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Insights

CORPORATE BRIEFING - JUNE 2023

May 31, 2023

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:

FCA proposals to simplify the listing regime

- The FCA has published a consultation paper proposing a single listing category to replace the premium and standard listing segments.

New regime for public offers and admissions to trading

- At the end of last year, the government published a draft illustrative statutory instrument setting out a new framework for the prospectus regime.

Takeover Panel review of Rule 21

- The Takeover Panel has released a consultation paper proposing changes to the Takeover Code in relation to Rule 21 (*Restrictions on frustrating action*).

FRC consultation on the UK Corporate Governance Code

- Following the government's white paper on 'Restoring trust in audit and corporate governance', the FRC has published a consultation on the UK Corporate Governance Code.

FRC publishes minimum standard for audit committees

- The FRC has published a Standard aimed at enhancing performance and ensuring a consistent approach across audit committees of FTSE 350 companies.

Digital Markets, Competition and Consumers Bill (DMCC)

- The government has published the DMCC Bill, which aims to provide the government with greater powers to regulate digital markets and protect consumers in the digital age.

Updated National Security and Investment Market Guidance

- The government has updated its guidance on the National Security and Investment Act 2021 following engagement with stakeholders and feedback.

Amendments to Retained EU Law (Revocation and Reform) Bill

- The government is amending the Retained EU Law (Revocation and Reform) Bill.

Court denies ClientEarth's claim against the board of Shell

- In February 2023 ClientEarth issued a derivative action against Shell's 11 directors.

Court finds that a holding company director was a 'de facto' director of its subsidiary

- An investor in an audiology services business was found to be a de factor director of the operating subsidiary, even though he had only been formally appointed a director of its holding company.

FCA PROPOSALS TO SIMPLIFY THE LISTING REGIME

The FCA has published a consultation paper with proposals for a single listing regime. The consultation will run until 28 June 2023 and will be followed by a further consultation in the Autumn with drafting. We anticipate the new rules will come into force in Q1 2024. This consultation is part of the FCA's three year strategy to ensure the UK public markets remain an attractive and trusted place to list companies. Key changes include:

SINGLE LISTING SEGMENT

- Creating a single listing regime to replace the premium and standard listing segments for equity shares in commercial companies. The FCA intends to retain a separate listing category and rules for closed-ended investment funds but will explore commensurate changes to those proposed for equity shares in commercial companies.
- Creating a new listing category for equity shares for SPACs and cash shells and creating a new category for "other shares" for those existing standard listed issuers not eligible to transfer to the new single category or the new category for SPACs and cash shells.
- A single set of Listing Principles.

ELIGIBILITY

- Removal of eligibility rules requiring a three-year financial and revenue earning track record and the need for a 'clean' working capital statement.
- Exploring and amending existing provisions to clarify that the FCA are open to diverse business models when it comes to the rules on independent business and control of that business.
- Modifying rules on the controlling shareholder relationship agreement requirements. This would require specific disclosures and a discussion of risk factors in the prospectus and annual report where a controlling shareholder agreement is not in place.
- A more permissive approach to dual class share structures enabling enhanced voting rights on all matters and at all times and not just on a change of control or to protect a founder's position as a director. However, enhanced voting rights would revert to 1 share, 1 vote to approve the issue of new shares at a discount in excess of 10%. In addition, the sunset clause for these rights would be extended from 5 to 10 years commencing from admission to allow founders more time to implement their strategy.

SIGNIFICANT TRANSACTIONS AND SHAREHOLDER APPROVAL

- Preserving the requirement to make Class 2 announcements for transactions but at the current Class 1 threshold of 25% as opposed to 5% and removing the current Class 1 obligations for shareholder approval and circulars except for reverse takeovers. In cases where a company is in any doubt about the correct application of the rules and its obligations, it must obtain the guidance of a sponsor.
- Removing the requirement for a mandatory independent shareholder vote under the Listing Rules on related party transactions (RPT) at or above the 5% threshold but maintaining the announcement obligations and the statement by the board, having been advised by a sponsor, that the RPT is fair and reasonable.
- Retaining the 75% majority shareholder approval for de-listing without a takeover offer.

SPONSORS

- A sponsor's role on listing would be relatively unchanged but a sponsor would no longer have a role on Class 1 circulars and RPT circulars and instead would have an advisory role on these type of transactions. The sponsor competency rules would be modified in light of these changes.

TRANSITIONAL ARRANGEMENTS

- Standard listed issuers with equity shares who do not wish to transfer to the new single category will be given the option to transfer to the 'other shares' category on a time limited basis. There will be transitional arrangements for IPOs that are in the application pipeline when the rules are finalised.

The revised proposals are likely to be welcomed following the previous discussion paper but it remains to be seen what criteria index providers will set for index inclusion.

NEW REGIME FOR PUBLIC OFFERS AND ADMISSIONS TO TRADING

At the end of last year the government published a draft illustrative statutory instrument setting out a new framework for the prospectus regime. The FCA would now like to hear views and is seeking engagement, by way of four engagement papers, on a number of areas to help them shape the future rules:

- Engagement paper 1 – when a prospectus should be required for admission to trading on regulated markets, the content requirements and format of the prospectus, who is responsible for the prospectus and how it is approved;
- Engagement paper 2- how to set a threshold for requiring a prospectus on further issuances and what document should be required if a prospectus is not required;
- Engagement paper 3 – in moving to a recklessness/dishonesty liability standard for forward-looking statements in prospectuses ("protected forward-looking statements" or "PFLS"), the FCA is seeking views on what types of information can be considered PFLS, any conditions for how it is prepared, and how it is presented within a prospectus; and
- Engagement paper 4 – how the FCA can improve the regime for non-equity securities under the new public offers and admission to trading regime including how debt programmes can be made more efficient, facilitating broader access to listed debt and the secondary issuances of debt.

Respondents have until 29 September 2023 to respond. Following the engagement process, the FCA will publish the feedback on key points raised and will then develop specific rule proposals for consultation in 2024.

TAKEOVER PANEL REVIEW OF RULE 21

The Takeover Panel has released PCP 2023/1, a consultation paper proposing changes to the Takeover Code in relation to Rule 21 (*Restrictions on frustrating action*). The consultation closes on 21 June 2023 with the final amendments expected in Autumn 2023.

Rule 21.1 currently imposes restrictions on target company boards from taking actions which may result in an offer or bona fide possible offer being frustrated, without shareholder approval. In order to enhance the flexibility of target companies in conducting their routine operations, which may involve transactions such as buying and selling assets, the Code Committee is proposing to amend to Rule 21.1. The amendments would generally authorise target boards to carry on certain activities that are either immaterial or align with the target company's ordinary course of business. For instance, a grant of options or awards over shares under a new employee share incentive scheme will be considered to be in the ordinary course of the target company's business if it is consistent with the company's proposed practice under that scheme and was publicly disclosed before the "relevant period".

The amended Rule 21.1 would apply during the "relevant period" being the period from the earlier of the target board receiving an approach and the beginning of the offer period until the end of the offer period. Whilst target boards would still be required to consult the Panel to determine whether a proposed action is in the ordinary course of business, the additional clarity and guidance should reduce the circumstances in which the bidder will have to be consulted before determining whether a proposed action is not restricted.

It is proposed that Rule 21.1 will be extended to apply to the board of the bidder in a reverse takeover. Changes are also proposed to Rules 21.3 and 21.4 addressing specific aspects relating to restricting frustrating actions during takeover situations.

If the proposed changes are adopted, the Takeover Panel plans to publish Practice Statement No.34, which will provide additional guidance on how the Panel Executive will interpret and apply the revised rules.

FRC CONSULTATION ON THE UK CORPORATE GOVERNANCE CODE

Following the government's white paper on 'Restoring trust in audit and corporate governance', the FRC has published a consultation on the UK Corporate Governance Code ("Code"). The consultation focuses on changes to:

- reflect the responsibilities, diversity of skills and experience on boards and the expanded responsibilities of audit committees;
- improve the transparency of malus and clawback provisions for directors' remuneration; and
- update the Code to ensure it aligns with the government's draft legislation (not yet published).

Comments are requested by 13 September 2023. It is expected that the revised Code will apply to financial years beginning on or after 1 January 2025 to allow sufficient time for implementation.

Read our insight for more details.

FRC PUBLISHES MINIMUM STANDARD FOR AUDIT COMMITTEES

The FRC has published a Standard aimed at enhancing performance and ensuring a consistent approach across audit committees of FTSE 350 companies. The Standard is currently voluntary and audit committees are encouraged to familiarise themselves with the requirements ahead of legislation which will make compliance mandatory. The Standard focuses on audit committee responsibilities, the tendering process, the oversight of auditors and audit and reporting.

DIGITAL MARKETS, COMPETITION AND CONSUMERS BILL (DMCC)

The government has published the DMCC Bill, which aims to provide the government with greater powers to regulate digital markets and protect consumers in the digital age. It provides the Competition and Markets Authority with more powers to investigate and take action against companies that fail to comply with consumer laws. The Bill includes measures to create a new Digitals Markets Unit, which will have the power to enforce codes of conduct on tech companies, improve competition and impose fines for non-compliance. It also seeks to address concerns around consumer protection, including transparency of online reviews and the protection of user data. The House of Commons Public Bill Committee published a call for evidence for the consideration of the Bill and potential amendments. The first sitting is expected on 13 June and the Committee is scheduled to report by 18 June.

Read our insight for more details.

UPDATED NATIONAL SECURITY AND INVESTMENT MARKET GUIDANCE

The government has updated its guidance on the National Security and Investment Act 2021 following engagement with stakeholders and feedback. The second edition provides businesses with further predictability and transparency on (i) how the government uses certain powers; (ii) how businesses can interact with the Investment Security Unit most effectively; and (iii) timing considerations when notifying contemplated acquisitions.

AMENDMENTS TO RETAINED EU LAW (REVOCATION AND REFORM) BILL

The government announced that it would be amending the Retained EU Law (Revocation and Reform) Bill, removing the controversial 'sunsetting' clause which would have led to the automatic revocation of all EU-derived legislation at the end of 2023. It now will include a specific list of legislation which will be revoked. The government's new schedule now only includes approximately 600 pieces of legislation to be revoked.

COURT DENIES CLIENTEARTH'S CLAIM AGAINST THE BOARD OF SHELL

In February 2023 ClientEarth issued a derivative action against Shell's 11 directors. ClientEarth alleged that the directors had breached their duties under the Companies Act 2006 by failing to adopt and implement an energy strategy that aligned with the Paris Agreement on Climate Change 2015 to limit global warming to 1.5°c.

Given that it was bringing a derivative claim on behalf of the company, ClientEarth needed to obtain the permission of the court before the action could proceed. The application was considered on the basis of the papers before the court without the court hearing oral submissions. On 12 May 2023, the judge refused permission for the claim to proceed. The judge made several key points in his judgment which will be pertinent to future activist shareholder derivative actions.

Read our insight for more details.

COURT FINDS THAT A HOLDING COMPANY DIRECTOR WAS A 'DE FACTO' DIRECTOR OF ITS SUBSIDIARY

Aston Risk Management Ltd v Jones and others [2023] EWHC 603 (Ch)

The statutory rules governing directors of English companies apply to "any person occupying the position of director, by whatever name called" (because that's the definition of a director in the Companies Act 2006, s.250). So, if someone acts as a director, they're bound by the rules governing directors - even if they haven't been formally appointed. In practice, English law recognises three categories of directors: 'de jure' directors (a person formally appointed); 'de facto' directors (a person who acts as a director, even though they haven't been formally appointed); and shadow directors (a person whose directions the board is accustomed to follow).

In this case an investor in an audiology services business was found to be a de factor director of the operating subsidiary, even though he had only been formally appointed a director of its holding company. The conduct of the subsidiary's business was governed by a shareholders' agreement, making it subject to the control of the holding company. But the court held that the actions of the investor had gone further - effectively making him personally part of the subsidiary's corporate governance structure. Applying established principles, the court found that the investor had assumed the status of a director, as he had undertaken functions which only a director could properly perform. For example, he had run weekly management meetings, referred to himself as a partner in the subsidiary, led discussions between the subsidiary and its customers and instructed lawyers on its behalf. As a result of him being held to be a director, the subsidiary's administrator was able to pursue claims against him for breach of directors' duties.

Directors of holding companies should be wary of personal involvement with their subsidiaries' operations, outside of the oversight they have acting as part of the holding company board.

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