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BOARDROOM ESSENTIAL

Need to know for non-executive directors and senior management

July 2024

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Welcome to the summer edition of Boardroom Essential, our regular publication for non-executive directors and senior management.

In this edition, we look at the Labour government's plans for employment, which together amount to the biggest reform of employment laws for a generation. We also report on what has been a relatively tranquil 2024 AGM season for Remuneration Committees, with average shareholder support for FTSE 350 directors' remuneration reports hovering in the 90-95% approval range; one trend that emerges is the adoption by some companies of "hybrid" LTIPs, a structure that has traditionally been more common in the US and been viewed with scepticism by UK shareholders.

We also take a timely look at two important areas that boards need to focus on. As increasingly active regulators and litigants target UK based corporates, we look at key themes in the challenging disputes and investigations landscape. And we also summarise what boards should be doing to improve their governance around the fast-developing field of Artificial Intelligence.

Finally we consider the draft Code for Conduct for directors recently published by the Institute of Directors, which aims to foster high ethical and behavioural standards in directors' governance and leadership activities, and consider whether it is a useful resource or not.

If you would like more information on any of the matters covered, please speak to your usual Slaughter and May contact. We hope you enjoy the issue.

Paul Dickson
Partner

LABOUR'S PLANS FOR EMPLOYMENT – WILL THEY "MAKE WORK PAY"?

The General Election on 4 July gave the Labour Party its widely expected win and Sir Keir Starmer has now formed the first Labour government in 14 years.

We have known for some time that the Labour Party plans a broad set of changes to employment law – ever since their New Deal for Working People Green Paper was published back in October 2022. This was followed by Labour's Plan to Make Work Pay in May 2024, which the Manifesto itself, published in June 2024, commits to implement "*in full*".

Taken together, the Labour proposals amount to the biggest reform of employment laws for a generation.

The King's Speech on 17 July included both an Employment Rights Bill and an Equality (Race and Disability) Bill. These Bills will implement several of the headline policies as set out in the Plan to Make Work Pay that require primary legislation. These include:

- Introduction of basic **day one rights**; most significantly, abolishing the current two-year qualifying period for protection against **unfair dismissal**. Labour have said, "*This will not prevent fair dismissal, which includes dismissal for reasons of capability, conduct or redundancy, or probationary periods with fair and transparent rules and processes.*" This is likely to make employers more cautious about recruitment, and pre-employment checks and probationary periods will assume greater significance.
- **Ending "fire and rehire"**: or at least only permitting it where there is "*genuinely no alternative*". There would be "*effective remedies against abuse*" and replacement of the current statutory Code of Practice on dismissal and re-engagement.
- **Flexible working** would be "*the default from day one for all workers, except where it is not reasonably feasible*". Unlike the current right for employees to request flexible working, this new right would put the onus on employers, to consider whether each role could be performed flexibly, in terms of hours and work location.
- **Strengthening protections for new mothers** by making it unlawful to dismiss a woman who has had a baby for six months after her return to work, except in specific circumstances.
- Amend the Equality Act 2010 to "enshrine in law the full right to equal pay for ethnic minorities and disabled people". **Ethnicity and disability** pay gap reporting would also become mandatory for large employers, which may involve challenges with both classification and data collection.
- Extensive changes to **trade union** legislation, including simplifying the process for applying for statutory recognition, giving trade unions a right of access to workplaces for recruitment and organisation, and repealing the restrictions on strike action introduced by the Trade Union Act 2016.
- **A ban on "exploitative" zero hours contracts** and a right for all workers to have a contract reflecting hours regularly worked, plus reasonable notice of changes in shifts or working time, with compensation for cancelled shifts (proportionate to the notice given).

The draft Bills have not yet been published, and may be subject to consultation before the changes come into force.

A number of other policies within the Plan to Make Work Pay do not appear to be part of these initial Bills, and may form part of a second wave of employment legislation in due course. These include:

- Workers would have a **right to switch off**. The Plan to Make Work Pay refers to following models in place in Ireland or Belgium, where employers and workers agree workplace policies on the right not to be contacted by their employer outside of normal working hours.
- A change in the law on **collective redundancies** so that the requirement to conduct collective consultation - where an employer proposes 20 or more redundancies within 90 days or fewer – would be determined by the numbers across the business rather than, as currently, at one "*establishment*" (generally interpreted as a workplace). For employers with multiple sites, this would inevitably mean that the duty to consult collectively would be triggered more often than under current law.
- Strengthening existing protections for workers subject to **TUPE** and for **whistleblowers** (no further details have yet been provided).
- Strengthening protections against **workplace harassment**, including a duty on employers to take all reasonable steps to prevent sexual harassment, and reintroducing employer liability for harassment by third parties.
- Implementing measures to include outsourced workers in both gender pay gap and pay ratio reporting and to ensure "*that **outsourcing** of services can no longer be used by employers to avoid paying **equal pay***".
- Introducing protection from **menopause** discrimination, in addition to a requirement for employers with more than 250 employees to produce menopause action plans.
- **Time limits** for employment tribunal claims would be increased from three to six months for all claims.

Labour have committed to introducing legislation to implement their plans within the first 100 days in government, with full consultation before it is passed. The King's Speech and State Opening of Parliament is set for Wednesday 17 July, so employers will be watching closely to see what the promised Employment Bill contains.

If you would like to discuss the implications of these plans for your business, please speak to Phil Linnard, Philippa O'Malley or your usual Slaughter and May contact.

EXECUTIVE REMUNERATION: 2024 AGM SEASON UPDATE

The 2024 AGM season has so far proved a relatively benign environment for UK-listed companies insofar as executive remuneration is concerned, with average shareholder support at its highest for the past five years. A particular emerging trend, which has its roots in the United States, is the introduction of several "hybrid" long-term incentive plans.

SHAREHOLDER SUPPORT

In the FTSE 350, average shareholder support for directors' remuneration reports in 2024 is hovering in the 90-95% approval range, marking welcome validation of Remuneration Committees' decisions on executive pay over the last twelve months. This favourable result should be viewed of the context of:

a. annual bonuses returning broadly to pre-pandemic levels, albeit that in approximately 15% of cases, Remuneration Committees exercised discretion to adjust - normally downwards - the formulaic outcome of annual targets when determining bonus awards; and

b. long-term incentive outcomes have increased this year, exceeding 60% of maximum, which also reflects historic pre-COVID outcomes.

It appears that the relative appeal of listing in London (compared to on the New York Stock Exchange or NASDAQ) has been on shareholders' minds following the Investment Association's (IA) much-anticipated letter to FTSE 350 companies on executive remuneration issued in February 2024 (discussed in more detail in our bulletin here). In its letter, the IA noted a particular concern with UK-listed companies being able to recruit and retain US executives, acknowledging that where a company is particularly focussed on or exposed to the US market, there may be a rationale for higher long-term incentive plan awards (as is common in the US) to incentivise and retain these particular individuals.

"HYBRID" SHARE PLANS

Picking up on another trend more widely seen in the US, in 2024 a number of UK companies across the FTSE 350 have obtained shareholder approval for a "hybrid" long-term incentive plan structure (although in some cases approval was only just achieved).

Under “hybrid” plans, participants receive part of their long-term incentives for a financial year as a share award that is subject to stretching performance conditions (known as the “performance stock” element), with the remainder being delivered as a share award that is either only subject to ongoing service requirements or is only subject to a much “softer” performance underpin (the “restricted stock” element). The aim of the performance stock element is to promote exceptional performance, while the objective of the restricted stock element is to incentivise ongoing service and to smooth out the overall incentive outcome over the economic cycle (i.e. to avoid a management team becoming disincentivised through an economic downswing as a result of a series of long-term incentive awards not vesting at all). If management has certainty over receiving the restricted stock element of the awards (provided that they remain with the company for the set vesting period), this can enable the Remuneration Committees to set more challenging targets in relation to the performance stock element to incentivise growth.

This sort of pay framework has historically been more common in the US, as UK shareholders have been reluctant to support a bipartite approach to long-term incentives. These recent approvals demonstrate more UK shareholders are prepared to consider such proposals where they are appropriate to the company. Some shareholders undoubtedly remain sceptical of these arrangements, but that scepticism seems to be mitigated where overall quantum is not being increased and where there is a compelling rationale for implementation of a hybrid structure for a particular company (for example, because of particular competition for talent in the US).

DISPUTES AND INVESTIGATIONS: TRENDS ATTRACTING ATTENTION ACROSS BOARDROOMS

1. Litigation funders with deep pockets are targeting UK based corporates and financial institutions including with mass claims:

- Litigation funders have significant capital to deploy: the government is introducing new law to make it easier to secure litigation funding, including reversing the effect of a Supreme Court decision last year, to support complex claims against moneyed corporations.
- UK parent companies continue to face claims relating to the acts of overseas subsidiaries. We are defending BHP on a claim brought in the High Court by the largest ever group of claimants, which will be tried in 2024, regarding whether BHP is liable in relation to a dam collapse in Brazil. We are acting in other, similar, mass claims against UK parents in respect of events overseas.

2. The Competition Appeal Tribunal (CAT) is at the forefront of mass claims:

- The CAT is adopting a very light touch in certifying mass claims for alleged breaches of competition law (such as cartel follow-on damages actions or abuse of dominance claims), even those with questionable underlying merits.
- There has been a recent trend of extremely speculative abuse of dominance claims being certified, particularly against large tech companies. These consumer-type claims have been framed as abuse of dominance cases to benefit from the CAT's generous "opt-out" mass claims regime.

3. Securities litigation and regulatory enforcement has crossed the Atlantic and is now firmly embedded in the UK landscape:

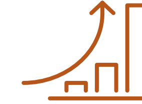
- Financial Conduct Authority inquiries relating to companies' published statements are on the increase, demonstrating an increased appetite for enforcement.
- Investors in listed companies can claim under sections 90 and 90A of the Financial Services and Markets Act 2000 for losses caused by a company's failure to provide full, accurate and timely disclosure of matters relating to its securities.
- Investor claims are likely to become more frequent and often follow on from an adverse regulatory decision. Claimants are also looking out for standalone claims, including based on "bluewashing" or "greenwashing".

4. Climate activists are using disputes and regulators more:

- In 2023, in two separate climate-related derivative claims brought by shareholders against directors (*ClientEarth v Shell*, in which we acted for Shell and its directors, and *McGaughey v USSL*), the English courts emphasised their reluctance to wade into the commercial decision-making of boards, even in a climate change context.
- The Supreme Court's recent decision in the *Finch* case is likely to give further encouragement to climate activists opposing fossil fuel projects: it was held that Surrey County Council's decision to grant planning permission for four new oil wells was unlawful because the council did not take into account the emissions that would occur when the oil produced was burnt as fuel, as it ought to have done under relevant environmental law.

5. Regulators are more powerful and active than ever before:

- We have seen an increased number of dawn raids by both national regulators and the EC. Cartel enforcement is top of the agenda for many European competition authorities. The SFO has also undertaken a number of dawn raids recently.
- UK prosecutors have new powers with the Economic Crime and Corporate Transparency Act which should make it easier to prosecute corporates for economic crimes in the UK. These lower the bar for corporate liability for economic crimes and introduce a further corporate "failure to prevent" offence: failure to prevent fraud. The SFO arguably has fewer excuses for not pursuing corporates in the future.
- The Digital Markets, Competition and Consumers Bill will soon hand the Competition and Markets Authority new enforcement powers to tackle consumer law breaches, levelling up its toolkit with that available for cartel enforcement, including the power to impose a 10% worldwide turnover fine.

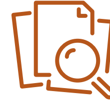


6. Increased threat from rapid technological developments:

- Organisations need to manage complex issues such as the evolving global cyber threat landscape and potential risks from AI to avoid disputes and investigations.
- As the risks continue to evolve, so too does the legal and regulatory landscape, with new rules expected to take effect in 2024.

7. London remains a leading seat for arbitration:

- A new Arbitration Bill to reform the Arbitration Act 1996 was introduced to Parliament in November 2023 which aims to solidify England's reputation as a world-leading arbitration centre. As a consequence, we expect London to continue to be a preferred arbitral seat, including in particular in the climate and energy contexts.



8. Non-financial misconduct investigations are more common and threaten the reputation of the whole organisation:

- The conduct of business leaders has become an increasingly topical issue, compounded by a recent string of high-profile investigations of senior figures. The organisation's culture as a whole comes under scrutiny, as well as how it responds to and investigates the allegations.

If you would like a conversation to discuss insights and perspectives on current trends in disputes and investigations, and how you can be best prepared, get in touch with a member of our Disputes and Investigations team or your usual Slaughter and May contact.

GOOD GOVERNANCE AROUND ARTIFICIAL INTELLIGENCE – WHAT DOES IT REQUIRE?

As AI adoption increases, and new AI laws, regulation and guidance are published, organisations are rightly focussing on their AI governance.

IMPORTANCE OF GOOD AI GOVERNANCE

Good governance will help ensure that organisations:

- have set an appropriate risk appetite around AI - acknowledging that not benefitting from the opportunities and efficiencies which AI can offer creates its own risks;
- understand where and how AI is being used within the business, and the rules which therefore apply; and
- can engage with all relevant stakeholders regarding their AI use – from ensuring the board is appropriately informed of current and proposed AI use, to managing engagement with customers, employees, suppliers and (where relevant) regulators.

ISSUES TO CONSIDER

There are a range of issues to consider around AI governance:

Greater board scrutiny on AI

- With the spotlight on AI, we can expect to see greater scrutiny by investors of AI-related governance frameworks and consequentially greater accountability for the board. We are beginning to see this expectation reflected in voting guidelines, with the Pensions and Lifetime Savings Association ("PLSA") recommending in its 2024 guidelines that investors should consider voting against the re-election of a director where there is evidence of "egregious conduct" around the development and deployment of AI. PLSA also recommends that companies should have a governance framework for the acceptable use of AI, implement robust data anonymisation techniques and adopt a "zero-trust" approach when selecting AI tools and third-party services.

- AI is also moving up the agenda of the Financial Reporting Council (the "FRC"). In its updated 2024 Corporate Governance Code Guidance, the FRC sets out an expectation that boards will at least consider whether controls over emerging technologies like AI are material and therefore should be monitored, reviewed and reported on under the Code. Separately, the FRC commented on annual reporting relating to AI for the first time in November 2023 in its Review of Corporate Governance Reporting, stating that it is important that boards have a clear view of the responsible development and use of AI within the company and the governance around it and noting that boards may need to increase their knowledge on AI.

Impact of existing governance structures

- Unsurprisingly, existing governance structures will shape approaches to AI governance. At board level, there are likely to be one or more committees (e.g., the risk or audit committee) where AI could be managed. Whilst many companies are setting up separate committees for AI governance (see below), this is below board level. For multi-nationals, the way global compliance strategies are usually managed should also inform approaches to governance of global AI compliance.

Where should AI 'sit'?

- The potential opportunities and risks around AI are varied and involve a range of different stakeholders. AI touches all functions within an organisation, from operations, R&D and finance to BD and HR and everything in between. Opportunities are many and varied.
- From a legal, regulatory and compliance perspective, AI raises many potential issues around liability and risk allocation, intellectual property, data privacy, ESG, employment rights, etc. Some organisations are expanding the scope of their privacy, IP or tech procurement teams to manage AI compliance, while others are choosing to manage it via their existing compliance and risk functions (particularly those operating in regulated sectors). Some clients (albeit to our knowledge, only a few) have created a new role and function of 'Chief AI Officer'.
- Wherever AI sits within an organisation, it is vital that all relevant stakeholders are properly engaged. To achieve this, we are seeing organisations pulling together relevant stakeholders from across the business in a newly established AI committee, AI council or AI board, at executive and operational level. This dedicated AI committee/council/board has direct reporting obligations to the senior executive team and beyond there to the Board.

  Also, in our experience, there is a keen (and understandable) emphasis on the AI committee/council/board to be driven by the business, rather than for it to be legal or compliance led, to ensure it enables responsible AI development or deployment.

Managing a shifting risk and compliance landscape

- Legislators and regulators across the globe are grappling with how to manage AI, and we are seeing developing regulatory approaches in all major jurisdictions. At first blush there appear to be fundamental differences of approach; for example, the EU has a new cross-sector AI law (the EU AI Act – see article) while the UK is taking a sector-specific approach underpinned by a central set of principles and functions – see article). However, closer observation shows there are common concerns and themes emerging around principles such as fairness, transparency, lack of bias and accountability. Multi-national initiatives such as the AI Safety Summits (see our blog) and OECD principles are also aiding global compliance. However, the area is fast-moving and it is important that governance structures enable organisations to keep abreast of, and adapt to, a changing legal, regulatory and technological landscape. We saw, for example, how ChatGPT and GenAI raised a whole new range of issues a few years ago.

The pace of technological development means that new functionality and use cases are continually raising new issues to consider.

- In addition to new laws and regulation, it is also important to monitor developing international standards, assurance and compliance frameworks. Many new laws (including the EU AI Act) recognise that it is not practical to set all rules out in rigid pieces of legislation, but that standards can help provide practical guidance on how to ensure AI is developed and deployed responsibly. The National Institute of Standards and Technology's AI Framework and ISO 42001 have been referred to (and adopted) by many organisations for the management of AI governance and risk, and a host of new AI standards are in the pipeline. It will therefore be important to monitor developments in this space to see what becomes market standard in terms of compliance.

While the AI hype cycle is set to continue for some time now, AI use is real and the vast majority of organisations are already using it in some form or other. This means the risks around AI are already real. Having a proper governance structure will help manage and mitigate these risks now, while also enabling benefits to be achieved from the many opportunities AI brings.

UK LISTING RULES REFORM: WHAT DOES IT MEAN FOR PREMIUM LISTED COMPANIES?

The FCA has published the final version of the new UK Listing Rules (UKLR), which will come into force on 29 July 2024. Designed to help improve the appeal of the UK's equity capital markets, the new rules represent the most far-reaching reforms of the listing regime in over three decades.

In this briefing, we look at how the changes will affect companies that have ordinary shares with a premium listing.

BACKGROUND

In CP 23/31, published in December 2023, the FCA set out details of how it intended to reform the listing regime and in March this year the FCA published a draft version of the whole UK Listing Rules Sourcebook that will replace the current Listing Rules.

In response to feedback received, the FCA has made some modifications to its original proposals in the final rules, particularly in relation to the rules around disclosures for significant transactions, the controlling shareholder regime and dual class share structures ("DCCS").

The reforms make a number of fundamental changes to the listing regime:

- The premium and standard segments will be collapsed into a single segment for **equity shares of commercial companies** (i.e., non-investment companies) ("**ESCC**"), whose rules will be based mainly on the current premium segment rules but with some eligibility criteria and continuing obligations dropped or simplified.
- Overall, five new listing categories will be created: ESCC; Shell companies (SPACs); Transition; Secondary listings; and Non-equity shares and non-voting equity shares (such as preference shares and deferred shares).
- Various existing categories will be retained, including Closed-ended investment funds; OEICs; Depositary receipts; Debt securities; and Warrants, options and other miscellaneous securities.

NEW ESCC CATEGORY

All existing listed companies were informed in May or June this year which UKLR category the FCA intended to map them to. **Broadly speaking, all commercial companies currently listed on the premium segment will be mapped to the new ESCC category**.

All commercial companies currently listed on the standard segment will be mapped either to the new Secondary Listing category or the new Transition category. We have prepared a longer briefing which looks at the changes in more detail, including the Secondary and Transition categories, and how the changes will affect companies such as those with a current standard listing. However, in this briefing we are only looking at companies on the new ESCC segment.

The box below summarises the key features of the new ESCC category.

KEY FEATURES OF THE EQUITY SHARES IN COMMERCIAL COMPANIES (ESCC) CATEGORY

- **Significant transactions** (25% or more in any class test) will not require shareholder approval; but a company will have to make an enhanced announcement containing certain key information about the transaction and how it will affect the company.
- Shareholder approval will continue to be required for a **reverse takeover** and certain other specific types of transaction.
- **Related party transactions** ("RPTs") will also not require shareholder approval; but the other main safeguards will remain, including the requirement for a sponsor's "fair and reasonable" opinion.
- For the purposes of both significant transactions and RPT rules, there will be additional guidance on which types of transactions are exempt on the basis that they are within a company's "ordinary course of business".
- A company with a **controlling shareholder** will have to demonstrate it can carry on business independently from its controlling shareholder. However, there will no longer be a requirement to enter into a controlling shareholder agreement. Instead, protection will be via disclosures and mechanisms through which directors can challenge certain resolutions proposed by a controlling shareholder.
- To make it easier to list, some eligibility criteria that currently apply on the premium segment will be relaxed; and companies will have more leeway to adopt a Dual Class Share Structure ("DCSS) if they wish.
- The sponsor regime will be retained, but sponsors will have a role on fewer transactions.

INDEXATION

The FCA does not control the index rules, so the consultation did not deal with indexation. However, in March, FTSE Russell published an overview of the provisional changes it expects to make to the Ground Rules for its FTSE UK Index Series. The overview gave market participants a strong indication of how the Ground Rules are likely to be changed and hence which companies will be eligible for inclusion in UK indices such as the FTSE 100 or FTSE 250.

Subject to the ratification by the FTSE Russell Index Governance Board, in summary when the new listing regime comes into force (Day 1):

- All companies with shares in the new ESCC category or the Closed-ended investment fund category will be potentially eligible for inclusion in the FTSE UK Index Series. **As all premium segment companies will be mapped to one of these categories, they will continue to be eligible for inclusion**.
- Companies with equity shares in the Transition category or Secondary Listing category will not be eligible for the FTSE UK Index Series. Most companies that currently have a standard listing will be mapped to one of these categories so, as at present, they will remain ineligible for inclusion.
- FTSE Russell does not intend to introduce any new index inclusion requirements: for example, a company will not need to have particular corporate governance arrangements. However, as at present, if a company has or will have a DCSS, it will need to assess whether it can satisfy the requirement for more than 5% of voting rights to be in public hands.

Due to the automatic mapping of premium-listed companies to the ESCC on Day 1, there will be no immediate impact on the FTSE UK Index Series' composition.

Companies with shares in the ESCC, Transition or Secondary Listing category will be eligible for inclusion in the FTSE Global Equity Index Series (FTSE GEIS) and associated indices. The immediate impact to the composition of the FTSE GEIS on Day 1 is therefore also likely to be minimal.

THE INSTITUTE OF DIRECTORS DRAFT CODE OF CONDUCT: A WELL-INTENTIONED WASTE OF TIME?

On 6 June 2024, the Institute of Directors (IoD) – an organisation aimed at promoting high levels of skill and integrity in the boardroom – launched a consultation on a proposed Code of Conduct for directors. According to the Press Release, the Code of Conduct is intended as a "practical tool to help directors make better decisions" and to provide leaders with a framework for behaviours that will help build wider public trust in business. Its publication comes in response to damaged public trust in business leadership following corporate failures such as the Post Office, Carillion, and BHS.

The IoD is inviting directors from all types of corporate entity – public, private and not-for-profit – to sign up to the Code of Conduct on a voluntary basis. By committing themselves to the Code of Conduct, it is intended that directors will signal their willingness to apply high ethical and behavioural standards in their governance and leadership activities.

In this article we summarise what the draft Code of Conduct says and consider whether it is a useful resource or not.

BACKGROUND

Back in 2022, the IoD wrote to the government urging them to adopt a voluntary code of conduct for directors but failed to gain any traction. Following this, they set up a specially-formed Commission – chaired by trade unionist and former general secretary of the Labour Party, Lord McNicol – to develop its own draft code, which it has now published. The IoD does not intend to monitor compliance or keep a register of signatories.

The consultation has garnered a bit of press interest, although there already has been some criticism from the Institute of Chartered Accountants in England and Wales about the effectiveness of a voluntary code with no enforcement mechanism or register of signatories.

HOW DOES THE PROPOSED CODE OF CONDUCT WORK?

The Code of Conduct is structured around six key "Principles of Director Conduct" which have been adapted from the Seven Principles of Public Life (aka the "Nolan Principles") that were developed in the 1990s and which are now overseen by the Committee for the Committee on Standards in Public Life.

The six Principles are:

1. **Leading by example** – demonstrating exemplary standards of behaviour in personal conduct and decision-making.
2. **Integrity** – acting with honesty, adhering to strong ethical values and doing the right thing.
3. **Transparency** – communicating, acting and making decisions openly, honestly and clearly.
4. **Accountability** – taking personal responsibility for actions and their consequences.
5. **Fairness** – treating people equitably, without discrimination or bias.
6. **Responsible Business** – integrating ethical and sustainable practices into business decisions, taking account of societal and environmental impacts.

Each Principle is fleshed out by a few specific Undertakings. The IoD believes that by applying the Principles and fulfilling the Undertakings, directors will achieve a number of positive outcomes such as building trust, fostering a positive atmosphere and stronger stakeholder relationships.

COMMENT

There are a number of observations to make:

- Many of the aims of the Code of Conduct are laudable and some are simply good common sense, but they are vague and general in nature. The Undertakings do provide some more detailed points but, overall, the Code of Conduct does not give a director much in the way of practical help, despite being described by the IoD as a "clearly articulated statement of what good conduct looks like".

- The borderline between some of the Principles is blurry – the Undertakings associated with Leading by Example and Integrity, for example, risk becoming interchangeable.

- Not all the Undertakings are clearly linked to the Principle under which they have been grouped. For example, the Principle of "Leading by Example" includes an Undertaking to devote sufficient time and attention to the director role. You get the impression that this Undertaking – a gloss on the statutory duty to exercise reasonable care, skill and diligence – needed a place rather than naturally falling under the Principle. Also, is it helpful to have guidance that simply summarises a statutory duty but less clearly?

- The Code of Conduct frames the role of a director almost as a public officer. However, the role, obligations and the structures of accountability that apply to a director are very different to those of a public servant. For example, the principle of Transparency (which has been borrowed from the Nolan Principles) might be desirable in the context of public service, but its application is more nuanced in the case of a director, who must balance aspirations of an open business culture against their duty of confidentiality.

- The Code of Conduct is aimed at all types and sizes of company, including not-for-profits. From the point of view of directors on the board of a listed company, the UK Corporate Governance Code and its associated Guidance already provides more tailored guidance as well as covering some of the same ground (e.g., upholding highest standards of integrity, transparency and accountability; fostering a culture of trust and honesty within the organisation; demonstrating ethical leadership and reinforcing values through directors' own behaviour and decisions).

- As the Undertakings are quite general in nature and since there is no enforcement mechanism, it might have been better to frame the Code of Conduct as simply guidance on best practice, rather than a set of Undertakings to which directors are expected to sign up.

In summary, the Code of Conduct in its current form does not seem to add very much to the already crowded field of corporate governance guidance, especially for listed boards. It will be interesting to see if the Code of Conduct gains any more traction with the press and the public, or whether it will be quickly forgotten.

NEXT STEPS

Responses to the consultation should be received by 16 August 2024. Guidance will be appended to the final version of the Code, providing examples of how the Code can be applied in various circumstances.

We understand that The Company Law Committee of the City of London Law Society will be making a submission and that it does not intend to endorse the Code in its current form.