BUSINESS IN THE COMMUNITY The Prince's Responsible Business Network

BRIEFING

IS PURPOSE-LED BUSINESS LEADING TO PURPOSE-LED LAW?

An increased focus on environmental, social, and governance (ESG) in the private sector is reflected in recent and proposed developments in legislation and regulation in this space. Is purpose-led business leading to a search for legislative solutions to the social and environmental problems that we face? Can purpose-led business only be business as usual once a baseline of ESG commitment is enshrined in law? This briefing highlights a selection of UK developments and an invitation to share your thoughts on this debate.

Purpose-led business

A business that is purpose led makes commercial decisions that positively impact wider society, going above and beyond profit and focuses on causes that its employees, customers and other stakeholders believe in.

The Better Business Act

The Better Business Act (BBA) is a campaign to amend Section 172 of the Companies Act 2006 so that companies are legally obligated to operate in a manner that benefits all of their stakeholders, including workers, customers, communities, and the environment, while seeking to deliver profits for shareholders. The campaign was started by B Lab UK and the BBA coalition currently consists of over 700 businesses – businesses that have signed up to the coalition in support of the proposed changes to the Companies Act.

Current company law in the UK provides for 'shareholder primacy', which means that a director has a duty to act in a way that they consider will be most likely to promote the success of the company for the benefit of its shareholders. In doing so, they must take into account six factors:

- the likely long-term consequences of any decision
- the interests of employees, the need to foster business relationships with suppliers, customers, and others
- the impact on community and environment
- maintaining high standards of business conduct
- and the need to act fairly between members.

The problem this creates is that it does not allow for directors to further the interests of other stakeholders (such as the community or employees) at the expense of shareholders, and it does not provide protection to companies that promote purpose beyond shareholder value. Whilst purpose-led organisations can amend their constitution to include a purpose statement and additional director duties to pursue that purpose (for example Anglian Water, whose case study can be found in our member-only Toolkit: Developing

HRH THE PRINCE OF WALES ROYAL FOUNDING PATRON and Embedding Purpose), the idea of the BBA is that it would be the starting point for all corporates. Every company would be able to consider all stakeholders, including shareholders, on an equal footing.

The BBA campaign believes that by empowering all directors to exercise their judgement in weighing up and advancing the interests of all stakeholders it will change the nature of conversations in the boardroom, allowing for a more holistic approach to the challenges faced by company directors. For many businesses this will be a formalisation of current behaviour and would support their intention to take ownership of their social and environmental impacts.

Climate change

The Environment Bill 2019-2021 is currently under consultation and is expected to be adopted by the end of the year (potentially before COP26 in November). The Bill sets out the Government's environmental commitments, including for clean air, biodiversity targets to reverse the decline of vulnerable species, water stewardship, and plastics pollution. The Bill will have implications for corporates, for example, it sets out restrictions on illegal deforestation by mandating that large businesses (with a specified turnover) assess their supply chains in relation to 'forest risk commodities' and to ensure that local laws are complied with.

The Government has also announced that the UK will make climate-related financial disclosures fully mandatory by 2025, through the Task Force on Climate-related Financial Disclosures (TCFD). The TCFD disclosure regime will apply to all UK-registered companies, financial advisers and institutions, insurers, pension schemes and other organisations. You can find out more in BITC's TCFD Factsheet.

Purpose-led pensions

This is a £3 trillion market and organisations such as Make My Money Matter would argue that it's a £3 trillion opportunity, and responsibility, to invest in positive social and environmental outcomes. The Defined Contribution Investment Forum found that 80% of Defined Contribution scheme members would agree and would like the way their pensions are invested to do some good as well as to provide them with a financial return.

Since October 2019, pension trustees have been required to include in their annual statement of investment principles

- their policy in relation to 'financially material considerations', which includes ESG considerations (specifically including climate change); and
- the extent (if at all) to which they take into account 'non-financial matters', meaning the views of their scheme members (including their ethical views).

Under new regulations which came into force on 1 October 2021, pension trustees of large schemes must now prepare detailed reports on how they take into account and plan to deal with the risks posed by climate change (TCFD reports). The regulations are part of a trend of legislative changes being imposed on pension trustees, and stem from the recently implemented Pension Schemes Act 2021, which introduced new provisions focused on protecting members' benefits against the physical risks of climate change and which aim to ensure that trustees are taking account of climate risks when making decisions. The Act also introduced new powers for the Pensions Regulator, the body responsible for pension schemes in the UK, to allow the Regulator to intervene in how pension schemes report on climate related risk.

A common concern for pension trustees is whether an investment approach that prioritises ESG outcomes could lead to a potential breach of their fiduciary duty to act in the best interests of their schemes' members. The question is whether it will need further legislative development to answer that concern.

Just this month, the Financial Reporting Council published the list of successful signatories to the updated 2020 UK Stewardship Code. The Code, which is voluntary, sets good stewardship practice for those investing money on behalf of UK savers and pensioners and the updated version takes account of ESG considerations, for example, by requiring signatories to provide evidence of their stewardship activities and show how they integrate ESG factors into investment decisions. The list was notable for a significant drop in the number of applicants, perceived by some to be as a result of a lack of a clear framework for integrating and measuring ESG factors.

Purpose-led procurement

Next year, the Public Services (Social Value) Act 2012 will celebrate its 10th anniversary. The Act required public authorities to 'have regard to economic, social and environmental well-being in connection with public services contracts' in order to fulfil the UK Government's ambition for social value to be embedded in the delivery of all public sector contracts.

In January 2021, the new Social Value Model came into effect; an evaluation model that requires the majority of public procurement tenders to assign at least 10% of the evaluation process to how the bidder furthers social value. Given that many tenders are won and lost on small margins, this strengthening of the requirements could have a significant impact on how the UK's £284 billion public sector spending is directed. It also presents a real opportunity for collaboration between corporates and social enterprises, who often lead the way on delivering social value.

Purpose-led employment

Workers' rights

Major revisions to employment law were expected to be introduced post-Brexit – mostly contained within the Employment Bill. Whilst this Bill was formally announced by the Government in the Queen's Speech of 2019, it has been delayed several times whilst the nation has responded to the unexpected consequences of the COVID-19 crisis. There is currently no timetable for when the Bill will be reintroduced.

However, most of the changes have been anticipated by the Good Work Plan, which set out how the UK would respond to the recommendations of the 2017 Taylor Review. This project assessed the impact of the gig economy, rising automation, and changing work practices on the UK labour market.[i]

Key elements of this Plan were:

- the right of employees working variable hours to request a more predictable and stable contract;
- creation of a single enforcement body to help workers enforce their rights and support business compliance;
- a week's leave for unpaid carers; and
- making flexible working the default option unless there is a good reason not to allow it.[ii]

In response to the report from the Women & Equalities Committee on the unequal impact of the pandemic on women, the Government has confirmed that it is:

- considering removing the 26-week service requirement for making a flexible working request and it will consult on making flexible working the default position;
- intending to extend the redundancy protection period afforded to mothers on maternity leave to apply to pregnant women and for six months after a mother has returned to work, and this will also include those taking adoption and shared parental leave; and
- considering proposals to require large employers to publish their parental leave and pay policies.[iii]

Whilst it is still unknown which elements of the Good Work Plan will be added to the Statute Book, or when these changes will come into effect, it is likely that the impact of the pandemic will affect legislation around flexible working and that certain changes around working practices will be here to stay. All responsible businesses should ensure that they stay well ahead of these changes and capitalise on a shift to greater flexibility.

Mandatory Pay Gap Reporting

Following on from the introduction of Gender Pay Gap reporting in 2017, for employers with 250 employees or more, we continue to expect and advocate for the introduction of ethnicity pay gap reporting[iv]. Many employers have already chosen to report voluntarily. For those considering voluntary reporting, this Guide for General Counsels, co-written by Hogan Lovells and BITC, focuses on some of the legal considerations behind ethnicity pay gap reporting.

National Insurance

In September 2021, an increase in National Insurance (NI) contributions was announced for all employees (effective from April 2022 onwards). This increase was announced as part of the Government's plan to fund social care in England, and to help the NHS to recover from the effects of the pandemic.[v]

These increases will have an impact on all workers in the UK, but some charities have warned that the proposals could have a more significant impact on those who have already been struggling financially throughout the pandemic. Analysis from Joseph Rowntree Foundation shows that around 2 million families on low incomes will pay, on average, an extra £100 per year in NI contributions.

This will be significant for families who are facing a £1,040 cut to their incomes when the Universal Credit and the Working Tax Credit are reduced in October 2021.[vi] The rise will also have a disproportionate impact on young people at the expense of non-working pensioners[vii] and could have worrying implications for in-work poverty in the UK. Businesses should be mindful of how these changes might impact on current low-paid employees and be proactive rather than reactive when it comes to mitigating this.

How can you get involved?

We are undertaking a piece of research with Hogan Lovells and the BBA campaign to gather insights into the perceived implications of the BBA's proposed changes to s172 Companies Act 2006 for UK business leaders.

The research will assist in developing an understanding of the BBA's campaign and highlight good practice amongst corporates who are already taking practical, tangible steps to embed purpose into their organisations' operations and governance structures.

If you are interested, please email GlobalGoals@bitc.org.uk for more information.

ENJOYED THIS CONTENT?

You might also like to:

- find out more about our work on Purpose and Values
- learn more about our advisory services
- join us for one of our upcoming events

Talk to one of our expert team today to learn how membership of BITC can help you take your responsible business journey further and drive lasting global change.

REFERENCES

[i] UK Government (2018), *Good Work Plan*. Available here: https://www.gov.uk/government/publications/good-work-plan
[ii] People Management (2021), *What progress has been made on the employment bill?* Available here: https://www.peoplemanagement.co.uk/experts/legal/what-progress-has-been-made-on-the-employment-bill#gref
[iii] Burges Salmon LLP (2021) *The latest UK employment law changes for employers, HR professionals, and in-house lawyers*. Available here: https://www.lexology.com/library/law changes for employers, HR professionals and in-house lawyers - Lexology
[iv] BITC (2021), *Leaders ask PM for mandatory ethnicity pay gap reporting*, Available here: https://www.bitc.org.uk/news/leaders-ask-pm-for-mandatory-ethnicity-pay-gap-reporting/
[v] BBC News (2021), *National Insurance: What's the new Health and Social Care tax and how does it affect me?* Available here: https://www.bbc.co.uk/news/uk-politics-58436009
[vi] Joseph Rowntree Foundation (2021), *NIC increases 'add insult to injury' for families facing devastating cut to Universal Credit*. Available here: https://www.jrf.org.uk/press/nics-increase-'adds-insult-injury'-families-facing-devastating-cut-universal-credit
[vii] The I, National Insurance rise: Young and poor will be hit hardest by tax hike to fund social care, ministers warned. Available here: https://inews.co.uk/news/politics/national-insurance-rise-socual-care-funding-impact-young-poor-universal-credit-1187360