Corporate—looking ahead to 2017

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Corporate analysis: As a new year begins, Nicholas McVeigh, professional support lawyer at Mishcon de Reya, and John King, partner at FDR Law, share their thoughts and predictions on corporate law developments for 2017.

Legal developments and practical impact

What are likely going to be the most important cases in 2017 and why?

John King (JK): Everything is going to follow on from the Supreme Court decision in R (on the application of Miller and Dos Santos) v Secretary of State for Exiting the European Union and associated references, as to whether the government needs a vote in Parliament to give formal notice of its intention to leave the EU. This is the case that our clients are most concerned about. The Supreme Court sat in December 2016, but a formal ruling is unlikely to come until early January 2017. I can’t imagine for political reasons that there will be an appeal to the European Court of Justice if the decision goes against the government.

What are likely to be the most significant legislative and regulatory developments and why?

Nicholas McVeigh (NM): Although it is difficult to predict with confidence what will be the key developments next year in light of uncertainty as to the impact of Brexit on legislative reform, corporate transparency is one of the key areas in which we expect to see continued legislative and regulatory change in 2017. The implementation of the Fourth Money Laundering Directive 2015/849/EU (MLD4), which is required by the end of June, will perhaps be the most significant development in UK company law in the coming year.

PSC Register

The introduction in April 2016 of a requirement for most UK companies and LLPs to identify and record the people who ultimately own or control them on a ‘register of people with significant control’ (PSC Register), and to file that information on the public register at Companies House, was a fundamental change in UK company law. In order to comply with its obligation to implement MLD4, the UK will now need to amend its company legislation to expand the scope of the PSC regime to more legal entities and to provide for more regular reporting of PSC information to Companies House.

Entities which will likely fall within the expanded regime will include Scottish limited partnerships, unregistered companies and open-ended investment companies—AIM-admitted companies may also have to start maintaining PSC registers. PSC information is also likely to have to be reported to Companies House more regularly, with the government proposing that the information would need to be updated on the central register within six months of a change, rather than annually in the entity’s confirmation statement.

Trusts

Implementation of MLD4 is also likely to have a significant impact on trusts. It requires Member States to ensure that the trustees of any express trusts governed under their national law obtain and hold adequate, accurate and up-to-date information on beneficial ownership regarding the trust, including the identity of the settlor, the trustees, the beneficiaries or class of beneficiaries and any other natural person exercising effective control over the trust.

In relation to trusts that ‘generate tax consequences’, each Member State must ensure that the beneficial ownership information is held in a central register, accessible at least by national competent authorities and financial intelligence units. The relationship between the registers required to be held by corporate entities and those required to be held by trustees is not yet clear, but the aligning of the requirements for trusts with those of corporate entities will have a significant practical impact for corporate structures which include trust arrangements.

Among the legislative proposals set out in the Fifth Money Laundering Directive (MLD5), which is the European Commission’s proposal to amend MLD4, are requirements for limited information on the beneficial owners of business-
related trusts to be made public. While MLD5 has not yet been finalised by the European institutions, if implemented these measures would represent an even more significant development for business-related trusts.

Corporate governance

Another area of company law in which there is potential for legislative or regulatory reform is corporate governance. The government, in its November 2016 green paper, is consulting on various proposals in relation to executive remuneration, enhancing employee and stakeholder voice in the boardroom, and the extension of certain aspects of the listed company corporate governance regime to larger private companies.

How is Brexit likely to affect these?

NM: Until the UK has formally withdrawn from the EU, it will still be required to implement European Directives in the same way as other Member States. MLD4 will therefore need to be to be implemented next year notwithstanding Brexit, and both the Treasury’s consultation paper and the Department for Business, Energy and Industrial Strategy’s (BEIS) discussion paper on the Directive’s implementation confirm the government’s intention to continue to negotiate, implement and apply EU legislation while the UK remains a full member of the EU.

The government’s consultation only deals with MLD4 at this stage—BEIS has noted that the proposed amendments set out in MLD5 have not yet been finalised and the government will address issues arising from that Directive ‘if/when the substance is clear and the Directive has been formally adopted’. The Treasury has voiced concerns about some of the amendment proposals. Depending on the form and timing of the process for Brexit, it remains to be seen whether Brexit could lead to the UK delaying implementation of the amendment proposals if and when they are agreed, or deciding not to implement them at all.

JK: Once again, it comes down to Brexit. Assuming Art 50 is triggered, there will be a repeal bill and a potential avalanche of new legislation as EU laws are scrapped, although some would be recreated as British law—we just don’t know yet. Certainly, I can’t see any marked change of emphasis in corporate law next year. Clients will be looking at the implications of Brexit from a commercial perspective and how it’s impacting upon their financial position, investment decisions etc.

Clients and business developments

How do you think the practice of corporate law is going to develop in 2017?

NM: At Mishcon de Reya, one area where we and our clients are likely to see the practice of corporate law developing in 2017 is the M&A sphere, particularly in light of Brexit. We are likely to see potential buyers factoring into their due diligence review the likely impact of Brexit on the target business—for example, investigating whether the target business relies on access to a European workforce that could be jeopardised by leaving the EU or EEA. For various industry sectors, uncertainty as to the nature and impact of Brexit is likely to lead to buyers managing their risk by pushing more for contingent and deferred consideration structures.

Reporting requirements

Businesses needing to get to grips with increased reporting requirements will be another theme in the development of the practice of corporate law in 2017. As we have already noted, MLD4 will mean increased reporting in the realm of corporate transparency. Another example is the introduction, expected in April 2017, of a requirement for large companies to publish specified information regarding their payment of suppliers. For financial years beginning after 6 April 2017, large companies and LLPs will have to publish, and update every six months, information relating to their payment practices and policies for business-to-business contracts under which they are supplied with goods, services or intangible assets, and set out how they have performed in relation to those practices and policies.

We see the practice of corporate law in the transactional context being shaped increasingly by the use of technology. For example, following the Law Society and City of London Law Society’s endorsement of the use of electronic signatures to execute documents including deeds, we may see law firms allowing parties to sign M&A transaction documentation using electronic signature technology.
JK: There will be much greater emphasis on people looking at the terms and conditions in their contracts in light of the issues highlighted by Brexit, ie jurisdiction—frustration or termination in the event of certain triggers such as currency drops etc. We have already seen a lot of that since the Brexit vote, and I think it will only increase next year.

What do you think the key challenges are going to be?

NM: Clients will need to continue to gauge the potential impact of Brexit on their businesses and on potential transactions. As well as considering the commercial and practical impact, a particular challenge in the corporate law context will be coping with the lack of certainty as to how Brexit will impact on legislative reform.

Businesses will also have to get to grips with the increased reporting requirements that will be introduced in the coming months. Some clients will want to look further ahead and start thinking about how future potential changes in corporate legislation will impact the way they operate and structure their businesses.

JK: I think one challenge for all law firms is working out how to effectively position themselves in a crowded market as the trusted advisers who add value for the client. Firms have to understand where they stand in relation to the general proliferation of legal advice on the internet. If firms are not careful they may lose ground to accountants and other financial professionals.

Interviewed by Duncan Wood.

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