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Insights

UK CORPORATE BRIEFING NOVEMBER 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:

IA Principles of Remuneration 2025

- The Investment Association has published its Principles of Remuneration for 2025 following a review to ensure they support a competitive remuneration environment and meet investor expectations.

Companies House ECCTA implementation plan

- Companies House has published its implementation plan for the Economic Crime and Corporate Transparency Act 2023.

Invest 2035: The UK's Modern Industrial Strategy

- The government has published a green paper focused on creating a pro-business environment that supports businesses to thrive and grow and making it simpler and cheaper for companies to scale up and invest.

Independent expert panel report on corporate re-domiciliation

- An independent expert panel on corporate re-domiciliation, convened by the government in December 2023, has published a report outlining its recommendations.

Code of Conduct for Directors

- The Institute of Directors has launched a voluntary Code of Conduct for Directors aimed at helping directors make the right decisions by providing clear guidance on what constitutes good conduct.

Material Adverse Effect conditions - lessons to learn from a recent case

- This case teaches us some valuable lessons about how the courts approach MAE conditions in M&A agreements.

An interim dividend paid to one shareholder may become a debt due to all

- This case highlights that if an interim dividend is paid to one shareholder, it may become a debt due to all shareholders (of the same class), unless they agree otherwise.

Article in 'PLC Magazine' on public M&A in the real estate sector: issues and trends

- Partners Richard Werner and Tom Bacon share their insights on the key issues that are relevant to public M&A in the real estate sector.

Article in 'Law 360' on tokenised investment funds in the UK

- Partner Tom Bacon and associate Andrew Tsang authored an article for Law360 on the road ahead for tokenised investment funds in the UK.

Article in 'Law360' on the FRC's report on good corporate governance

- Lead Knowledge Counsel Tessa Hastie, assisted by Dana AlBalooshi, authored an article published in Law360 providing insights from the FRC's recent report on reporting against the Wates Principles.

IA PRINCIPLES OF REMUNERATION 2025

The Investment Association ("IA") has published its Principles of Remuneration for 2025 ("Principles") following a review to ensure they support a competitive remuneration environment and meet investor expectations.

The Principles have been simplified to reflect evolving practices and investor expectations with a clear message that they represent guidance not rules and that each company should adapt pay structures that best suit their business and the market it operates in.

Engagement between companies and major shareholders continues to be crucial and recent AGM seasons reflect positively on this with an increased alignment between shareholders and companies on pay demonstrated by the fall in the number of pay resolutions receiving significant dissent year on year.

KEY CHANGES

The updated Principles contain three overarching principles to ensure remuneration policies:

- promote long-term value creation through the delivery of the company's strategy;
- support individual and company performance within the context of sustainable long-term financial health of the business and sound risk management; and
- seek to deliver remuneration levels clearly linked to company performance.

Changes include:

Shareholder consultation - companies should, if they are not already, consult with shareholders particularly when making material strategic remuneration decisions such as substantially changing performance metrics or materially increasing remuneration levels. This will ensure that companies understand shareholder views and expectations when designing and implementing remuneration policies, and not to seek their approval or endorsement. Best practice, following the consultation process, would be for remuneration committees to follow up with a wrap-up letter with those shareholders consulted, summarising the finalised proposals, the rationale behind them and include details of the consultation process in the remuneration report. This would allow all shareholders to understand how the committee's proposals have evolved.

Long-term incentives – the previous 5% dilution limit for the issue of new shares or the re-issue of treasury shares under executive (discretionary) schemes in any rolling 10-year period has been removed. However, the 10% cap for all company share schemes in any rolling 10-year period remains.

Levels of remuneration – the overall message hasn't changed - there should be a clear link between pay and performance reflecting the long-term objectives of the company but there is a clear recognition that the level of remuneration needs to be appropriate for the company's circumstances taking into account the need to attract, retain and motivate talent and implement the corporate strategy.

Annual bonus – on the point of bonus deferral, the IA has clarified that if an executive director has met the shareholding guideline, shareholders may support a reduction in the level of deferral for the relevant director, provided that the committee still has the ability to exercise malus and clawback provisions.

Hybrid schemes – as mentioned in the IA's letter to remuneration chairs in February 2024, some companies, often those with a significant US footprint, may want to use hybrid schemes which typically consist of a combination of performance shares and restricted shares. Where these are used, committees should explain why the hybrid model is preferred over a single structure and the restricted share plan portion should be discounted to reflect the lower risk and higher certainty involved. The vesting period for the hybrid scheme should be at least five years with no early release or accelerated vesting, subject to a clear explanation of a different approach.

COMPANIES HOUSE ECCTA IMPLEMENTATION PLAN

Companies House has published its implementation plan for the Economic Crime and Corporate Transparency Act 2023 ("ECCTA"), outlining upcoming changes in stages. The purpose of ECCTA is to reform the role of Companies House and improve transparency over UK companies and other legal entities.

Key updates include:

Autumn 2024: Companies House will be able to issue financial penalties for offences under ECCTA and the Companies Act 2006.

Spring 2025: Identity verification is a major part of the reforms and those professional service providers registered for Anti-Money Laundering can register to be Authorised Corporate Service Providers ("ACSPs") to carry out identity verification ("IDV") services for their clients. Individuals will also be able to voluntarily verify their identity. Companies House will also be able to receive and assess applications to have residential addresses removed from the public register in certain circumstances.

Summer 2025: Allow access to trust information on the Register of Overseas Entities, on request.

Autumn 2025: IDV becomes mandatory for new directors and PSCs for new incorporations and new appointments, with a 12-month transition period for existing companies to provide identity verification credentials for directors and PSCs when their confirmation statement is due.

Spring 2026: IDV for persons delivering filings and third-party agents filing on behalf of companies to be registered as an ACSP. Filings made by a disqualified director will be rejected.

End of 2026: IDV transition period completed, introduce new filing requirements for limited partnerships and start compliance actions against those who have failed to complete IDV.

INVEST 2035: THE UK'S MODERN INDUSTRIAL STRATEGY

The government has published a green paper "Invest 2035: The UK's Modern Industrial Strategy" focused on creating a pro-business environment that supports businesses to thrive and grow and making it simpler and cheaper for companies to scale up and invest.

Part of this strategy:

- are reforms to company law and a proposed UK re-domiciliation regime – see below for further details;
- new legislation, to be laid this year, which will remove redundant reporting requirements and uplift the monetary size thresholds for micro-entities, small and medium-sized companies

together with 'fixes' to the UK's audit framework;

- is a consultation, to launch next year, aimed at simplifying and modernising the UK's non-financial reporting framework including examining the potential for updating shareholder communication in line with technology. This will include tackling the long-standing debate about the permissibility of virtual AGMs under company law - there are currently differing opinions on whether a virtual only meeting would be in compliance with the Companies Act 2006 which requires the notice to state the 'place' of the meeting.

The government has also announced its commitment to implementing the outstanding recommendations from the 2022 Secondary Capital Raising Review which should speed up and simplify the process for raising share capital.

The response to the green paper will be included in the final Industrial Strategy and growth-driving Sector Plans, to be published alongside the Spending Review in Spring 2025.

INDEPENDENT EXPERT PANEL REPORT ON CORPORATE RE-DOMICILIATION

An independent expert panel on corporate re-domiciliation, convened by the government in December 2023, has published a report outlining its recommendations.

Re-domiciliation is the process of moving a company's place of incorporation from one country to another while maintaining its legal identity. The report confirms that the panel strongly supports the introduction of a two-way re-domiciliation regime, enabling both non-UK companies to register in the UK and UK companies to move abroad. It believes that a re-domiciliation regime will make it easier and more cost efficient for certain companies to move their businesses to the UK and that the flexibility to re-domicile both into and out of the UK will increase the overall attractiveness of the UK as a destination of choice.

The report suggests how parts of the regime could work noting that:

- only solvent companies intending to operate as going concerns in the UK should be eligible to re-domicile, with flexibility to register as either private or public entities;
- the regime needs to be as clear and simple as possible with guidance;
- for a body re-domiciling to the UK, protections for stakeholders in the UK will come from the information the applicant will provide in its application and from the protections offered by UK company law once the applicant becomes a UK company;
- for a UK company wishing to re-domicile outside the UK, protections should be available to members and creditors and in relation to national security interests; and

- differences will remain in the way that certain requirements apply to a re-domiciled company and for this reason it is recommended that re-domiciled companies are distinguished from companies originally incorporated in the UK so that those transacting with them are on notice of these differences.

The panel advises further consultation with regulators and stakeholders on detailed aspects, particularly around accounting and audit.

The government welcomes the report and intends to consult on a proposed regime design.

CODE OF CONDUCT FOR DIRECTORS

The Institute of Directors ("IoD") has launched a voluntary Code of Conduct ("Code") for Directors aimed at helping directors in all organisations (private, public, and non-profit) by providing clear guidance on what constitutes good conduct.

The Code is structured around six key Principles of Director Conduct:

- **Leading by example**: Demonstrating exemplary standards of behaviour in personal conduct and decision-making.
- **Integrity**: Acting with honesty, adhering to strong ethical values, and doing the right thing.
- **Transparency:** Communicating, acting and making decisions openly, honestly and clearly.
- **Accountability**: Taking personal responsibility for actions and their consequences.
- **Fairness:** Treating people equitably, without discrimination or bias.
- **Responsible business**: Integrating ethical and sustainable practices into business decisions, taking into account societal and environmental impacts.

Each Principle is supported by specific undertakings, guiding directors to achieve positive outcomes for their organisations.

The Code will be updated with further guidance over time, and while it is voluntary the IoD suggests it could be used to assess director's actions. They recommend that directors commit to it and seek professional advice when fulfilling their legal obligations.

MATERIAL ADVERSE EFFECT CONDITIONS - LESSONS TO LEARN FROM A RECENT CASE

BM Brazil I FIPM v Sibanye BM Brazil (Pty) Ltd [2024] EWHC 2566 (Comm)

This case concerns a share purchase agreement for the acquisition of a Brazilian mining company. The agreement contained a Material Adverse Effect ("MAE") condition to closing which entitled the buyer to terminate if, after the date of the agreement, there occurred "any change, event or effect that individually or in the aggregate is or would reasonably be expected to be material and adverse to the business, financial condition, results of operations, the properties, assets, liabilities or operations of the Group Companies, taken as a whole…" (subject to a number of carve-outs).

After the date of the agreement, a section of the open pit mine collapsed. Relying on the MAE condition, the buyer terminated the agreement. But the court has decided that it was not entitled to do so – and there are some valuable lessons to learn from its decision (although every case will turn on the drafting of the contract and the facts):

- there are no special rules applying to the interpretation of MAE conditions – their meaning is to be ascertained objectively, having regard to the drafting of the contract and the facts existing when it was entered into;
- when assessing "any change, event or effect" what was relevant was the actual impact of the change, event or effect in question – and not what it might reveal about the state of things as at the date of the agreement;
- in determining whether something "would be reasonably be expected to be" material and adverse, the assessment to be made was whether a reasonable person would have considered it more likely than not that the matter would turn out to be material (and it was not sufficient simply for that expectation to be one of a range of reasonable views);
- the point in time when the assessment as to whether something was or would reasonably be expected to be material and adverse was when the notice of termination was served;
- something is material if it is 'significant or substantial';
- in the context of M&A, it's unlikely that something will be 'qualitatively' material (i.e. by its nature is material) and not also 'quantitatively' material (i.e. capable of having a financial amount assigned to it that is material); and
- although there is no fixed threshold for materiality, on the facts of the case the judge determined that a reduction of 20% in the equity value of the target would be material, a reduction of 15% might also be material, but a reduction of 10% would not be material.

On the basis of the expert evidence that the impact was considerably less than 10%, the judge held that the buyer had not been entitled to terminate. We await the judge's ruling as to the compensation/relief to be awarded to the seller.

AN INTERIM DIVIDEND PAID TO ONE SHAREHOLDER MAY BECOME A DEBT DUE TO ALL

Peter Gould v HMRC [2024] UKUT 00285 (TCC)

A company paid an interim dividend to one shareholder and only later paid it to a second shareholder – as he had wanted to receive the payment in a later tax year. But, for tax purposes, when that second shareholder was paid depended on when the interim dividend became due and payable to him.

An interim dividend – i.e. a dividend declared by the board and not subject to shareholder approval – generally only becomes a debt when it is actually paid (in contrast to a final dividend - i.e. typically, a dividend approved by shareholder resolution – which becomes a debt on the date it is declared, or on any later date specified for its payment).

However, the Upper Tribunal held that the interim dividend paid to the first shareholder would, at the time it was paid to the first shareholder, automatically become a debt due to the second shareholder (unless he had agreed otherwise, which he had done). The decision flowed from the principle that shareholders (of the same class) should be treated equally and was consistent with the company's articles.

ARTICLE IN 'PLC MAGAZINE' ON PUBLIC M&A IN THE REAL ESTATE SECTOR: ISSUES AND TRENDS

In the last three years, there have been 15 takeovers of UK listed real estate companies, with eight announced or completed in 2024 alone. Many more took place in the preceding years. In most of these transactions, the bidder has been another listed company. However, private equity firms have also been active.

In this article, Richard Werner and Tom Bacon share their insights on the key issues that are relevant to public M&A in the real estate sector.

This article first appeared in the November 2024 issue of PLC Magazine.

ARTICLE IN 'LAW 360' ON TOKENISED INVESTMENT FUNDS IN THE UK

Partner Tom Bacon and associate Andrew Tsang authored an article for Law360 on the road ahead for tokenised investment funds in the UK, providing insights on the proposed model for implementation, potential next steps and wider developments within the digital assets space that would offer greater legal and market certainty to the creation of tokenised investment funds.

ARTICLE IN 'LAW360' ON THE FRC'S REPORT ON GOOD CORPORATE GOVERNANCE

Lead Knowledge Counsel Tessa Hastie, assisted by Dana AlBalooshi, authored an article published in Law360 which provides insights from the FRC's recent report on the quality of reporting from private companies that have opted to follow the Wates corporate governance principles.

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