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Dear Sir/ Madam

BIS Consultation: Scope of exceptions to the prohibition of corporate directors

We welcome the opportunity to comment on the BIS consultation regarding the exceptions to the prohibition of corporate directors. The Institute of Chartered Secretaries and Administrators ("ICSA") is the professional body that qualifies Chartered Secretaries and, as such, our members are well placed to understand the issues connected with the use of corporate directors. In preparing our response we have consulted, amongst others, with members of the ICSA Company Secretaries Forum, which includes company secretaries from more than 30 large UK listed companies from the FTSE100 and FTSE250. However, the views expressed in this response are not necessarily those of any individual members of the ICSA Company Secretaries Forum nor of the companies they represent.

General comments

Reforms that seek to increase transparency and trust in UK companies are to be applauded. We wholeheartedly agree that a 'lack of transparency and accountability with respect to those controlling a company can facilitate illicit activity, erode trust and damage the business environment' and 'ultimately hold back economic growth'. The challenge is to avoid disproportionately increasing the compliance and resource burden for all companies in order to prevent a minority from breaking the rules. Changes need to be proportionate and

considered. We refer to our submission response to the BIS consultation on Transparency and Trust in 2013 and in particular the section on the general prohibition on corporate directors, which we have included below for your reference:

> "Removal of corporate directors is a concern for many companies of all sizes as these provide a legitimate administrative function. A carve out for group structures (both PLC and private) should be considered. The increase in administrative resource burden for companies of all sizes that use corporate directors far out-weighs the minority of companies that abuse them. This is a legitimate administrative function used by many companies and although the number of corporate directorships may be small in comparison to the number of companies registered, these are often used on several hundreds of subsidiary companies within a group. So, for example, if a corporate director has 6 senior employees as its directors, and this corporate director is registered as a director on 500 companies, a single change in personnel requires only 2 forms to be completed (one resignation and one new appointment on the corporate director company), compared to 1,000 forms (one appointment and one resignation for each subsidiary) if individuals were to be appointed personally on all 500 companies. We appreciate that an alternative arrangement is for companies to arrange for certain individuals to have authority to execute for a subsidiary, and if there was a choice to be made between abolishing nominee or corporate directors, then some of our members would opt for the former. However, the preference would be to keep both nominee and corporate directors and make the law work correctly rather than abolish a well-used mechanism used by many to stop a minority.
>
> 1.1. Another area where a carve-out may be required for legitimate use of corporate directors is those freelance company secretaries who act as incorporation agents and for ease of administration use corporate directors.
>
> 1.2. All companies need to have one 'human' director thus there is always one named individual in which to target enquiries and, as mentioned above, if this is a nominee director, declarations to this fact and disclosure of the underlying beneficial owner or on whose behalf they act would help remove this loop-hole. Where there is legitimate use by companies of corporate directors, it is usually apparent, as generally:
> 1.2.1. They are used for signatory purposes to avoid multiple appointment and resignation letters when personnel change (as illustrated above);
> 1.2.2. They are serviced by individuals not a series of other corporate directors; and
> 1.2.3. They are generally employees of the group.
> Instead of abolishing the use of corporate directors altogether, alternatives should be considered such as a requirement that where corporate directors are being used there should be 2 natural persons only one of which can be a 'nominee' or one natural person who cannot divest themselves of their responsibilities and that the corporate director has some if not all natural persons as its directors not more corporate directors. The aim being that there is not several layers of corporate directors and nominees owning subsidiary companies within the group."

Notwithstanding our objection to the general prohibition of corporate directors, we do appreciate the opportunity to contribute to this consultation about exemptions, which we believe are vital.

Commentary on specific sections

3 Group structures including large companies

Public companies

a) UK companies with shares admitted to trading on regulated markets

1. Should we use UK companies listing on UK regulated markets as a basis for an exception from the prohibition of corporate directors? And UK subsidiaries of non-UK companies listed on UK regulated markets?

A1. Yes

2. Should we use listing on other markets, with broadly similar rules to those of UK regulated markets, as the basis for an equivalent exception from the prohibition of corporate directors? Do you have any further thoughts on the handling of UK companies listed on overseas markets, and evaluation of their rules and requirements?

A2. Yes – although it may be difficult for BIS to assess rules in all overseas markets.

3. How far should an exception extend in the group?

a. Should it apply only to dormant companies?

Should it apply to

b. wholly owned subsidiaries; or

c. subsidiary bodies corporate controlled through voting rights or control of directors; or

d. subsidiary undertakings subject to wider means of parental company influence?

A3. We believe that an exception should extend to all subsidiary companies of UK companies with shares admitted to trading on regulated markets, whether or not dormant, including those controlled through voting rights or control of directors and those subject to wider means of parental company influence. We appreciate that such an exemption is widely drafted, but this reflects the current position and we believe that there is sufficient security provided by the fact that these exemptions apply only to the subsidiaries of UK companies listed on regulated or prescribed markets.

4. Should it apply only to companies appointing another company in the group or a parent company only? Should this be made explicit?

A4. We do not believe that the exemption should apply only to companies appointing another company in the group or a parent company, but also to companies outsourcing the role to an appropriately regulated or registered service provider.

5. Should it apply only to companies appointing a corporate director whose directors are all natural persons?

A5. We agree that the exemption should apply only to companies appointing a corporate

director, the directors of which are all natural persons.

6. Are there any other arrangements or relationships we should consider?
A6. In terms of other arrangements or relationships, we would suggest that BIS consider the role of the Corporate Secretary, which is extensively used amongst, for example, investment trusts. We would also suggest that exemption be considered in the case of appropriately regulated or registered company formation agents.

7. Can you provide any evidence of the costs and benefits of your preferred outcome?
A7. See the example in our general comments above. For those companies with a large number of subsidiaries, the cost is likely to be significant. These exemptions will put the great majority of these out of scope.

b) UK companies with shares admitted to trading on prescribed markets

8. Should we use UK companies listing on UK prescribed markets as a basis for an exception from the prohibition of corporate directors? And UK subsidiaries of non-UK companies listed on UK prescribed markets?
A8. Yes

9. Do you have any further comments on overseas markets broadly similar to UK prescribed markets which are not covered above (in your response to question two regarding overseas markets broadly similar to UK regulated markets)?
A9. Yes – although it may be difficult for BIS to assess rules in all overseas markets.

10. How far should an exception extend in the group?
    a. Should it apply only to dormant companies?
    Should it apply to
    b. wholly owned subsidiaries; or
    c. subsidiary bodies corporate controlled through voting rights or control of directors; or
    d. subsidiary undertakings subject to wider means of parental company influence?
11. Should it apply only to companies appointing another company in the group or a parent company only? Should this be made explicit?
12. Should it apply only to companies appointing a corporate director whose directors are all natural persons?
13. Are there any other arrangements or relationships we should consider?
A10-13. As above for section a).

14. Can you provide any evidence of the costs and benefits of your preferred outcome?
A14. See the example in our general comments above.

c) Public companies without shares admitted to trading

15. Should we use public company status as a basis for an exception from the prohibition of corporate directors?

A15. No. The assumption of good corporate governance is difficult. This would need to be related to the issue of external oversight (eg by the FCA) and/or an enhanced auditor role in non-listed companies. The caveat needs to be the level and quality of external oversight. On balance, therefore, we are not persuaded of the need for exceptions here.

16. Should any exception extend to all public companies, only to large public companies, or only to large public companies in group structures?

A16. No. Some plcs are wholly owned subsidiaries and have a listed parent, in which case the ownership trail is easier to prove, but a carte blanche exception could be dangerous.

17. How far should an exception extend in the group?

a. Should it apply only to dormant companies?

Should it apply to

b. wholly owned subsidiaries; or

c. subsidiary bodies corporate controlled through voting rights or control of directors; or

d. subsidiary undertakings subject to wider means of parental company influence?

18. Should it apply only to companies appointing another company in the group or a parent company only? Should this be made explicit?

19. Should it apply only to companies appointing a corporate director whose directors are all natural persons?

20. Are there any other arrangements or relationships we should consider?

A17-20. We do not believe that exceptions are appropriate for this group, but if the decision is taken to make them so, it would probably be best to follow the model proposed for listed companies.

21. Can you provide any evidence of the costs and benefits of your preferred outcome?

A.21 See the example in our general comments above.

Private companies

22. Should we use large private company status as a basis for an exception from the prohibition of corporate directors?
A22. No. Although we still believe that the group structures of large private companies could derive similar benefits to public companies from the use of corporate directors, we accept that the lack of transparency associated with private companies militates against exemption. The over- arching consideration should be that of external oversight and we do not believe that the costs of compliance will outweigh the potential risks.

23. Should any exception extend to all large private companies, or only to large private companies in group structures?
A23. On the above basis, we do not believe that a case can be made for an exemption in respect of private company groups.

24. How far should an exception extend in the group?

a. Should it apply only to dormant companies?
Should it apply to
b. wholly owned subsidiaries; or
c. subsidiary bodies corporate controlled through voting rights or control of directors; or
d. subsidiary undertakings subject to wider means of parental company influence?

25. Should it apply only to companies appointing another company in the group or a parent company only? Should this be made explicit?
26. Should it apply only to companies appointing a corporate director whose directors are all natural persons?
27. Are there any other arrangements or relationships we should consider?
A24-27. We do not believe that a case can be made for an exemption in respect of private company groups.

28. Can you provide any evidence of the costs and benefits of your preferred outcome?
A28. N/a.

4. Companies in regulated sectors

29. Are there any further areas where regulation supports high standards of transparency and corporate governance, which might also suggest a basis for an exception?
See section below for A29-32.

a) Charitable companies

30. Should we use operating as a regulated charitable company as a basis for an exception from the prohibition of corporate directors?
31. How far should an exception extend among charitable companies?

For instance should it apply

a. To all charitable companies; or
b. To charitable companies appointing a charity as corporate director; and/or
c. To charities appointing a public body as a corporate director; and/or
d. To charities of a certain size; and/or
e. On the basis of evaluation by charity regulators; and/or
f. On any other basis?

32. Can you provide any evidence of the costs and benefits of your preferred outcome?
A29-32. Generally:
In principle, we would favour the ability of charitable companies to appoint corporate directors, subject to appropriate safeguards, given the higher level of regulation to which they are subject. Given the Department's suggestion that a corporate trustee in the case of academies can "be useful to introduce specialist sector expertise and high standards of strategic governance," we are not clear why the same argument cannot be applied to other charities in equal need of specialist expertise. However, see our observation below on Academy Trusts.

Charities registering with the Commission generally have to have three trustees (best practice rather than legal requirement – which it might be appropriate to reconsider). Any concerns about the impropriety of a corporate trustee should therefore be balanced by having two other trustees with a fiduciary duty to act in the best interests of the charity in furthering its charitable purposes and providing public benefit. The Commission can monitor this at registration and at each annual return (in theory) and trustees are required to update the Commission whenever there is a change in trustees. The details regarding trustees can be found on the register of charities that is online – thereby providing an additional level of scrutiny. Of course, as we have suggested above, the directors of the corporate trustee – which we do not believe should necessarily be a charity itself – should all be natural persons.

The option for an exemption to be subject to the approval of the Commission may be a compromise here – but the Commission would need additional funding in order to perform this role.

Specific points

Para 47/Q29. There may be an issue for public bodies with commercial subsidiaries. For example NHS FTs establish joint ventures which may utilise a corporate director.

Para 54/Q31. A recent National Audit Office report into conflicts of interest at Durrant Academy Trust along with Department of Education reports into the governance at other academies suggest that the regulatory oversight of Academy Trusts by the principal regulator (the Department) is weak and of far more concern than that covering charitable companies registered with the Charity Commission due to the large public funds invested in academies. The argument supporting the retention of corporate directors in this sector is lacking. Without further evidence to support the assertions behind the consultation proposal it is hard to agree with.

b) Corporate trustees of pension funds

33. Can you provide any further information or evidence we should consider in relation to the abuses or value of corporate directors in the pensions industry?

a. Are corporate directorships in trustees rare, restricted to larger companies and generally transparent? Are there any other or particular arrangements in which they are used in the pensions industry?

b. Are there any significant risks attached to allowing corporate directorships in corporate trustees to continue?

34. Is there more that should be done to improve transparency of corporate directorships in corporate trustees?

35. Can you provide any evidence of the costs and benefits of your preferred outcome?

A33-35

It is generally easy to validate the owners of corporate trustees or those companies operating as corporate trustees and as the consultation states, where corporate directors are used they are 'restricted to a small number of well established, sizable and transparent companies…'. We would therefore agree that corporate directors of corporate trustees should continue under an exception to the general prohibition of corporate directors.

5 Consideration of other legal entities beyond companies

a) Societas Europaea (SEs)

36. Should we use **SE status** as a basis for an exception from the prohibition of corporate directors?
A36. No.

b) Limited Liability Partnerships (LLPs)

37. Do you agree with the approach that use of corporate members of LLPs should continue unchanged in the present reforms?
A37. Yes. We are not persuaded that there is a case for LLPs to be treated differently from other companies, but in the absence of a case for change, we accept that none should be made. We would, however, strongly recommend that the situation be kept under review and change progressed if evidence of abuse comes to light.

38. Can you provide any further information or evidence we should consider in relation to the abuses or value of corporate members of LLPs?
A38. No.

39. Do you agree we should review the issues in relation to corporate members of LLPs in parallel with the review of the Small Business Enterprise and Employment Bill provisions covering corporate directors of companies, or sooner if compelling evidence of abuse of the LLP structure were to emerge?
A.39 Yes. See our response to Q25 above.

Conclusion

We hope our feedback is useful and if you would like to discuss any comment in more detail, please contact me.

Yours faithfully

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