

Insights

CORPORATE BRIEFING - APRIL 2023

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SUMMARY

Welcome to our first edition of Corporate Briefing, where we review the latest developments in corporate law that you need to know about. In this month's issue, we discuss:

JUDICIAL REVIEW AGAINST FCA – ITHACA ENERGY

- ClientEarth has launched a judicial review against the FCA for approving a prospectus which ClientEarth claims contained inadequate climate-related disclosures.

FCA REGULATORY NEWS ANNOUNCEMENTS USING MULTIMEDIA CONTENT

- There is a new practice in the market where some Regulatory Information Services are offering issuers the ability to include multimedia content (eg. audio and video) in regulatory news announcements.

FCA CLARIFIES ITS POSITION ON SCHEMES AND THE NEED FOR A PROSPECTUS

- The FCA has always been of the view that a scheme of arrangement with a mix and match facility offering a choice between shares and cash, would require a prospectus.

DIVERSITY UPDATE REPORT FROM THE PARKER REVIEW AND THE FCA

- An update report, published in March 2023, from the Parker Review on Ethnic Diversity highlights that 96% of FTSE 100 companies have met the target of at least one minority ethnic director on their boards.

DISAPPLICATION OF PRE-EMPTION RIGHTS – 2023 AGM SEASON

- Following the revised Pre-emption Group Statement of Principles, companies have been taking different approaches to this resolution in their AGM Notices for 2023.

ELECTRONIC SIGNATURES – INDUSTRY WORKING GROUP (IWG) FINAL REPORT

- The IWG Final Report, published on 14 March, looks at two issues: cross-border transactions and the risks of fraud.

WARRANTY CLAIM DISMISSED BECAUSE IT FAILED TO MEET SPA NOTICE REQUIREMENTS

- The courts enforce compliance with notice of claims requirements on the grounds that parties should be clear as to the claims they face.

JUDICIAL REVIEW AGAINST FCA – ITHACA ENERGY

ClientEarth has launched a judicial review against the FCA for approving a prospectus which ClientEarth claims contained inadequate climate-related disclosures. This is part of an increased use by environmental pressure groups of judicial channels to challenge companies - and now regulators - and to promote the transition to Net Zero. The courts of England and Wales have shown that they are willing to hear cases of this type and this trend is likely to continue. Please read our "[Judicial Review against the FCA in ITHACA Energy case](#)" insight for further details.

FCA REGULATORY NEWS ANNOUNCEMENTS USING MULTIMEDIA CONTENT

There is a new practice in the market where some Regulatory Information Services are offering issuers the ability to include multimedia content (eg. audio and video) in regulatory news announcements. To address concerns/risks around this practice, the FCA has published Primary Market Bulletin 44. Please read our "[FCA primary market bulletin no. 44](#)" for further details.

FCA CLARIFIES ITS POSITION ON SCHEMES AND THE NEED FOR A PROSPECTUS

The FCA has always been of the view (first confirmed in UKLA List! Issue No.23 December 2009) that a scheme of arrangement (scheme) with a mix and match facility offering a choice between shares and cash, would require a prospectus (absent an exemption). Contrary to this, the market/legal advisers have generally disagreed with this view on the basis that under a scheme, there is no 'public offer' which enables investors to buy or subscribe for securities but instead there is a court procedure where members/creditors are asked to vote on and approve an arrangement resulting in the allotment of securities to shareholders. In recent years, a small number of issuers have offered mix and match facilities without producing a prospectus.

Although the FCA's analysis remains unchanged, they have recognised that the question of whether a prospectus is required is a question of law and ultimately it is for the courts to decide. Please read our "[FCA primary market bulletin no. 44](#)" for further details.

DIVERSITY UPDATE REPORT FROM THE PARKER REVIEW AND THE FCA

An update report, published in March 2023, from the Parker Review on Ethnic Diversity highlights that 96% of FTSE 100 companies have met the target of at least one minority ethnic director on their boards. FTSE 250 companies are making progress towards meeting this target by 2024.

The report also sets out new targets for each FTSE 350 company to set a target percentage for senior management positions that will be occupied by ethnic minority executives and for 50 of the UK's largest private companies to have at least one ethnic minority director on the board. Please read our ["Update from Parker Review 2023"](#) for further details.

In addition, to help companies comply with the new Listing Rules on diversity, Primary Market Bulletin 44 confirms that the FCA will conduct periodic reviews of annual reports, disseminate examples of good practice and if listed companies are not meeting the new requirements under the Listing Rules, they may ask companies to take corrective action, for example by enhancing their disclosures in subsequent annual reports. Please read our ["FCA primary market bulletin no. 44"](#) for further details.

DISAPPLICATION OF PRE-EMPTION RIGHTS – 2023 AGM SEASON

Following the revised Pre-emption Group (PEG) Statement of Principles (see our [earlier blog](#)), companies have been taking different approaches to this resolution in their AGM Notices for 2023.

So far this year, approximately 28% of the FTSE 350 AGM notices we have reviewed have sought authority to disapply the statutory pre-emption for up to 20% of the issued share capital together with an additional authority for follow-on offers for up to 2% of issued share capital for each of the 10% limits. Other companies have sought disapplication authorities for just 10% (5% + 5%) but with the additional 2% for each limb for follow-on offers.

Whichever disapplication threshold is chosen, PEG expects companies to take a consistent approach as between the old and revised regimes. IVIS will red top companies that are seeking 20/24% disapplication authorities that do not follow, in substance, the new PEG template resolutions or provide the assurances on following the shareholder protections and retail follow-on offer contained in the new PEG Statement of Principles.

We would expect more companies to take advantage of these increased thresholds as the AGM season progresses. Please read our ["Preparing for your 2023 AGM"](#) guide for further details.

ELECTRONIC SIGNATURES – INDUSTRY WORKING GROUP (IWG) FINAL REPORT

The [IWG Final Report](#), published on 14 March, looks at two issues: cross-border transactions and the risks of fraud.

The report notes that uncertainty as to how e-signing laws apply in different countries can hinder the adoption of e-signing. It recommends that countries adopt a common standard – perhaps the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Electronic Signatures – and that a government body be tasked with maintaining a record of which countries have adopted that standard and, if not, what requirements apply.

As regards the risks of fraud, the report notes the advantages of e-signing platforms' authentication processes and recommends adopting a uniform approach to e-signing and online identification.

WARRANTY CLAIM DISMISSED BECAUSE IT FAILED TO MEET SPA NOTICE REQUIREMENTS

DRAX SMART GENERATION HOLDCO LTD V SCOTTISH POWER RETAIL HOLDINGS LTD
[2023] EWHC 412

The courts enforce compliance with notice of claims requirements on the grounds that parties should be clear as to the claims they face.

In this case, the buyer had paid c£700m to acquire a company that owned, amongst other things, the potential site of a new power station. However, it later became apparent that a pre-sale reorganisation – that was meant to give the company a right to lay cables over neighbouring land – was defective. The buyer gave notice of a warranty claim. The share purchase agreement (SPA) required the buyer to provide details of its loss (i.e. the loss in value of the shares in the company), but its notice referred only to losses and costs of the company itself. The seller applied to have the claim dismissed – and was successful.

Parties notifying claims will want to make sure they comply with all SPA notice requirements, otherwise they risk losing the right to pursue their claim, irrespective of its merits. Fortunately for the buyer in this case, it also had a claim in relation to a reorganisation indemnity which had different notification requirements and a longer claims period.

For further information please contact Benjamin Lee, Simon Beddow or your usual BCLP contact.

RELATED PRACTICE AREAS

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