Q1 Commercial Forecast

January 2017

Welcome to the first edition of our Commercial Forecast for 2017.

We aim to help to keep our business clients in the know about a range of legal developments and issues that might affect them and the markets in which they operate. In this edition we cover a broad range of topics including how you should prepare for the GDPR; corporate governance reforms and non-financial reporting of PIEs.

GDPR: Less than 500 days to go - what should you be doing now?

The General Data Protection Regulation (GDPR) will take effect in the UK, and across the EU, on 25 May 2018 – in less than 500 days' time.

The basic structure of data protection law will remain the same after May 2018, but the compliance burden will increase significantly on data controllers (and some data processors). Both should use the diminishing window to get ready well before the new law applies.

Those heavily affected by data protection will have been closely focused on compliance for months. This very quick summary of action points is aimed more at those who are data controllers without it forming their core business activity.

- **Identify a compliance lead within your organisation, and raise awareness.** Even if you do not require a Data Protection Officer by law under the GDPR, you will need someone at your organisation to take responsibility and know their stuff.
- **Make the most of the coming year**. There is no "transitional relief" after May 2018, and the ICO (the regulator) expects you to hit the ground running.
- **Ensure you are on top of the ICO guidance.** There is some GDPR material already available on the ICO's website; far less than was expected at this stage, but since confirmation that Brexit will not stop the GDPR taking effect, a busier programme of new guidance is now expected in 2017.
- **Carry out a mini-audit of the personal data you hold and use, and why.** Questions include:
  - What nature of information do you hold on individuals? Where does it come from? What do you use it for? Do you share it with others?
  - Are people aware of what you are doing with their data? Will your consents be valid under the GDPR?
- **Identify any areas of potential vulnerability** or gaps in your corporate knowledge.
- **Conduct a "privacy impact assessment" before embarking on any new major projects or policy changes** (say, a marketing campaign, privacy policy update or IT restructure). The GDPR gives legal effect to the concepts of "privacy by design and default": you must plan around data protection, and the fall-back position must be compliance.
- **Get familiar with new or changing concepts:**
  - *Registration*. This will be abolished as a requirement of European law, but may be replaced by a levy.
  - *Applicability.* For the first time, data processors will have direct obligations under the law (and contracts with them will need updating); so too will data controllers based outside the EU but selling goods or services to individuals within the EU.
  - *Consent as a basis of processing*: tougher rules on what constitutes legal consent (including for marketing). ICO guidance is due later this month.

- *Legitimate interests as a basis of processing*: tougher rules apply here too. Under GDPR, an individual will be able to challenge your reasons for using their data and prevent further processing unless you show "compelling" legitimate interests.
- *New and expanded data subject rights*: We will not focus on these here as their impact will not be felt for another 15 months, but they increase the imperative for getting your business GDPR-ready.
- *Transparency and accountability*. These buzzwords occur throughout the GDPR. Much fuller information is required from data controllers about what they do with data and what people can do to stop them. On demand, the burden lies with data controllers to demonstrate compliance with the data protection principles.

This is already a lot to take in, but we will continue to update you in specific areas as the time approaches. Specific updates on the GDPR and information law are also available via our newsletter Information Matters.

For further information please contact Henry Sainty or Owen O'Rorke.

Corporate governance reforms: the stakeholder voice and corporate governance in private companies

Following recent high-profile corporate governance failings in the UK, the Department for Business, Energy & Industrial Strategy (BEIS) has published a green paper to canvas opinion on corporate governance reform. This forms part of the Government's objective that the UK's corporate governance regime will ensure that "*we have an economy that works for everyone*". The deadline for responding to the green paper is 17 February 2017.

Two areas of corporate governance have been considered in particular:

- **Stakeholder voice at boardroom level:** Although directors already have a legal obligation to have regard to (and indeed do have regard to) wider stakeholder interests, the green paper reports on the public concern that companies should do more to reassure the public that employees, customers and suppliers are not being side-lined in favour of board and shareholder interests. BEIS proposes a number of options for consideration to strengthen the voices of stakeholders, including the creation of stakeholder advisory panels, designating non-executive directors to represent certain stakeholder groups, or the voluntary appointment of individual stakeholder representatives to company boards. An additional proposal is to enhance reporting requirements relating to stakeholder engagement. At this stage, it is not clear if implementation of these ideas would be through change in legislation and the Corporate Governance Code, or through a more industry-led voluntary approach.
- **Corporate governance in large private businesses**: Given that only a small proportion of the UK's largest companies have a primary listing on the London Stock Exchange (and hence are subject to the strongest corporate governance and reporting standards), BEIS is considering whether private companies of a similar size and economic significance to public companies should be expected to meet higher minimum standards of corporate governance and reporting. Potential options include extending the reach of the Corporate Governance Code or developing a new code tailored more specifically to the circumstances of large privately-held business.

The green paper also considers changes that may be appropriate to the regulations concerning executive pay (see below).

For further information please contact Marie Bates.

Upcoming reforms to executive pay

It seems that the reforms on executive pay introduced in 2013 did not put an end to the debate on enhanced scrutiny of executive pay, as the Government is looking to introduce further measures in this area.

The BEIS green paper on corporate governance reform (see above) also examines the possible changes required to the regulations on executive pay, in light of a perception that executive pay is becoming disconnected to the pay of ordinary people and the underlying performance of companies. The green paper seeks opinions on the following three areas to address this:

- **Strengthening shareholder influence over directors' remuneration:** Although the new reforms in 2013 introduced shareholder oversight over executive pay packages, a number of additional options have been proposed to increase shareholders' rights further. These range from introducing an annual binding votes on pay packages (rather than every three years), to setting an upper threshold for annual pay (with a shareholder vote for amounts in excess of that), or amendments to the Corporate Governance Code to include more guidance on how companies should meet their obligations to shareholders when deciding on pay. Proposals have also been made to encourage further engagement on the part of the shareholders, as well as suggestions to improve the effectiveness of remuneration committees.
- **Increasing transparency**: The green paper considers whether additional disclosure requirements would make shareholders more effective in holding boards to account. For example, disclosure of pay ratios and bonus targets are being considered.
- **Simplifying and strengthening long-term incentive plans (LTIPs):** Proposals include replacing LTIPs with "restricted shares" awarded at a future point in time as an alternative to LTIPs (which often contain complicated performance criteria which are difficult for shareholders to understand), and increasing the holding period of LTIPs to a minimum of 5 years.

For further information, please contact Eleanor Rowswell

Non-financial reporting to PIEs

Companies who do not disclose their non-financial risks in accordance with reporting requirements may face action from the Financial Reporting Council ('**FRC**'). Less than 5 months ago, Client Earth reported two oil and gas companies to the FRC.

New EU legislation has come into force in the UK which changes the type and format of non-financial information that some companies have to report on as part of their annual report.

'Public-interest entities' ('**PIE**') must include a stand-alone 'non-financial statement' ('**NFS**') in their annual report from financial years commencing on or after 1 January 2017. PIEs include listed, banking and insurance companies established in the UK, with over 500 employees. Listed companies already had to include similar information in their strategic report and can relocate it. This will be new for some banking and insurance companies.

The NFS must contain information to the extent necessary for an understanding of the company's development, performance and position and the impact of its activity, relating to, as a minimum: environmental, social and employee related matters, respect for human rights and anti-corruption and bribery matters. If the report does not include any such information, it must explain why. This has extended the scope of matters for large listed companies to bribery and anti-corruption matters.

If a company is not a PIE there are still other non-financial reporting requirements that may apply. Companies should ensure they have the processes in place early, to gather this information in time for their reporting deadline.

For further information, please contact Karen Phull or Jay Sattin.

Further In-Roads to the PSC Regime

The Fourth Anti-Money Laundering Directive (EU) (the "**Directive**") is designed to build on the work of its previous iterations. The majority of the Directive imposes additional requirements in relation to customer due diligence and internal controls to combat money laundering. However, part of the Directive imposes additional obligations on Member States to ensure that they oblige corporate entities to maintain registers of people with significant control (**PSC**s) of these entities. Member States are required to implement the necessary domestic legislation to comply with the Directive by 26 June 2017.

The UK has remained ahead of the curve on its PSC rules, which came into force in April last year, and require certain UK entities (such as limited companies and limited liability partnerships) to maintain a PSC register and to file this information on a public register at Companies House. However, the EU requirements go further than the current UK regime in two key areas.

First, the government has indicated that a number of additional types of legal entities may now be brought within the scope of the PSC regime to comply with the broader remit imposed by the Directive. AIM companies, and those listed on the ISDX Growth Market for example, may soon be required to hold PSC registers and file details at Companies House.

Second, Article 30 of the Directive requires central registers of PSC information to hold "*adequate, accurate and current information*" regarding beneficial ownership of corporate bodies. Presently, an entity must update its PSC information every 12 months (as part of a confirmation statement filed at Companies House). The government has consulted on the implementation of the PSC elements of the Directive and we are waiting for a firm announcement on what steps it will take to change the existing PSC regime as a result. However, indications are that the period for an entity to file PSC information at Companies House may be as short as 14 days following the date that the relevant entity's PSC register has been updated.

This is a much shorter period than was expected, and may lead to inconsistency between the timing for PSC-related filings and others related to share allotments and transfers. Furthermore, it is possible that a failure to file within this time frame could give rise to criminal liability, and the effects may therefore be draconian.

For further information, please contact Anthony Turner.

Tell me more...

If you'd like to discuss any of these issues further, please contact the authors or speak to David Fletcher on 020 3375 7117 or email him at david.fletcher@farrer.co.uk