TPT Transition Plan Taskforce

Legal considerations for transition plan preparers using the TPT Disclosure Framework

OCTOBER 2023

On 9 October 2023, the Transition Plan Taskforce (TPT) published the TPT Disclosure Framework (the **"Framework"**). The Framework is intended to facilitate the development of best practice and support entities in preparing and publishing transition plan disclosures that are robust, credible and decision-useful to a wide variety of users. During the consultation period on the draft Framework, the TPT sought and received feedback in respect of perceived legal impediments in relation to publishing transition plans in accordance with the Framework.

This paper accompanies the publication of the final Framework and considers the implications under English law (or EU law where specified) for entities publishing a transition plan and/or making transition plan disclosures in accordance with the Framework by reference to two areas: (i) directors' duties and (ii) competition law.

It is based on inputs from Slaughter and May, Clifford Chance LLP and Linklaters LLP, made at the request of the TPT.

This paper addresses these areas of potential concern as they apply to **UK companies incorporated under Companies Act 2006 (or its predecessors) only.** It does not address whether UK companies and their directors should prepare and publish transition plans but simply considers whether English law (or EU law where specified) concerning directors' duties and competition law currently prohibits UK companies from publishing transition plans in *accordance* with the Framework.

1. STATUS OF THE TPT DISCLOSURE FRAMEWORK

The Framework sets out good practice for transition plan disclosures and is framed as a set of recommendations that can be used as guidance for entities making transition plan disclosures. While a voluntary framework, the Framework is expected to inform the content of transition plans to the extent preparation and publication of such plans become mandatory under UK law.

Listed companies, in meeting FCA requirements to make climate-related disclosures consistent with the TCFD Recommendations and Recommended Disclosures on a comply or explain basis (which have applied to both premium and standard listed companies since 1 January 2022), are already expected to make some transition plan disclosures where appropriate.

On 10 August 2023, the FCA further signalled its intention to consult on strengthening its requirements for transition plan disclosures by introducing guidance aligned with the Framework at the same time when it consults on implementing disclosure rules referencing UK-endorsed ISSB Standards (which would require an entity to disclose information about any climate-related transition plan [it] has) for listed companies. If these requirements are implemented, they are expected to come into force for accounting periods beginning on or after January 2025, for disclosures in 2026[1].

The UK government has also committed to consulting on introducing requirements for the UK's largest companies to disclose their transition plans if they have them. This consultation, expected in the fourth quarter of 2023, will ensure consistency in disclosure requirements for both listed and large private companies[2].

Pending the introduction of legislative and regulatory measures which would require entities to prepare or disclose transition plans, entities which are already making transition-related disclosures or are in the process of preparing and publishing transition plans may voluntarily choose to adopt the Framework to inform "best practice" in relation to their transition plan disclosures.

2. THE LEGAL POSITION

(i) Directors' duties

Does the Framework modify the underlying statutory director's duty or prioritise certain matters that a director is to have regard to (such as the environment) in a manner that does not fit with the overriding statutory duty?

English Law

In general terms, there is no English law prohibition on companies or their directors taking a decision to disclose a transition plan in accordance with the Framework.

Under section 172 of the Companies Act 2006, directors are required to *"act in a way [they] consider, in good faith, would be most likely to promote the success of the company for the benefit of the members as a whole"* having regard to a number of (non-exhaustive) factors, including the impact of the company's decisions on the environment and the likely consequences of any decision in the long term. The law does not prescribe any fixed weighting that should be attached to each factor. It is open to directors to determine how much weight to give to each relevant factor, subject to the overarching duty to act in a way most likely to promote the success of the company for the benefit of the members as a whole. Directors are also required to *"exercise reasonable care, skill and diligence"*, under section 174 of the Companies Act 2006.

1) See **FCA, Primary Market Bulletin 45, August, 2023.**

2) See page 9, paragraph 10a of HM Government, **Green Finance Strategy, March 2023**

The Framework is underpinned by the guiding principles of "**ambition, action** and **accountability"**. These principles are applied through a set of Disclosure Recommendations structured around five Elements[3], broken down into a further 19 Sub-Elements. The Framework recommends that entities take a "strategic and rounded approach", by considering three inter-related channels in designing transition plans: decarbonising the entity; responding to the entity's climate-related risks and opportunities; and contributing to an economy-wide transition. As noted in the Framework, taking a strategic and rounded approach may help an entity *"to protect and enhance [its] long term value"* – an approach which may be pursued consistently with the proper exercise of directors' statutory duty. The Framework also notes that the three guiding principles of "ambition, action and accountability" should be applied by an entity in accordance with the duties of the entity's directors and senior managers, constitutional documents and relevant law or regulation.

In addition, the Framework is expressly not intended to override, substitute or alter legal or regulatory requirements that apply to entities or their directors, including (without limitation) directors' duties, nor does it seek to compel action. It is (and remains) open for directors to determine their company strategy, including any transition pathway and to decide whether, and the extent to which, they make transition plan disclosures in accordance with the Framework.

As with any decision relating to a company's strategy or plan, or to any public disclosures made by a company, directors must *"exercise reasonable care, skill and diligence"* when making any decision in respect of the adoption or disclosure a transition plan. The Framework does not create any higher standard in relation to the preparation or publication of a transition plan than in respect of any other strategic or forward-looking disclosures.

EU Law

At the time of publication of this paper (9 October 2023), the rules on directors' duty of care have not been harmonised at EU level. They vary from one EU Member State to another, including on whether – and to what extent – the directors' duty of care has evolved beyond consideration of shareholders' interests only.

EU corporate reporting rules indirectly support (but do not require) the adoption of corporate transition plans[4]. The adoption and implementation of transition plans may become mandatory for certain undertakings at EU level if the European Commission's Proposal for a Directive on Corporate Sustainability Due Diligence (CSDDD)[5] is adopted. The CSDDD may also impact directors' duties in a wider way, as the European Commission's Proposal foresees that "*Member States shall ensure that, when fulfilling their duty to act in the best interest of the company, directors of [in-scope EU companies] take into account the consequences of their decisions for sustainability matters, including, where applicable, human rights, climate change and environmental consequences, including in the short, medium and long term".*

3) Foundation **(ambition)**, Implementation Strategy, Engagement Strategy **(action)**, Metrics and Targets, Governance **(accountability)**.

4) See Article 33 of the Accounting Directive (Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC Text with EEA relevance, OJ L 182, 29 June 2013, pp. 19–76) as updated by the Corporate Sustainability Reporting Directive (Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting (Text with EEA relevance), OJ L 322, 16 December 2022, pp. 15–80); and ESRS E1-1 (Transition plan for climate change mitigation) of the ESRS E1 (Climate Change) which provides that "The undertaking shall disclose its transition plan for climate change mitigation." (paragraph 14). Paragraph 15 of ESRS1 sets out that the objective of this Disclosure Requirement is to: "enable an understanding of the undertaking's past, current, and future mitigation efforts to ensure that its strategy and business model are compatible with the transition to a sustainable economy, and with the limiting of global warming to 1.5 °C in line with the Paris Agreement and with the objective of achieving climate neutrality by 2050 and, where relevant, the undertaking's exposure to coal, oil and gas-related activities".

5) Proposal for a Directive of European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 23 February 2022, COM/2022/71 final. Article 15 of this Proposal mandates in-scope undertakings to *"adopt a plan to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement"*. The CSDDD, including the wording of this Article 15, is currently under discussions among the EU institutions (Council and Parliament, with the Commission facilitating the political negotiations) in the so-called "trilogues", at least for the remainder of this year. The European Parliament has proposed to include a provision pursuant to which directors would be responsible for overseeing the obligations pertaining to the transition plan (Amendments adopted by the European Parliament on 1 June 2023 on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM(2022)0071 – C9-0050/2022 – 2022/0051(COD)), amendment 256).

(ii) Competition Law

Does the Framework require disclosure of commercially sensitive information to competitors?

The Framework expressly provides that nothing in the Framework should be understood to require disclosure of commercially sensitive information. While entities are ultimately responsible for ensuring that their disclosures are compliant with competition and other laws (which can only be assessed on a fact-specific basis), the Disclosure Recommendations have been drafted in sufficiently broad terms to allow entities to present information, within the confines of the Framework, at a sufficiently high-level, or in aggregated form, so as not to constitute commercially sensitive information.

Does the Framework require any form of engagement with industry peers or competitors in a manner that contravenes competition law?

English Law

The Framework recommends that entities disclose information about any engagement and collaborative activities with industry counterparts that it is undertaking or plans to undertake in order to achieve the Strategic Ambition of its transition plan. To the extent that a company participates in any such initiatives and in any collaborative engagements, it will, of course, need to have regard to the possibility of competition law risks (on a case-by-case basis). However, these risks do not arise as a result of adoption of the Framework itself which only serves as a disclosure framework. Companies voluntarily and independently determine the extent to which they engage with industry counterparts as part of their transition plan, which will determine any corresponding disclosures made in line with the Framework.

It is possible that competition law could prohibit an agreement (which, under competition law, has a broad meaning and may arise from an expression of joint conduct) between entities to cease the provision of financing or other services to certain types of businesses, such as fossil fuel producers. In addition, it has been suggested that entities which sign up to industry-wide initiatives that seek, for example, collective commitments to reduce investment in fossil fuels may be engaged in a form of collective action that could potentially give rise to competition issues. Companies should always be mindful of these and other competition risks associated with any collective action[6].

However, the Framework itself, as a disclosure framework, does not require any such agreement or collective action.

EU Law

At EU level, the competition law considerations are similar to those set out under English law.[7]

3. CONCLUSION

There should be no legal impediment arising from English law (or EU law where specified) on directors' duties or competition law that would prohibit a UK company from disclosing a transition plan in accordance with the Framework.

6) It should be noted that the UK Competition and Markets Authority has issued **draft guidance** that provides that certain environmental sustainability agreements (including agreements relating to the organisation of joint campaigns to raise awareness of environmental sustainability issues within any industry and joint lobbying for policy or legislative changes) which "do not affect the main parameters of competition between parties" are likely not to be prohibited under competition law.

7) The European Commission has also provided guidance on sustainability agreements under EU competition law in Chapter 9 of the EC Horizontal Guidelines. See European Commission, **Guidelines on Horizontal Cooperation agreements.**

Transition Plan Taskforce

CONTACT US

secretariat@transitiontaskforce.net

transitiontaskforce.net