A Changing Face

Technology is driving stability in the global subsidiary governance industry

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COVID-19 has affected nearly every industry and changed the way countless people go about their working lives. Of course the severity of the impact varies from industry to industry and sector to sector. Some have had to move to an operating model of 100% of staff working from home, while others have been forced to close entirely. In the global subsidiary governance world, it is hard to think of a time when General Counsels and corporate secretarial teams have been under as much pressure than during the onset of this global pandemic.

The global pandemic has left multinational companies around the world struggling to maintain the full compliance of their international subsidiary portfolios. This new reality is bringing into even sharper focus the need for firms to ensure the robustness of their subsidiary governance operating and control models. Lack of transparency in particular was a critical issue in the early days of the outbreak, making it difficult to effectively manage the relevant processes and workstreams. Ensuring effective visibility at the central level of local operations around the world, which was always crucial, became much more difficult in a work from home situation, potentially compromising governance frameworks.

Ensuring a company's operations meet corporate governance requirements during these complicated times is of paramount importance. The topic of Annual General Meetings (AGMs) has been widely debated throughout the pandemic, with solutions differing in various regions, from the temporary acceptance of virtual or hybrid AGMs, to the extension of AGM due dates. As with attending AGMs, exercising voting rights via proxy, whilst already common before COVID-19, was most likely adopted more widely during the early stages of the pandemic. It will be extremely interesting to see the extent to which these new measures, hastily adopted to adapt to the global pandemic become a 'new normal'.

As the pace of regulatory change continues to grow, a robust subsidiary governance framework is vital. This is all the more important in the current climate, as regulatory developments wait for no one. Whilst multinationals are now coming to terms with the changes sparked by the COVID-19 pandemic, attention is already turning to another major regulatory challenge with a host of considerations to make before the end of the year: Brexit.

On 31 January this year, the UK finally made its official departure from the EU, entering into a transition period set out in the Withdrawal Agreement. This transition period, made between the UK government and the EU Commission in October 2019, unless otherwise agreed by both parties, will end on 31 December 2020.

At this stage, it is yet unclear what agreement the UK government and the EU Commission will reach, if at all. In the case of a no-deal Brexit (i.e. transition period ending with no formal trading agreement), a body of EU law currently in force will be implemented into UK law (with amendments) under the European Union (Withdrawal) Act 2018, which will 'retain' a considerable amount of current EU law.

From a corporate and company law perspective, nothing has changed nor is likely to change until the end of the transition period. This is because The Companies Act 2006, which is the primary source of company law in England and Wales, is unlikely to be amended in any major way.

Directors' duties, shareholders' remedies and rules in respect of accounts and audit will also likely not change. However, prior legislation made to amend The Companies Act 2006 raises important considerations that could still significantly affect many companies going forward.

Companies (Cross-Border Mergers) Regulation 2007

Currently, a legal framework allowing cross-border mergers between limited liability companies from the member states of European Economic Area (EEA)

exists by way of the European law Directive 2005/56/EC. Part of the procedure prescribed by the directive is set out in the Companies (Cross-Border Mergers) Regulations 2007, which will likely be revoked in the UK in the case of a no-deal Brexit. There are several types of cross-border mergers available to companies where the process is largely similar. These are: merger by absorption, merger by absorption of a wholly owned subsidiary and merger by formation of a new company.

Currently, companies are required to complete the 'pre-merger acts', which include preparing a merger plan, a directors' report and an independent expert's report (not applicable if a merger is by absorption of a wholly owned subsidiary). Companies must then obtain court approval from the country where the merged entity is to be registered and following that, Companies House must receive the merger documentation, which will strike off the relevant company.

In light of this, according to the UK government's guidance, cross-border mergers involving UK companies must be completed and registered before 1 January 2021. After this, cross-border mergers that use this regime will not be able to take place, likely increasing both the complexity and the time it takes to complete a merger in the future.

Company Registration

The government has stated that leaving the EU will not affect how UK companies will be required to report information to Companies House. There are, however, some changes that need to be taken into consideration if a company is formed under EU law. This includes European public limited liability companies, known as Societas Europaea (SE) or European economic interest groupings (EEIGs).

If alternative arrangements are not made before the end of the transition period, these companies will be automatically converted into new UK corporate structures, namely UK Societas and UK economic interest grouping (UKEIG), thereby allowing them to retain a clear legal status. Alternatively, to avoid automatic conversion, SEs can convert to a UK public limited company (PLC) if certain conditions are met and both SEs and EEIGs can also move their seat of registration from the UK to another EU member state.

EEA Corporate Officers

After the end of the transition period, the filing requirements for companies and limited liability partnerships (LLP) with EEA corporate officers will also change. The companies, or LLPs, will have to provide the corporate officer's name, registered or principal office address, legal form, its governing law, and its registration number to the Companies House.

Currently, the legal form of the company and the law by which it is governed does not need to be provided if the corporate officer is an EEA company. In practice, this means that some of the Companies House forms will indeed be affected.

UK Resident Directors

Finally, companies must also consider whether their subsidiaries based in the EEA will be affected by any local legislation requiring that their directors be EEA residents. For example, UK-resident directors may be required to meet the requirement of the Irish Companies Act 2014, stating that a company registered in Ireland must have at least one director who is a resident in an EEA state, or meet one of the other options set out in section 137 of the Act. Similar restrictions apply to directors in some other EEA countries including Finland and Norway.

With a cloud of uncertainty overhanging the Brexit process, the UK government has urged all affected companies to take necessary measures to prepare for a no-deal Brexit. Companies should therefore consider whether their structures will be negatively affected by the changes, and if so, establish a new legal presence for operations in the EU or UK as required. They also need to ensure that their directors are able to continue carrying out their duties, addressing residence immediately, and any cross-border mergers should be completed without delay, before the end of the transition period. Above all, companies must continue to monitor developments on the Brexit negotiations closely, to ensure minimum disruption in the event of a no-deal scenario.

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Corporate Governance

The challenges of 2020 have also served to speed up existing longer-term trends, in particular the way technology is driving stability in the global subsidiary governance industry. As with so many areas of our lives, it feels as if 2020 may represent less of an interruption and more of an inflection point. We are seeing the need to rapidly adopt new technologies, clearly setting apart providers that have a culture of agility, flexibility and innovation. Some measures put in place to maintain corporate governance may be temporary, but the pandemic has also accelerated longer term technology trends that we have been pointing to for a number of years and could change subsidiary governance for good. In particular, a considerable growth in the way corporate governance teams use technology to improve their workflows. A recent report published by LexisNexis last year found that 85% of General Counsels have considered multiple technology-enabled insight systems. A further 60% believe that technology will improve accuracy over the next five years.

Certainly for our own business model, technology is now central to allowing us to offer our clients the control and transparency they need. I hope the pace of innovation among our clients and wider ecosystem continues to grow over coming months and years. n