SUMMARY OF OBLIGATIONS

RELATING TO PRIVATE LIMITED COMPANIES

The legal and regulatory framework which applies to private and public companies is primarily set out in:

- The Companies Act 2006, which governs all companies registered in the UK. The Companies Act also sets out a range of general and specific directors' duties. There is guidance on the basic application of the Companies Act and related regulations on the Companies House website.
- The Insolvency Act 1986, which governs company insolvency and winding up (including the winding up of companies that are solvent).
- The Financial Services and Markets Act 2000 (FSMA), which regulates the public offering and listing of shares and other securities. It applies to both private and public companies.
- The City Code on Takeovers and Mergers (Takeover Code), which regulates the conduct of takeovers and mergers of all UK-incorporated public companies (and certain private companies in very limited circumstances).

Appointment and removal of Directors

The procedure for appointing directors is governed by the company's articles of association (and, in some cases, by a shareholders' agreement or an investment agreement). Most private companies' articles provide that a director may be appointed by a decision of the board or by an ordinary resolution of the company's shareholders.

The Companies Act 2006 provides that shareholders may remove a director of any company before the expiration of his term of office by ordinary resolution if a particular procedure is followed. The director is able to make representations in writing to the company which must be circulated to shareholders with the notice of meeting if received in time. The director also has the right to attend and speak at the meeting on his proposed removal. However, a company's articles typically provide for other situations in which a director's appointment ceases and often set out other grounds and procedures for removal.

The Companies Act 2006 does not impose any restrictions on the term of appointment of directors. The articles, however, may provide for retirement by rotation.

Employment of Directors

Directors are not required by law to be employed by the company. The Companies Act 2006 requires companies to keep any directors' service contracts available for inspection by shareholders without charge.

Directors of private companies are generally (subject to the provisions of the articles, a shareholders' agreement or similar) free to own shares in the company, although it is not a requirement that they do so.

Subject to the company's articles, the remuneration of directors is set by the board. Remuneration of private company directors is decided by the board unless there is a shareholders' or investment agreement in place with other requirements.

Articles of Association

The articles regulate the company's internal management (although a shareholders' agreement or an investment agreement may impose additional rules). The Companies Act 2006 provides sets of articles for use by companies incorporated under the Act known as model articles, but they can be, and commonly are, tailored to the particular circumstances of a company before they are adopted. Companies commonly adopt bespoke articles without reference to the model articles. There is considerable freedom in practice. The relevant version of the model articles in force at the time of a company's incorporation applies to the company to the extent it has not been excluded or varied by the articles adopted.

Articles of private companies typically provide that:

- The quorum for a board meeting is two, unless otherwise determined by the directors.
- Board resolutions are passed by a majority of the directors attending.

Meetings

Subject to provisions to the contrary in the company's articles and/or any shareholders' agreement, directors must be given reasonable notice of a board meeting. In practice, private companies tend not to give long notice of board meetings, while listed companies tend to have a programme of board meetings set at the outset of the year. Commonly, any director can call a board meeting, and the company secretary can call a board meeting if asked to do so by a director. The meeting must be called on reasonable notice (what is reasonable depends on the circumstances). Unless the company's articles specify otherwise, there is no requirement for the notice to be in writing, but notice must include the meeting's proposed date, time and location. If the directors are not all going to be physically present in the same location, the notice must specify how they are to communicate during the meeting, for example through a conference call (to the extent permitted by the articles).

Apart from single-director companies, the minimum quorum for a board meeting is usually two directors, although the company's articles or the directors themselves may increase the quorum requirement. The articles may also dictate that directors with a personal interest in a matter do not count towards the quorum for voting, and may not vote, on that matter.

Unless varied by the company's articles, voting is on a simple majority basis, with each director having one vote. In the event of a 50/50 vote split, which would in effect defeat the proposal, some companies allow for the chairman to have a casting vote.

A common alternative to a board meeting is for the directors to pass a written resolution, for which there must usually be unanimous agreement among all those directors who would have been entitled to vote if the resolution had been raised at a board meeting

The articles usually provide that the directors are responsible for the management of the company's business, for which purpose they may exercise all the powers of the company. English law does not distinguish between, for example, a management board and a supervisory board. However, the directors' powers are restricted by the articles, previous shareholder resolutions and statute (and any relevant provisions in a shareholders' agreement, an investment agreement or service contract need to be taken into account). Therefore, some powers can only be exercised by the shareholders in a general meeting.

A general meeting of a private company must be called with at least 14 clear days' notice (the articles may stipulate a longer period).

Under the Companies Act 2006, the quorum for a general meeting is basically two shareholders, present in person or by a representative (single member companies require only one). However, a company's articles can require a higher quorum.

Voting at a general meeting can be conducted on a show of hands, where each ordinary shareholder typically has one vote. On a show of hands, an ordinary resolution is passed by a simple majority of the votes cast by those entitled to vote. A special resolution is passed by a majority of no less than 75% of the votes cast by those entitled to vote. Alternatively, shareholders may request that a poll is taken, in which case a shareholder typically has one vote for every ordinary share he or she holds. For example, a special resolution on a poll is passed by members representing no less than 75% of the total voting rights of the members who vote.

Directors powers and duties

Section 40 of the Companies Act 2006 protects persons dealing in good faith with a company. It provides that the power of the directors to bind the company, or authorise others to do so, is deemed to be free of any limitation under the company's constitution (which would include shareholders' agreements and so on).

The directors' ability to delegate powers is regulated by the articles. Typically, directors can delegate any of the powers which are conferred on them under the articles to individual directors/persons or committees. While delegation is not a legal requirement, it is common practice for day-to-day management of the business to be delegated to a chief executive or managing director, or an executive committee.

Directors of UK companies are subject to fiduciary (meaning to be in a position of trust) and other duties owed to the company. In summary, directors owe duties to:

- Act within the powers conferred by the company’s constitution.
- Promote the success of the company.
- Exercise independent judgement.
- Exercise reasonable care, skill and diligence.
- Avoid conflicts of interest.
- Not accept benefits from third parties.
- Declare interests in (proposed) transactions or arrangements.

These duties are codified in the Companies Act 2006 and are (save for the duty to exercise reasonable care, skill and diligence) enforceable as fiduciary duties. The remedies for breach of a fiduciary duty include:

- Injunctive relief.
- Setting aside the transaction (at the company’s request).
- Restitution and account of profits.
- Damages.

The remedy for a breach of the duty to exercise reasonable care, skill and diligence is damages for losses suffered.

Directors also owe a duty of confidentiality to the company, and the terms on which they are engaged by the company, especially in the case of executive directors, may impose or give rise to further duties and obligations.

A director can be held criminally liable for theft under the Theft Act 1968, but a company cannot. A company, and any director who consented to or connived in the act, may be held criminally liable for fraud under the Fraud Act 2006. It is a criminal offence for a company to bribe another person (including a foreign public official) or to accept a bribe under the Bribery Act 2010. If the offence is committed with the consent or connivance of a director, the director may also be held criminally liable. The Companies Act 2006 duty of a director not to accept benefits from third parties is also relevant in this context.

In certain circumstances, directors may be held criminally liable for a company’s breach of the Data Protection Act 2018 which implemented the General Data Protection Regulation (GDPR) in the UK.

A director may be held criminally liable for a number of offences under the Companies Act 2006 (such as for failing to make certain regulatory filings).

A director may be disqualified from acting as a director for a variety of reasons (such as breaches of competition law). Acting as a director while being disqualified is also a criminal offence.

Conflict of Interest

The Companies Act 2006 provides that directors have a statutory duty to avoid situations in which their personal interests (actual or potential) conflict (directly or indirectly) with the company's interests. Such conflicts can, though, ordinarily be authorised by the rest of the board if:

- The other board members who authorise the conflict are independent of that conflict.
- The conflicted director (or any other interested director) does not vote on the authorisation.
- Either the company's articles permit the directors to authorise the conflict (in the case of a public company) or the articles contain nothing that would prevent such authorisation (in the case of a private company).

The Companies Act 2006 also imposes a duty on directors to declare the nature and extent of their interest in a proposed (or an existing) transaction or arrangement with the company. The company's articles may provide that a director who has disclosed an interest will not be counted for quorum and voting purposes.

The Companies Act 2006 imposes restrictions on the following transactions between a company and its directors:

- Directors' service contracts with a guaranteed term of more than two years.
- Substantial property transactions involving the acquisition of non-cash assets by the director from the company (and vice versa).
- Loans, and giving a guarantee or providing security in connection with loans, to directors.
- Payments for loss of office in connection with a share or business transfer.

Shareholder Approval

The Companies Act 2006 requires shareholder approval for a number of corporate actions, either by an ordinary resolution (simple majority required) or special resolution (requiring at least 75% of the votes cast). Actions requiring a special resolution include:

- Changing a company's constitution or name.
- Re-registering a private company as public or a public company as private.
- Various actions regarding the disapplication of pre-emption rights on share issues.
- Certain activities to reduce (and increase) share capital or the purchase of a company's own shares from capital.

Actions requiring an ordinary resolution include:

- Removal of a director or the company's auditor.
- Approval to give a director a service contract of two years or longer.
- Election of a chairman at a general meeting.
- Redenomination of share capital.
- Authorising the allotment of shares.

Articles or shareholders' agreements can provide for higher majority requirements.

Shareholders with at least 5% of a company's paid-up share capital (with voting rights) can require the holding of a general meeting of that company. However, they must first ask the directors to call a meeting on their behalf. If the directors fail to act within the deadlines specified by the Companies Act 2006, then the shareholders may call a general meeting themselves, reclaiming reasonable expenses from the company. This power is used very rarely in practice. If a general meeting is convened by shareholders in this way, they can put their own resolutions before the meeting.

In addition, shareholders can ask the company to circulate a written statement to members about a resolution/matter coming before the meeting.