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Private & Confidential

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Corporate Governance – Current Developments

Corporate Governance

"Corporate governance is the system by which companies are directed and controlled. Boards of directors are responsible for the governance of their companies. The shareholders' role in governance is to appoint the directors and the auditors and to satisfy themselves that an appropriate structure is in place. The responsibilities of the board include setting the company's strategic aims, providing the leadership to put them into effect, supervising the management of the business and reporting to shareholders on their stewardship."

- **2018 UK Corporate Governance Code**

  - Leadership
  - Division of Responsibilities
  - Composition
  - Succession and evaluation
  - Audit
  - Risk and internal control
  - Remuneration

- "Comply or Explain" model
- Increase in disclosures required of large private companies in Annual Reports and websites

Liability of Directors

1. Breach of Directors Duties (Companies Act 2006)

2. Bribery Act 2010

- "Consent" or "Connivance" in the offer, giving, requesting or receiving of a bribe by the company;
- Aware that there is a good chance that the bribery is going on and doing nothing to investigate or put a stop to it.
- Section 7 of the Bribery Act 2010 – in practice, responsibility of the Board to ensure that 'Adequate Procedures' have been implemented.

3. Health & Safety

- "Consent" or "Connivance" or offence is attributable to neglect (Section 37 Health and Safety at Work Act 1974)
- Unreasonable breach of duty of care

4. Tax Evasion

- Finance Act 2020 – joint and several liability for tax or tax penalties in insolvency circumstances.

5. Other

- Statutory Declarations; Directors Disqualification Act 1986; Trading Disclosures at Companies House; Wrongful trading and Phoenix liability under the Insolvency Act 1986; Fraud Act 2006; Theft Act 1968.

ESG – Benefits

Value Creation	Summary
Top Line Growth	• Attract more customers with more sustainable products. • Achieve better access to resources through stronger community and government relations. • Avoid losing customers through poor sustainability practices e.g. Human Rights and Supply Chain.
Cost Reduction	• Reduce energy consumption and water intake. • Avoid waste disposal costs and packaging costs.
Regulatory Intervention	• Subsidies and government support • Greater freedom through a reduction in regulatory intervention. • Avoid fines, penalties and enforcement actions.
Productivity	• Boost employee motivation and attract talent through social credibility. • Retain employees through a sense of purpose.
Optimization	• Improve investment returns by better allocating capital for the long term. • Advantage against less efficient competitors.

ESG – The Criticisms

	Summary
No place in business	• The purpose of business is profit. • Businesses should and will continue to evaluate risk, and at least some of the risks that fall within the rubric of ESG are among them.
Too Broad	• Encompasses so many different considerations (some of which may actually be at odds with each other). • Companies fail to follow through due to financial concerns and fiduciary duties to investors. • Some elements are more easily measured than others.
Too Vague	• Too amorphous and broad to be meaningful. • ‘E’ is too nebulous and should be boiled down to greenhouse gas emissions. • Open to interpretation - can be applied however one wants. • Environmental and social initiatives are hijacked for profit. • Companies should focus on disclosures which are most relevant to their industry.
Idealistic	• False impression that markets can and will solve the most pressing social and environmental problems. Regulatory/government intervention is crucial. • Myth that problems can be solved without imposing significant costs.

Pressure and Accountability

Net Zero and Energy Transition

- Challenging macroeconomic climate
- Pressure to produce transition plans which withhold scrutiny
- “Loss and damage” fund for developing countries

Internal & External Stakeholders

- Employees/Whistleblowers
- Media
- Shareholders
- Activist Investors
- Activist charities and pressure groups
- Regulators
- Prosecutors
- Legislation

Litigation Risks

- Increasingly novel and innovative claims being brought.

Parent Company Liability

- *Okpabi and others (Appellants) v Royal Dutch Shell Plc and another* [2021] UKSC 3
- *Lungowe and others v Vedanta Resources PLC and another* [2019] UKSC 20

Supply Chain Liability

- *Begum v Maran (UK) Ltd* [2021] EWCA Civ 326

Companies Act 2006

- Client Earth v Shell

Section 90/90A Financial Services and Markets Act 2000

- Petrofac (2023)

Class Actions

- BHP [2022] EWCA Civ 951

Greenwashing

"When you're constructing a claim, keep it simple. Be precicse. Limit the claim to what you are really trying to draw attention to. And beware of making big, bold, absolute claims unless you are certain you can back them up" – **UK Advertising Standards Authority** (June 2022)

Litigation
- Client Earth v Shell
- DWS (Deutsche Bank)

Regulators
- **Green Claims Code** (2022) - guidance to companies about substantiating environmental/sustainability claims.
- **Competition and Markets Authority** announced investigations into ASOS, ASDA and Boohoo (August 2022). The investigation will scrutinise environmental claims made by the companies including:
  - Broad and vague statements that may create the impression that clothing collections are more environmentally sustainable than they actually are.
  - The criteria for 'sustainable' collections may be lower than customers might reasonably expect from their descriptions e.g. some products may contain only 20% recycled fabric.
  - Items included in sustainable collections without meeting the criteria.
  - Missing information about what the fabric is made from and misleading statements about fabric accreditation schemes and standards which may not apply to the product in question.

Due Diligence – Human Rights & Environmental

- There is currently no mandatory UK due diligence requirement for corporates relating to adverse impacts to human rights and the environment in their supply chains.

Modern Slavery Act 2015

- Transparency; No environmental protection; Advisory in nature.

Europe

- **Germany, France and Norway**

- **Corporate Sustainability Due Diligence Directive (due to be adopted in 2023 – likely timescale for implementation 2025 onwards)**
  - EU companies + Non-EU companies ‘active’ in the EU
  - Duty to monitor, prevent and account for actual and potential adverse human rights and environmental impacts
  - Own operations and across the value chain
  - Third parties with whom they have “an established business relationship”
  - Additional duties on Directors to ensure effective implementation of principles, policies and procedures

Failure to Prevent Model?

END