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UK Corporate Update.

Women on boards – approaching the finishing line?

The third Davies Review Annual Report has been issued, with comments on progress since the original Lord Davies "Women on boards" report was published in February 2011. Overall, the latest report considers that there is clear evidence that the business-led voluntary approach to increase the number of women on boards is working. Nonetheless, companies need to maintain momentum to avoid legislative quotas or EU intervention in this area. One of the most prominent recommendations made in 2011 was for FTSE 100 companies to have at least 25% female directors by 2015. Recent figures show that women make up 20.7% of board positions in the FTSE 100, up from 12.5% in 2011. Equivalent figures for the FTSE 250 are 15.6%, up from 7.8% in 2011.

The Davies Review Annual Report 2014 refers to, and was published at the same time as, the Cranfield University School of Management's Female FTSE Board Report 2014. The Cranfield report emphasises that progress made can also be measured by the rapid drop in the number of all male boards, of which only 2 remained at the time the reports were published. One of these has in the meantime appointed its first female board director.

Specific comments in the Davies Review Annual Report 2014 on the Davies diversity recommendations are as follows:

> **Targets, disclosure, diversity policies**. The report states that only 39 FTSE 100 companies and 12 FTSE 250 companies have set voluntary targets for 25% or more female directors by 2015, although this target should be a starting point for working towards gender parity. In terms of disclosure, the report distinguishes between a compliance-based approach and real buy-in, evidenced by measurable objectives and the recording of progress against such objectives. The new strategic reports which had been issued in time for this review show that 90% of companies now refer to gender in the board room, compared to 78% in 2012, although most companies still do not explain how they intend to improve gender balance. As a result, the report recommends that FTSE 350 companies set themselves stretching targets for female directors and senior managers, make meaningful disclosures about diversity and, if not yet at 25%, look at how their peers are achieving success.

> **Nominations process and search**. The report notes the FRC's stated intention of looking in 2014 at succession planning and the activities of the Nomination Committee. A point which is drawn out by the Davies report, as well as by Cranfield, is that over 90 male non-executive directors have been on the same FTSE 100 board for over nine years and that this should be considered by chairmen who have not yet made sufficient progress on the gender balance of their boards. Other specific recommendations are for FTSE 350 companies to make sure at least one

In this issue

Women on boards – approaching the finishing line? 1

Provisions to facilitate electronic payments of dividends by PLCs 2

BIS consultation on implementation of extractive industries reporting requirements 3

Consultation on measures to implement changes to EU regime on notification of interests in listed companies 5

European Commission long-term financing initiative: corporate governance and accounting proposals 5

When shareholders' agreements and articles of association conflict: Court of Appeal declines to imply terms into a shareholders' agreement 6

woman sits on the Nomination Committee, include gender balance in succession planning and appoint search firms which are committed to increasing diversity.

> **Investors**. The report sees investors as one of the "key levers yet to be fully exploited" on this agenda and anticipates that pressure on companies to appoint more women directors will be a feature of this year's AGM season. Recommendations for investors include: adopting a clear voting policy for companies failing to set diversity policies, being prepared to vote against key directors that fail to take action on all-male boards and campaigning for women to be appointed to the Nomination Committee.

> **Advertising**. The report encourages companies to reach into the widest possible pool of talent by periodically advertising non-executive board positions with their search firms. The report also notes with approval that the Equality and Human Rights Commission intends in 2014 to look at recruitment practices of the top 350 companies.

> **External search**. The report refers to the recent review of the Voluntary Code of Conduct for Executive Search Firms and recommends that its findings should be acted on, including by companies and search firms making sure that there is at least one woman on the short list for director searches.

> **Talent pipeline**. To support investment in women in the longer term, the report acknowledges the efforts made by a number of companies to strengthen the talent pipeline, including Barclays, Lloyds and Diageo. Companies are encouraged to hire professional support where necessary, use peer to peer networks, identify and support senior women and look at measures to address possible bias.

The Cranfield Female FTSE Board Report 2014 also contains specific recommendations to help companies achieve the 25% female board target. These overlap with the Davies recommendations in advising companies to consider non-executive directors' tenure and to proactively develop their talent pipeline. Separate recommendations are that:

> FTSE 100 companies with less than 25% female directors and boards of less than 11 members, grow their boards by appointing women to additional available seats

> chairmen and search firms should expand their searches to women in the public and voluntary sectors and

> women directors on Nomination Committees should nominate and advocate women for upcoming vacancies on their boards.

The Davies Review Annual Report 2014 is available here and the Cranfield University School of Management Female FTSE Board Report 2014 is available here.

Provisions to facilitate electronic payments of dividends by PLCs

The ICSA Registrars Group has published a guidance note on practical issues arising from articles of association in relation to dividends and distributions. It considers that technological developments mean that dividend payment methods may change in the future. It suggests new wording for articles which will allow a company to decide on the payment method to be used for dividends without the need for shareholder consent each time it changes practice or adopts a new approach.

Currently, most companies' articles permit the payment of dividends by electronic means but do not allow companies to determine the method of

payment to be used or allow them to introduce new methods without shareholders' consent. The new wording seeks to provide greater flexibility by allowing a company to decide:

> which payment method is to be used;
> which payment method is to be the default method; and
> whether shareholders may make an election for a payment method other than the default.

The new wording also provides that amounts due to shareholders who give no, or invalid, account details, may be held in a non-interest bearing account in the company's name until the shareholder gives valid details.

The guidance notes that some listed companies have already changed their articles, each approaching the wording in a slightly different way. The new wording attempts to provide some consistency, whilst acknowledging that the wording will need to be adapted to fit in with a company's existing articles.

The wording was drafted by a Joint Working Party of the City of London Law Society's Company Law Sub-Committee and the Law Society of England and Wales' Standing Committee on Company Law. It replicates the wording in articles 70 to 77 of the model articles for public companies but inserts a new article 72 to meet the aims described in the ICSA Registrars Group guidance note.

The ICSA Registrars Group has requested guidance from the FCA to confirm that these changes would not be treated as having unusual features, which would require the circular to shareholders to be pre-approved by the FCA in accordance with Listing Rule 13.2.2 R. Pending such confirmation, the guidance note states that companies and advisers should take their own view on whether shareholder circulars relating to such changes need to be approved.

The guidance note can be found here.

Listing Rules reminder

Under LR 13.2.1 R and 13.2.2 R a circular to shareholders must be approved by the UKLA in advance unless (i) it is of a type referred to in LR 13.8, or it relates only to a proposed change of name or is an information-only circular which does not relate to a vote; (ii) it complies with the general content requirements of LR 13.3 and any applicable requirements of LR 13.8; and (iii) neither it, nor the transaction or matter to which it relates, has unusual features. Amendments to a company's articles of association are one of the types of circular referred to in LR 13.8. LR 13.8.10 R requires such a circular to include an explanation of the effect of the proposed amendments and either the full terms of the amendments or a statement that they are available for inspection in the City of London from the date of the circular until the close of the relevant general meeting and at the place of the general meeting for at least 15 minutes before and during the meeting.

BIS consultation on implementation of extractive industries reporting requirements

The Department for Business, Innovation and Skills has published a consultation paper on implementation of EU requirements for large companies and listed companies of all sizes that operate in the extractive industries to publish an annual report on the payments they make to governments.

Large companies registered in the UK that are engaged in the extraction of oil, minerals and gas and in the logging of primary forests will be affected by

the reporting requirements set out in Chapter 10 of the new Accounting Directive (2013/34/EU). These requirements are extended by Directive 2013/50/EU, which amends the Transparency Directive (2004/109/EC), to issuers with securities admitted to trading on a regulated market that are active in the extractive industries. The deadline for implementation of the Accounting Directive is 20 July 2015 and the deadline for implementation of Directive 2013/50/EU is 27 November 2015.

The consultation seeks views on draft regulations to implement the extractive reporting requirements and sets out BIS' proposals in relation to matters left to EU Member States' discretion. In particular:

> **First reporting period**. BIS proposes that companies should report annually in respect of financial years commencing on or after 1 January 2015. This is earlier than expected but in line with the Government's commitment to implement quickly the reporting of payments to governments expressed in the 2013 Lough Erne G8 Leaders' Communiqué.

> **Timeframe for publication of reports**. Listed companies will be required by the Transparency Directive to publish extractive reports six months after the end of their financial year (i.e. two months after the deadline for publishing their annual financial statements). BIS therefore proposes that unlisted UK-registered companies should publish their extractive reports no longer than 11 months after the end of their financial year (i.e. two months after the deadline for filing their accounts under the Companies Act 2006). The consultation includes a table setting out the different timeframes for publication of reports depending on whether a company is subject to the Accounting Directive or the Transparency Directive.

> **Format of reports**. BIS is working with industry representatives to develop guidance that will provide a recommended template that complies with the Accounting Directive's requirements. The consultation includes an illustration of what such a report might look like.

> **Exemption for subsidiaries**: an exemption from the requirement to publish an extractive report is available for UK-registered companies that are subsidiary undertakings if their parent is subject to the law of an EU Member State and the payments to governments made by the subsidiary undertaking are included in the consolidated report drawn up by the parent in accordance with the requirements of the Accounting Directive. UK companies that are subsidiaries of non-EU registered companies will be unable to benefit from this exemption.

> **Filing reports with Companies House**. Extractive reports should be filed with Companies House electronically. A fee will be payable.

> **Penalty regime**. BIS proposes a similar penalty regime to that in place for failure to prepare and file statutory accounts and reports. It seeks views on the imposition of an offence for filing a report containing misleading, false or deceptive information and how the penalty regime should apply in cases where external factors affect the preparation of a report or prevent a company from filing a report.

The closing date for responses to the consultation is 16 May 2014. The Government's response to the consultation and proposed timetable for the laying of regulations will be published within 12 weeks of the closing date.

BIS' consultation is available here. An impact assessment is available here.

Consultation on measures to implement changes to EU regime on notification of interests in listed companies

The European Securities and Markets Authority is consulting on regulatory technical standards on how certain interests in listed companies should be calculated for the purposes of determining whether a disclosure will be required under the Transparency Directive. The consultation also includes an indicative list of financial instruments subject to notification requirements.

Amendments to the Transparency Directive in November 2013 which will require greater disclosure of economic interests and ensure greater uniformity in the application of the notification of interests provisions across the EU need to be implemented in EU Member States by 27 November 2015. These changes will bring the EU rules broadly in line with the UK's super-equivalent rules in DTR 5, which already require notification of financial instruments which create a long economic interest in an issuer's shares.

The greater level of harmonisation will be welcomed by investors, who will be able to streamline their reporting systems and procedures. Those who already notify interests in UK-listed companies under DTR 5, or issuers themselves, may wish to respond to the consultation to share the benefit of their experience of complying with those rules.

The consultation is available here. Responses must be made by 30 May 2014.

European Commission long-term financing initiative: corporate governance and accounting proposals

The European Commission has published an action plan setting out measures to stimulate the long-term financing of the European economy and support Europe's return to sustainable growth. The action plan is wide ranging and includes proposals to mobilise private sources of long-term financing, make better use of public finance, make European capital markets more attractive for small and medium sized entities ("**SMEs**"), and attract private finance to infrastructure projects. There are also a number of corporate governance and accounting reform proposals as part of measures to enhance the overall environment for sustainable finance. These include the following:

> revisions to the Shareholder Rights Directive to better align long-term interests of institutional investors, asset managers and companies

> possible actions to promote employee financial participation and employee share ownership in the EU

> consideration by the European Commission of a recommendation to improve the quality of corporate governance reporting, a report on incentives for institutional investors and asset managers to take better account of environmental, social and governance information in their investment decisions and a study on fiduciary duties and sustainability

> in view of concerns that the fair value concept encourages market volatility and short-termism, consideration by the European Commission, as part of its endorsement of IFRS 9 (Financial Instruments), whether the use of fair value in that standard is appropriate

> as part of its evaluation of the IAS Regulation, consideration by the European Commission of the appropriateness of the endorsement criteria of international accounting standards, taking account of Europe's long-term financing needs

- a consultation by the European Commission on a simplified accounting standard for the consolidated financial statements of listed SMEs and on a self-standing accounting standard for non-listed SMEs to supplement the Accounting Directive.

The proposal to amend the Shareholder Rights Directive is expected to be published in the next few weeks whereas other measures will be progressed during the course of 2014.

The European Commission's action plan can be found here, its press release, here, and a set of FAQs, here.

When shareholders' agreements and articles of association conflict: Court of Appeal declines to imply terms into a shareholders' agreement

In *Dear and Griffith v Jackson* [2013] EWCA Civ 89 the Court of Appeal overturned a High Court decision to imply terms into a shareholders' agreement ("**SHA**") in order to resolve a contradiction between the SHA and the articles of association of the relevant company.

Two director-shareholders, Dear and Griffith, entered into an SHA to use their shareholder voting rights to appoint and continue re-appointing Jackson as a fellow director.

The company's articles of association granted a power to the directors to remove unanimously any director. This power was not affected by any express terms in the SHA.

Dear, Griffith and the other directors exercised this power to dismiss Jackson from office.

Jackson brought a claim for specific performance of the SHA. The High Court ruled in favour of Jackson and implied a term into the SHA preventing Dear and Griffith from exercising the power of removal set out in the company's articles. Dear and Griffith appealed.

The Court of Appeal held that:

- the addition of the proposed implied term was not strictly necessary in order for the SHA to make commercial sense
- whilst shareholders in a UK company can vote their shares in any way that they wish, directors are subject to statutory duties and it would be difficult to imply a term into an SHA which fetters the parties' powers to act in their capacity as directors
- independent directors and future directors who may not know of the existence or terms of the SHA are entitled to assume that the power of removal of directors in the company's public articles of association are self-standing. For these reasons, it was impermissible to imply the proposed terms into the SHA.

Conclusion

This case reflects the English courts' long-standing approach to interpreting and implying terms into contracts. It highlights the importance of ensuring that an SHA and related articles of association do not contain contradictory terms, since the articles of association will normally prevail and an English court will not imply terms into the SHA that override the articles of association unless it is satisfied that, if no term were implied, the consequences would contradict what a reasonable person would understand the SHA to mean.

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The Court of Appeal's judgment in *Dear and Griffith v Jackson* [2013] EWCA Civ 89 can be found here.

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