

**COMPANY LAW**

**GOVERNANCE REFORM**

Following publication of Sir David Walker's review of the boards of UK banks, the Financial Reporting Council (FRC) is consulting on possible reform to the governance of all UK companies. It is seeking comments on the annual re-election of company chairmen and succession planning for boards, and whether or how investors should play a more active role. The latter is key and the responses to initial consultations suggest that boards are open to new ideas.

The Council is not suggesting moving away from the 'soft law' approach, ie. 'comply and explain' which is currently at the heart of UK corporate governance, in favour of a more prescriptive, legislative-based approach, exemplified by the US model which equally failed to prevent their sub-prime mortgage and banking crisis.

One way in which shareholder engagement could be increased is through the so-called two-tier share register mooted by Lord Myners, the City minister, but this has not been widely welcomed. His suggestion is that greater voting rights would be given to longstanding institutional investors who are comfortable 'with the responsibilities of ownership as opposed to (purely) investment'.

The National Association of Pension Funds, the Association of British Insurers and the Investment Management Association have all countered, in one way or another, with fears that this would inhibit shareholder selling decisions to the detriment of underlying investors, although all agree that greater

involvement is important. In addition, these proposals arguably run counter to the 'one-share, one-vote' and other reforms contained in the *EU Shareholder Rights Directive*. Lord Myners subsequently took a step back and said that 'it is only by considering the widest possible range of options that we will break out of the current approach to shareholder engagement'.

In addition to these issues, the FRC progress report on its preliminary

findings also highlights the importance of getting right the role and performance of the board, focusing on recruitment and on-going activity. Specific areas of consultation include the definition of responsibilities; the extent to which selection criteria restrict the availability of candidates, whether more prescriptive board evaluation (for existing board members) and induction and training (for new members) should be laid down.

The FRC is also looking at the role of remuneration committees in the light of the furore about bonuses in the banking industry worldwide and the FSA's Code of Practice and also at boards' responsibilities with regard to risk evaluation and determining the risk appetite of the company. This was one of the proposals of the Walker Review, specifically in relation to banks, which was criticised as restricting entrepreneurial activity and innovation. However, it is considered by many that it is not only possible but desirable for strategic direction and day-to-day monitoring to co-exist. Meanwhile a study in the *Journal of Financial Economics* suggests that over-intrusive monitoring of well-managed companies 'may not always be a good thing.'

The Institute of Directors (IoD), in responding to the Walker Review, consider that risk and remuneration changes should be restricted to the financial sector and, therefore, should not be incorporated into the Code which 'should consist of high-level best practice principles for all listed companies'. As far as the bulk of the other recommendations are concerned, the IoD is broadly supportive, considering that the right balance has been struck without over-reacting to the crisis.

Lord Adair Turner has also waded into the debate with his widely reported comments about 'the swollen financial sector'. He proposed higher capital requirements to limit 'excessive activity and profits' and said that, if this failed, an international finance tax would need to be considered although he acknowledged that it would be very difficult to reach an international consensus. The British Banking Association reacted negatively, suggesting that action in the UK alone, risked driving business abroad.

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### SHAREHOLDER RIGHTS

Implementation of the *Shareholder Rights Directive* by amendment to the **Companies Act 2006** on 3 August 2009, has been extensively reported. The new regulations can be found at [http://www.opsi.gov.uk/si/si2009/uksi\\_20091632\\_en\\_1](http://www.opsi.gov.uk/si/si2009/uksi_20091632_en_1)

Some provisions affect all companies while others only affect traded companies. Details of the new requirements and who needs to take note and action is given in the new Guidance issued by the Institute of Chartered Secretaries and Administrators. This covers areas such as the impact of the new rules on proxies and corporate representatives; the reduction in level of shareholdings needed for requisitions; things a chairman needs to consider in terms of questions and the casting vote, and changes a company needs to make to documents and its website. The Guidance also highlights the requirement for passing an annual special resolution and introducing 'electronic voting' to take advantage of the 14 day notice period for meetings.

The full text of the Guidance Note can be found at [https://www.icsasoftware.com/dl/Shareholder\\_Rights\\_Directive.pdf](https://www.icsasoftware.com/dl/Shareholder_Rights_Directive.pdf)

Further guidance has also been provided in relation to documentation by the City of London Law Society. A pro-forma circular has been issued, containing special resolution wording relating to the Memorandum of Association, adopting new articles under the Companies Act 2006 and to obtaining shareholder approval for the 14 day general meeting notice. The Society has liaised with the UK Listing Authority (UKLA) and the Association of British Insurers (ABI), which bodies have both confirmed that they believe the recommendations are in line with good practice. Details can be found at <http://www.citysolicitors.org.uk/FileServer.aspx?oID=641&iID=0>

### BANKING CRISIS REPORT

The final Report from the Parliamentary Treasury Committee on and entitled *Banking Crisis: Regulation and Supervision*, was released at the end of July 2009. Its damning introduction states that, 'By any measure the FSA has failed dreadfully in its supervision of the banking sector' but concedes that 'it has already begun to rectify its mistakes'.

The Committee considers the reforms to the institutional structure of the Tripartite Committee, announced in the Treasury's recent White Paper, to be largely cosmetic and will not be effective. The lack of clarity on who is responsible for systemic oversight, and who has executive authority in a crisis, is still found to be a major failing.

Chairman of the Committee, John McFall has said that, "Institutional reforms should wait until the macro prudential

tools themselves have been designed. When the dust settles, we cannot afford to have any ambiguity over who is in charge and who is responsible if something goes wrong."

It remains to be seen whether the change of approach will survive the commercial pressures when profitability is restored and the City hopefully resumes its previous position as the powerhouse of the UK economy.

The European Commission has also taken steps - adopting legislative proposals to create a new European Systemic Risk Board to flag up risks at a stage early enough for action to be taken; to improve co-ordination of national supervisors and by setting up European sector-based authorities for banking, securities and occupational pensions.

### SHORT SELLING

One of the triggers for the banking crisis has been identified by many commentators as short selling in UK financial sector stocks. In its latest issue of *Market Watch*, the Financial Services Authority (FSA), has confirmed that it has extended, indefinitely, the disclosure requirements for net short positions of 0.25% and above in this sector.

Temporary intervention (e.g. banning short selling) would also be available should circumstances dictate. However, because respondents to an earlier consultation stated that consistency across jurisdictions was essential, the FSA is awaiting European developments before deciding on further action.

### LAW LORDS RULE

The Law Lords have dismissed a negligence case brought by a company's liquidator, on behalf of its creditors, against a firm of accountants, for failing to detect a massive fraud perpetrated by the owner and controller of the company

The House of Lords' decision in *Stone & Rolls* (in liquidation) v *Moore Stephens* has been heralded as a beacon of hope for auditors (and their insurers) in the impending storm of professional indemnity claims.

When it was discovered that the controller of the company and (indirectly) beneficial owner, had used it as a vehicle for fraud, both he and the company were successfully sued by one of the defrauded banks for deceit.

The company then went into liquidation and the liquidators (in the company's name) claimed \$174m from its auditors, *Moore Stephens*, alleging they had negligently failed to uncover and report the fraud.

The House of Lords upheld the decision of the Court of Appeal to strike out the claim by a three-to-two majority. The majority held that in the case of a 'one-man' company, where the directing mind and will of the company is also its owner, its fraudulent conduct is to be treated as the

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company's conduct and the illegality principle will defeat the company's claim against its auditors for failure to detect the fraud. (**Moore Stephens v Stone & Rolls Limited (in liquidation)**)[2009]UKHL39)

### COMPANY OR SOCIETY

A difference in the powers given to holders of floating charges depending on whether it is given by a 'company' or an 'industrial and provident society' was established, and the distinction between the two entities spelt out in **Re Dairy Farmers of Britain Ltd (2009 EWHC 1389 (Ch))**. It was found that the **Insolvency Act 1986** did not apply to this company which was an industrial and provident society and not a company incorporated under the Companies Act.

### DE FACTO DIRECTORS

A recent appeal against an 80-page judgement on 27 July 2006, following a ten day trial of 42 originating applications issued by The Commissioners for Her Majesty's Revenue and Customs (HMRC) against a Mr Holland and his wife Linda, **Holland v Revenue and Customs & Anor [2009] EWCA Civ625**, brings into question the definition of de facto directorships.

The original applications, made under section 212 of the **Insolvency Act 1986**, were brought on the basis of allegations that, as de facto directors of 42 insolvent companies, Mr and Mrs Holland had been guilty of misfeasance and breaches of duty in causing the payment of unlawful dividends totalling some £13m. **Secretary of State for Trade & Industry v Hall and Nuttall [2006] EWHC 1995(Ch)**.

The claims against Mrs Holland were dismissed but while the Court of Appeal limited the liability claimed by HMRC, declared in its conclusion that a director of a company which is a corporate director of a second company does not himself become a de facto director of the latter, with the consequences should that company become insolvent.

### LIABILITIES OF PARTNERSHIP

In **Hodson v Hodson & Ors, Court of Appeal - Chancery Division, March 12, 2009, [2009] EWHC430** the court decided that a partnership still existed when a solicitor sold her practice but exercised a supervisory role because the purchaser could not practice on his own account and also retained a 1% interest even though she waived her entitlement to the 1% share of the profits. She was named in the partnership deed and met the requirements of the **Partnership Act 1890** so could not avoid liability for partnership debts and obligations.

### LIMITED PARTNERSHIPS REGISTRATION

The Department for Business, Innovation and Skills has addressed a concern that there should be absolute clarity when a limited partnership has been registered. From 1 October 2009, the **Legislative Reform (Limited Partnerships) Order 2009 (SI 2009/1940)** provides that any new such entity will need to include the words 'Limited Partnership' or 'LP' (or the Welsh equivalent) in its name. The precise requirements of the application have also changed.

### iXBRL DATA FORMAT

To align Companies House with Her Majesty's Revenue and Customs (HMRC), the former will introduce the iXBRL data format for full, unaudited accounts in the summer of 2010. HMRC require companies to submit their tax returns in this format from April 2011.

### ACCOUNTING STANDARDS BOARD

The Accounting Standards Board has published its Consultation paper proposing three tiers – publicly accountable entities, small entities, and those between the two (Tier two) - and changes to / choices of the accounting standards that each needs to apply.

### DIRECTIVE RELAXES REQUIREMENTS

In line with the EU Commission's call to bring in proposals to reduce audit and accounting administrative burdens, an amending directive has been published. For 'medium-sized companies' it removes the need to disclose formation expenses and a breakdown of turnover by activity and geographic market, and also dispenses with the requirement for consolidated accounts where subsidiaries are 'non-material'. EU member states have until 1 January 2011, to bring in the relevant legislation in their national parliaments. For the full text see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:164:0042:0044:EN:PDF>

### AMENDMENTS TO TAKEOVER CODE

The Code Committee of the Takeover Panel is consulting on amendments. There are a number on proposals but the most material relate to:

- whether a company, which offers to acquire another (the offeror) which in turn has a controlling interest in a third, is required to make an offer for the third;
- whether an offeror can withdraw without Panel consent in the event that a second published offer in the target company is made.

Details can be found at: [www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/PCP200902.pdf](http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/PCP200902.pdf)

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### CADBURY DEFENDS VIEWS

Following the rejection of a £10.2bn indicative offer by Kraft, Cadbury's Chief Executive, Todd Stitzer, has been criticised following a private meeting with investors at which potential takeover valuations were discussed. Cadbury defended the views expressed at the meeting and said it had been in regular touch with the Takeover Panel. Mr Stitzer subsequently attacked 'unbridled capitalism', without mentioning the offer explicitly, contrasting it with 'principled capitalism ... (which if you) take it away or dilute it...you risk destroying what makes Cadbury a great company'.

### INCREASE IN MERGER FEES

Fees for UK merger notification have doubled. The minimum is now £30,000, rising to £90,000. The increase scheduled for April was deferred because M & A activity has slowed down, but the fact that the Department for Business, Innovation & Skills feels the time is right now suggests they expect this economic indicator to pick up.

### DRAFT ORDER AND GUIDANCE

On 1 October 2009 the *Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009* brought into effect the remaining provisions of the Companies Act. This deals with minor amendments to the existing provisions and further clarification of the transitional arrangements which have produced numerous difficulties for companies and their legal advisers as a result of rolling implementation.

Also included is insolvency legislation and changes of name, which does not require a change to the company's articles after that date. Meanwhile, Companies House has prepared a leaflet which will be mailed to all registered offices, reminding companies of those changes which have been brought in and how they will be affected. Details can be found at [www.opsi.gov.uk/si/si2009/uksi\\_20091941\\_en\\_1](http://www.opsi.gov.uk/si/si2009/uksi_20091941_en_1)

### STATEMENT OF CAPITAL

The Institute of Chartered Secretaries and Administrators (ICSA), has issued guidance, following discussions with the Department for Business, Innovation & Skills (BIS), after ICSA Software flagged up an issue with **s856(2)(d)** of the **2006 Act** relating to 'the amount paid up or unpaid ...by way of premium'. This is potentially very difficult to calculate for companies with a complex capital structure. BIS acknowledges this and is reviewing the situation but, in the meantime, is asking companies to 'do what they can' to comply with the spirit of the law. The guidance can be found at [www.icasoftware.com/dl/090925\\_statement\\_of\\_capital.pdf](http://www.icasoftware.com/dl/090925_statement_of_capital.pdf)

### NEW REGULATIONS

- The *Overseas Companies (Execution of Documents and Registration of Charges) Regulations* implement the relevant sections of the **Companies Act 2006** – ss1045 and 1052. See full text at [www.opsi.gov.uk/si/si2009/uksi\\_20091917\\_en\\_1](http://www.opsi.gov.uk/si/si2009/uksi_20091917_en_1)
- The *Companies Act (Consequential Amendments) (Uncertificated Securities) Order 2009* amends the 2001 Regulations legislation for which Her Majesty's Treasury is responsible. It makes a couple of important changes as a result of discussions between the ICSA Registrars Group and BIS. These require companies to state the last date of alteration of the register before a copy is produced.

As this might be impractical for a large electronic register, the Order exempts companies with uncertificated securities and it also applies the record date for general meetings to exclude non-working days in line with the Act itself. The Order and explanatory note are at [www.opsi.gov.uk/si/si2009/uksi\\_20091889\\_en\\_1](http://www.opsi.gov.uk/si/si2009/uksi_20091889_en_1)

- Following a consultation in February 2009, changes are being introduced to the Community Interest Company legislation which was introduced in 2005 as a new legal entity for social enterprises. The most important change is the introduction of a 'reasonable person's test' as to whether a group constitutes a 'section of the community'. Previously the definition of a group who could benefit was 'those who had an easily identifiable common characteristic which sets them apart'. Other changes include: the conduct of board meetings; the ability to convert to a form of industrial and provident society and the extension of the legislation to Scotland. The full text and explanatory note are at [www.opsi.gov.uk/si/si2009/uksi\\_20091942\\_en\\_1](http://www.opsi.gov.uk/si/si2009/uksi_20091942_en_1)

### LOANS TO DIRECTORS

The Department for Business, Innovation & Skills (BIS) is consulting on the disclosure of loans to directors in company accounts because section 413 of the **Companies Act 2006** has been drafted more broadly than was intended. The new wording of s413(8) requires individual director disclosure by banks rather than aggregate amounts as in the **Companies Act 1985**. The consultation asks whether the situation should revert to the previous requirement; retain the new requirements, aligning banks to provide the same information as other companies; or extend the requirements for all companies more widely. Responses were required by 23 October 2009. Details can be found at [www.berr.gov.uk/files/file52469.pdf](http://www.berr.gov.uk/files/file52469.pdf)

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### NEW GUIDANCE FOR INVESTING COMPANIES

As a result of an amendment to the AIM Rules, Investing Companies must comply with new guidance by 1 December 2009. The Association of Investment Companies require such companies to publish and then comply with an 'investing policy'. It need not be more than one page in length but the London Stock Exchange has said that a catch-all clause is not appropriate as it would give too much leeway for companies to invest outside the published policy. As soon as it has been compiled it must be announced to the market and put on a website, and also included in the company's next audited accounts. The company and its nominated advisor (Nomad) should review it against its current strategy and, provided it does not differ materially, should not need shareholder approval. The guidance can be found at [www.theaic.co.uk/Documents/Technical/AICAIMinvestingpoliciesJuly2009.pdf](http://www.theaic.co.uk/Documents/Technical/AICAIMinvestingpoliciesJuly2009.pdf)

### ACCESS TO DIRECTORS' CONTRACTS

A listed company was embarrassed at its AGM this year when, during persistent shareholder questions about directors' remuneration, it was pointed out that their contracts should be available for inspection at the meeting. Although it is not necessary for them to be advertised or 'thrust in the face of shareholders' who attend, it is important to understand the company law requirements concerning availability of directors' service contracts at AGMs.

### REMUNERATION CODE

The Financial Services Authority, (FSA) has published its Handbook Rule and Code of Practice for the top 26 large companies in the financial services sector. Eight new Principles have been added and the affected companies must submit their remuneration policies demonstrating compliance with these by the end of October 2009. They will become effective from 1 January 2010.

There are few changes from the draft published in March 2009, although the final version is less prescriptive. It remains very clear that the FSA expects a minimum of two thirds of significant bonuses should be deferred i.e. spread over three years and guaranteed bonuses of over 12 months are unacceptable. The aim is to establish a link to long-term performance by removing incentives to unacceptable risk-taking.

Non-compliance could lead to enforcement action but it remains to be seen whether the 21 companies previously included but now excluded from these requirements as well as other firms in the sector will voluntarily comply or pursue alternative remuneration strategies which will inevitably lead to complaints about un-level playing fields.

### ACTIVIST INVESTORS CLARIFICATION

The FSA have supported the recent proposals by Sir David Walker. In response to a request for guidance, Sally Dewar, its Managing Director for Wholesale Markets, has written to the Institutional Shareholders' Committee (which includes the ABI, AIC and NAPF) stating that it is satisfied that shareholders acting together to engage with companies in which they have investments, would not breach market regulation.

Specifically, action of this nature should not fall foul of the market abuse regime nor under the Disclosure and Transparency Rules which require disclosure of 3% or more voting rights. It is also considered that it would not trigger the 'concert party' need to seek pre-approval under the **Financial Services and Markets Act 2000**, provided that such coordinated activity is in response to specific issues, rather than being in pursuit of a long-term agreement and is not used to influence trading activity.

However the guidance given by the FSA in 2007, in a publication *Market Watch*, which prompted the initial disquiet, remains in force, and such investors still need to be mindful of its contents and work within the restrictions imposed in it.

Copies of the FSA letter can be viewed at [www.fsa.gov.uk/pages/library/other\\_publications/miscellaneous/index.shtml](http://www.fsa.gov.uk/pages/library/other_publications/miscellaneous/index.shtml)

### CODE OF CONDUCT FOR PAY CONSULTANTS

Sir David Walker has been critical of 'the integrity and professionalism of external pay consultants', stating that greater confidence in them is an ingredient in restoring confidence in the remuneration process. Among his criticisms is their perceived responsibility for the rises in executive salaries and also potential conflicts of interest because they, or other members of their groups, sell additional services to the executives whose remuneration they influence. Rather than recommending extra regulation, Sir David has welcomed a code of conduct drafted by a group of leading consultants and suggested that the group sets up a body to keep the code updated, though there is no mention of such a body monitoring observance of the code.

The code requires consultants to be competent, objective and transparent with comparative data being 'rigorously sourced'. Acknowledging the potential conflict of interest, it proposes that different managers must lead on executive pay consultancy work and other services, provided, that the chairpersons of remuneration committees must be kept fully aware of the fees received from such services and that consultants' fees must not be contingent upon, or linked to the level of remuneration recommended.

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The voluntary code has not been universally welcomed. The ABI criticised it on the grounds that the recognition of conflicts of interest did not go far enough, wanting boards to disclose how much they spend on pay consultants and also the amount spent on other services sourced from the same organisations. PIRC, the UK's leading independent research and advisory consultancy providing services to institutional investors on corporate governance and corporate social responsibility has argued against self-regulation.

The Code of Conduct can be found in Annex 11 of Sir David's Review: [www.hm-treasury.gov.uk/d/walker\\_review\\_consultation\\_160709.pdf](http://www.hm-treasury.gov.uk/d/walker_review_consultation_160709.pdf)

### EXECUTIVE PAY GUIDELINES

A further contribution to this topic was released at the beginning of September 2009. The Chartered Institute of Personnel and Development (CIPD) has published a set of general principles on executive pay designed to act as a framework to help HR directors and Remuneration Committees to develop executive remuneration policies, practices and structures. They are intended to rise above what is seen as an increasingly polarised debate driven by individual interest groups.

Charles Cotton, CIPD Reward Adviser says: "Organisations should focus their attention on what they need to do to ensure their reward packages support the needs of the business and its stakeholders and to attract and retain the talent the business requires.

"Existing guidelines tend to focus on a particular industry or type of company, to be written from the perspective of a consultancy practice, and to change frequently, failing to provide a consistent reference point. Ours have been drafted to be sustainable over time, rather than focusing too much on the current heated debate around executive pay."

Full details and further information about the document is at: [www.cipd.co.uk/pressoffice/\\_articles/090909CIPDexecpayguidelines.htm](http://www.cipd.co.uk/pressoffice/_articles/090909CIPDexecpayguidelines.htm)

### EXECUTIVE PAY AND BONUSSES

- Support has been given by 100 union leaders, academics and politicians (including a leading Liberal Democrat spokesman and Labour back-bencher) to the call of Compass, the campaigning organisation, for a High Pay Commission to curb excessive remuneration and 'massive bonuses', linked to wage ratios.
- Lane, Clark & Peacock, the actuarial consultants, have reviewed the pension costs of FTSE 100 executives. For those in final salary schemes, companies are contributing an average of 70% of executives' pay

at a time when many companies are reducing or closing such schemes for employees. Even in money purchase schemes, employers' contributions average 30% of executives' pay, more than double the average contribution to employee schemes.

- Meanwhile, Hewitt New Bridge Street, a remuneration consultancy, has also analysed the FTSE 100 and found that, on average, they paid well over 50% of the maximum bonus available and a fifth paid 90%, during a year when the same high percentage of FTSE 100 companies saw their share price fall. The same report shows that the average pay of chief executives' remuneration rose 167% between 2000 and 2008 compared to 35% for the average of all employees.
- This year's AGM season showed higher levels of investor and shareholder criticism that executive remuneration policies have not adequately reflected the downturn in performance with much higher level of voting against remuneration reports than has been previously seen.
- There have also been developments in Europe which may influence the direction of events in the UK. Dutch banks have agreed a new voluntary code of conduct which includes bonus caps (100% of salary for executive board members but not for others) and claw-back provisions. It will come into effect on 1 January, 2010. The Dutch Finance Minister said a law would be introduced in due course requiring companies to 'comply or explain' their failure to follow them and he explicitly proposed them as a model for other jurisdictions and commended them to the G20 summit in Pittsburgh. It is understood that the reaction of others was not so positive. President Sarkozy of France threatened that French Government business would be withheld from banks which failed to abide by tough new rules on traders' bonuses, including deferrals, the imposition of long-term criteria and increased transparency. However he did say that France would not act unilaterally on limiting bonus payments across the board because of the impact on the competitiveness of the Paris market.
- Individual companies who hit the headlines earlier in the year have come under continued scrutiny. Sir Peter Job, chairman of Shell's remuneration committee retired from the role at the end of September and will step down from the committee after the AGM in May 2010. A second member of the three-man committee will transfer to the audit committee at the same time. 60% of shareholders who voted rejected the outgoing Chief Executive's bonus at the 2009 AGM.

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- Despite opposition by shareholder group PIRC, only 8.6% of shareholders at Berkeley Group, the house builders, voted against the remuneration report because of concerns about the size of a new long-term incentive plan. 4.5% of shareholders also voted against the appointment of Tony Pidgley as chairman.

Corporate governance guidelines advise against chief executives stepping into the chairman's role unless there is a compelling reason, something PIRC said Berkeley had not put forward. PIRC had also recommended dropping PwC as auditors because of the amount of non-audit work which they carry out for the group. All resolutions were carried.

- DSG International received 87% approval for its executive incentive scheme which allows salary sacrifice in exchange for share options despite PIRC opposition because it was not performance linked. The ABI also voiced opposition but major shareholders, including Standard Life, backed the plan.

### DISCLOSURE AND TRANSPARENCY

In order to implement the *EU Company Reporting Directive*, **DTR 7.2** was inserted into the FSA's Disclosure and Transparency Rules. This requires all listed companies, for reporting periods starting on or after 29 June 2008, to include a corporate governance statement within the directors' report (or as a separate statement which will need to be filed at Companies House with the auditors' report) containing:

- details of the company's internal control and risk management systems in respect of financial reporting and (where relevant for groups) the preparation of consolidated accounts;
- cross-referral to the applicable corporate governance code;
- information on share capital structures; and
- details of the company's administrative, management and supervisory organisation and committees.

### PERFORMANCE SURVEYS

Two reports have been produced recently, which look at progress with corporate governance. The first, by consultancy, Resources Global Professionals, looks at all elements in FTSE 100 companies, covering some 60 different weighted categories, ranging from yes/no (split Chairman/CEO) to detailed calculations/evaluations on such matters as remuneration and environmental issues.

The second comprises two related surveys by Radley Yeldar, corporate communications consultants, jointly entitled *How does it stack up?* which assess narrative and corporate responsibility reporting. The conclusion is that in general, both sectors had made progress but there was still a way to go to level up to best practice, particularly in the area of non-financial reporting and key performance indicators.

As might be expected, the combined results suggest that larger companies, and those who have to report in more than one jurisdiction, perform better because they have more resources available to work on the reports. They also tend, where possible, to harmonise more than one report by including all the different requirements.

Interestingly, no companies appear in the Top 10 in all three surveys, and only three appear in more than one – Intercontinental Hotels, Xstrata and HSBC; the last company bucking the trend that, across sectors, mining and energy companies over-perform and the financial services companies are at the opposite end of the scale.

### MULTIPLE DIRECTORSHIPS

The accusation that the difficulty of recruitment is leading to a concentration of directorships in fewer and fewer hands has been countered by research of FTSE 100 directors from Resources Global Professionals.

Around 9% of the 1095 directors listed in their 2007-08 annual reports have two directorships, less than 1% have three and only one, John Buchanan, Chairman of Smith & Nephew has four. A comparison with the US is difficult to assess, as the statistics there collected by Corporate Library covers the S & P 500, showing 55% of directors serve on more than one board. In the UK the research has not been extended to the FTSE 250 which is likely to show a much more overlapping picture but the picture is markedly different from continental Europe where there is a tradition of cross-company directors (over three quarters of the Italian Top 30 have shared directors).

### BAN THE BLACKBERRY

A recent article in the Financial Times has speculated on the negative impact on good decision-making of a director's attention being distracted by incoming e-mail or, worse, by replying to it during the course of a board meeting. A man's alleged inability to do more than one thing at a time or, more seriously, the proven impairment of concentration by using a mobile phone at the same time as driving, suggests that the director's effectiveness will suffer by dealing with incoming messages during an important meeting.

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There are also the implications for colleagues in the room; some may regard this as acceptable behaviour and start to act in the same way whereas others will be so incensed (particularly if they are talking or presenting at the time), and the quality of their thinking or concentration will diminish as a result. It is interesting to speculate how many companies have policy on this situation.

## EMPLOYMENT

### UNEMPLOYMENT NEWS

Despite unemployment having risen by over 40% in a year to just under 2.5m at the end of July 2009, the Organisation for Economic Co-operation and Development (OECD) suggests that the UK has suffered comparably to the average of OECD countries and better than some of its peers who have achieved this level only by micro-economic intervention.

The Chartered Institute of Personnel & Development (CIPD) confirmed that ‘the UK has managed to contain the rise in unemployment without widespread use of statutory job protection measures and short-time working subsidies’, but fears that, as the UK comes out of the recession, it will not see high levels of job creation.

The CIPD called for a six-month ‘work placement subsidy’ to encourage employers to take on 16 and 17 year-olds who have been unemployed for more than six months; (18 year olds already qualify), after research published in the latest *Labour Market Outlook*, which they compile with KPMG, showed that this age group is the least likely to be recruited. Only 24% of employers plan to take people from this age group, citing lack of experience and poor people skills, compared with 60% who expect to recruit 19 – 24 year-olds and a similar number targeting pensioners.

In an initiative aimed at helping skilled UK nationals who are unemployed, the Government has accepted proposals by the Migration Advisory Council whereby vacancies would have to be advertised in Jobcentre Plus for four weeks (rather than two) before being advertised overseas. The minimum salary is being raised to £20,000 from £17,000 and transferees into the UK by multinational companies will have to have been previously employed for more than 12 months in their native country.

### FOREVER ON THE BOOKS?

An Appeal Court ruling at the end of October, could have major repercussions on the employment market and raises important privacy issues when employers seek to find new staff.

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Police have won the right to keep details of old and minor criminal convictions after three Appeal Court judges rejected a ruling that they should be removed from computer records, saying that the records of convictions from years ago could help the fight against crime and that police forces should be allowed to retain them.

Five convicted people who had contested their cases complained to the Information Commissioner after their records showed up in checks when they applied for jobs. One was a record held by Humberside Police about a man who applied to be a care officer and who had been fined £15 at a juvenile court for the theft of a 99p packet of meat in 1984, when he was under 18.

Under current police policy, criminal records can remain on the police national computer for up to 100 years. The forces said that if they had lost the appeal, they may have been forced to delete the convictions of one million people.

Lord Justice Carnwath, sitting with Lord Justices Waller and Hughes, said he could not see why the purposes for which data was retained should not extend to the provision of information to assist other bodies with similar aims. These include the Crown Prosecution Service, social services, probation services, the Criminal Records Bureau in the context of employment vetting, and those seeking the whereabouts of missing persons.

Civil liberties groups said that the judgment meant that people would for ever be ‘haunted by minor indiscretions’ of their youth and that ‘this judgment ignores the privacy rights of millions of people and we hope it is appealed.’

“The benefit to the police of retaining the samples is minimal. The cost to the individuals can be huge — and potentially life-ruining.”

### ‘PHILOSOPHICAL BELIEF’ IN EMPLOYMENT

Two years ago the law on religious discrimination was extended to philosophical beliefs ‘worthy of respect in a democratic society’. To receive workplace protection against discrimination, a viewpoint no longer had to be ‘similar’ to religious faith.

In the first case to be heard under this extended protection, Tim Nicholson, former head of sustainability at Grainger plc, claimed that his dismissal on grounds of redundancy from the company was unfair and an act of discrimination and that his strong belief about the importance of the environment contributed to the loss of his job.

**Nicholson v Grainger plc and others** (case no.2203367/2008).

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In Judge Sneath's view, Nicholson's beliefs went 'beyond a mere opinion' and further stated that, ... 'for purposes of this case, the claimant's beliefs are or amount to a philosophical belief within the 2003 regulations.' He further added that his decision 'should not be seen as the thin end of the wedge' of similar complaint

### EFFECTIVE DATE OF TERMINATION

With one dissenting opinion, the Court of Appeal has held that the date that an employee reads a letter of dismissal, not the date it was sent or the date it was received at the home address but not read, was the effective date of termination of employment for the purposes of determining the timescale for presenting a claim for unfair dismissal.

In **Gisda Cyf v Barrett [2009] EWCA civ648** the employee was sent home from a disciplinary interview on Tuesday but did not read the letter (sent recorded delivery on Thursday and signed for on the next day) until the following Monday morning after being away for a long weekend. The dissenting opinion was on the basis that uncertainty should not be created for employers particularly as the judgement in this case (and earlier ones) could be abused by employees.

### EQUAL PAY CLAIMS

The Court of Appeal has defined more clearly the reach of equal pay claims going back beyond a TUPE transfer, backing the verdict of the Employee Appeals Tribunal (EAT). Claims do not have to be brought within six months of the transfer, but within six months of the termination of the employees' contracts with the transferee. However, a claim could only be brought for the period following the transfer, not for the period with the previous employer. (**Guttridge & others v Sodexo [2009] EWCA Civ 729: 14 July 2009**).

### MEDICAL QUESTIONNAIRE PROBLEM

In **Cheltenham Borough Council v Laird [2009] EWHC 1253** the High Court has clarified the degree of precision with which pre-employment medical questionnaires need to be drafted in order to be able to rely on them in the event that a medical problem comes to light following recruitment.

Mrs Laird was appointed as Managing Director of the Council and as part of the recruitment process she was asked to complete a questionnaire in which she did not disclose the fact that she had suffered three bouts of stress-related depression and was on medication at the time. After starting the job, Mrs Laird's employment relationship deteriorated, following which she had a nervous breakdown and was on sick leave until retiring with an ill-health pension following a full medical report.

The Council started proceedings for recovery of the sickness benefits paid, alleging misrepresentation in completing the questionnaire but the claim was rejected on the basis that she had correctly answered the questions asked which, because of their potential ambiguity, had not required disclosure of all the relevant information. In completing it as she had, Mrs Laird had been neither fraudulent nor negligent.

### 'SICK NOTE' TO BECOME 'FIT NOTE'

The Government is planning to replace the current doctor's note, which focuses on the health condition and how long an individual should be away from work, with a surgery's computer-generated note indicating when someone 'may be fit for some work now'.

The idea, due to be launched next year, is being piloted as a way of cutting the 150million annual sick days and slashing the numbers claiming employment support allowance, which costs £13billion a year

The format and content will be agreed after the responses to the consultation have been analysed and a medical statement will be launched in April 2010.

Doctors say the plan will put their patients at risk as they 'do not have the expertise to comment on people's fitness for work'.

The GP's trade union, the British Medical Association is resisting the proposals and has advised its GP members that it is not their role to 'police' the benefits system. They also put the question that 'as the majority of GPs are self-employed, who will discipline them if they refuse to cooperate?'

### EMPLOYMENT TRIBUNAL

The employment tribunal statistics for the period April 2007 to March 2008 show a 43% rise on the previous year. Indications are that this will rise significantly again in the next year due to the downturn in the economy and the rise in redundancies which have resulted.

### EQUAL PAY CLAIMS

The Employee Appeals Tribunal (EAT) has ruled that a successful claim by one person or group can then be used by another to leverage wages up across the board – the so-called 'piggyback' claims. In **McAvoy & others v Llewellyn & others [2009] UKEAT 0006/08/2406: 24 June 2009** a number of claims had been brought against three councils on the basis of the **Sex Discrimination Act 1975**. The claims were primarily by women who successfully claimed arrears in respect of a comparative

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group of male workers. However, another group of men who claimed that if the women's claims were successful then they were being discriminated against because their wages were lower than the revised scale, were initially unsuccessful.

They could not use the original male group as a comparison but, when the women's claims were upheld, the EAT ruled that they could claim arrears from the date on which the relevant women presented their claims. This reinforces the need for an employer, once it has been the subject of a successful claim, to review comparable contracts across the business.

### SEXUAL DISCRIMINATION & BULLYING

After a long running case, the EAT ruled at appeal in favour of Gill Switalski who left her job as Head of Legal Affairs at F & C Asset Management because she claimed she was harassed about her working hours and treated less well than a male colleague in a similar situation. She had two special needs children; her salary was £140k and the case could result in the highest award of its kind. Figures of between £13m and £19m have been quoted, but the final figure is not likely to be decided until January 2010.

### ORDER FOR DISCLOSURE

In **Canadian Imperial Bank of Commerce v Beck [2009] EWCA CIV 619 CA: 26 June 2009** the EAT had ruled, and the Court of Appeal endorsed, that very full disclosure of information held by the employer should be made. This covered all senior management correspondence regarding job guarantees / re-deployment offers, specifically to Canadian as opposed to non-Canadian employees (Beck was a German national) and the relevant documentation on another grievance case brought by a non-Canadian employee in an unrelated redundancy exercise.

The order was made despite the fact that Beck could not specify the nature of the documents concerned and the difficulty of retrieving them was not sufficient an argument against doing so.

### CONTINUITY OF EMPLOYMENT PRESERVED

In the current economic climate companies have been placed into administration and employees have found themselves unemployed with no legal comeback. In **Oakland v Wellswood (Yorkshire) Ltd**, one such employee, Mr Oakland, challenged the decision not to allow him to claim for unfair dismissal in such circumstances

A purchaser for Wellswood Ltd had been identified and it was agreed that this purchaser would buy the company assets as well as taking on a few of the employees from the administrator as a pre-pack sale on the same day that the administrators were appointed. The administrators confirmed the company could not be rescued as a going concern and that it was likely the company would soon enter into a creditors' voluntary liquidation.

Shortly after the acquisition, Mr Oakland was dismissed by the purchaser without any redundancy pay. Mr Oakland brought a claim for unfair dismissal and argued that he was entitled to make this claim as he had transferred to the purchaser under the *Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)* and consequently had more than the one year's service required to claim unfair dismissal.

Initially the EAT held that the transfer provisions of TUPE did not apply in Mr Oakland's case. This meant that he would not be deemed to have sufficient continuity of service in order to bring a claim for unfair dismissal. The EAT relied on the exclusion set out in *Regulation 8(7) of TUPE*, which provides that where insolvency proceedings are in line with bankruptcy proceedings and have been commenced with a view to a liquidation of the assets of the business ('terminal' proceedings), there will be no transfer of staff to the purchaser and no claim for unfair dismissal against them.

However, the Court of Appeal took a different view. They decided that **section 218 (2) of the Employment Rights Act 1996** should be applied. This section preserves continuity of employment on the transfer of a business meaning that if this were to be applied, Mr Oakland would be able to bring a claim for unfair dismissal. The Court of Appeal however did not hear the full argument for the TUPE point and therefore made no ruling on the application of the transfer provisions to pre-pack administrations.

### LIKELIHOOD OF A RECURRING DISABILITY

The House of Lords have ruled, in the case of **SCA Packaging Limited v Boyle, [2009] UKHL 37 [NI], 1 July 2009** that an employer needs to be mindful of a disability, even though it is not active, when making changes to an employee's work environment if it is 'likely' that an adverse affect 'could well happen'.

Mrs Boyle had suffered from throat nodes, which had been successfully removed in an operation in 1992 and she had subsequently prevented a recurrence by following medical advice. In addition she had benefited from partitioning in her office environment which reduced the noise level. In 2000 the company removed

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this and refused her request for them to reconsider, as she believed she would have to raise her voice with a risk that the condition would return. The company appealed against the original Belfast Industrial Tribunal and the subsequent Northern Ireland Appeal Court rulings, and the House of Lords unanimously rejected the appeal, defining what is meant by an effect that 'is likely to recur'.

### DISABILITY DISCRIMINATION

A young lady with a prosthetic arm has been successful in a claim against Abercrombie & Fitch at the Central London Tribunal who held that the firm's Savile Row store had wrongfully dismissed and harassed her because of her disability. However, it rejected her claim for direct disability discrimination, by reversing an earlier agreement that she could wear a special cardigan to cover the arm on the sales shop floor and making her work solely in the stock room. The award amounted to a little over £9,000 including £7,800 for compensation for injury to her feelings.

### COURT RULING ON GOVERNMENT AGE REVIEW

The Government has decided to bring forward by a year an Age Review which was scheduled for 2011, with the suggestion by the Prime Minister, that extending the age limit and allowing older people to work longer will be a factor in the UK's economic growth. This was supported by the TUC although the CBI felt that it would impact on companies' ability to plan, saying that the vast majority of businesses were already being flexible when dealing with requests from employees to work beyond 65.

This latter view is slightly contradicted by the number of cases pending with employee tribunals as a result of forced retirements at the age of 65. These are likely now to be dismissed because of a High Court judgement on a judicial review brought by Age Concern (**R (on the application of Age UK) v Secretary of State for BIS [2009] EWHC2336 (Admin)**). Mr Justice Blake has ruled that the Default Retirement Age in 2006 did not breach EU law on age discrimination. He strongly endorsed the Government's review and said the case for the compulsory retirement age to rise 'would seem to be compelling'. Had the review not been imminent 'the choice of age 65 would not have been proportionate'. This has now become a plank of Conservative policy announced at their conference on 6 October 2009.

### PENSION QUALITY MARK

The National Association of Pension Funds (NAPF) announced in October that it will start awarding a Pension Quality Mark for any employer offering defined

contribution (DC) pensions that meet three core tests. These schemes include occupational DC schemes, group personal pensions, group stakeholder pensions and, from 2012, Personal Accounts.

The first recipients including Marks and Spencer, BG Group, Standard Life, IBM, Kellogg's and Accenture received their Marks in September. The eligibility criteria for the award include 10% contributions (of which 6% is employer), member-orientated management, maximum admin and fund management charges of 1% and good employee communication. NAPF said this was not a reaction to the closure of defined benefit schemes but to recognise high-calibre schemes and to help employees. Those companies seeking the Mark will need to pay a one-off assessment fee and annual licence fee. There is a higher Pension Quality Mark Plus for schemes where there is a higher contribution rate of 15% (of which 10% is from the employer).

### EXTENSION OF PATERNITY LEAVE RIGHTS

The Government has announced that mothers who return to work after six months can transfer the unused part of their maternity leave to their partners, who could then take up to six months leave, of which half would be paid. The Business Minister, Pat McFadden, claimed that less than one in ten eligible fathers were likely to take up the opportunity and that less than 1% of small businesses would be affected. It hopes to implement in 2011, but legislation in early 2010 will be preceded by a consultation on the new Regulations.

Representatives from both the British Chambers of Commerce and the Federation of Small Businesses reacted negatively, emphasising that it was the administrative impact of navigating through the paperwork and resulting disruption rather than the time taken off in itself, which would affect their members, especially during a time of recession.

Director General of the Institute of Directors (IoD), Miles Templeman, warned that if poorly introduced it would have impact. He said the IoD '... strongly supports new paternity leave rights for fathers, providing the new system is simple for businesses to administer and there is no overall increase in the total leave parents can take'. It does appear that, in response to the concerns of business at this time, the Government have dropped other proposals to increase paid maternity leave from nine to 12 months.

### HOLIDAY PAY

The European Court of Justice (ECJ) has clarified one aspect of the *Working Time Directive* (WTD) in respect of holidays. After the House of Lords confirmed in **HMRC v Stringer [2009] UKHL 31** that employees continue

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to accrue holiday during sick leave, the ECJ has ruled in **Pereda v Madrid Movilidad** (case C-277/08) that an employee who becomes ill prior to a pre-booked holiday which he cannot therefore enjoy, is entitled to have the holiday re-allocated to a later time, even into the next holiday year if necessary. This overrides any national or collective agreement.

Although not explicitly covered in the ruling, the implication is that if an employee becomes sick during a period of annual leave, they would also be entitled to re-use that time. The Chartered Institute of Personnel and Development, (CIPD), was very critical of the ruling on the basis of the potential for abuse and recommended that very close contact should be maintained between the employer and the employee in these circumstances and that employers should consider amending their HR procedures to incorporate such a requirement.

### MINIMUM WAGE AND REDUNDANCY PAY

Increases in the National Minimum Wage rates came into effect on 1 October 2009. For new rates, entitlements and help with calculation [www.direct.gov.uk/en/Employment/Employees/TheNationalMinimumWage/index.htm](http://www.direct.gov.uk/en/Employment/Employees/TheNationalMinimumWage/index.htm) provides extensive help.

Statutory Redundancy Pay will also increase to £380 per week for dismissals after the same date, bringing forward the normal date from February, so there will be no increase in February 2010 and the next review will be in February 2011. The rate is also used for a wide range of compensation payments ordered by employment tribunal awards and also various payments from the National Insurance Fund in the event of insolvencies.

'A Code of Best Practice on Service Charges, Tips, Gratuities and Cover Charges' was produced in October by the Department for Business, Innovation and Skills, (BIS). Developed by business representatives and consumer groups, the guidance covers all relevant establishments including hotels and restaurants, gambling and betting outlets, hairdressing and beauty therapy businesses and taxi operations.

The document sets out the four principles of the Code of Best Practice in ensuring transparency in relation to service charges, tips, gratuities and cover charges:

- Businesses should clearly display information on their mandatory and discretionary policies on tips etc
- They must have a process in place to deal with requests for information from customers about the distribution of such income
- They will ensure workers themselves understand and can confidently explain the policy

- All workers informed of the breakdown and distribution of any income and deductions from it and should be asked to reach agreement on any change of this policy.

### VULNERABLE WORKERS HELPLINE

Minister for Business, Innovation and Skills, the Rt Hon Pat McFadden, has announced that a helpline for vulnerable workers to enquire about their rights under the National Minimum Wage and Working Time Directive has been set up. The intention is to consolidate the work currently done by a number of different bodies and will include advice (for employees and employers) and also a place where abuses can be notified and complaints directed.

In an innovatory move, a mobile 'street café' has been set up to tour the country to promote the new helpline. The national roadshow will give people an opportunity to sit and discuss their working rights with trained advisers. The 'café' will appear in towns from Glasgow to Exeter, from around 10 am to 5 pm and details of timings can be found on: [www.direct.gov.uk/en/NII/Newsroom/DG\\_181058](http://www.direct.gov.uk/en/NII/Newsroom/DG_181058)

### SWINE FLU

With the incidence of swine flu rising again after the summer break, the results of a survey by lawyers, DLA Piper, has to raise concerns. Half of those companies who responded believe they could face operational disruption, while most admitted that their continuity planning is not as robust as it might be, in that it had not been communicated effectively to key stakeholders, including employees!

Many had not factored in indirect effects such as employees having to stay off work due to school closures or the increased care of dependants. Only a minority had considered they would need to adapt HR policies and procedures.

### EMPLOYEE ENGAGEMENT

Research (including a survey and evaluation of over 3,000 employees in and outside of share schemes) carried out by the London School of Economics, in partnership with Computershare, has concluded that there is empirical evidence to support the long-held view that participants in company share plans are more interested in, and contribute more to, their employer company.

The Demos report, 'Reinventing the Firm', from the think tank supported by the John Lewis Partnership, has lobbied for increased employee ownership. In Germany, unions are demanding equity stakes in restructured businesses as a price for their support.

## HEALTH AND SAFETY

### HEALTH & SAFETY AT WORK

In October 2007, the Health & Safety Executive (HSE) and the Institute of Directors jointly launched an eight-page publication *Leading Health & Safety at Work – guidelines written ‘by directors, for directors’*. Research was conducted by Databuild in 2008 on behalf of the HSE which was published in March this year and revealed that awareness and use of the guidance was disappointingly low.

Only 25% of organisations surveyed were aware of the guidance, of whom around half had read it and only 50% of those had taken action as a result. Those who had read it were positive about its usefulness and perhaps unsurprisingly, there was a higher level of knowledge about recent H&S legislation amongst those.

Awareness was lowest in one of the higher risk sectors, hotels and catering, where 19% knew of the guidance but only 7% had taken practical action as a result. Between 2007 and 2008 HSE statistics showed that there had been an increase of almost 10% of major incidents in this sector and a smaller increase in less serious injuries.

The new **Health & Safety (Offences) Act 2008** which came into effect at the beginning of 2009, has increased the level of financial penalties and introduced imprisonment for directors and responsible senior managers as an option for a wider range of H&S offences.

Parallel to this, the Risk and Regulation Advisory Council (RRAC) have led a one-year initiative against the mishandling of risk in conjunction with the Government and HSE. Specifically, they have looked at why small organisations struggle to comply with H&S legislation.

They came up with 16 recommendations aimed at Government and HSE, seeking to improve the competence and confidence of the target audience of smaller organisations. This includes clarity of advice and guidance which was seen to be discordant, involving the HSE working with insurers who are another prime source of information of linking H&S performance with insurance premiums.

The new Ministry of Justice is tasked with reviewing the interaction between the Health and Safety at Work Act and compensation claims for personal injury (particularly the administrative cost of preparing for a hearing) and the HSE with reviewing the H&S aspects of the public procurement process. The HSE has also been asked to look at coaching and training and the accreditation of H&S consultants to ensure consistency.

The HSE recently launched their new strategy document *‘Be part of the solution’* which aimed to reduce the number of accidents at work by encouraging a common-sense approach – so that risk management is seen as an enabler not, as it is often perceived, as a burden.

### OUT OF HOURS HELP

The HSE have been criticised for failing the 3.5m shift workers in the UK because their staff are not scheduled to work outside of normal office hours.

HSE’s website makes plain that, unlike the health service or other criminal law enforcers like the police, normal service is not available outside of office hours: ‘In our experience, most incidents may be satisfactorily investigated during normal working hours,’ its contact page says.

However, it also adds, helpfully: ‘The type of circumstances where HSE may need to respond out of hours are:

- following a work-related death, or where there is strong likelihood of death following an incident at or connected with work;
- following an accident at a workplace, to gather details of physical evidence that would be lost if you waited until normal working hours;
- following a major incident at a workplace where the severity of the incident, or the degree of public concern, requires an immediate public statement from either HSE or government ministers.’

An HSE spokesperson did confirm that HSE duty officers and press officers are always on call.

### ICL PLASTICS FACTORY EXPLOSION

Lord Gill published his report on July 2009 into the gas explosion which caused nine deaths and 33 injuries in Glasgow in 2004.

This followed the conviction of the owner and operator of the factory in August 2007. They had pleaded guilty to H&S breaches and were fined £400,000. Echoing the Risk and Regulation Advisory Council (RRAC) report, Lord Gill concluded that the complexity of the legislation created a serious weakness in the H&S regime in the UK.

He specifically criticised the HSE for failures to follow up certain technical aspects relating to underground metallic piping and, more generally, the lack of effective communication between them and other interested bodies. These have subsequently been addressed.

## HEALTH AND SAFETY

### FATAL ACCIDENT ENQUIRIES AWARDS

In the Scottish case **(First) Global Santa Fe Drilling (North Sea) Limited and Others v The Lord Advocate [2009]CSIH43** a significant ruling has been made which changes the law on the award of expenses. Previously, Fatal Accident Enquiries and other administrative processes were closed to such awards but the appeal considered they were sufficiently akin to civil proceedings that, 'in certain circumstances, it will be open to the sheriff to make an award'. The full decision is at [www.scotcourts.gov.uk/opinions.html](http://www.scotcourts.gov.uk/opinions.html)

### FIRST CASE COMES TO TRIAL UNDER ACT

Cotswold Geotechnical Holdings Ltd, a company specialising in geological surveys, has become the first company in the UK to be charged under the **Corporate Manslaughter and Homicide Act 2007** following the death of an employee in September 2008. Alexander Wright, a junior geologist, was killed when a pit, excavated as part of a site survey, collapsed on him while he was taking soil samples.

The company's director, Peter Eaton, has also been charged with the common law offence of gross negligence manslaughter and, if convicted, faces in theory a maximum sentence of life imprisonment. The Company and Mr Eaton also face numerous charges for breach of health and safety legislation. They have pleaded not guilty.

Under the Act an organisation is guilty of an offence if the way in which its activities are organised or managed by its senior management cause a person's death. This failure on its part amounts to a gross breach (conduct that falls far below what can reasonably be expected of the organisation in the circumstances) of a relevant duty of care owed by the organisation to the deceased. The Act sets out certain factors which must be taken into account when considering whether an organisation is guilty of such an offence, including:

- whether it is in breach of Health and Safety legislation;
- how serious the management failure was; and
- how much of a risk there was of death occurring.

An organisation may incur unlimited fines if convicted. It is unclear when sentencing guidelines will be published but The Sentencing Advisory Panel have proposed that the fine should fall somewhere between 2.5 and 10% of the offending organisation's average turnover.

If a criminal prosecution for corporate manslaughter is successful, insurance cover will not be available for any fine or costs order against the organisation. If a defence is successful there may be cover for the legal costs incurred. This should not prevent a company from being covered

under its employers' or public liability policies in relation to civil claims arising from death. Directors' and officers' insurance may be available to individuals for the defence costs in the event of a defence being successful but any indemnities given by a company will not cover any criminal fines or costs incurred by them in the defence of criminal proceedings where a director is found guilty.

The prosecution of Cotswold Geotechnical Holdings Ltd is likely to be the first of many to come under the new law. The trial has been listed for 23 February, 2010 at Bristol Crown Court and is scheduled to last six weeks.

### EASTBOURNE BUSES DEATH CHARGES

Eastbourne Buses and its managing director, Stephen Barnett, have both been heavily fined after a driver was crushed to death at their Depot.

HSE principal inspector Russell Adfield said the driver's death, "resulted not so much from a failure to follow rules, but rather a lack of rules to follow." He stated that Eastbourne Buses' 'policies and procedures were confused and inconsistent.

'There was no clear reversing policy; walkways were often obstructed; speed limits undefined and instructions to staff were inconsistent. This environment gave rise to bad practice and danger' - a situation overseen by the managing director.

'Had the recommendations of previous advisers and consultants been properly understood, implemented and enforced then this tragic incident may never have occurred.'

Eastbourne Buses - now owned by Stagecoach - admitted failing to ensure employees' safety, contrary to **Section 2(1)** of the **Health and Safety at Work Act**, and was fined £100,000 with £135,000 costs.

After a two-week trial, managing director Stephen Barnett was found guilty of the same offence by virtue of **Section 37** of the Act, which states that where a company's breach is committed with the consent or connivance, or due to the neglect, of a director, the director will also be guilty of the offence. Barnett was fined £5000 and received an order for costs against him personally of £5000.

### SAFETY BARRIER SLAMS INTO CAR

An incident in which an unsecured safety barrier swung and hit an employee has cost supermarket giant Morrisons £188,681 in fines and costs.

As the employee pulled into the chain's Crewe store's petrol station on his way to start a night shift, a safety barrier in front of the station swung across, smashed through the passenger side of the car's windscreen and into his head.

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After several months in hospital and a series of operations for his facial injuries, which included the loss of an eye, the employee is unable to talk, eat or swallow. He now intends to pursue a civil claim against the supermarket.

At Chester Crown Court on 16 October, the judge fined Morrisons for failing to ensure the safety of employees, as required under **Section 2(1)** of the **Health and Safety at Work Act**.

### HSE WARNS BUILDING FIRMS

The Health and Safety Executive (HSE) is urging employers to ensure their workers are protected when working at height after a man fell from the first floor of a building he was working on, suffering life-threatening injuries.

The man was using a power saw at Barnfields Industrial Estate in Leek, Staffordshire, when he fell through the side of the building to the ground. An investigation showed the walls of the building had been removed and there was an inadequately positioned steel girder around the sides.

G Baskerville Ltd, of Cobridge, Stoke-on-Trent, pleaded guilty at Newcastle-under-Lyme Magistrates Court, in October 2009, to breaching **Section 2(1)** of the **Health and Safety at Work etc Act 1974**. The company was fined £8,000 and ordered to pay costs of £6,000.

The injured party sustained serious injuries from the fall. He had to be sedated for three weeks and spent a further three weeks in hospital. At one stage his injuries were believed to be life threatening.

### ASTHMA CASE STUDIES

A number of case studies have been produced looking at the effects of employers' failure to take adequate action to prevent workers suffering from asthma, particularly in relation to flour dust but also from other causes.

In one case the employer (a local council) admitted that it had not taken sufficient action in spite a number of complaints, and the employee was awarded damages of £200k. In another case, when the link with the employment was raised, management took decisive action, including changing the employee's immediate place of work, improving dust extraction and issuing suitable protective equipment.

### OFFSHORE WORKING

The HSE have identified that legislation needs to be extended to cover wind farms and 'related structures' (including those transmitting energy back to shore and accommodation for workers carrying out activities on either) operating outside the UK's 12-mile territorial sea limit.

The **Health & Safety at Work Act 1974** (Application Outside Great Britain) (Variation) Order 2009 will require compliance with the Act for those new aspects not currently covered and came into force on 5 August. It can be found at [www.opsi.gov.uk/si/si2009/uksi\\_20091750\\_en\\_1](http://www.opsi.gov.uk/si/si2009/uksi_20091750_en_1)

The HSE have announced that, in due course, a composite order taking all developments in the offshore energy field into account will be drafted and put into a consultation before implementation.

### STRESS MANAGEMENT GUIDELINES

The Chartered Institute of Personnel & Development (CIPD), together with the HSE and Investors in People have produced guidance entitled *Line Management Behaviour and Stress at Work*. Its publication followed research in 17 organisations and earlier studies which showed that the incidence of stress-related illness had doubled in the 17 years to 2007 and was now the second biggest cause of staff absence amounting to 13.5m lost working days and rising, as levels increase in the current economic conditions.

The guidance can be found at [www.cipd.co.uk/subjects/health/stress/\\_strwklmng.htm](http://www.cipd.co.uk/subjects/health/stress/_strwklmng.htm)

## ENVIRONMENT

### CONTROLLING EMISSIONS

The International Energy Agency has reported that greenhouse gas emissions have fallen to their lowest level for 40 years, primarily as a result of the recession but also as a result of Government action in Europe, the US and China.

The Carbon Disclosure Project, an independent not-for-profit organisation holding the largest database of primary corporate climate change information in the world, has published a survey that indicates that the overwhelming majority of the global 500 companies do not have medium- or long-term strategies to cut emissions. 82% of companies responded to the survey so the figure could be even lower. Those that do have targets are insufficiently high, if taken globally, to deliver internationally agreed national targets. However, business leaders in Britain have been critical of the lack of specific targets as opposed to general exhortations by the UK Government.

Insurers have been pressing for growth in renewable-energy supplies, which they see as essential for reducing the likelihood of natural disasters, and the consequences for the insurance industry and the wider economy which would follow. Research by HSBC indicates that this is a growth area of world economies and disappointment has been

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expressed at the low level (around 15% of the Government's economic stimulus package) targeted in this area.

In addition, concerned that the recession will lead to a diluting of tangible action, a group of eight of the most well-known environmental groups in the UK have urged all the British political parties to include firm pledges on spending on ten environmental demands on which all have agreed.

### GREENHOUSE GAS EMISSIONS

The Department for Environment, Food and Rural Affairs (Defra) has consulted on the reporting of greenhouse gas emissions as required by the **Climate Change Act 2008**. It has now published guidance on the calculation of emissions and reporting, 'standard' and 'best practice' for those who want to go further than the minimum required. It also goes into detail about what the reports should cover – any business over which a company has financial control – and relevant activities, including direct and indirect emissions. The former includes emissions from direct manufacturing, the company's own vehicles etc and the latter from energy purchased from another supplier, or consumed by one of their suppliers. Companies also should set targets for themselves. Mandatory reporting is required in 2012.

More detail can be found at [www.defra.gov.uk/corporate/consult/greenhouse-gas](http://www.defra.gov.uk/corporate/consult/greenhouse-gas)

### ENVIRONMENTAL PERMITS

The Environment Agency has consulted on rules under the *Environmental Permitting (England & Wales) Regulations 2007* whereby standard or bespoke permits (for low-risk and higher-risk activities respectively) are required for regulated activities. The consultation sets out 16 sets of rules for specific low-risk waste activities, including land restoration and reclamation, composting, waste treatment, construction and scrap metal which will come into force in April 2010.

### WASTE DIRECTIVE IMPLEMENTATION

The *EU Waste Framework Directive* must be implemented by member states by 12 December 2010 so DEFRA are consulting on suggestions how the law should be changed. Some aspects are technical but it asks views on what the Government needs to do in respect of recycling targets, encouraging bio-waste treatment and whether local authorities should be required to write local waste prevention programmes to underpin the national one.

There was also a separate consultation on hazardous waste.

### EMISSIONS TRADING

The Department for Energy and Climate Change has consulted on the regulation of the implementation of **Directive 2009/29/EC; Phase III** of the EU Emissions Trading Scheme. The Directive allows companies in the EU to sell or bank unused emissions below their allocated allowances and others to buy additional units where they have exceeded their allowances.

The Government has released a draft statutory instrument which will require relevant operators to submit data for the calendar years 2005 – 2008 by 30 April 2010, so that National Implementation Measures can be submitted to the EU by 30 September 2011. The Directive will come into force in its entirety from 2013.

Potentially running counter to this in practice, however, is a European Court of First Instance ruling on 23 September 2009, which stated that the EU Commission had exceeded its powers by rejecting the national plans of Poland and Estonia and imposing a lower cap on both countries.

This could increase the amount available in Europe either used by industry in the individual countries or available for trading on the carbon market (the Emissions Trading System). Prices fell immediately as a result of increased supply, both as a direct result and because of fears that similar challenges will be raised by other countries. The Commission may appeal.

Carbon trading has proved profitable for one group, it is alleged. Nine people were arrested when 130 HMRC officers raided 27 business and residential premises in August 2009, following a seven month investigation into a suspected £38m fraud. This involved cross-border carbon trading, based on the so-called VAT carousel frauds. In July 2009 the UK followed France and the Netherlands by removing VAT on carbon credits, rendering such frauds impossible going forward.

### ATMOSPHERIC POLLUTION

Corby Borough Council was found negligent over its failure to prevent toxic waste pollution when it cleaned up the old British Steel steelworks between 1983 and 1997.

It is the first time that a UK court has found that material so released could have caused deformities in new-born children and has also raised the bar in terms of the standard of care required for land reclamation.

Corby is considering an appeal, but individual claimants will have the monumental task of needing to prove that their conditions were a direct result of exposure to the pollution.

## DATA PROTECTION

### HSBC FINE MORE THAN DOUBLE PREVIOUS

HSBC have received a fine of £3.2m from the FSA, more than twice the level of the highest previous fine levied by the FSA for data security lapses, when its insurance arm 'lost' an unencrypted floppy disk containing details of another company's pension scheme.

In February 2008 HSBC Life lost an unencrypted CD containing details of 180,000 life insurance customers. There was no evidence that fraud resulted but, in the FSA's judgement, that was not a factor. They were disappointed with other serious and commonplace breaches which were uncovered by the subsequent investigation, but indicated that the fine would have been almost 50% higher had HSBC not cooperated fully.

### LOST MINISTRY OF JUSTICE FILES

Not fined but admitted in the Ministry of Justice's accounts, were losses of personal information on almost 2,000 people, including a filing cabinet (by contractors during a move) containing information about offenders and their criminal records and an unencrypted memory stick containing names, NI and employee numbers of MoJ staff. Some breaches were reported to the Information Commissioner's Office (ICO) but a number of others were not.

### NEW BRITISH STANDARD

A new British Standard, BS 10012:2009, has been developed to establish best practice and aid compliance with data protection legislation and is the first standard for the management of personal information.

The Standard was developed by a panel of experts including representatives from industry, government, academia and consumer groups and specifies the requirements for a personal information management system (PIMS), which provides an infrastructure for, among other things, maintaining and improving compliance with the **Data Protection Act 1998** (DPA).

Rather than prescribing exactly how operations should be run, BS 10012 provides the framework which will enable effective management of personal information. It can be used by organizations of any size and sector to create a tailored management system which includes procedures in areas such as training and awareness, risk assessment, data sharing, retention and disposal of data and disclosure to third parties.

It has been designed for use by organizations of any size, in both the public and private sectors. Users should also be aware that other legislation (such as the **Freedom of Information Act 2000**) can have an effect on decisions taken in relation to the processing of personal information

but BS 10012 does not cover this other legislation, which should be accounted for when processing personal information.

The DPA implements a European Directive (95/46/EC) and applies to 'personal data' which is defined in the Act as information relating to living individuals. This new British Standard uses the term 'personal information' in place of the term 'personal data'.

It has been welcomed by the Information Commissioner's Office (ICO) which has reminded users that 'Recent reports suggest that data loss is not restricted to the public sector.'

Full details can be found at [www.bsigroup.com/en/Shop/Publication-Detail/?pid=00000000030175849](http://www.bsigroup.com/en/Shop/Publication-Detail/?pid=00000000030175849)

It is worth noting that the fees for all initial notifications and renewals to the ICO (by organisations with a turnover of £25.9m+ or 250 or more staff) rose from £35 to £500 on 1 October 2009. Charities and other organisations which fall below this threshold will continue to be £35.

### SELF-ASSESSMENT PASSWORDS STOLEN

HM Revenue & Customs (HMRC), has warned the six million self-assessment tax payers making filings by internet to keep the password details secure as some have got into the hands of fraudsters who are making bogus repayment claims to their own bank accounts.

The system had previously been targeted in an unrelated scam, whereby e-mails purporting to come from HMRC seeking users' bank account details, were identified as fraudulent.

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### FULL STOP ON EXCLAMATION MARK

The Office of Harmonisation of Internal Markets (OHIM) in Luxembourg, ruled that an exclamation mark cannot count as a trade mark, as it turned down an application from German fashion and fragrance group Joop!

Joop! had applied to have two versions of the punctuation mark registered as trade marks for a range of goods including clothes and jewellery in Classes 14, 18 and 25.

The designs featured an exclamation mark in a single box and a double box.

The company appealed to the European Union's Court of First Instance who turned down the application; upholding the decision by the (OHIM) that an exclamation mark lacked distinctive character, under article 7(1)(b) of the **Community Trade Marks Regulation** which corresponds to s3(1)(b) of the **Trade Marks Act 1994**.

## INTELLECTUAL PROPERTY

The Court rejected the argument saying that ‘the consumer, including one having a high degree of attention, would not be in a position to infer the origin of the goods designated by relying on a mere exclamation mark.’

The court also ruled that the box-like frame did not help their case because ‘placing the mark inside a label-like rectangle is a very common practice in the relevant commercial sector and is devoid of any capacity to individualise as to commercial origin.’ Furthermore, they confirmed that a mark must have become distinctive through use before an application for registration is filed.

Joop! can appeal the decision within two months if it feels that the Court misinterpreted EU law.

### COUNTERFEITING AND PIRACY

The European Commission adopted a Communication *at the end of September*, on enhancing the enforcement of intellectual property rights in the internal market. The Communication sets out a series of practical initiatives to respond to the dramatic and damaging effect that counterfeiting and piracy is having on EU economies and on society in general.

The Commission is proposing to complement the existing legal framework by more focused enforcement through greater collaboration between the private sector, national authorities and consumers, throughout the internal market.

Internal Market and Services Commissioner Charlie McCreevy said: “The EU is home to some of the most successful businesses in the world who consider intellectual property rights to be amongst their most precious commercial possessions.

“These rights are a cornerstone of a creative, competitive, wealth-generating, knowledge-based society. Counterfeiting and piracy undermines this position, placing creators, business, jobs and consumers at ever-growing risk through fake products and services that pose a real threat to health and safety.

“We need to stop this dangerous trend, both within and outside the internal market, not by more legislation, but by mobilising stronger collaboration helping us to fight back.”

Complementing legislation, the actions in this Communication aim to:

- \* support enforcement through a new EU Observatory which will bring together national representatives, private sector experts and consumers to work to collect data on and analyse the scope and scale of the problem, to share information, promote best practices and strategies and to raise awareness and propose solutions to key problems;

- \* foster administrative cooperation across Europe by developing coordination to ensure that more effective exchanges of information and mutual assistance can take place. As a result, Member States are called to designate *National Coordinators*. An electronic network for information sharing will also need to be available .
- \* build coalitions between stakeholders to overcome conflicts and disputes, by developing *collaborative voluntary arrangements* that focus on concrete problems, such as the sale of counterfeit goods over the internet, and are capable to adapt quickly to changing markets and technology. Such agreements can also be more easily extended beyond the EU and become the foundation for best practice at global level.

The Communication results from the Commission’s IPR Strategy for Europe adopted last year and builds upon the recent Council Resolution on a comprehensive European anti-counterfeiting and anti-piracy plan.

### ROUNDTABLE ON MUSIC

A joint statement setting out general principles that will underpin the online distribution of music has been signed at the fourth meeting of the EC’s roundtable on the Online Distribution of Music.

The roundtable held on 20 October, recognised the importance of a global repertoire database as the cornerstone for the development of effective models for the online licensing of music and has announced concrete steps that should result in improved access to music online. It has also recognised the urgent need to address piracy.

The new and agreed commitments include:

- pursuing new EU licensing platforms comprising the rights held by several collecting societies. These platforms should consolidate the widest possible repertoire and should be based on voluntary cooperation among the owners of the rights.
- the decision that collective rights managers should adhere to certain objective, transparent and non-discriminatory criteria to allow other entities to deliver multi-territorial licences.
- the setting up a of working group to create a common framework for the identification and exchange of rights ownership information. This will make it easier for commercial users to identify the relevant right owners and secure necessary rights.

The European Commissioner for Competition, Neelie Kroes, who chaired the meeting said, “It is the first time that players from various parts of the market have agreed on a common roadmap. I also welcome the concrete steps

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and commitments that have been made and which should improve the availability of online music for consumers.”

Commissioner Kroes opened the meeting by saying that because current licensing mechanisms are too complex and burdensome, stakeholders are missing out on opportunities in the digital world. Simpler and more transparent licensing solutions had the potential to expand the market and bring new and more innovative online music offerings to a broader range of European consumers.

The meeting was attended by Amazon, BEUC, (the European Consumers Association), EMI Music Publishing, Universal Music Publishing, Apple iTunes, Nokia and some of the leading performing rights societies, PRS for Music, SACEM and STIM. Their joint statement can be accessed at:

[http://ec.europa.eu/competition/sectors/media/joint\\_statement\\_2.pdf](http://ec.europa.eu/competition/sectors/media/joint_statement_2.pdf)

### PATENT LAW CHANGE?

Trevor Bayliss, the inventor of the wind-up radio has suggested to Lord Mandelson that the theft of intellectual property should be criminalised and has received support from Vince Cable, the Liberal Democrat Treasury spokesman. He argues that the state should take action against someone who infringes a patent rather than the patent holder having to sue for compensation through the civil courts, which can be an expensive and protracted process.

Members of the Institute of Patent Attorneys have dismissed the idea because they believe that patent law is too complex to be dealt with in the criminal courts. One suggested that it would even act as a drag on innovation because others would be unduly cautious for fear of committing a criminal offence.

However, where criminal sanctions do apply under current intellectual property law to those who breach rights, the Intellectual Property Office is consulting on raising fines from £5,000 currently to £50,000, though not revisiting prison sentencing. Details can be found at [www.ipo.gov.uk/response-gowers36.pdf](http://www.ipo.gov.uk/response-gowers36.pdf)

### ONLINE PIRACY

The Government has produced *Digital Britain*, its final report through which it hopes to achieve a 70 – 80% reduction in unlawful peer-to-peer file sharing, estimated to have cost creative rights holders over £300 million in 2007. The figure is almost certain to have increased since then, despite the voluntary memorandum of understanding between them and Internet Service Providers (ISPs) in 2008, which has been largely ineffective.

Ofcom had been tasked with putting measures in place which include ISPs identifying and notifying illegal users

and collecting and making available to rights holders information about serious repeat offenders. ISPs have been largely unmoved by the proposals and are sceptical about whether notification will have any deterrent effect. They have also been concerned about the burden of following up a myriad of individual offenders. Ofcom has some reserve powers, which could come in after 12 months if the current proposals continue to be unsuccessful.

### FAKE GOODS IN TRANSIT NOT SEIZED

Nokia has asked for a judicial review of the decision by HM Revenue & Customs (HMRC) not to seize a consignment of goods passing through Heathrow, which purported to be Nokia products but which, on inspection, were not. HMRC’s legal advice stated that they could not be seized as ‘counterfeit goods’ as they were in transit, and not destined to be traded in an EU market.

Mr Justice Kitchen said he hoped that the case would lead to ‘a review of the inadequacy of the measures available to combat the international trade in fake goods’.

HMRC have said they will only seize goods when ordered to do so by the Court. They can temporarily detain goods pending such an application which will need to be sought within 10 days and up to 20 days if a further application is necessary.

### FACEBOOK CRITICISM

Canada’s privacy commissioner has criticised four aspects of Facebook’s service and demanded changes to which the organisation has 30 days to respond or risk enforcement action through the courts.

The areas are:

- Third party access to sensitive user information
- Retention of such information after account deactivation
- Uncertainty about the accounts of deceased customers and
- Retention of e-mail addresses of those who declined to join.

Similar concerns have been expressed about social networks in Europe but there has been criticism of the US regulators that they are not giving the issue sufficient importance.

In the UK, Frank Warren, on behalf of Amir Khan, the WBA light welterweight champion, has appointed lawyers to seek to require Facebook to be more proactive in policing defamatory and racist postings. Facebook (and Google in respect of videos on YouTube) already promise to remove objectionable or offensive material

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but both rely on such material being drawn to their attention and there have been accusations that Facebook has been slow to react.

### DIGITAL LIBRARY AND BOOK COPYRIGHT

According to a new European Commission policy document, Europe's multilingual digital library, Europeana, already hosts more than 4.6 million items, including maps, photographs and newspapers and is expected to see further digitisation of up to 10 million items by 2010.

In light of this and future growth, the Commission is opening a public debate on the challenges of book digitisation in Europe to explore public-private partnership potential in this domain and to review Europe's copyright framework.

One of the aims of Europeana is to make Europe's cultural and scientific resources accessible for all.

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### INSURANCE FRAUD AT RECORD LEVELS

The Association of British Insurers (ABI) has estimated that undetected, fraudulent, general insurance claims have risen by almost 20% over the last two years and could be as high as £1.9 billion per annum. This follows a previous record high of £730 million in 2008. These figures do not fully include the potential impact of the recession on fraudulent claims and the ABI add that it is 'too early' to understand what the implications of that might be.

### STATUS OF AGENTS

The Court of Appeal has defined more clearly the status of a commercial agent (under *the Commercial Agents (Council Directive) Regulations 1993*) in rejecting an appeal by a jewellery trader that he 'was such an agent and could make a claim under the Regulations, following the termination of his contract with a company whose jewellery he sold'.

The Regulations define two types of agent; those who have authority only to negotiate and those who negotiate and contract on behalf of the principal. In this case, the trader contracted in his own name and there were additional reasons why he fell outside the definition. The decision also referred back to the contractual documents which are key to making an assessment. (**Sagal (trading as Bunz UK) v Atelier Bunz GmbH [2009] EWCA Civ700**).

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### NEW GUIDANCE FROM HMRC

Her Majesty's Revenue and Customs (HMRC) has published the final version of its guidance to senior accounting officers, (SAOs) in qualifying companies and groups (turnover exceeding £200 million or gross assets over £2 billion in the preceding financial year). This follows on from s46 of the **Finance Act 2009** which requires SAOs to notify HMRC who they are and for them to establish, monitor and then certify that adequate accounting systems are in place to ensure adequate tax reporting for any financial year starting on or after 21 July, 2009. Previously, there had been no specific individual responsibility. Failure to do so could result in a fine on the individual up to £10,000, subject to appeal as there are two separate offences; though HMRC have said they will apply a 'light touch' for the first applicable financial year, but for one year only.

The guidance can be found at [www.hmrc.gov.uk/largecompanies/sao-large-companies.htm](http://www.hmrc.gov.uk/largecompanies/sao-large-companies.htm)

### PRICE-FIXING – DIRECTORS RESPONSIBILITIES

The Office of Fair Trading, (OFT), as part of its fight against cartels and price-fixing by senior executives, has stated that it plans to revive recently unused powers to disqualify directors who fail to prevent it in their companies.

This initiative is likely to add to concerns that non-executive directors will be more difficult to recruit as it is yet another example of personal sanctions, including disqualification for up to 15 years, being applied to areas beyond a directors control or direct influence, and will increase their reliance on internal audit departments and other controls.

Copies of the consultation paper, on which comments must be received by 20 November can be found at: [http://www.oft.gov.uk/shared\\_oft/consultations/oft1111con.pdf](http://www.oft.gov.uk/shared_oft/consultations/oft1111con.pdf).

At the end of a five-year investigation by the OFT, 103 firms have been fined £129.5m for collusion in the bidding process for building contracts. Almost 200 projects were affected, including hospitals, schools and universities, the main offence being so-called 'cover pricing' whereby supposedly competitive quotes are priced so as not to win the contract.

Some commentators suggested they were surprised at the level of the fines which they estimated at between 1 and 2% of turnover when the OFT has the power to fix the level up to 10%. Some of the highest profile names, including Balfour Beatty and Carillion, said that the offences had taken place in subsidiaries which they had taken over since the offences occurred and they and others had fully cooperated with the investigation.

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There was the suggestion that some leniency might also have been shown because of the state of the construction industry in the recession. For this reason more generous (extended) payment terms for the fines were agreed and also, it is thought, Lord Mandelson wrote to public procurement offices saying that the firms should not be automatically prevented from tendering for public sector works, though this is not binding and individual procurement officers will make their own decisions.

In September 2009, it was announced that the Serious Fraud Office is investigating JJB Sports and Sports Direct in relation to 'suspected offences under the **Fraud Act** and the **Enterprise Act**'. The SFO said that JJB had approached the OFT in January asking for immunity or reduced penalties in return for cooperation with an investigation and JJB themselves said they had whistleblown because they suspected a cartel in the sportswear retail market.

### **BROKER FINED FOR FAILURE TO REPORT**

The Financial Services Authority (FSA) has fined Mark Lockwood, a former trading desk manager at a retail stockbroking firm, £20,000 for failing to observe proper standards of market conduct. Lockwood failed to identify and act on a suspicious client order that allowed the firm to be used to facilitate insider dealing. As a result of his failings the firm failed to identify the trade as suspicious and report it to the FSA.

Lockwood's misconduct related to his dealings with a client who sold shares in oil and gas exploration company Amerisur in May 2007 - ahead of an announcement by the company of a placing of shares the next day. The client has been subject to separate FSA enforcement action for market abuse in relation to Amerisur shares.

Lockwood failed to identify that the transaction was being conducted on the basis of inside information, despite his own knowledge of the impending transaction and clear warning signals from the client. He failed to prevent the trade or alert his firm to the possibility that the trade was being conducted on the basis of inside information. As a result no Suspicious Transaction Report (STR) was submitted to the FSA and the trading only came to light because of a report submitted by another broker.

### **EMERGENCY PROCEDURE INVESTIGATION**

PhonepayPlus, the phone-paid services regulator, has launched an investigation following six complaints from members of the public about a service called 'SMSWinner'.

The service, operating on SMS shortcodes 64546 and 60032, has been suspended pending the result of the

investigation. PhonepayPlus considers the Service Provider responsible to be Ericsson IPX AB.

The complaints relate to a competition service promoted online at smswinner.net, which offered consumers the chance to win high-value prizes, such as international holidays, by correctly answering a series of questions by text message in the quickest time possible.

During the course of its preliminary investigation, PhonepayPlus identified a number of issues, which it believes contravene the Code of Practice (Eleventh Edition Amended April 2008). These include:

- Chargeable messages, costing £2 each, being sent after the 'STOP' command had been received
- Not sending users subscription initiation messages
- Not sending users reminder messages
- Not applying for prior permission from PhonepayPlus for a service which costs more than £4.50 per week
- Stating on the website that users would receive two quiz question messages at a cost of £2 each when, in fact, eight £2 messages are sent, followed by eight more for each subsequent competition, until the subscription is ended

In all, PhonepayPlus suspected the service to breach 11 paragraphs of its Code. As such it invoked its emergency procedure to bar access to the numbers associated with the service with immediate effect. In addition, all revenue payable to the Service Provider has been withheld by the Network Operator pending the outcome of the investigation.

Research carried out by the organisation in advance of its take-over of responsibility suggests that services are widely accepted but the level of price transparency is sub-optimal. Callers will need to be told when they phone that they will be charged, not kept hanging on and given an estimate of how long they should expect to wait. Failure to comply with the new rules could lead to fines up to £250,000.

One direct consequence of the new regime is that the Daily Express, up to now alone among national newspapers in using 0871 numbers for calls to the paper, will cease doing so to avoid having to meet the new requirements.

### **GOVERNMENT'S PROCUREMENT WEBSITE**

The £180 annual subscription to allow businesses to access the www.supply2.gov.uk website has been removed. SMEs can see and consider applying for contracts up to £100,000. Whether this will address the other issue of complexity of tendering for such contracts remains to be seen but the Federation of Small Businesses has welcomed the relaxation as a 'first step'.

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### EU SURVEY OF WEBSITES

Because of the level of complaints being received and at the instigation of the EU consumer commissioner, Meglena Kuneva, trading standards authorities across 28 European countries have reviewed 369 websites selling electronic goods.

203 of these will be further investigated because, on the face of it, they provided misleading information. Of these the main culprits (over 130) did not give clear detail of the right to return goods bought within seven days and half this number did not give sufficient detail for the purchaser to contact the supplier in the event of a problem. Only six of the 14 reviewed in the UK were inadequate while every website checked in Cyprus and Hungary was defective.

### RELIANCE ON WEBSITES

In **Gary and Karen Patchett v Swimming Pool & Allied Trades Association Limited [2009] EWCA Civ717** the Court of Appeal, in an interesting and very full judgement, ruled that a trade association website did not owe a duty of care to the plaintiffs who sought costs for completing work on a swimming pool when the original contractor, listed on the website, became insolvent. Although the website said that members had been vetted, the Patchetts did not follow through on a special guarantee and bond, referred to on the website, nor contact the Association as had been recommended.

However, the judgement makes it clear that, had the circumstances been different, websites may owe a duty of care to readers and sets out the factors which will be taken into account.

### CONTRACTUAL RATES OF INTEREST

In **Taiwan Scot Co Ltd v The Masters Golf Company Ltd [2009] EWCA Civ685** the Court of Appeal held that a 15% rate of interest in a contract mutually agreed between two parties was not penal if cross-referred in the context of the economic conditions at the time it was contracted.

### FLEXIBLE TIME TO PAY

As a consequence of the recession, the Government has introduced an initiative allowing companies with cash flow problems to defer payments of PAYE and VAT. Take-up has been brisk with 177,000 requests covering £3bn reported at the beginning of August 2009. Over half of these cover deferrals of up to three months and over 90% of monies owed has subsequently been paid within the timescales agreed. In some cases there has been a negotiated second deferral.

However, while being welcomed by hard-pressed businesses, there has also been criticism that it allows insolvent businesses to continue trading to the detriment of customers or suppliers. However, HM Revenue & Customs says that it is assessing and monitoring the situation very carefully and 'when a business is no longer viable... appropriate action' will be taken.

It has been discovered that some large companies have amended their payment terms to the disadvantage of their smaller suppliers. Research at Leeds University Business School suggests that they are using the threat of interest being charged if they do not pay on time (under the **Late Payment of Commercial Debts Act**) as an 'excuse' for demanding a discount if they do pay on time.

The Federation of Small Businesses (FSB) said that a third of members surveyed had told them that they were experiencing extended credit times, up to four months, and late payment was a cause of around 4,000 business failures. They named and shamed a number of the larger firms concerned, including TNT, Bernard Matthews, Amazon, DHL and the Carlsberg Group. Jewson was singled out for particular comment as it was reported to have told suppliers it would only pay after 60 days and would charge a 10% fee for paying within this period! The FSB has approached all the companies concerned asking them to subscribe to the Government's **Prompt Payment Code** and is also pursuing other avenues to get the message across that this behaviour is unacceptable.

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- Shareholder agreements
- Elective resolutions
- Dissolution
- Restorations
- Health & Safety
- Trade Mark registration
- Data Protection policies

For further information on any of the above, please call and speak directly to a partner:

**David Venus, Douglas Armour,  
Martha Bruce or Susan Wallace.**

*For further copies of **Update** or to be placed on our mailing list, please e-mail, telephone or fax:*

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*Update* published by  
Public Affairs & Marketing Ltd. Tel: 020 8398 0255



**David Venus** FCIS is a Chartered Secretary with over 30 years' experience of company secretarial work. Following a career in commerce and industry, gaining wide experience in several companies including subsidiaries of Nestle and ITT, he established the practice in 1980, having recognised a need, particularly among small and medium sized companies and other professional firms, for independent professional advice.

David is primarily concerned with the continuing development of the practice particularly in terms of technical expertise and in forging links with fellow professional advisers. He also acts as company secretary to several listed, private and public sector companies.

Over the years, he has written and contributed to a number of company law reference books and continues as author of Butterworths' *Company Secretarial Procedures and Precedents Manual* first published in 1993 and updated quarterly.



**Douglas Armour** FCIS joined the practice in 1985 having completed the ICSA professional examinations as a postgraduate student. He became a partner in 1992, since when he has gained considerable experience of companies of all sizes and types in particular start-ups and IPOs. He acts as company secretary to several public and private companies and heads our share registration division, SLC Registrars Limited, which specialises in smaller fully listed, AIM and OFEX companies.

Douglas is a specialist adviser to the ICSA and has written and contributed to a number of books, including two published by the Institute: *The ICSA Company Secretary's Checklists*, first published in 1992 now updated bi-annually and *The ICSA Company Secretary's Handbook*, first published in 1999 and now updated annually.



**Martha Bruce** FCIS has been with the firm since 1992 having previous experience with Chantrey Vellacott and Morgan Grenfell. She became a partner in 1997, since when she has built an extensive portfolio of clients in all areas of industry and commerce. She acts as company secretary to many listed and unlisted companies and heads our trade mark and health & safety consultancy services.

Martha has written two books *Rights and Duties of Directors* first published in 1998 by Tolley's and now in its 6th edition and more recently *The ICSA's Directors Guide* published in 2003. In addition, she has been a contributing editor to Butterworths *Corporate Law Service* since 1995 and as a specialist adviser to the ICSA, is also responsible for editing a monthly Q&A section in the Institute's monthly professional journal *Chartered Secretary*.



**Susan Wallace** FCIS joined the firm in 2001 initially on a temporary contract, but quickly became a valuable member of our permanent staff and was appointed partner in 2004.

She gained her initial experience within accountancy and legal practices including Eversheds and more recently KPMG in Hong Kong. Since joining the practice, she has rapidly established her own client portfolio; predominantly large, unlisted private groups. She also has a number of company secretarial appointments and specialises in the setting up of employee share schemes and the drafting of shareholder agreements.

Susan is a regular contributor to the Q&A section for the *Chartered Secretary* journal and has responsibility for in-house staff training.