Briefing: Legislation and its impacts on responsible business

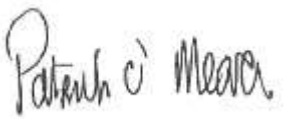
About this briefing

This briefing contains a selection of the most relevant legislations – existing and forthcoming – that impact responsible business and may not represent an exhaustive list. It contains general information only and is not a substitute for professional advice or services, nor should it be used as a basis for any decision or action that may affect your business. Before making any decisions or taking any action that may affect your business, you should consult a qualified professional advisor. Business in the Community shall not be responsible for any loss sustained by any person who relies on this publication.

We have compiled this briefing to inform and raise awareness amongst our members of the potential impact of an increasingly complex legislative landscape relating to responsible business. It includes key information and requirements related to existing legislation, specific requirements of quoted companies where these differ and the emerging legislative landscape. This includes, amongst others, the EU directive on non-financial reporting, gender pay gap reporting and the apprenticeship levy.

It is important that our members understand the possible implications of forthcoming legislation and prepare early, but also that they are able to see the opportunity of raising standards and greater transparency and consistency across the board. We invite readers to engage in dialogue with us on the possible impacts, issues and opportunities that sit behind each law and the challenge to go beyond minimum standards to develop and deliver business strategies that have responsibility at their heart. I would also point readers to the section at the back of this document where we signpost to further reading and supporting resources.

Finally, we are delighted to have partnered with Pinsent Masons LLP on this publication and thank them for their valuable time casting a critical eye over the content



Patrick O'Meara

Membership Director, Business in the Community

Media and social media in particular has raised public awareness of unfair practices, tax avoidance, environmental risks and more. This has driven an increase in the volume of national legislation and European regulation in this sphere. Reputational risk is becoming more difficult to manage.

Businesses that prepare early for changes in law and reporting requirements will have time to self-reflect on their findings. Whilst compliance is clearly essential, both from a reputational and a sanctions perspective, early preparation will reduce overall compliance costs and allow some time to look for business improvements. Last-minute compliance will likely be more costly, both in terms of resource and long-term benefit.

The diverse range of obligations can touch on all aspects of a business – this can't be left to risk managers alone. We hope this briefing will help bring some clarity for Business in the Community members and allow them to prepare properly throughout their business.

Kate Fergusson

Head of Responsible Business, Pinsent Masons LLP

Overview: Enacted Legislation

	Law/Code	Applicable to	Main obligations	Quoted Companies
Governance	UK Corporate Governance Code 1992 (formerly the Combined Code 1992)	The Code applies to all companies with a Premium listing of equity shares regardless of whether they are incorporated in the UK or elsewhere.	Companies are required to follow the Code or explain how else they are acting to promote good governance. The code sets out good practice covering the following issues: Leadership, effectiveness, accountability, remuneration, and relations with shareholders.	Specific to FTSE companies although some of the provisions do not apply to companies below the FTSE 350.
Reporting	The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013	All companies (except those classified as "small" under the Companies Act).	The strategic report must contain a fair review of the company's business and a description of the principal risks and uncertainties facing it. Quoted companies have additional obligations to provide information about environmental matters, employees and social, community and human rights issues	Not specific to FTSE companies but Quoted companies have additional obligations.
	Modern Slavery Act 2015	Entities with a turnover of over £36m (including that of subsidiaries) which carry on a business, or part of a business, in the UK, regardless of where the entity is headquartered.	Each business caught by the Act is required to publish an annual statement on the steps it has taken during the financial year to prevent slavery or human trafficking existing in its business and supply chain. The statement must be approved by the board of directors and signed by a director (or equivalent management body). The statement must be published on a prominent location on the organisations website, with a link to the statement on the homepage. A statement is required for each financial year ending on or after 31 March 2016.	Not specific to FTSE companies.

	CRC Energy Efficiency Scheme	The CRC covers companies that have energy bills for metered electricity of approximately £500,000 or more (equating to 6,000 MWh electricity usage in a year) and affects the party that is paying the electricity provider.	Measure and report electricity and gas (used for heating) related carbon emissions; annually buy and surrender allowances equal to the CO2 emissions generated. Note: in the 2016 budget, the government confirmed that, following its review of business energy efficiency taxes, it would abolish the CRC Energy Efficiency Scheme from the end of the 2018-2019 compliance year. Businesses will be required to surrender allowances for the final time in October 2019.	Not specific to FTSE companies.
Energy Management	Energy Savings Opportunity Scheme (ESOS)	ESOS applies to relevant undertakings which are: - large undertakings - any other undertaking that is part of the same corporate group as a large undertaking in the UK. 'Undertakings' include all limited or public companies, trusts, partnerships, unincorporated associations, not-for-profit bodies and some universities (as defined by the Companies Act 2006). Large undertakings are defined as meeting at least one of the following criteria: - employ at least 250 people - have an annual turnover over EUR50 million and an annual balance sheet total over EUR43 million, based on the undertaking's most recent annual financial statements ending on or before the qualification date.	ESOS requires larger companies and non-public sector organisations in the UK to carry out mandatory energy saving assessments. It requires participants to calculate their total energy consumption, carry out energy audits and identify where savings can be made. ESOS came into force in the UK on 17 July 2014.	Not specific to FTSE companies.
Cross Cutting	Small Business, Enterprise and Employment Act 2015	Large companies, as defined by the Companies Act, as those that satisfy two or more of the following conditions: turnover of more than £25.9m; balance sheet total of more than £12.9m; or more than 250 employees.	The Small Business, Enterprise and Employment Act 2015 will require companies to disclose payment practices and policies. It also includes a provision that zero hour contracts will not have exclusivity clauses stopping individuals from working for another employer.	Not specific to FTSE companies.

Data Protection	Data Protection Act 1998	Anyone holding or using information about one or more living persons ("personal data").	The Act requires that personal data is stored, used and shared in a fair and lawful manner. It requires certain measures to be put in place to ensure that personal data is secure, is of sufficient quality and is not disclosed to third parties without cause. The Act gives individuals a right of access to their data. Compliance is regulated by the Information Commissioner's Office. The Act will be replaced by the General Data Protection Regulation (GDPR), which will apply from 25 May 2018.	Not specific to FTSE companies.
Social Value	Public Services (Social Value) Act 2012	Those who commission public services. No direct requirements on companies in the private sector although those bidding for public sector contracts are likely to be affected, both in terms of what they include in bids and how they deliver public services.	The Act requires those who commission public services to think about how they can also secure wider social, economic and environmental benefits. It encourages commissioners to think about whether the services they are going to buy, or the way they are going to buy them, could secure these benefits for their area or stakeholders. The Act is therefore a tool to help commissioners get more value for money out of procurement. The Act came into force in the UK on 31st January 2013.	Not specific to FTSE companies.

Overview: Forthcoming Legislation

	Law/Code	Applicable to	Main obligations	Timeline	FTSE Listing
Reporting	EU Directive on disclosure of non-financial and diversity information	Large undertakings which are public interest entities with more than 500 employees. Includes listed as well as some unlisted companies that are designated by Member States because of their activities, size or number of employees (e.g. banks).	The new legislation introduces additional non-financial disclosure requirements for large public interest entities to include a non-financial statement in their management report containing information on: Environmental matters, Social and employee-related aspects, Respect for human rights, Anti-corruption and bribery issues.	Companies are expected to publish their first reports for the year 2017.	Not specific to FTSE companies.
	Equality Act 2010	Companies and public sector bodies with more than 250 employees.	Requirement to publish the gender pay gap showing the difference between pay of their male and female employees.	Gender pay gap reporting is expected to begin in 2018.	Not specific to FTSE companies.
	EU Regulation on Conflict Minerals	TBD	It is expected that any companies that are involved in the extraction, transportation and manufacturing of tin, tantalum and tungsten, their ores, and gold from conflict areas, and are listed in the EU, will be expected to report on their supply chain in a way which few already do.	Expected to be applied from September 2017.	Not specific to FTSE companies.
Audit	European Union Audit Legislation	Includes entities with listings on the London Main Market, and excludes entities quoted on the London Alternative Investment Market.	The legislation, taking effect on financial years beginning on or after 17 June 2016, imposes mandatory audit firm rotation and significant restrictions on non-audit services for EU Public Interest Entities (PIEs).	The legislation takes effect for financial years beginning on or after 17 June 2016.	Specific to FTSE Main Market quoted companies.
Others	Apprenticeship Levy	Businesses with a wage bill of over £3 million in the UK.	Companies will have to pay a 0.5% levy to fund the creation of 3 million more apprenticeships by 6 April 2017. It will be paid through Pay As You Earn, and each employer will receive an allowance of £15,000 to offset against their levy payment. This means that the levy will only be paid on any paybill in excess of £3 million.	The government will be introducing the levy in April 2017.	Not specific to FTSE companies.

	Three Days Paid Volunteering Leave	The policy would apply to companies over 250 employees.	Companies will grant employees three volunteering days each year (in addition to annual leave).	Included in Conservative Party pre-election manifesto – not confirmed on legislative agenda	Not specific to FTSE companies.
	EU's General Data Protection Regulation	All UK and foreign companies processing data of EU residents.	The new EU Data Protection Regulation (GDPR) will replace the existing Data Protection Act in the UK. The Regulation extends the scope of EU data protection law outside of the EU, to all entities targeting or monitoring the behaviour of EU residents. Entities that process personal data will be more accountable; there are more stringent security requirements; there is a mandatory security breach obligation; individuals will have stronger rights (such as the so called "right to be forgotten"); there are significantly tougher powers of enforcement for national data protection authorities, including the power to impose substantially higher fines for non-compliance.	The GDPR will apply from 25 May 2018.	Not specific to FTSE companies.

Enacted Legislation: Specific requirements

UK Corporate Governance Code 1992 (formerly the Combined Code 1992)

The UK Corporate Governance Code consists of principles of good governance in the areas of leadership, effectiveness, accountability, remuneration and relations with shareholders. The current September 2014 version applies to reporting periods beginning on or after 1 October 2014.

Although no part of the Code is specifically concerned with Responsible Business, there is recognition that Boards need to look beyond the interests of shareholders.

Principle A.1 of the Code provides that "Every company should be headed by an effective board which is collectively responsible for the long-term success of the Company". It goes on to say that "The board should set the company's values and ensure that its obligations to its shareholders and others are understood and met. All directors must act in what they consider to be in the best interests of the company, consistent with their statutory duties."

The statutory duties of directors are set out in sections 170 to 177 of the Companies Act 2006. The primary duty of directors is contained in section 172:

"A director of a company must act in the way he considers, in good faith, would be the most likely to promote the success of the company for the benefit of its members as a whole, and in doing so, have regard (amongst other matters) to:

(a) the likely consequences of any decision in the long term;
(b) the interests of the company's employees;
(c) the need to foster the company's business relationship its suppliers, customers and others;
(d) the impact of the company's operations on the community and the environment;
(e) the desirability of the company maintaining a reputation for high standards of business conduct; and
(f) the need to act fairly as between members of the company.

It is clear therefore that these duties extend beyond those owed to shareholders and directors must take into account a wider interest group.

The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013

1.1 General

These regulations amended the Companies Act 2006 to introduce an obligation on all companies (except for small companies[1]) to prepare a stand-alone strategic report *in addition to* their directors' report.

The strategic report must contain a fair review of the company's business, and a description of the principal risks and uncertainties facing the company. The review must be a balanced and comprehensive analysis of both the development and performance of the company's business during the financial year, and the position of the company's business at the end of that year, consistent with the size and complexity of the business.

1.2 Key Performance Indicators (KPIs)

To the extent necessary for an understanding of the development, performance or position of the company's business, the fair review must include analysis using financial KPIs, and where appropriate, analysis using other KPIs, including information relating to environmental matters and employee matters.

It is for the directors to decide (in light of the company's sector and business activities) which KPIs should be used. Commonly used non-financial KPIs include employee or customer satisfaction, environmental issues[2],

1 To qualify as a small company, a company must meet at least two of the following requirements (1) Annual turnover must be not more than £10.2 million (2) Balance sheet total must be not more than £5.1 million (3) Average number of employees must be not more than 50.

2 Assistance can be found in Joint ICAEW and Environment Agency Environmental Issues and Annual Financial Reporting and Defra's Environmental Reporting Guidelines.

health and safety commitments and community involvement. Where possible, KPIs should be widely used, generally accepted measures.

There are no statutory requirements on how KPIs should be presented but guidance from the Financial Reporting Council recommends that a company should provide information that enables members to understand each KPI including identification and explanation of:

- Its definition and calculation method.
- Its purpose.
- The source of the underlying data, and any significant assumptions made.
- Any changes in the calculation method used compared to previous financial years, including significant changes in the underlying accounting policies adopted in the financial statements which might affect the KPI.

1.3 Quoted companies
The strategic report of a quoted company must also include a description of the company's strategy and business model and a breakdown showing at the end of the financial year, the number of persons of each sex who were:

- directors of the company
- senior managers[3] of the company (other than directors)
- company employees.

If the report does not contain any of this information, it must state which of those kinds of information it does not contain.

Finally and to the extent necessary for an understanding of the development, performance or position of the company's business, the strategic review of a quoted company must include:

- The main trends and factors likely to affect the future development, performance and position of the company's business; and
- Information about:
    - environmental matters (including the impact of the company's business on the environment)
    - the company's employees
    - social, community and human rights issues, including information about any policies of the company in relation to those matters and the effectiveness of those policies.

Modern Slavery Act 2015

The Modern Slavery Act 2015 has been passed to address slavery and human trafficking in the 21st century. Under s.54 of the Act certain businesses will be required to prepare a slavery and human trafficking statement for each financial year ending on or after 31 March 2016.

Entities obliged to report are those: (i) with a turnover of £36m or more (which includes the turnover of subsidiaries); (ii) which supply goods or services; and (iii) which carry on a business, or part of a business, in the UK.

Businesses will be required to produce:

a) a statement of the steps the entity has taken during the financial year to ensure that slavery and human trafficking is not taking place: (i) in any of its supply chains; and (ii) in any part of its own business; or
b) a statement that the organisation has taken no such steps.

The statement must be approved by the board of directors (or equivalent management body) and signed by a director (or equivalent). The entity must publish the statements on its website and include a link in a 'prominent' place on the homepage.

[3]A senior manager is a person who has responsibility for planning, directing or controlling the activities of the company or a strategically significant part of the company and is an employee of the company.

The Act does not prescribe the content of a statement, however guidance published by the Home Office suggests that a statement could include information about:

a) the organisation's structure, its business and its supply chains;
b) its policies in relation to slavery and human trafficking;
c) its due diligence processes in relation to slavery and human trafficking in its business and supply chains;
d) the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk;
e) its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate;
f) the training and capacity building about slavery and human trafficking available to its staff.

CRC Energy Efficiency Scheme

The ***CRC Energy Efficiency Scheme*** (formerly known as the Carbon Reduction Commitment) is a mandatory carbon emissions reporting and pricing scheme to cover all organisations using more than 6,000MWh per year of electricity. It's designed to improve energy efficiency and cut carbon dioxide (CO_2) emissions in private and public sector organisations that are high energy users.

The CRC scheme applies to emissions not already covered by Climate Change Agreements (CCAs) and the EU Emissions Trading System (EU ETS).

Emissions reporting requirement:
Participants in the CRC need to measure and report their electricity and gas (used for heating purposes) related carbon emissions annually, following a specific set of measurement rules. Additionally, participants must buy and surrender allowances equal to the CO_2 emissions generated.

It operates in phases. Phase 1 ran from April 2010 until the end of March 2014. We are now in phase 2 that runs from 1 April 2014 to 31 March 2019. Each phase is divided into annual reporting years (ARY), which run from 1 April to 31 March of the following year.

Your organisation or group qualifies for CRC phase 2 if, between 1 April 2012 and 31 March 2013, it met both of the following criteria:

- Having at least one settled half hourly electricity meter (sHHM).
- Using 6,000 megawatt hours (MWh) or more of qualifying electricity supplied through settled half hourly meters.

A carbon price:
The scheme requires participants to buy allowances for every tonne of carbon they emit (relating to electricity and gas), as reported under the scheme. Participants are required to buy allowances from Government each year to cover their reported emissions. It was originally envisaged that from Phase 2 onwards, the government would auction a limited (capped) number of allowances. However, the government subsequently announced that auctioning would be replaced by two fixed price sales for each ARY (a cheaper "forecast sale" and a more expensive retrospective "buy-to-comply sale"). The deadline for surrendering allowances annually to the administration is the end of October.

This means that organisations that decrease their emissions can lower their costs under the CRC. All participants have to pay a registration fee of £950.

Publishing of information on participants' energy use and emissions:
In the first years of the scheme, a CRC performance league table was published showing how each participant was performing compared to others in the scheme, based on a number of metrics including absolute and growth-adjusted reduction of emissions. The 2011/2012 CRC performance league table can be seen on the Environment Agency website.
After July 2013, these league and performance tables are no longer published, and instead are replaced by a publication of participants' energy use and emissions.

In the 2016 budget, the government confirmed that, following its review of business energy efficiency taxes, it would abolish the CRC Energy Efficiency Scheme from the end of the 2018-2019 compliance year. Businesses will be required to surrender allowances for the final time in October 2019.

The Government announcements included:

- close the CRC following the 2018-19 compliance year, with no purchase of allowances required to cover emissions for energy supplied from April 2019
- increase main rates of the Climate Change Levy (CCL) from April 2019, to recoup revenue lost from abolishing the CRC, in a fiscally-neutral reform, and encourage energy efficiency amongst CCL-paying businesses The CCL is a carbon tax that adds around 15% to the energy bills of business and public-sector organisations. It is levied on non-domestic consumers of certain energy supplies (e.g. electricity, gas, solid fuel and liquefied gas). CCL is levied by energy suppliers when they bill energy consumers; and
- consult later in 2016 on a simplified energy and carbon reporting framework for introduction by April 2019. See: https://www.gov.uk/government/consultations/consultation-reforming-the-business-energy-efficiency-tax-landscape

Energy Savings Opportunity Scheme (ESOS)

The UK has implemented the Energy Efficiency Directive 2012 requirements as to regulatory mandatory energy audits for large enterprises through the ESOS scheme. This requires large undertakings to:

- carry out an assessment that measures total UK energy consumption across a consecutive 12 month period across its activities, i.e. buildings, transport and industrial activities;
- carry out an energy audit of at least 90% of their energy consumption. Energy audits must be carried out or reviewed by a qualified lead assessor.
- identify cost-effective recommendations to improve energy efficiency in their energy audits.

ESOS applies to relevant undertakings which are large undertakings and any other undertaking that is part of the same corporate group as a large undertaking in the UK. Large undertakings are those that meet one of the following criteria on the qualification date (being the 31 December 2014 for the first phase) for the relevant phase:-

- employ at least 250 people.
- have an annual turnover over EUR50 million and an annual balance sheet total over EUR43 million, based on the undertaking's most recent annual financial statements ending on or before the qualification date.

An undertaking can change from qualifying as a large undertaking to no longer qualifying, and vice versa. In order to change status for the purposes of ESOS, an undertaking must either meet one of the criteria, or fail to meet them, for two successive accounting periods.

Where several undertakings are party of a corporate group, they must comply with ESOS as a single participant. However, undertakings have the option of disaggregating from the group, so that they can comply with ESOS separately rather than as part of the group.

Importantly, there is no obligation to carry out the recommendations in an energy audit, although DECC hopes organisations will voluntarily carry out such recommendations. The lack of action following (recommendations) is however likely to be picked up on lettings (and sales of properties in Scotland) under the requirements for minimum energy efficiency standards (see below).

Public bodies are not included within the scope of ESOS.

For the first phase of the scheme undertakings can use energy auditing activity dating back to December 2011 to support compliance, provided such data meets the standards required of an ESOS energy audit e.g. the Carbon Trust Standard.

The scheme will operate in four yearly compliance phases. The initial compliance period ran from 17 July 2014 to 5 December 2015. Subsequent compliance periods last for four years, starting with the 6 December 2015. For each phase there is:-

- a qualification date (this is the date at which the relevant undertakings must decide if they qualify for ESOS). The first qualification date is 31 December 2014. Subsequent qualification dates are every four years after that.
- a compliance date. This is the date by which ESOS assessments must be completed and compliance noted to the Environment Agency. The first compliance date was the 5 December 2015 and the second compliance date (for phase 2) is 5 December 2019.

The ESOS assessment and audit must be carried out or reviewed by a qualified lead assessor, which can either be an in-house expert or external consultant. This must then be reviewed by a Board-level director. Civil penalties can be imposed by the scheme administrator for non-compliance.

The Environment Agency published version 5 of its ESOS guidance document on 22 March 2016. See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/509835/LIT_10094.pdf

Small Business, Enterprise and Employment Act 2015

The provisions of the Act were developed from the UK's corporate transparency proposals published after the 2013 G8 Summit. It is aimed at making the United Kingdom a more attractive place to start, finance and grow a business and reduce the barriers that many small businesses face in their drive to innovate, grow and compete. The Act contains a number of provisions, but the ones most concerned with responsible business include:

Payment Practices: Large companies will be required to report on their payment practices and policies twice a year. Large companies, as defined by the Companies Act 2016 are those that satisfy two or more of the following conditions: turnover of more than £25.9m; balance sheet total of more than £12.9m; or more than 250 employees will be required to report on their payment practices and policies twice a year. An indicative format for the report has been published by the government which highlights the type of information that large organisations will be required to report on, including:

- standard payment terms, including any changes to these in the last reporting period
- the average time taken to pay invoices
- the proportion of invoices paid beyond agreed terms
- the proportion of invoices paid in 30 days or less, paid between 31-60 days and paid beyond 60 days
- the amount of late payment interest owed and paid
- whether financial incentives were required to join or remain on supplier lists
- the availability of e-invoicing, supply chain finance and preferred supplier lists
- dispute resolution processes
- membership of a payment code

It is expected that large organisations will be required to publish the reports on their websites. The purpose of publishing such reports is to increase transparency and comparability in the payment practices of large organisations. The publication of this information will also highlight those businesses with good payment practices whilst raising awareness of those whose payment practices are poor.

Zero hour contracts: Zero hour contracts will not have exclusivity clauses stopping individuals from working for another employer. The maximum penalty for underpayment will be amended for employers who fail to pay the national minimum wage, allowing the penalty to be calculated on a per worker basis.

Data Protection Act 1998

The Data Protection Act 1998 ('the Act') aims to strike a balance between the rights of individuals to privacy and the ability of organisations to use data for the purposes of their business.

The Act applies whenever a data controller processes personal data – which terms are given special meanings under the Act. A "data controller" is the person who determines the purposes for which, personal data is processed, "personal data" means data which relates to a living individual who can be identified from that data and "processing' covers virtually any use which can be made of personal data, from collecting the data, storing it and using it to destroying it.

A data controller must justify its processing of personal data under one of a list of conditions, such as the data subject has given his consent to the processing, the processing is necessary for the performance of a contract or the processing is necessary for compliance with any legal obligation. A data controller must register with the UK regulator, Information Commissioner's Office ("ICO"), in respect of the processing it is carrying out.

There are tighter restrictions for the processing of "sensitive" personal data (e.g. racial or ethnic origin, political opinions, religious beliefs, sexual life, physical or mental health or condition, or criminal offences or record). Except in certain limited circumstances, processing of sensitive personal data requires the *explicit* consent of the data subject.

Other key obligations for data controllers under the Act include:

- Data subjects must be given information about the purposes of the processing, such as the details of the data controller, the purposes for the processing and details of any third party recipients of the data. This information is generally provided in the form of a data protection or privacy notice.
- Data controllers must put in place adequate technical and organisational measures to safeguard personal data which they are processing from destruction, adequate loss, unauthorised access or disclosure.
- Data controllers must put in place processing contracts with their 'data processors'. A data processor is a third party appointed by the data controller to process personal data on its behalf, although it will still be the data controller who ultimately decides what happens to the data. These processing contracts must be in writing and must set out what the data processor may or may not do with the personal data, including what security measures should be taken to safeguard the data.
- Data controllers must give the rights to data subjects to access to his or her personal data (by means of a "data subject access request") and a right to object to direct marketing practices.
- Personal data must not be transferred out of the European Economic Area unless certain conditions are met, including that the recipient has ensured an adequate level of protection in relation to the processing of the personal data.

Monitoring compliance with the Act and its enforcement is carried out by the ICO. In the event that the ICO finds that there has been a breach of the Act, it may then serve a data controller with an 'enforcement notice' and/or issue a fine up to a maximum of £500,000 per incident. Failure to comply with an enforcement notice is a criminal offence.

Forthcoming legislation: Specific requirements

EU Directive Non-Financial Reporting

The European Parliament adopted on 15 April 2014 the Directive on disclosure of non-financial and diversity information by certain large undertakings and groups which will amend the existing accounting legislation to increase the relevance, consistency and comparability of information disclosed. The Directive needs to be transposed into national law by 6 December 2016, meaning that companies might be required to publish their first reports for the year 2017.

The new legislation introduces additional non-financial disclosure requirements for large public interest entities to include a non-financial statement in their management report containing (as a minimum) information on:

- Environmental matters,
- Social and employee-related aspects,
- Respect for human rights,
- Anti-corruption and bribery issues.

The Statement should include:

(a) a brief description of the undertaking's business model,
(b) a description of policies, including due diligence processes implemented,
(c) outcomes of these policies,
(d) the risks relating to those areas and how the company manages those risks and
(e) non-financial key performance indicators relevant to the particular business.

For making these disclosures, undertakings may rely on national, EU-based or international frameworks, such as the UN Global Compact, the Guiding Principles on Business and Human Rights implementing the UN "Protect, Respect and Remedy" Framework, the OECD Guidelines for Multinational Enterprises, ISO 26000, the ILO Tripartite Declaration of principles concerning multinational enterprises and social policy, the Global Reporting Initiative, or other recognised international frameworks. Undertakings will need to specify which framework was used for such reporting. The Directive adopts a "report or explain" approach - an undertaking that does not pursue policies in one or more of these areas is required to explain why this is the case.

Diversity Policy

- The legislation will require large listed undertakings to disclose their diversity policies in relation to the administrative, management and supervisory bodies, including information on the age, gender and educational and professional backgrounds of their members.
- This diversity related information should be included in the corporate governance statement and will have to contain the objectives of such a policy, its implementation and the results obtained.
- If no such policy is applied, the corporate governance statement should contain an explanation as to why this is the case.
- The statutory auditor or audit firm shall check that the required information has been provided ("existence check").[4]

Equality Act 2010

The Equality Act 2010 replaced previous anti-discrimination laws with a single Act, making the law easier to understand and strengthening previous legislation. It legally protects people from discrimination in the workplace and in wider society. The Act sets out the different ways in which it is unlawful to treat someone, such as direct and indirect discrimination, harassment, victimisation and failing to make a reasonable adjustment for a disabled person.

The Act prohibits unfair behaviour against individuals and set the guidelines to achieve equal opportunities in the workplace and society. It covers 9 protected diversity strands: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

[4] http://www.fee.be/images/Factsheet_EU_Directive_NonFinancial_Information_1406.pdf

Section 78 of the Equality Act 2010 has always contained a power for the government to issue regulations requiring businesses to publish information relating to employees' pay, for the purpose of showing whether there are differences in the pay of male and female employees. The government has used this power. In July 2015 the Government launched its 'Closing the Gender Pay Gap' consultation paper, raising a variety of questions on mandatory pay gap reporting to find a workable approach to implementing section 78. In February, the Government has published its draft regulations on gender pay gap reporting for organisations with over 250 employees. The key points from the draft regulations are:

- Employers will have to publish two single figure pay gaps – both mean and median.
- Figures will be calculated over a prescribed pay period; employers can then choose the date on which they publish over the following year.
- Employers will have to publish a separate bonus pay gap figure.
- Employers will have to publish the number of men and women in each salary quartile.

The government will publish league tables, which show the progress employers are making on closing the gender pay gap.

EU Regulation on Conflict Minerals

The EU Parliament is currently in discussion with member states around mandatory action on all union importers of minerals that can be classified as conflict minerals. This coincides with the first round of reporting as required by America's Dodd Frank Act and new guidelines developed by China's Chamber of Commerce. Though the final law is yet to be agreed, it is expected to be the first piece of overarching legislation that covers all Conflict Minerals in all Countries.

It is expected that any companies that are involved in the extraction, transportation and manufacturing of these minerals, and are listed in the EU, will be expected to report on their supply chain in a way which few already do.

European (EU) Union Audit Legislation

1. **Mandatory rotation of the statutory audit firm (MFR) for PIEs:** Companies are required to rotate the statutory audit firm after a maximum of 10 years. Individual EU member states can extend this term to 20 years if there is a competitive tender after the first 10 years; or 24 years in the case of a joint audit regime. The legislation provides substantial transition periods for firm rotation, such that statutory audit engagements that have been in place for 20 years or more will have until 2020 to rotate, and statutory audit engagements that have been in place for 11 years or more (but less than 20 years) will be due to rotate in 2023. There is uncertainty around the rotation date for engagements of less than 11 years. If a company becomes a PIE (for example on a flotation) the period prior to the year in which the company becomes a PIE is not included in determining when the relevant engagement term limits are reached. Therefore, there are three key questions a company needs to consider in understanding which set of transition arrangements, if any, apply and when rotation must occur.

2. **New prohibitions on non-audit services:** The legislation includes a detailed list of non-audit services that audit firms and members of their networks may not provide to PIE statutory audit clients.3 These include prohibitions on tax services that are more restrictive than those required under U.S. auditor independence rules; individual EU member states may choose to allow certain tax services, provided they have no direct or material effect on the audited financial statements. The legislation also contains an overall cap (at 70% of audit fees) on the amount of non-audit services a firm may provide to a PIE statutory audit client and certain of its EU affiliates.

The provisions in the legislation requiring rotation of the statutory audit firm and limits on non-audit services have received the most attention. There are a number of other provisions in the legislation, however, which are likely to have an effect on statutory audits in the EU. These include provisions designed to:

- Strengthen audit committees,
- Provide more transparency into activities of the audit committee and the statutory audit,
- Enhance dialogue between auditors and regulators, and

- Void agreements that limit the choice of auditor[5]

Apprenticeship Levy

In June 2015, the government announced that it would create three million additional Apprenticeships by 2020, and that the term 'apprenticeship' would gain a set legal definition to protect training standards and quality.

On 25 November 2015, the Chancellor announced in the Spending Review and Autumn Statement that the government will be introducing an 'apprenticeship levy' on larger employers in April 2017 to contribute to funding the policy.

This is expected to generate £3 billion by 2019 – 2020, which will cover half the cost of creating the 3 million apprenticeships.

The levy will apply across the UK and spending on apprenticeships in England will be £2.5 billion, with Scotland, Wales and Northern Ireland also receiving a share of the levy.

The levy is set at a fixed rate of 0.5% of an employer's total wage bill. However, employers will have an allowance of £15,000 to offset against their levy payment, meaning that the levy does not apply to the first £3 million of a wage bill. Therefore, the levy will only be paid by larger businesses, or an estimated 2% of businesses in the UK.

Three Days' Paid Volunteering Entitlement

David Cameron initially announced plans for a mandatory three days' paid volunteering leave at before last year's general election on 10 April. More recently David Cameron has outlined the pledge as one of the things he wants to achieve before leaving office. The policy would apply to companies over 250 employees and could see 15 million workers entitled to the three volunteering days each year (in addition to annual leave) and an extra 360 million volunteering hours a year being created. As of March 2016, the latest news from the Cabinet Office is that it is very likely that consultation will begin on the policy during 2017; a process that will be led by the Cabinet Office and the Department for Business, Innovation and Skills. Businesses would be required to:

1. Create Paid Volunteering Leave Policy
2. Find suitable volunteering opportunities
3. Champion Volunteering

The General Data Protection Regulation (GDPR)

The GDPR will replace the current EU Data Protection Directive and the Data Protection Act 1998 in the UK. It will be directly applicable in all EU Member States, without the need for implementing national legislation. The GDPR will apply from 25 May 2018. Some of the key points include:

- A company outside the EU which is targeting or monitoring the activity of EU residents, or using the personal information of EU consumers, will be subject to the GDPR. This is not the case currently.
- the definition of "personal data" is extended to include other information that is capable of identifying an individual, such as location data and online identifiers (e.g. an IP address).
- The GDPR places heavy accountability obligations on data controllers requiring them to: 1) maintain certain documentation and records, 2) conduct a data protection impact assessment for more risky processing, and 3) implement data protection by design and by default, e.g. data minimisation.
- A data subject's consent to processing of their personal data must be freely given, specific, informed and unambiguous. In assessing whether consent has been given, the data controller must take into account the relationship between the controller and the data subject. The burden of proof is on the data controller to show that consent has been given.
- There are specific provisions regarding the processing of personal data of children, with the age of digital consent being 16, although individual member states can lower this from 16 to 13.

[5] http://www2.deloitte.com/content/dam/Deloitte/us/Documents/center-for-corporate-governance/us-ccg-eu-audit-legislation-overview-033115.pdf

- Data controllers must notify most data breaches to the relevant national regulator. This must be done without undue delay and, where feasible, within 72 hours of awareness. In certain circumstances, affected individuals must also be notified.
- Data processors have direct obligations under the GDPR, including an obligation to implement technical and organisational measures, notify the controller without undue delay of data breaches and appointing a Data Protection Officer (DPO) (if required). Data processors can now also be fined by national regulators.
- A tiered approach to penalties for breach which enables national regulators to impose fines for some infringements of up to €20million or 4% of annual worldwide turnover in the preceding financial year.
- In certain circumstances data controllers and processors must designate a DPO as part of their accountability programme.
- Individuals can now request a copy of the personal data held on them free of charge and can require the erasure of their personal data (the so called "right to be forgotten") without undue delay by the data controller in certain situations.
- contracts for the processing of personal data between data controllers and data processors will have to contain certain mandatory provisions, with equivalent provisions flowed down to any sub-processors.
- the appointment and replacement of sub-processors of personal data can now only be with the consent of the data controller[6]

[6] For more information on the GDPR, see http://www.out-law.com/topics/tmt--sourcing/eu-data-protection-regulation/.

Further support & reading

Governance (general)

- The governance of Corporate Responsibility (Doughty Centre for Corporate Responsibility Guide)
- Towards a Sustainability Mindset: How Boards Organise Oversight and Governance of Corporate Responsibility (BITC and Doughty Centre for Corporate Responsibility joint publication)

Reporting (general)

- BITC leadership insight resources: Metrics & reporting (summary & further links to GRI & IIRC)
- BITC Strategic Advice & Solutions: Performance reporting

Modern Slavery Act 2015

- A short guide to the Act from Pinsent Masons LLP can be found here
- Home Office guidance can be found here

Energy Savings Opportunity Scheme (ESOS)

- Detailed Government guidance can be found here
- ESOS: DECC answer the questions businesses are asking

Small Business Enterprise and Employment Act 2015

- BITCs Access Programme and Access Pledge

Public Services (Social Value) Act 2012

- Government information & resources can be found here
- A short guide to the Act and its implications from Social Enterprise UK can be found here
- Why measuring social value makes business sense
- Social value briefing (contains BITC member-only content)

Conflict Minerals

- Is your smartphone funding guerrilla warfare?

Equality Act 2010 (gender pay gap reporting)

- The business case for gender pay gap transparency
- The gender pay gap: What employees really think
- Gender pay gap toolkit 1: Measuring your gender pay gap (also available to BITC gender equality campaign members: Understanding/Communicating/Tackling your gender pay gap)

The Apprenticeship Levy

- The apprenticeship levy: Key points (contains BITC member-only content)
- The apprenticeship levy: Opportunity cost
- Why we're launching a new framework for youth recruitment
- BITC Future Proof: youth employment framework and resources

Three Days Volunteering

- Community investment resource bank (BITC member-only content)

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