on the date that the Regulation comes into force, and these are set out in the box below.

MEASURES TAKING EFFECT WHEN THE REGULATION COMES INTO FORCE
• There is a current exemption from the obligation to publish a prospectus for annual increases in share capital of less than 10 per cent of the number of shares of the same class already admitted to trading on the same regulated market. **The 10 per cent threshold will be changed to 20 per cent and will apply to all securities and not just shares.**
• There is also a current exemption from the obligation to publish a prospectus for shares resulting from the conversion or exchange of other securities. **This exemption will be limited to an increase of less than 20 per cent of the number of shares of the same class already admitted to trading on the same regulated market over a period of 12 months (subject to limited disapplications).**

The FCA is consulting on proposals to amend the Prospectus Rules to take account of these measures. The amendments will take effect from the date that the Regulation comes into force.

The change from the 10 per cent to 20 per cent thresholds mentioned above will benefit listed companies that issue shares regularly, although they will still need to bear in mind the Investment Association's Share Capital Management Guidelines and the Statement of Principles issued by the Pre-emption Group.

Review of the effectiveness of the UK Listing Regime

The FCA has published two papers that aim to review the effectiveness of the existing UK listing regime and to consider areas that may not be properly accommodated by the current framework (the Papers). The Papers reflect the commitment set out in the FCA's 2016/2017 business plan to review the structure of the UK's primary markets.

The first paper (DP 17/2) is a discussion paper that makes certain suggestions as to how the UK primary markets might be structured and enhanced in the future.

The second paper (CP 17/4) is a consultation paper proposing specific changes to the FCA's Listing Rules in a number of areas in order to ensure that certain provisions that apply to a premium listing remain effective and are appropriately calibrated.

The FCA states:

"the overall outcome we want to achieve is an increase in the efficiency and effectiveness of primary markets to ensure they meet the needs of issuers and investors."

Two areas set out in CP 17/4 which may be of particular interest to listed issuers are changes to class tests and reverse takeovers.

Changes to the class tests. Premium listed companies will be permitted to disregard the profits test where the result is anomalous, the result is 25% or more and all other class tests are below 5%. In this situation, the transaction would be unclassified. In addition, where the profits test is 25% or more and is anomalous, issuers would be permitted to make specified adjustments to profit figures used in the profits test (such as adjusting for certain one-off costs).

In both situations, the issuer would not need to seek the agreement of the FCA, provided that it had sought advice from a sponsor first. In all other situations where the issuer considers that the profits test would produce an anomalous result (for example, related party transactions and class 2 transactions), the issuer would have to consult the FCA if it wanted to modify the profits test rules. The FCA is also seeking views on whether other adjustments could be made to how profit before tax is calculated which would not require the agreement of the FCA or whether alternative profit measures could be used, either together with, or instead of, the profits test.

Changes to the reverse takeovers regime. Where a reverse takeover is contemplated, the FCA currently presumes that there will be insufficient information in the market about the target and that this will result in suspension of listing unless the issuer rebuts the presumption.

The FCA is proposing to remove this presumption from the rules in respect of all issuers with a premium or standard listing. This is because the FCA is assuming that proper price formation will happen as a result of the information that listed issuers already make public, principally under MAR.

In addition, feedback received by the FCA has indicated that stakeholders think that suspension of listing is a disproportionate action that harms investors and has the practical effect of deterring some issuers from pursuing transactions. The proposed changes will make the completion of reverse takeovers easier to achieve and is a change which will be welcomed by listed issuers.

The deadline for responses to the Papers is 14 May 2017. In relation to DP 17/2, the FCA will respond by way of a consultation paper if it chooses to proceed with any of the suggestions. The FCA will respond to CP 17/4 by publishing a policy statement with final rules in the second half of 2017.

Please click here for our briefing - *Review of the Effectiveness of the UK Listing Regime* - setting out further detail.

Tesco PLC to compensate investors for market abuse and provisionally agrees a DPA

Tesco PLC (Tesco) has agreed with the FCA to pay compensation to certain investors. The FCA has held that Tesco committed market abuse in relation to a trading statement published on 29 August 2014. The statement gave a false and misleading impression about the value of Tesco shares and bonds, and was subsequently corrected on 22 September 2014.

Investors who purchased Tesco shares or bonds on or after 29 August 2014 and who still held those securities on 22 September 2014 are entitled to compensation. The cost of the compensation is estimated to be £85 million, excluding interest. This is the first time the FCA has used its powers under section 384 of the Financial Services and Markets Act 2000 to require a listed company to pay compensation for market abuse and highlights the emphasis that the FCA places on market integrity. The FCA has not imposed a financial penalty on Tesco.

Although the conduct in question happened prior to implementation of the Market Abuse Regulation (MAR), there is no reason to suggest that the FCA's approach in relation to breaches of MAR would be different. The FCA press release is available by clicking here.

In addition, the Serious Fraud Office (SFO) has confirmed that it has reached an agreement with Tesco Stores Limited (TSL) which, if approved by the Crown Court on 10 April 2017, will result in the terms of a deferred prosecution agreement (DPA) becoming effective. If approved, the DPA will result in TSL paying a financial penalty of £128,992,500. The DPA relates to false accounting by TSL between February 2014 and September 2014. The proposed DPA with TSL does not address whether liability of any sort attaches to Tesco PLC or any employee or agent of Tesco PLC or TSL. For more on DPAs, please see the "Corporate Crime" section of this briefing below.

New disclosure obligation for large businesses to report on payment practices and performance

In our December 2016 newsletter and our separate client briefing, we covered the new obligation to be imposed on large UK companies and LLPs to disclose information about payments made to their suppliers.

By way of reminder, for those businesses in scope, this will involve posting a report twice a year on a freely-accessible web-based service provided by the Government. The report must contain prescribed details of payment terms and performance metrics in relation to supply contracts, such as standard payment terms, the average number of days taken to actually make payments and payments not paid within the agreed period.

UK company or LLP. Broadly, the test for determining if a UK company or LLP (that is not a parent entity) must disclose payment information is whether, on its two previous balance sheet dates, it has exceeded at least two of the thresholds for qualifying as a medium-sized company, namely:

- £36 million annual turnover;
- £18 million balance sheet total;
- 250 employees.

UK company or LLP that is a parent entity. There are two tests for determining whether a UK company or LLP that is a parent entity is in scope and therefore required to disclose payment information.

The first test is whether the UK parent entity meets the test identified above for any UK company or LLP (that is, exceeding at least two of the thresholds for qualifying as a medium-sized company on its two previous balance sheet dates). If the UK parent meets that test, a second test is relevant for determining whether it must disclose payment information, which is whether the group that the parent entity heads exceeds at least two of the thresholds for qualifying as a medium-sized group on its two previous balance sheet dates, namely:

- aggregate £36 million annual turnover net (or £43.2 million gross);
- aggregate £18 million balance sheet total net (or £21.6 million gross);
- 250 employees.

BEIS guidance. In January 2017, BEIS issued its guidance to reporting on payment practices and performance (Guidance) to assist companies and LLPs who may have to report.

WHAT DOES THE BEIS GUIDANCE COVER?
• Who needs to report • What needs to be reported • Where does the information need to be reported • When and for what period does the information need to be reported.

The Guidance also contains a useful flowchart to help entities decide if they are in scope, clarification on reporting periods and linked filing periods, and some further explanation of what it is to be covered in the report, including a few helpful examples.

However, the Guidance does not give any further details of the Government website on which the filing is to be done or mention any practical issues (such as how to amend a report if needed). We understand that the site is still being worked on, that it is being designed to be

user-friendly both for those reporting onto it and those seeking to find information from it and that it will be available from April. We propose to do a further client briefing as and when details of the website emerge.

On 15 March 2017, the final form regulations for companies (*The Reporting on Payment Practices and Performance Regulations 2017*) and LLPs (*The Limited Liability Partnerships (Reporting on Payment Practices and Performance) Regulations 2017*) were made. As expected, they will come into force on 6 April 2017.

KEY POINTS TO NOTE FROM THE REGULATIONS AND THE GUIDANCE

- Reports must be published within 30 days of the end of each six-month reporting period.
- **The first companies or LLPs that must comply** are those with a financial year beginning on 6 April 2017, whose first reporting period will be 6 April to 5 October 2017 and who must **file their report on or before 4 November 2017**.
- Most companies will not have to report until 2018. **December year-end companies or LLPs** will have a first reporting period of 1 January 2018 to 30 June 2018 and must **file their first report on or before 30 July 2018**. **March year-end companies or LLPs** will have a first reporting period of 1 April 2018 to 30 September 2018 and must **file their first report on or before 30 October 2018**.
- A reminder that, whilst there is a need for any UK parent company or LLP to do each of the two tests specified by the Regulations and identified on the previous page of this briefing (that is, individual and group tests) to work out if the parent company or LLP is in scope, there is no consolidated reporting. Reporting is on an individual entity basis only, so any company or LLP within that group that is in scope then does its own report based on its own payment practices.

Corporate governance developments

BEIS green paper. As we noted in our December 2016 client briefing (*Government publishes options for corporate governance reform*), the Department for Business, Energy and Industrial Strategy (BEIS), has issued a corporate governance Green Paper on the following three key areas:

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

The Green Paper was open for responses until 17 February 2017. We understand that the intention is to publish a Government response within 12 weeks of that date, that is, before mid-May 2017 (although unconfirmed press reports have suggested a response is more imminent).

BEIS committee inquiry. The other development that we noted in our December 2016 client briefing is the BEIS Committee Inquiry on corporate governance, covering similar areas. At the time of writing, the Inquiry is still open although no written submissions have been posted since the end of January and no further meetings are scheduled. We understand that deliberation by the Committee of its draft report is imminent.

Review of Corporate Governance Code. In February 2017, the Financial Reporting Council (FRC) announced that it will be conducting a fundamental review of the UK Corporate Governance Code, which will take into account:

- the FRC's work on culture and succession planning;
- the outcome of the Green Paper; and
- the outcome of the BEIS Committee Inquiry.

The FRC has said that to guide its review it will seek input from a wide range of stakeholders, including its recently established Stakeholder Advisory Panel of representatives from a wide variety of sectors. It will then commence a consultation on its proposals later in 2017

based on the outcome of its review and the Green Paper.

A further matter that the FRC notes in its announcement is that, in its response to the Green Paper, it proposes that the Government extend its enforcement powers to ensure that it can take disciplinary action against directors where there have been reporting breaches. Noting that as regards enforcement in the area of financial reporting, the FRC is currently only able to investigate and prosecute directors if they are accountants and/or actuaries, it suggest that "*the entire annual reports and accounts, and associated issues of integrity, be brought within [the FRC's] monitoring and enforcement activity*". It remains to be seen how the Government responds to this suggestion.

The 2017 AGM and narrative reporting season

On 31 January 2017, we issued our annual client briefing for the 2017 AGM and narrative reporting season. Topics covered include those listed below.

AGM ISSUES FOR 2017
• Template pre-emption disapplication resolutions • Remuneration policy resolution • MAR and the buyback resolution • Changes to articles of association • Appointment of auditors • No more FRS 101/102 shareholder notifications in AGM notices
NARRATIVE REPORTING ISSUES FOR 2017
• EU audit reform implementation • FRC publications (including Brexit reminders; areas for improvement; and end of year advice) • Investment Association publications • Updated institutional guidance - UK and US groups • Miscellaneous new and updated reporting requirements (including the Hampton/Alexander review on improving gender balance in FTSE Leadership; and the Parker Review Committee consultation document on ethnic diversity of UK boards).

DEVELOPMENTS FOR 2018 OR LATER
• The new non-financial information statement within the strategic report • Additional diversity disclosures in corporate governance statements

The client briefing also includes links to key corporate governance publications produced in 2016.

Race in the workplace: McGregor-Smith review

In February 2017, Baroness McGregor-Smith published her independent review into the issues affecting black and minority ethnic (BME) groups in the workplace.

The review contains 26 recommendations aimed principally at businesses but also at the Government and others. Recommendations include:

- **Published, aspirational targets**: businesses with more than 50 employees should set and publish five-year aspirational targets and report against them annually.
- **Disclosure**: businesses with more than 50 employees should publish a breakdown of employees by race and pay band.

At the same time, the Government also published its response to the review, from Margot James MP - Minister for Small Business, Consumers & Corporate Responsibility, looking at the review's recommendations as regards Government. It states, for example, that Government:

- will work with and support business to improve their diversity and inclusion approach;
- advocates a business-led, voluntary approach on improved transparency before a legislative solution; and
- agrees that organisations should consider diversity and inclusion in all parts of their business, including their supply chains.

Subsequently, on 28 March 2017, a press release was issued noting that the Minister had written to FTSE 350 company CEOs urging them to improve diversity and inclusion in the

workplace and calling on them to take up the key recommendations from the review including:

- publishing a breakdown of their workforce by race and pay;
- setting aspirational targets; and
- nominating a board member to deliver those targets.

The press release also noted that the Minister would chair a new Business Inclusion & Diversity Group bringing together business leaders and organisations to co-ordinate action to remove barriers in the workplace.

CONTRACT UPDATE

Contractual interpretation and commercial context

In *Wood (Respondent) –v- Capita Insurance Services (Appellant)* (2017), the Supreme Court held that an indemnity in a share purchase agreement (SPA) did not cover the costs of a remediation scheme agreed between the purchaser of a company and the Financial Services Authority (the precursor to the Financial Conduct Authority) to compensate customers who had been identified as potentially affected by the Company's mis-selling of insurance products before the completion date.

In reaching its decision, the Supreme Court examined the rules of contractual interpretation and confirmed that the exercise remains an iterative one by which conflicting interpretations are checked against the provisions of the contract and its commercial context.

In this particular instance, an indemnity provision formed part of an overall risk allocation regime within the SPA and therefore had to be read in conjunction with the extensive warranties in the document. This prevailed over a detailed analysis of the syntax of the clause in question.

Enforceability of a reasonable endeavours clause

The dispute in *Astor Management AG and another -v- Atalaya Mining Plc and others* (2017) centred upon the payment of deferred consideration under an agreement between the parties relating to the ownership and exploitation of a copper mine in Southern Spain.

After holding that the obligation to pay deferred consideration had not been triggered because the specified source of funding had not been obtained, Leggatt J dealt with ancillary issues of reasonable endeavours and good faith.

In particular, he held that the obligation to use reasonable endeavours to enter into an agreement with a third party for funding was sufficiently certain to be enforceable and, as a general principle, unenforceability was very much a "last resort" of the court in such cases.

However, whether the obligation to use reasonable endeavours had been satisfied depended heavily on commercial factors and the economic viability of the project as a whole. The court confirmed that an obligation to use all reasonable endeavours to achieve an end does not require unlimited expenditure, which means that costs are a highly relevant factor in deciding what, if any, further steps are reasonable – and ultimately when to stop. Applying this to the facts in the case, the agreement with a third party for funding had to be commercially viable. On the evidence, only one lender was prepared to make available such a facility, and that was on terms which did not make economic sense. Accordingly, the defendant was not in breach of the obligation to use reasonable endeavours.

CORPORATE CRIME

SFO secures third DPA

At the end of 2016, the SFO Director, David Green QC, said he expected there to be more DPAs in 2017 which will raise different and interesting questions. True to his word, 2017 started with Rolls-Royce entering into a DPA, which was approved by the court on 17 January 2017. The investigation into the company's defence, aerospace and energy business was the largest investigation

conducted by the SFO to date, as was the fine imposed.

Allegations. The allegations concerned conduct on a global scale (jurisdictions involved included Indonesia, India, Russia, Nigeria, Thailand, China and Malaysia) that took place over 24 years and involved senior management and politically exposed persons.

The Judge acknowledged the egregious nature of the criminality, but considered that there were still enough public interest factors for a DPA to be granted. In particular, the significant steps the company had taken to remedy the position, which included spending over £15 million on compliance, reviewing its relationships with agents and intermediaries, replacing senior management and bringing about a change in culture.

Comparing SFO's second and third DPAs. The Rolls-Royce matter was similar to XYZ (the second DPA secured by the SFO). However, a key difference was that Rolls-Royce did not self-report, despite management being aware of the bribery from 2010. Given the focus the SFO has given to the importance of self-reporting, many would have expected this to be a decisive factor weighing in favour of prosecution. However, Rolls-Royce was saved by the "extraordinary" co-operation it provided, which included spending over £123 million on an internal investigation and dealing with the prosecutors, and waiving privilege (on a limited basis) over witness first accounts.

Another marked difference between XYZ and Rolls-Royce concerns the terms of the DPA. Rolls-Royce's DPA came with a hefty price tag: payments of £258 million and £239 million (disgorgement and financial penalty), reimbursement of the SFO's costs of £13 million, and completion of its compliance programme (which has already cost £15 million).

Future approach of SFO and courts. As more DPAs are approved, a clearer picture will develop as to how the SFO and the courts approach the balance to be struck between the need to hold companies accountable and the need to incentivise others to self-report.

It is expected that more corporates will self-report, rather than try to "quietly fix the problem". The SFO has indicated that DPAs are now part of "business as usual", and the Rolls-Royce DPA certainly supports that. However, the Judge was at pains to make it clear that a DPA is not a cosy deal and the threshold remains high. As the Sweett Group conviction in December 2015 demonstrates, not all cases will be considered appropriate for a DPA. The key seems to be genuine co-operation.

Consultation on corporate liability for economic crime

The Government has previously announced its intention to consult on extending the scope of the corporate "failure to prevent" offence beyond bribery to include other economic crimes (including tax evasion).

The Government recently published a consultation paper (*Corporate liability for economic crime: call for evidence)* which seeks to establish whether the extension is needed and to survey the options for possible reform.

Identification doctrine. The consultation paper seeks evidence on the extent to which the identification doctrine is hindering effective criminal law enforcement. The "identification doctrine" requires prosecutors to prove that those who can be regarded as the directing mind or will of the company knew about, actively condoned or played a part in the offending. Critics argue that this encourages companies to decentralise responsibilities to avoid corporate liability, making it difficult to identify a senior individual who is in charge of a particular operation.

Options for reform. The consultation paper presents a series of options for reform which include:

POTENTIAL OPTIONS FOR REFORM
• Amending the identification doctrine • Introducing a strict liability offence with or without a due diligence defence • Regulatory reform on a sector by sector basis

Having already adopted the failure to prevent approach but with a due diligence defence for bribery and the facilitation of tax evasion, it may be difficult to justify taking a different approach in relation to the offences potentially contemplated in the paper, namely:

- common law conspiracy to defraud;
- offences under section 1, Fraud Act; and
- false accounting and money laundering offences under the Proceeds of Crime Act 2002.

If that proves to be the case, this potentially wide-ranging extension may require significant expansion in the corporate compliance programmes of companies.

The House of Lords has, separately, proposed amendments to the Criminal Finances Bill which would enable the Secretary of State to effectively extend the Section 7 of the Bribery Act "failure to prevent offence" to other economic crime by way of statutory instrument. However, it seems unlikely to progress further, at least until after the consultation is concluded.

TAX

UK Spring Budget and subsequent consultations

On 8 March 2017, Philip Hammond gave his last Spring Budget before we revert to a single fiscal event each autumn. As expected, this was relatively light on new tax measures with much of the focus on amendments to, and further consultation on, previously trailed changes. And one of the flagship new announcements, the proposed rise in Class 4 NICs for the self-employed, was abandoned less than a week after the Budget.

Nonetheless, confirmation of the general direction of travel for corporates is always useful and the Government appears committed to the corporation tax roadmap published in 2016, designed to make the UK an attractive place in which to do business. In particular, we were reminded that the UK currently has the lowest rate of corporation tax in the G20 and that this will be going down to 19% from 1 April 2017 and will be reduced further to 17% by 2020.

Changes or proposals of interest to large corporates are set out below.

Bringing non-resident companies within the charge to corporation tax.
A consultation has been published on the case and options for bringing non-resident companies which are currently within the charge to income tax on income from UK real estate within the scope of corporation tax. This would result in these companies becoming subject to more complicated and restrictive corporation tax rules such as the new interest deductibility and loss relief regimes.

New interest deductibility regime*.*
A new draft of the interest deductibility legislation was published on 20 March 2017. These new rules will, from 1 April this year, introduce the rules restricting a group's net deductions for interest to either 30% of EBITDA or to a ratio based on the net-interest to EBITDA of the worldwide group, if higher.

A number of changes have been made to the legislation to ensure that the rules do not give rise to unintended consequences or impose unnecessary compliance burdens. In particular, the new drafting helpfully removes the concern that intra-group guarantees of third party could have resulted in lower interest deductions (although third party guarantees remain problematic). The regime still retains some anomalies, however, and will require careful analysis.

Business Rates revaluation. There is to be a consultation on how to improve the process around the Business Rates revaluation and the issues caused to businesses by the large rate rises. However, this is of little comfort to those facing substantial rises in their liabilities this time around and the package of measures to provide relief in the meantime is largely targeted at small businesses and pubs. It is disappointing, though not entirely unexpected, that the Government has not taken the opportunity to reform the archaic business rates system which has not significantly evolved since business rates were introduced in the early 1990s, despite changes in the use of UK property in that time.

Oil & gas*.* A formal discussion paper has been published on options to maximise exploitation of remaining North Sea oil and support the transfer of late-life UK oil and gas assets.

The paper looks at a number of key issues that are regularly engaged on as part of prospective M&A transactions on the UK Continental Shelf, in particular, the challenges faced by sellers and buyers in relation to late-life assets and the potentially huge decommissioning liabilities connected to them. In this respect, the paper explores the possibility of establishing a

transferable tax history (TTH) for these assets to facilitate asset sales of late life assets in circumstances where the seller did not retain any liability for historic decommissioning.

The consultation process will need to address the detailed mechanics together with other issues posed by the concept of a TTH such as taxpayer confidentiality and the question of whether an on-transfer of the TTH should be allowed on a subsequent sale. However, it is very much hoped that a package can be introduced by the time of the Autumn Budget.

R&D tax credits. Following a review of research and development tax credits, it has been concluded that this regime is already globally competitive. The incentives offered will not therefore be enhanced, as had been hoped, although there is to be a welcome reduction in the associated administrative burdens.

Online Sales. HMRC has published a call for evidence on the case for a new VAT collection mechanism for online sales, using payment technology to allow VAT to be extracted directly from transactions at the point of purchase (known as 'split payment'). This would result in a cash-flow disadvantage to those affected and is likely to be targeted at offshore sellers operating through online marketplaces where lack of VAT compliance is a particular issue.

EMPLOYMENT

Holiday pay

In our December 2016 newsletter, we reported on a Court of Appeal decision to the effect that a British Gas salesman's commission, which was contractual and results-based, should have been taken into account when calculating his holiday pay for the minimum four-week period of holiday required by EU law. As we reported, British Gas had sought leave to appeal the decision to the Supreme Court. However, leave to appeal has now been refused, meaning that the Court of Appeal decision is final.

KEY POINT FOR EMPLOYERS

Employers who have not been including commission within holiday pay should review their practices going forward and also consider whether claims for back holiday pay could arise.

It is important to note, however, that this case dealt with "results based" commission and is not a general ruling that all commission payments should be factored into the holiday pay calculation.

Worker status

Following on from a topic covered in our December 2016 newsletter, Uber has now launched an appeal against the Employment Tribunal's decision that one of its drivers was a "worker" and therefore entitled to such rights as holiday pay and the national minimum wage. The decision in this appeal is eagerly anticipated as similar decisions have now been handed down in the case of other employers.

In January 2017 the Employment Tribunal held that a CitySprint bicycle courier was a worker. Then in February the Court of Appeal, in a case involving Pimlico Plumbers, found that a plumber engaged under an agreement which purported to make him an independent contractor was actually a worker.

It remains to be seen whether Pimlico Plumbers will appeal the decision to the Supreme Court. As we noted before, these decisions impact not only on the gig economy but also on other sectors engaging "self-employed" individuals.

Aside from the judicial activity in this area, a number of governmental inquiries have now also been launched. On 26 October 2016 BEIS launched an inquiry - *Future world of work and rights of workers* - followed shortly afterwards on 30 November 2016 by the *Taylor review on modern employment practices*.

The Work and Pensions Committee also launched an inquiry on 1 December 2016 - *Self-employment and the gig economy* - and, as previously reported, HMRC has established the "Employment Status and Intermediaries Team" to investigate the use of false employment status.

This has been accompanied by the release on 9 February 2017 of the 2015 review into the framework for determining employment status, commissioned by the then coalition Government. This area certainly remains one to watch.

Employment and pensions aspects of the Spring Budget 2017

Key employment, incentives and pensions announcements from the Chancellor's Spring Budget are summarised in our briefing which is available by clicking here.

Recovery of tax paid in the event of malus or clawback

"Malus" provisions broadly provide for performance adjustment by incentives or bonuses being forfeited before they have vested and been paid. "Clawback" provisions generally provide for the repayment of remuneration.

Where malus and clawback provisions apply to bonuses and share awards, one issue yet to be wholly resolved is whether HMRC will allow an employee to recover the income tax paid on any part of a bonus or share award which is subsequently cancelled or recovered.

This impacts on whether malus and clawback should be operated by employers on the gross or net amount of the bonus or award.

HMRC has recently confirmed that tax relief may be available in relation to the repayment of cash bonuses in certain tightly-defined circumstances but we await further clarification in relation to share-based awards.

Potential tax consequences of post-vesting holding periods

In light of recent comments from HMRC, companies that operate a holding period following the vesting of employee share awards should consider requiring employees to make a tax election to ensure they are not subject to an unexpected and unwelcome tax charge.

This is an issue of which many companies may be unaware but can be dealt with by a simple piece of form-filling. For more information, please click here for our briefing.

Data subject access requests

In two recent cases (see here and here) the Court of Appeal has provided somewhat mixed messages for employers dealing with data subject access requests (DSAR) made under the Data Protection Act 1998.

The cases helpfully clarify that a proportionate search is all that is required to comply with a DSAR, but there is still ambiguity regarding the importance that a court will attach to the motives of the party making the DSAR when deciding whether to enforce compliance, particularly when the DSAR is being used as a litigation tool.

Employers should be aware of DSARs and deal with them seriously; as these cases demonstrate, the costs of compliance can easily exceed £100,000.

There will be further changes to the DSAR regime when the General Data Protection Regulation comes into force in May 2018.

Automatic enrolment update

It has been confirmed that the earnings for 2017/18 which trigger the requirement to auto-enrol eligible jobholders will remain at £10,000 and the qualifying earnings band in respect of which the statutory minimum contributions must be calculated will be earnings between £5,876 and £45,000.

On 6 March 2017, regulations also came into force whereby the employer duties to automatically enrol and re-enrol eligible jobholders with HMRC protection on pension savings at or above the Lifetime Allowance (namely Fixed Protection 2016 and Individual Protection 2016) were turned into an employer discretion.

2017 will also see a review of automatic enrolment and the Department for Work and Pensions has announced the expert advisory group who will support the automatic enrolment review and its terms of reference.

Defined benefit schemes

The Government has published a Green Paper, *Security and Sustainability in Defined Benefit Pension Schemes.*

The Green Paper "sets out the evidence available about the key challenges facing defined benefit pension schemes and highlights a number of options that have been suggested to improve confidence in the system."

Four areas are considered in the Green paper when looking at the regulation of defined benefit provision which are set out below.

DEFINED BENEFIT SCHEMES: WHICH AREAS ARE COVERED IN THE GREEN PAPER?
• Funding and investment • Employer contributions and affordability • Member protection • Consolidation of schemes

The consultation closes on 14 May 2017.

COMPETITION

UK CMA updates register of advisory and warning letters

On 15 February 2017 the Competition and Markets Authority (CMA) updated its register of warning and advisory letters to include details of letters sent in 2016.

These warning and advisory letters are becoming an increasingly important part of the CMA's regulatory toolkit and the recent wave of letters has predominantly focused on retail price maintenance (RPM) conduct.

An advisory or warning letter does not amount to a finding as to whether or not a company has infringed competition law. Letters contain a deadline by which the business should confirm receipt and, in the case of warning letters, explain what steps it is taking to ensure it is complying with the law.

When will the CMA send a letter? There are three main scenarios in which advisory or warning letters are sent, and these are highlighted in the box opposite.

What do the letters cover? Although available information is limited, an analysis of the published register reveals that in 2016, the CMA sent a total of 63 warning letters covering 19 different issues.

A vast majority (over 80%) of the warning letters relate to RPM in a range of sectors, including clothing, photographic equipment and cosmetics. The most common issues addressed in the letters concerned:

- online sales restrictions,
- adherence to minimum advertised prices;
- adherence to recommended retail prices; and
- actual or potential threat of supply withdrawal.

In 2016, the CMA also sent 31 advisory letters covering 14 different issues, of which half related to RPM.

What do businesses need to do? Businesses need to ensure that they deal with advisory and warning letters and the CMA has issued guidance in this regard. It is essential that the letter is disclosed to senior managers or board of directors, and legal advice should be taken before responding or contacting the CMA.

WHEN WILL THE CMA SEND AN ADVISORY OR WARNING LETTER?
• The CMA receives information from a third party or its own intelligence but decides that a full formal investigation would not currently be justified under its prioritisation principles.
• The CMA reaches a settlement or infringement decision in relation to certain undertakings, but decides, on prioritisation grounds, not to pursue other parties. For example, in May 2016 the CMA issued a decision concerning online retail price maintenance in the commercial catering equipment sector. The CMA also sent warning letters to 20 other industry parties which it suspected may have engaged in similar practices regarding internet sales.
• The CMA reaches a settlement or infringement decision in relation to conduct which it considers to be widespread in the same or related industries. For example, in April 2016 the CMA published an open letter to estate agents on the need to choose online portals without colluding with estate agents that are its competitors.

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London corporate partners and consultants

Rob Aird	T: +44 (0)20 7859 1726	E: rob.aird@ashurst.com
Chris Bates	T: +44 (0)20 7859 2388	E: chris.bates@ashurst.com
Simon Beddow	T: +44 (0)20 7859 1937	E: simon.beddow@ashurst.com
Patrick Boyle	T: +44 (0)20 7859 1740	E: patrick.boyle@ashurst.com
Nick Bryans	T: +44 (0)20 7859 1504	E: nick.bryans@ashurst.com
Michael Burns	T: +44 (0)20 7859 2089	E: michael.burns@ashurst.com
David Carter	T: +44 (0)20 7859 1012	E: david.carter@ashurst.com
Nick Cheshire	T: +44 (0)20 7859 1811	E: nick.cheshire@ashurst.com
Adrian Clark	T: +44 (0)20 7859 1767	E: adrian.clark@ashurst.com
Karen Davies	T: +44 (0)20 7859 3667	E: karen.davies@ashurst.com
Mark Elsey	T: +44 (0)20 7859 1721	E: mark.elsey@ashurst.com
Nick Elverston	T: +44 (0)20 7859 3143	E: nick.elverston@ashurst.com
Nick Goddard	T: +44 (0)20 7859 1358	E: nick.goddard@ashurst.com
Richard Gubbins	T: +44 (0)20 7859 1252	E: richard.gubbins@ashurst.com
Amanda Hale	T: +44 (0)20 7859 3144	E: amanda.hale@ashurst.com
Bruce Hanton	T: +44 (0)20 7859 1738	E: bruce.hanton@ashurst.com
Nicholas Holmes	T: +44 (0)20 7859 2058	E: nicholas.holmes@ashurst.com
Naomi Horton	T: +44 (0)20 7859 1526	E: naomi.horton@ashurst.com
Hiroyuki Iwamura	T: +44 (0)20 7859 3244	E: hiroyuki.iwamura@ashurst.com
Isabelle Lentz	T: +44 (0)20 7859 1094	E: isabelle.lentz@ashurst.com
Adam Levitt	T: +44 (0)20 7859 1633	E: adam.levitt@ashurst.com
Mark Lubbock	T: +44 (0)20 7859 1762	E: mark.lubbock@ashurst.com
Logan Mair	T: +44 (0)20 7859 1902	E: logan.mair@ashurst.com
Nikhil Markanday	T: +44 (0)20 7859 1328	E: nikhil.markanday@ashurst.com
Tom Mercer	T: +44 (0)20 7859 2988	E: tom.mercer@ashurst.com
Robert Ogilvy Watson	T: +44 (0)20 7859 1960	E: robert.ogilvywatson@ashurst.com
Sergei Ostrovsky	T: +44 (0)20 7859 1821	E: sergei.ostrovsky@ashurst.com
David Page	T: +44 (0)20 7859 1908	E: david.page@ashurst.com
Geoffrey Picton-Turbervill	T: +44 (0)20 7859 1209	E: geoffrey.picton-turbervill@ashurst.com
Nick Rainsford	T: +44 (0)20 7859 2914	E: nick.rainsford@ashurst.com
Michael Robins	T: +44 (0)20 7859 1473	E: michael.robins@ashurst.com
Dominic Ross	T: +44 (0)20 7859 1043	E: dominic.ross@ashurst.com
Jan Sanders	T: +44 (0)20 7859 1246	E: jan.sanders@ashurst.com
Jennifer Schneck (US)	T: +44 (0)20 7859 1744	E: jennifer.schneck@ashurst.com
Antony Skinner	T: +44 (0)20 7859 1360	E: antony.skinner@ashurst.com
Cameron Smith	T: +44 (0)20 7859 1125	E: cameron.smith@ashurst.com
Michael Smith	T: +44 (0)20 7859 1004	E: michael.j.smith@ashurst.com
Nick Stalbow	T: +44 (0)20 7859 1802	E: nick.stalbow@ashurst.com
Eric Stuart (US)	T: +44 (0)20 7859 3654	E: eric.stuart@ashurst.com
Jeffrey Sultoon	T: +44 (0)20 7859 1717	E: jeffrey.sultoon@ashurst.com
Huw Thomas	T: +44 (0)20 7859 1238	E: huw.thomas@ashurst.com
Philip Thomson	T: +44 (0)20 7859 1243	E: philip.thomson@ashurst.com
Terence van Poortvliet	T: +44 (0)20 7859 2424	E: terence.vanpoortvliet@ashurst.com
Philip Vernon	T: +44 (0)20 7859 1705	E: philip.vernon@ashurst.com
David Wadham	T: +44 (0)20 7859 1064	E: david.wadham@ashurst.com
Piers Warburton	T: +44 (0)20 7859 1099	E: piers.warburton@ashurst.com
Nick Williamson	T: +44 (0)20 7859 1894	E: nick.williamson@ashurst.com
James Wood	T: +44 (0)20 7859 3695	E: james.wood@ashurst.com

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