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Insights

UK CORPORATE BRIEFING JUNE 2024

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SUMMARY

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

Primary Market Bulletin 49

- The FCA has released the latest PMB discussing LTIPs, GDRs, annual reports, ethnicity reporting categories and ISSB standards.

New draft Regulations and Registrar rules on identify verification

- Draft Regulations and Registrar rules have been published outlining the procedures and requirements for identity verification.

Panel Bulletin No.7 (Bidder Intention Statements)

- Panel Bulletin No.7 discusses the Takeover Panel's expectations regarding statements of intentions

Revised Practice Statement 31

- The Takeover Panel has published revised Practice Statement 31 setting out new guidance on private sale processes.

UK Sustainability Reporting Standards and Sustainability Disclosure Requirements update

- The government publishes its framework and terms of reference for developing UK Sustainability Reporting Standards, alongside an update on implementing a Sustainability Disclosure Requirements regime in the UK.

Simpler corporate reporting

- The government announces proposals to reduce the reporting burden on medium-sized companies.

Using reasonable endeavours does not require a party to accept non-contractual performance

- The Supreme Court has held that, where a party has to use reasonable endeavours to overcome a force majeure event, that does not require it to accept performance of the contract on different terms.

Court of Appeal upholds notice of claim – and gives buyers a boost

- The Court of Appeal has saved a buyer's notice of claim, providing useful guidance on notice of claim clauses and commenting that they should not become a "technical minefield".

Duomatic (unanimous consent) principle required the consent of the beneficial owner

- This High Court case held that, on the facts, the consent of the beneficial owner was required for the Duomatic principle to apply.

PRIMARY MARKET BULLETIN 49 ("PMB")

This edition of PMB reports the following:

- **Long Term Incentive Plans ("LTIPs"):** a review by the FCA found high levels of compliance with the Listing Rule requirements for shareholder approval prior to adoption of the scheme. However, many companies (15 out of 25) failed to publish a circular with the full text of the scheme or a description of its principal terms choosing to provide a summary of the terms in the Notice of AGM, contrary to the Listing requirements.

- **Global Depositary Receipts ("GDRs"):** the purpose of the thematic review was to assess whether issuers of the shares underlying GDRs listed on the standard segment of the Main Market were meeting certain continuing obligations and in particular, under the UK Market Abuse Regulation. The review found, amongst other things, an absence of RIS notifications in relation to projects and/or events in 2021 and 2022, no Delayed Disclosure of Inside Information notifications and a low number of PDMR transaction notifications to the FCA (23 out of 26 GDR issuers had not submitted any PDMR transaction notifications).

- **Annual Financial Reporting:** the FCA have noticed instances of annual financial reports being made public via a regulatory announcement without the report being filed on the National Storage Mechanism (DTR 6.2.10R requires the annual financial report to be filed with the FCA by uploading it to the NSM) together with a low compliance rate for tagging the reports. Under

DTR 4.1 consolidated financial statements should be prepared in tagged structured digital reporting format (see FCA Technical Note for further details).

- **Changes to ethnicity reporting categories:** The Listing Rules require UK and overseas issuers with a premium or standard listing to make annual disclosures, in their annual financial reports, on the representation of women and ethnic minorities at board and executive management level including that at least one member of the board is from a minority ethnic background (defined by reference to categories recommended by the Office for National Statistics ("ONS")). To align with recent updates made by the ONS, the FCA proposes to update their rules this summer alongside the wider Listing Rule changes. These changes allow individuals to identify themselves within a broad range of ethnicities.

- **ISSB Standards**: as reported below in this Corporate Briefing, the government recently announced that it expects to complete the UK endorsement process of the ISSB Standards by Q1 2025. Once complete, the FCA will consult on changes to its rules to move from TCFD to UK-endorsed ISSB disclosure standards.

In areas where the FCA have identified compliance issues, it will continue to use thematic reviews to assess compliance.

NEW DRAFT REGISTRAR RULES ON IDENTIFY VERIFICATION AND THE ECCTA REGULATIONS

The ECCTA has introduced a one-off identity verification requirement for new and existing Directors and Persons of Significant Control, which is expected to be implemented during 2025. Verification will be facilitated through Companies House or Authorised Corporate Service Providers ("ACSPs"), such as company formation agents, solicitors or accountants.

Companies House has published draft Registrar's rules on Companies House identification verification outlining the procedures and requirements for identity verification.

The identity verification process requires applicants to provide an email and residential address, with verification possible through the Gov.uk ID check app, One Login web journey, or at a post office. Accepted documents, listed in Schedule 1, include biometric chipped passports, driving licenses, and residence cards. If none of these options are available, combinations, such as passports and birth certificates are accepted using a registrar-approved third party supported by an identity checking interview.

For verifications conducted by ACSPs, biometric or machine-readable documents, as listed in Schedule 2, are required alongside a verification of cryptographic features by ACSPs. If documents do not fit the requirements or ACSPs cannot verify cryptographic features, a combination of documents, similar to the above, is required.

The draft Registrar (Identity Verification and Authorised Corporate Service providers) Regulations 2024 have now been published and laid before Parliament. These Regulations set out the procedure for the verification and reverification of an individual's identity, the allocation of unique identifiers, the procedure for suspension and cessation of ACSP's status as well as imposing additional requirements on persons who are or have been ACSPs.

PANEL BULLETIN NO.7 (BIDDER INTENTION STATEMENTS)

BACKGROUND

Under the Takeover Code, a bidder must explain, in the offer document, the long-term commercial justification for the offer and state its intentions with regard to the business, employees and pension schemes (Rule 24.2). Exceptionally, where a bidder has no intention of making any changes, it must include a negative statement to that effect. Where a party to an offer, usually the bidder, makes a statement relating to a particular course of action that it commits to take or not to take after the end of the offer period ("post-offer intention statements") it must confirm in writing to the Panel, 12 months after the end of the offer period, whether it has taken, or not taken, the course of action stated in the post-offer intention statement and publish confirmation of this via a RIS.

Any post-offer intention statement must be:

- an accurate statement of that party's intention at the time that it is made; and
- made on reasonable grounds (Rule 19.6(a)).

In addition, it should be "specific and bespoke appropriately reflecting the bidder's unique business rationale and intentions" as to what it will do (or not do) in the 12 months following completion of the acquisition (Response Statement 2017/2).

These changes were introduced to the Takeover Code in 2011 and 2015 as a package of reforms to improve the quality of disclosure by bidders and target companies in relation to the bidder's intentions and to assist shareholders in the target company in making an informed decision on the takeover bid and the board of the target when giving its views on the bidder's plans for the company and its employees.

PANEL BULLETIN NO.7

In the latest bulletin the Panel Executive sets out some of the arguments it receives for not complying with these requirements including:

- because the bidder is not certain about expected synergies, this means that the bidder has not formulated any intentions;

- while some headcount reduction is envisaged, the bidder need not disclose the detail of that intention or, where the bidder considers that the reduction will not be material, need not disclose any intention in relation to the continued employment of employees; and
- the bidder's only intention for the 12 months after an offer has completed is to conduct a strategic review and it will only formulate its intentions with regards to the target company's business after that review has concluded.

In the Executive's view, none of these arguments provide an acceptable basis for formulating statements of intention and the Executive expects that a bidder will almost always have developed specific intentions in relation to the business, employees and pension schemes which must be stated in the firm offer announcement and the offer document.

REVISED PRACTICE STATEMENT 31

The Takeover Panel has published revised Practice Statement 31 setting out new guidance on private sale processes.

Under the Takeover Code, if a company makes an announcement either voluntarily or due to rumour or speculation, Rule 2.4(a) of the Code typically requires the identification of any potential offerors. The Panel will now grant dispensations from this requirement if a company is genuinely initiating a private sale process. Such dispensations allow the company to withhold the names of potential offerors unless specifically identified in any rumour or speculation.

UK SUSTAINABILITY REPORTING STANDARDS FRAMEWORK AND SUSTAINABILITY DISCLOSURE REQUIREMENTS UPDATE

The government has published its framework and terms of reference for developing UK Sustainability Reporting Standards, alongside an update on implementing a Sustainability Disclosure Requirements ("SDR") regime in the UK.

In terms of UK Sustainability Reporting Standards, the government aims to have the UK-endorsed ISSB standards ready by Q1 2025. The FCA will use these standards to establish requirements for UK-listed companies. Separately, a decision on disclosure requirements for other UK companies will be made by Q2 2025. Any subsequent changes would apply, at the earliest, to accounting periods starting on or after 1 January 2026, meaning companies would begin reporting under these standards in 2027 at the earliest.

As part of the SDR regime, the government is consulting on extending the SDR and labelling regime to portfolio managers and plans to consult on a further extension to the Overseas Funds Regime. Further consultations are also underway regarding how the UK's largest companies should disclose transition plans as well as on the UK Green Taxonomy.

SIMPLER CORPORATE REPORTING

The government has announced proposals to reduce the reporting burden on medium-sized companies.

The government is consulting on 2 proposals to:

- raise the employee threshold for medium-sized companies to 500 employees; and
- exempt medium-sized (private) companies from producing a Strategic Report.

These changes are in addition to the government's proposals, announced in March 2024, to increase the thresholds that determine a company's size.

The combined expected changes, subject to stakeholder feedback, are set out below - figures in red represent the existing thresholds:

Individual companies – proposed thresholds

2 of 3 out of:	Small	Medium	Large
Annual turnover (£)	Not more than 15m (10.2m)	Not more than 54m (36m)	54m+
Balance sheet (£)	Not more than 7.5m (5.1m)	Not more than 27m (18m)	27m+
Average number of employees	Not more than 50 (50)	Not more than 500 (250)	500+ (250)

The government intends to take these proposals forward in this Parliament, subject to feedback. Responses must be received by 27 June 2024.

USING REASONABLE ENDEAVOURS DOES NOT REQUIRE A PARTY TO ACCEPT NON-CONTRACTUAL PERFORMANCE

RTI Ltd v MUR Shipping BV [2024] UKSC 18

This Supreme Court case establishes an important principle: that where a party has to use reasonable endeavours to overcome a force majeure event, that does not require it to accept performance of the contract on different terms.

MUR had agreed to ship bauxite for RTI under a contract that required RTI to pay MUR in US dollars. However, during the course of the contract, as a result of sanctions, RTI became unable to pay US dollars and so offered to pay in Euros instead (and to pay any exchange rate costs). MUR refused to accept payment in Euros and stopped shipping the bauxite. The question arose as to whether MUR's obligation under the contract to use reasonable endeavours to overcome a force majeure event (the sanctions), required it to accept performance of the contract that was not in accordance with its terms (a payment in Euros, rather than US dollars).

The Supreme Court has held that there was no requirement to accept non-contractual performance because:

1. the object of the reasonable endeavours obligation was to find a way to perform the contract in accordance with its terms – not to substitute different terms;

2. the principle of freedom of contract includes the freedom not to contract – which in turn includes the freedom not to accept an offer to perform a contract in some other way than on its terms;

3. a party should not be considered to have given up an important contractual right (such as how payment is made) without it being clear (expressly or by necessary implication) that that was their intention; and

4. certainty and predictability are important features of English commercial law - and to permit performance other than in accordance with the terms of the contract would introduce unwelcome uncertainty as to how the contract might be performed.

COURT OF APPEAL UPHOLDS NOTICE OF CLAIM – AND GIVES BUYERS A BOOST

Drax Smart Generation Holdco Ltd v Scottish Power Retail Holdings Ltd [2024] EWCA Civ 477

Buyers regularly lose claims because of some defect in their notice of claim. But this Court of Appeal judgement has saved a buyer's notice of claim and provided useful guidance on how notice of claim clauses should be interpreted - commenting that they should not become a "technical minefield to be navigated, divorced from the underlying merits of a buyer's claim".

The buyer, Drax, had bought a company that owned the potential site of a power station. However, due to a defective reorganisation, the company didn't have an option to lay cables over neighbouring land (for further details, see our earlier briefing). The case turned on whether the buyer's notice of claim had met the SPA requirement to specify 'in reasonable detail the nature of the claim and the amount claimed'.

The High Court judge had said no – on the basis that the buyer's notice had not specified that its claim was for damages based on the reduction in value of the shares in the company (as a result of

not having the option) – which is what it now sought to recover.

But the Court of Appeal disagreed on the basis that:

- the initial purpose of a notice provisions is to provide a time limit by which claims must be made;
- whether a notice satisfies the requirements of applicable notice provisions will depend primarily on how those provisions are drafted, but broad and general terms - such as 'the nature of the claim' and 'in reasonable detail' - should be interpreted in the light of the commercial purpose of notice provisions (such as enabling the recipient to make investigations and assess the merits of the claim) and the "courts should not interpret such clauses as imposing requirements which serve no real commercial purpose unless compelled to do so by the language of the clause"; and
- notice provisions are essentially exclusion clauses – and "the parties are not lightly to be taken to have intended to cut down the remedies which the law provides for breach of important contractual obligations without using clear words having that effect".

On the facts of the case:

- there was nothing in the drafting of the notice provisions or their commercial purpose which required the buyer to spell out how damages would be calculated; and
- the requirement to provide details of the amount claimed was satisfied by the calculations put forward by the buyer in good faith in its notice (and whilst those calculations were not based on the reduction in the value of the shares, they were the 'buyer's calculation of loss' at the time - which is what the SPA expressly required it to provide – and there was nothing in the clause that required the buyer to stick with those calculations).

The Court also suggested that it may not even have been necessary for the buyer to specify which provisions of the SPA it alleged had been breached – and that a simple statement that the seller had failed to ensure that the company had the benefit of the option would have been sufficient, not least as the parties had been corresponding about that issue for over a year. However, this is not in line with a previous decision of the Court – and the relevance of a recipient's actual knowledge is not clear – and so it remains generally advisable, when making a claim, to specify (expansively) the provisions that have been breached – and not to take into account the recipient's knowledge.

DUOMATIC (UNANIMOUS CONSENT) PRINCIPLE REQUIRED THE CONSENT OF THE BENEFICIAL OWNER

Chohan v Ved [2024] EWHC 739 (Ch)

The Duomatic (or unanimous consent) principle states that if all shareholders informally agree a matter, then their agreement is as effective as a resolution passed in accordance with formal requirements. Some evidence of agreement is always required: this case highlights that the agreement of a beneficial owner may be required. It also suggests that, in certain circumstances, the principle might apply so as to ratify a breach of a director's duty to use their powers for a proper purpose.

Two old school friends – Mr Ved, an accountant, and Mr Chohan, a solicitor – decided to buy a property together. They formed a joint venture company to acquire the property. Mr Ved was the sole director; and Mr Ved and his wife were the registered holders of all the shares, declaring a trust over half their shares in favour of Mr Chohan's wife.

Mr Ved was granted a short 'contracted out' lease for his business to occupy part of the property (which meant that when the lease came to an end there would be no automatic right to remain). Within a year or so – by the time Mr Ved sought a lease extension so that he could sub-let - the two men had fallen out. But Mr Ved, as sole director, saw to it that the company granted him a new lease that was not contracted out.

The court held that – in granting the new lease that was not contracted out – Mr Ved had breached his duties as a director (as he had not acted to promote the success of the company, nor had he exercised the power to grant a lease for a proper purpose). However, Mr Ved argued that the granting of the lease had been approved by all the shareholders. The court found that that wasn't the case: there was no evidence that Mr and Mrs Ved – as the registered shareholders - had consciously considered and ratified the grant of the lease. In addition, in this case the agreement of Mrs Chohan, as beneficial owner, was also required – not least as it would not be a joint venture if all shareholders decisions could be made without her; and, again, there was no evidence that she had consented.

As a result of these findings, the court didn't need to determine whether the Duomatic principle could apply in relation to a breach of a director's duty to use their powers for a proper purpose. But, following comments in a 1989 Court of Appeal case (Rolled Steel Products (Holdings) Ltd v British Steel Corporation) it was suggested that it might – so long as the act was within the company's powers and there was no fraud on the creditors.

RELATED PRACTICE AREAS

- Corporate

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