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D&O and the Crystal Ball A Legal Perspective

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Liability developments



- EU facilitating claims against cartel/dominance tortfeasors, including on B of P (done)
 - Personal liability of directors still overlooked
- UK has made negligence without personal gain actionable by shareholders and increased range of duties
- Frequency and severity reported on rise in USA
- Other European countries galvanised *ad hoc* by “events”?

Criminalisation



- UK has criminalised some cartel/dominance acts
 - How many others have followed suit?
 - What is effect on coverage?
- Increased use of criminal law by States in death cases
 - Sometimes targeted at Company but politicians prefer to target Directors
- Easy UK to US extradition but not vice versa (or elsewhere?)

Auditors and Caps



- UK has law to cap liability of Auditors by agreement
- EU discussing limiting liability of auditors
 - Recognises effect on the un-capped
 - Specifically directors whose insurance costs it would expect to see rise
- Unilateral caps to Auditors will clearly increase exposure of directors

Procedural Rules 1



- Class Actions:
 - Available in US and considered by France (“French style”),
- Collective Action:
 - Allowed or under development in UK, Germany (trial period), France, Netherlands, Spain Italy
 - EU proposing to allow for anti-trust
- Contingency Fees
 - generally not allowed in Europe (though German courts have declared ban unconstitutional and Italy has allowed them recently)
 - Allowed in USA
- Conditional fees allowed in UK, Netherlands
- Loser often pays winner costs in Europe
 - but not in USA;
 - EU proposing relaxation for anti-trust.

Procedural Rules 2



- EU mulling increased shareholder rights – but don’t expect action soon absent EU scale catalyst
- Derivative Actions:
 - % shareholding thresholds falling
 - New UK procedure gives slight advantage to activists

Activist Shareholders



- Two main types of activist:
 - Activist Investors with large shareholdings and their own agendas
 - Pressure groups with external agenda (e.g. green) who buy a few shares
- UK:
 - Times recognises “new pugnacity” among UK activist investors ranging from ABI to hedge funds and private equity
 - New Companies Act seems to open door to more leverage for big investors
 - Pressure Groups will try their luck but likely to fail?
 - But one group has already published a “how to” pamphlet
- USA
 - Legal-based activism already easier than in UK?
- Mainland Europe:
 - Laws tending to make activism easier but effects not yet apparent?

What drives collective actions?



- Activist Investors
 - Dynamics concerned with getting Board to submit on commercial issues
- Pressure Groups
 - Aim is to pressure change in policy, e.g. on environment
- Victims and their proxies
 - Aim is to punish as well as to obtain compensation
 - E.g. “make directors disgorge 20% of net assets”

Trends 1



- Neglected areas of liability, e.g. competition law will be recognised
- Procedural rules will make it easier for large numbers of small claims to be recovered, with relaxation of costs rules
- Activist major shareholders
 - looking more for leverage than compensation?
- Political and Ethical Activists
 - Outsiders masquerading as insiders

Trends 2



- Political agendas of States and of EU on “governance”
 - More liabilities and criminalisation for Directors?
- Grandstanding Attorneys General?
 - Wish to “make Directors hurt”
- Greater targeting of Boards by “victims” of major events particularly where Board conduct:
 - makes “victims” want revenge
 - Causes share price damage

Other solutions for Directors?



- Most existing products depend on liability concept
- Is purpose of D&O (apart from “defence costs”):
 - social protection of victims or
 - protection of Director
 - protection of Director’s/family’s assets?
 - there is a more efficient way to protect family wealth.