



COMPANY LAW MEMO 2008

Newsletter Issue 4

July 2008

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Welcome to the *Company Law Memo 2008* newsletter, highlighting important recent developments in company and insolvency law. You can also access comprehensive updates to specific paragraphs via our online updating service. We always welcome suggestions from readers, so please contact us if you have any comments.

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NEWS ROUND-UP

Proposals for European Private Company unveiled

See *CLM* ¶188+

Following its consultation on the introduction of a European Private Company, the European Commission has published proposed regulations for this **new business format**. The European Private Company will also be known as the *Societas Privata Europaea* (SPE), and will offer a private alternative to the public European Company (or *Societas Europaea*). The idea is that a company doing business throughout Europe will be able to be established and governed by the same set of rules, rather than having to set up subsidiaries in the different member states. Any areas not governed by the regulations, such as accounting, tax and insolvency, will be regulated by the local law where the SPE has its registered office.

An SPE will be able to be formed:

- » from scratch;
- » by an existing company converting to the form; or
- » by the merger or division of existing companies.

The consultation on this proposal was discussed in *CLM 2007 Newsletter Issue 6*.

BERR guidance on accounting and reporting

See *CLM* ¶4185+

BERR has published guidance for companies on accounting and reporting under the new Companies Act to flag up the substantive changes and their impact. These provisions were implemented on 6 April this year, principally applying to accounts prepared for financial years starting on or after this date. See *CLM 2008 Newsletter Issue 2* for a detailed discussion of this implementation phase.

The guidance focuses on:

- » the increase in the financial thresholds for **qualification as small and medium-sized**;
- » disclosure in the notes to the accounts of large and medium-sized companies of the nature and business purpose of any **off-balance sheet** arrangements;
- » disclosure by large companies of transactions with **related parties** (typically, directors and their families);
- » the option for companies to prepare Companies Act or **IAS accounts**;
- » the extension of the option to **include financial instruments** at “fair value”; and
- » the increased threshold for declaring **political and charitable donations**.

The guidance is available on BERR’s website: <http://www.berr.gov.uk/files/file46791.pdf>.

New guidance on auditors’ liability limitation agreements

See *CLM* ¶4303

The FRC has produced finalised guidance on auditors’ liability limitation agreements, following a period of consultation. Companies have been permitted to agree a limit on the liability of their auditors since 6 April, but only if the arrangement is “fair and reasonable” in the circumstances. The guidance seeks to explain in practical terms:

- » what the new Companies Act allows;
- » the relevant **factors** to be considered by the directors and shareholders, like directors’ duties and a lower audit price;
- » the matters to be covered in the **agreement**;
- » suggestions as to **how to limit liability** (e.g. capping it at a particular figure or by using a set formula); and
- » the process that needs to be followed to obtain shareholder **approval**.

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NEWS ROUND-UP cont...

It also sets out specimen provisions for agreements, resolutions and notices. The FRC guidance is available on its website: <http://www.frc.org.uk/>.

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Takeover Panel consultations on changes to the Code

See CLM ¶16872+

The Takeover Panel plans to amend the Takeover Code to facilitate the use of **electronic communication** when sending out information required by the Code. The proposed amendments largely mirror the communications provisions of the new Companies Act that are already in force (see CLM ¶13695+) so that information will be able to be sent in hard copy or electronic form (e.g. by email) or by being published on a website. Parties will be free to choose between these options and, unlike the new Companies Act provisions, shareholders will not have to consent to information being supplied electronically or via a website. However, an individual recipient will be able to request that documents are sent to him in hard copy.

In order to reduce the size of documents that must be sent out, certain information (e.g. financial details) will be able to be incorporated by reference to other documents rather than incorporating it in the main document. This information will have to be made available on a website and in hard copy on request. In addition, information that must be generally available for inspection during the offer period will have to appear on a website as well as being made available in hard copy.

These changes should cut the administrative costs of the takeover process and improve the speed and efficiency of communications.

In a separate consultation paper, the Panel outlines other **miscellaneous amendments** to the Code.

Both consultations close on 17 October 2008. The papers are available from the Panel's website: <http://www.thetakeoverpanel.org.uk/new/>.

Insolvency Service modernisation and consolidation project update

See CLM ¶17364, ¶17404, ¶18227, ¶18339, ¶18449, ¶18530, ¶18648, ¶19019, ¶19369, ¶19546

The Insolvency Service has announced two changes to its proposals to update the **Insolvency Act 1986** to complement the forthcoming new Insolvency Rules. These changes are that:

- » the proposal to require **creditors to opt-in to receiving notices** during an insolvency procedure has been withdrawn because the consultation responses did not support it; and
- » implementation of the proposal to give insolvency practitioners a discretion as to when to **advertise insolvency events in the general press** will be brought forward to 6 April 2009. Changes will have to be made to IA 1986 and IR 1986 to facilitate this. The requirement to advertise insolvency events in the Gazette will not be affected.

More generally, the Insolvency Service announced that it is working on the detail of the **new Insolvency Rules** in conjunction with the Insolvency Rules Committee. A draft of the new rules is not yet available to the public. It has also been consulting with Companies House and the Ministry of Justice on the impact of the new Rules on matters such as statutory forms and court procedure. Earlier this year, the Insolvency Service announced that the implementation of the new Rules would be postponed until October 2009.



RECENT CASES

Directors' breach of duty for failure to act

See CLM ¶2418

Lexi Holdings (in administration) v Luqman and another [2008] EWHC 1639 (Ch)

The court has found that two directors were not liable for the consequences of serious **fraud perpetrated** on their company **by their fellow director**, despite the fact that they were themselves in breach of duty to the company for not alerting other directors to the situation.

Mr L was a director of LH, as were his brother Mr WL and his sisters Ms ML and Ms ZL. There were also two other directors, who were not members of the same family. Mr L defrauded LH on a massive scale by misappropriating its assets, breaching the restrictions on loans to directors and substantial property transactions and creating a fictitious directors' loan account. LH went into administration as a result. Mr WL was actively involved in the fraud. Ms ML and Ms ZL were not actively involved, but the administrators of LH commenced proceedings against them for breach of duty. The administrators alleged that, by their inactivity, the sisters had breached their duty of skill and care and they should have at least brought two serious matters to the attention of the independent directors:

- » the fact that Mr L had previous criminal convictions for fraud; and
- » that loans and substantial property transactions were being carried out in contravention of the statutory requirements.

The court found that the sisters were in breach of duty as they had **failed to supervise** Mr L properly, knowing that he had a history of fraud. The court accepted that Mr L had such a strong influence over the sisters that they could not have prevented him from perpetrating the fraud. However, a director acting in accordance with his duty would have brought this, and the other breaches, to the attention of his fellow directors.

Given their breach, the court then had to assess **whether this caused any loss** to the company that would render the sisters liable to compensate the company for their inaction. It decided that if the other directors had been informed, they would have passed the information on to the auditors and then resigned. However, there was no evidence that this would have resulted in the fraud being discovered earlier or the company suffering less of a loss. Nor would it have persuaded the company's lenders to take a more hard-line approach in dealing with the company.

The court found that the sisters had breached their duties to the company but this breach had not led to the company suffering any greater loss than it would otherwise have done. Therefore, they could not be held liable with their brothers for the total loss suffered by the company. However, they were both liable in respect of particular unlawful substantial property transactions because they had signed the relevant documents on the company's behalf. They were also held liable for the unlawful receipt of certain sums of money.

The case against the sisters was for breach of their **common law duty of skill and care**, upon which the new **statutory duty of care, skill and diligence** is based. Since the dual subjective and objective test was applied and case law on the common law duty is applicable to the new statutory duty, this case is still relevant when looking at the new statutory duty (s 170 CA 2006).

Auditors' liability for fraud

See CLM ¶4301

Moore Stephens v Stone & Rolls Ltd [2008] EWCA Civ 644

Auditors are at risk of being sued for negligence if they **fail to spot fraud** being perpetrated against a company (by one of its directors, for example). However, if it is the **company** itself that has **committed the fraud**, it will not be allowed to sue the auditors for any loss it sustained as a result. It is against public policy to allow a person or company to benefit from

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RECENT CASES cont...

his/its own illegal acts.

In this case, the auditors successfully applied to have a negligence suit against them dismissed. The auditors were sued by the liquidator of R Ltd, who alleged that they had failed to spot fraud on several banks committed by Mr S (who owned, controlled and managed R Ltd). The liquidator claimed that R Ltd had suffered loss because of Mr S's fraud (in the form of a judgment against it in favour of a victim of the fraud) and that the auditors were liable to compensate R Ltd for this loss. However, the court found that the company was the fraudster, not a victim, in this case because Mr S was the sole directing mind of R Ltd and had caused R Ltd to commit the fraud. The fact that R Ltd had incurred liabilities as a result did not in itself make it a victim. The court dismissed the case, because it would not allow R Ltd to benefit from its own wrongdoing.

Inspecting the court's file on an insolvent company

See CLM ¶7398

Franbar Holdings Ltd v Patel and others [2008] EWHC 1534 (Ch)

It is possible to apply to inspect the court's file on an insolvent company for a **purpose** not related to the insolvency of the company.

In this case, the applicant was a shareholder of M(UK) Ltd. It was bringing actions for unfair prejudice and breach of a shareholders' agreement based on the conduct of M(UK) Ltd's directors. One of its allegations was that Mr P should never have been appointed as a director in the first place because his involvement in other companies (which had ended up in insolvency) made him unfit to hold office. SBC Ltd was one such company and the shareholder wanted access to the court's file on the insolvency to obtain evidence of this point to use in his case against M(UK) Ltd.

The court decided that this was a legitimate use of the ability to inspect, as long as:

- » the evidence demonstrated or was pertinent to a point at issue in the litigation; and
- » any person to whom the information related was not unduly prejudiced by the inspection being allowed.

In this case, the court allowed inspection, on the **condition** that the information was only used in connection with the shareholder's unfair prejudice and breach of contract claims.

This case also dealt with two other aspects of company law:

- » an application was made under the new Companies Act for permission to proceed with a **derivative claim** (see CLM ¶7127+). The court refused permission because it felt that the claimant would be able to obtain the appropriate remedies by pursuing the unfair prejudice action alone. The court decided that the list of factors in the new Act for it to consider when reaching its decision was not exhaustive, so it could take other relevant circumstances into account as well; and
 - » the court confirmed that the **ratification** provisions in the new Companies Act work with the pre-existing rules (see CLM ¶2497+). Therefore, the common law rule preventing a company from ratifying illegal or fraudulent acts (including fraud on the minority) still applies. This means that the company cannot ratify such an act, even unanimously.
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Case law



RECENT CASES cont...

Protective award in employment claim is a provable debt

See CLM ¶18012

Haine v Secretary of State for Business, Enterprise and Regulatory Reform and another [2008] EWCA Civ 626

CS Ltd went into administration, resulting in the **redundancy** of 40 employees. The company then went into liquidation. Four months later, an employment tribunal found that the company had not complied with its obligation to follow a proper **consultation procedure** prior to making the employees redundant and ordered the company to pay protective awards. At first instance, the court held that the awards were not provable debts because they arose after the start of the liquidation. The employees appealed against this ruling.

The court found that protective awards for breach of the company's duty to consult employees prior to redundancy were provable debts in liquidation. The liability arises when the company fails to consult, not when the tribunal makes the award, making it a **contingent liability** to which the company may become subject after the commencement of the liquidation. This is within the definition of "debt" for the purposes of creditors proving their debts (see CLM ¶18005+). Therefore, the debt is still provable even if the award was made after the company went into liquidation.

The position may be different with **other types of award** under employment legislation, as they may not be seen as liabilities arising before the commencement of the liquidation in the same way.

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LEGISLATION

Changes to the annual return from 1 October 2008

See CLM ¶4062, ¶4063

SI 2008/1659, SI 2008/1861, SI 2008/1860

New regulations coming into force on 1 October 2008 will change the information required on a company's annual return. The changes are:

- » every company will have to state whether or not it was a **"traded company"** during the return period. It will be a traded company if any of its shares were traded on a regulated market in the period;
- » non-traded companies will not be allowed to give their **shareholders' addresses** in the annual return; and
- » there will be additional **business activity codes** for non-trading (i.e. companies that are not in business, rather than companies whose shares are not traded) and dormant companies.

Shareholders' addresses are to be omitted to ensure that companies that submit annual returns made up to a date on or after 1 October 2008 do not divulge information in the annual return to which they may have refused access under the new procedure for inspecting the register of shareholders (see CLM ¶3930+). This brings the existing rules into line with those which will be implemented under the new Companies Act on 1 October 2009 (draft Companies Act 2006 (Annual Return and Service Addresses) Regulations 2008).

New versions of Forms 363a and 363cym (for Welsh companies) have been published to take account of these changes.

Changes to trading disclosures during insolvency from 1 October 2008

See CLM ¶7750, ¶8229, ¶8468, ¶9021, ¶9368, ¶9480

SI 2008/1897

Amendments are to be made to the requirement to disclose the fact that a company is subject to an insolvency procedure in order to harmonise them and make them compliant with EC law (EC Directive 2003/58). These changes will apply from 1 October 2008. Currently, there are discrepancies between the different procedures.

The **disclosure to be made** will still depend on the procedure:

- » liquidation (compulsory or voluntary): that the company is being wound up;
- » administration: the administrator's name and the fact that the company's affairs, business and property are being managed by him;
- » receivership: that a receiver or manager has been appointed; and
- » pre-CVA moratorium: the nominee's name and the fact that a moratorium is in force.

This disclosure will have to be **included on** all of the company's business documents and websites, whether or not they mention the company's name. It applies to documents in whatever form (hard copy, electronic or other form). "Business documents" include invoices, orders for goods or services, business letters and order forms.

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COMPANIES ACT 2006: IMPLEMENTATION

The text of the Companies Act 2006, explanatory notes and tables of destinations and origins are freely available to download at: <http://www.opsi.gov.uk/acts/acts2006a.htm>.

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To see when specific sections of the Act will or have come into force, check the implementation timetable on the FL Memo Ltd newsletter homepage (follow the link to "Companies Act 2006 implementation timetable"). This document will be updated as new secondary legislation is passed and further announcements are made. The implementation timetable is now up to date to the draft 8th Commencement Order.

Final version of 7th Commencement Order

See *CLM* ¶1247, ¶1360, ¶1361, ¶1438, ¶1439, ¶1445, ¶1469, ¶1472, ¶3554

A final version of the 7th Commencement Order has been published (SI 2008/1886). This will implement the new out-of-court procedure for private companies to **reduce** their **share capital** on 1 October 2008 (ss 641(1)(a), (2)-(6), 642-644, 652(1), (3), 654 CA 2006). Instead of applying to court, private companies will be able to reduce their share capital with the shareholders' approval (which requires a special resolution) and a **solvency statement** from the directors.

By way of transitional adaptations (arts 3-5 SI 2008/1886):

- » the special resolution will also have to make any necessary alterations to the memorandum (reducing the share capital and shares);
- » instead of filing a statement of capital at Companies House, the company will have to file a memorandum setting out the relevant information (i.e. the amount of the company's share capital, the number of shares, the amount of each share and the amount deemed to be paid up on each share); and
- » a private company's ability to reduce its share capital in this way is subject to any restrictions in the memorandum and articles (rather than just the articles).

This new procedure applies to the company's **share premium account** and **capital redemption reserve** (ss 610(2)-(4), 733(5), (6) CA 2006).

For the implementation of the new reduction of capital procedure more generally, see *CLM 2008 Newsletter Issue 3*. Along with the commencement order, a final version of the Companies (Reduction of Capital) Order 2008 has been published (SI 2008/1915). It is the same as the previous draft, reported on in *Issue 3*.

The 7th Commencement Order also touches on **restorations to the register after dissolution**. Although the two-year time limit for applying for a declaration that a company's dissolution is void can be waived in the case of a claim for damages for personal injury or a fatal accident, there is currently a long-stop date preventing restoration where the company was dissolved before 16 November 1969 (s 141(4) CA 1989). This time limit will be repealed on 1 October 2008. The limit is not restated in the new Companies Act and, following consultation, the government has decided to bring the repeal into force ahead of the implementation of the other dissolution and restoration provisions.

Draft 8th Commencement Order and consultation on final implementation

BERR has published a draft of the 8th Commencement Order, which will bring the final tranche of the new Companies Act into force on 1 October 2009. It has launched a public consultation on the draft and the proposed switchover of Companies House systems. Comments are invited by 5 September 2008.

CA 2006



COMPANIES ACT 2006: IMPLEMENTATION cont...

Company and business names

See *CLM* ¶240+

Provisions affected: ss 53-68, 75-81, 1192-1208 CA 2006

Most of the provisions on company and business names come into force on 1 October 2009, restating the position in the current legislation (CA 1985, Business Names Act 1985).

Two aspects of this topic will be **implemented early** (by the 5th Commencement Order), on 1 October 2008: the new procedure for objecting to a registered company name and the provisions setting out the information companies have to make available to the public.

The new procedure for **objecting to a company name** will be the most significant change in this area (ss 69-74 CA 2006). This will allow any person to apply to a new names adjudicator for a company to change its name. The applicant will have to show that the name is the same as one in which he had acquired goodwill, or so similar to such a name as to suggest an association between the two businesses. The company will be able to defend the application on various grounds, including by showing that it was using the name before the applicant. The application procedure is set out in recently finalised regulations that will also come into force on 1 October 2008 (SI 2008/1738).

The **trading disclosures** provisions also come into force on 1 October 2008 (ss 82-85 CA 2006). These set out the requirements for companies to disclose their names and other important trading information (such as their registered addresses and registration numbers) to the public. The associated regulations set out the detailed requirements on what information has to be displayed where (SI 2008/495). These provisions are similar to the current ones, but there are some differences, for example the list of documents on which the name needs to be displayed is more comprehensive.

Company formation and constitution

See *CLM* ¶517+

Provisions affected: ss 7-28, 31-38, 86-111 CA 2006

The provisions of the new Act dealing with company formation and the constitution will introduce major changes to this area when they come into force on 1 October 2009.

The **memorandum** will become a far less significant document that just records the intention of the subscribers to form a company and take at least one share in it. For companies already incorporated by 1 October 2009, any provisions in their memoranda that do not belong in this new style document will be deemed to form part of their articles instead. Therefore, an existing company's objects will become part of the articles (meaning that they will be alterable in the same way as other provisions in the articles, unless the company entrenches them). This will be an automatic process, so the company will not have to inform Companies House of the changes to its articles. A company will have unrestricted objects, unless the articles restrict them in some way. Any objects imported from an existing company's memorandum will be treated as restrictions on its objects, so if a company wishes to take advantage of the new freedom to have unrestricted objects, it will have to alter its articles to remove these provisions (this is a change that will have to be registered).

Also coming into force are the provisions dealing with the company's **registered office**. They substantially restate the existing law. The only change will be to allow companies with a registered office in Wales to change their domicile between "England and Wales" and "Wales" by passing a special resolution (under the current law, they can change their domicile to "Wales", but cannot change it back again).

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The **new formation and registration procedure** will comprise:

- » the new style memorandum;
- » an application for registration, setting out the basic information about the company;
- » its articles; and
- » a statement of compliance.

Another significant change will be the ability to form a public company with only one shareholder.

The change in the incorporation regime will be managed by **Companies House** as follows:

- » applications for incorporation under CA 1985 will be accepted up to and including 30 September 2009. Any received after this date will be rejected and new applications under CA 2006 will have to be submitted. Companies incorporated under CA 1985 on or before 30 September are referred to as “existing companies” for the purposes of transitional arrangements;
- » CA 1985 applications will still be able to be processed on 1 and 2 October. They are referred to as “transitional companies” because they will be incorporated under CA 1985 after CA 2006 is in force. They will be treated as existing companies; and
- » applications for incorporation under CA 2006 will be accepted on and after 1 October 2009. Any received before then will be rejected and new applications will have to be filed (therefore, it will not be possible to send an application under the new Act in early for Companies House to deal with on 1 October). Companies House will fully update its systems to cope with all of the filing changes over the weekend of 3/4 October 2009. This means that any incorporation applications under the new Act received between 1 and 4 October will not be processed until 5 October. The same-day service will not be available until 5 October either.

The provisions setting out how a company can **change its status** between private limited, public limited and unlimited are due to come into force on 1 October 2009. The current methods of re-registration will all still be available under the new Act, with the addition of a procedure for public companies to re-register directly as an unlimited private company. This removes the current interim step of re-registering as a private limited company first.

Shares

See *CLM* ¶1700+

Provisions affected: ss 540-543, 545-640, 641(1)(b), 645-651, 653, 655-737, 1149-1153 CA 2006

The bulk of the provisions to be implemented on 1 October 2009 concerns shares. Much of the current law will be restated, but there will be important changes in some areas.

The concept of **authorised share capital** will be abolished on 1 October 2009. The statements of authorised share capital in existing or transitional companies' memoranda will become part of their articles and will be treated as a ceiling on the amount of shares that can be allotted. The shareholders will be able to amend or revoke any such provision by ordinary resolution (which will have to be filed at Companies House). Other changes to do with share capital will come into force on the same date:

- » companies will no longer be able to convert shares into **stock**. However, stock created before 1 October 2009 will be unaffected, and will be able to be reconverted to shares if the company wishes. If a company passes a resolution to convert shares into stock prior to implementation, it will still be able to carry out the conversion afterwards; and
- » companies will no longer be able to create **reserve capital**. Again, a resolution to do so passed before implementation will still be able to be carried out afterwards.

Private companies with only one class of shares will not have to give their directors **authority to allot** shares, unless their articles require. This will only apply to an existing or transitional company if the shareholders so resolve (any such resolution will have to be filed at Companies

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House). A requirement in the articles of an existing or transitional private company with only one class of shares for their directors to be authorised to allot shares under s 80 CA 1985 will be read as a requirement for them to have authority under the new provision. Where a company needs to give its directors authority to allot, it will be able to do so in the same way as it does now. Any authority given before 1 October 2009 will remain valid after implementation of these provisions, so will expire in the usual way. There will be no change to the rules on public companies' allotments.

The provisions on **pre-emption rights** will substantially mirror the current position.

The theme of removing private companies' need for authority in their articles is continued with allotments of **redeemable shares**. As with similar provisions, existing and transitional companies will continue to need authorisation, either in their articles or by special resolution (where the articles do not prohibit the company from allotting redeemable shares). There will also be a relaxation in the rules on paying for redeemable shares, with shareholders being able to agree with the company to pay after the redemption date if the terms of redemption are fixed on or after implementation.

The provisions on **varying class rights** will largely restate the current law, although companies will be able to set out an alternative procedure in their articles if they wish. In addition, the provisions will apply to companies without a share capital (currently, these companies have to set out their own procedures in their constitutions).

Some changes will be made to a company's ability to **purchase its own shares**. Generally speaking, companies will not need authority in their articles to do this. A private company will not need authority in its articles to redeem or purchase its shares out of capital either. However, existing and transitional companies will need to be authorised in both cases, either by their articles or by shareholder special resolution (where the articles do not prohibit the company from purchasing its own shares).

The remaining **reduction of share capital** provisions will be brought into force on 1 October 2009. Companies will no longer need authority in their articles to carry out a reduction, although its articles will be able to prohibit it from doing so. However, existing and transitional companies will need authority, either in their articles or by special resolution (as long as the articles do not prohibit a reduction). Private companies will be able to use a new out-of-court procedure to reduce their share capital from 1 October 2008 (see above).

Execution of deeds and documents

See *CLM* ¶¶345+, ¶¶3486+

Provisions affected: ss 39-43, 45-52 CA 2006

The remainder of the provisions of the new Act dealing with the execution of deeds and documents will come into force on 1 October 2009. The provision allowing a document to be executed by the signature of two directors, a director and a secretary or a director and a witness came into force on 6 April 2008 to coincide with the removal of the requirement for private companies to have a secretary. The remaining provisions deal with:

- » entering into contracts;
- » using the company's seal;
- » executing deeds;
- » pre-incorporation contracts, deeds and obligations; and
- » bills of exchange and promissory notes.

This topic was discussed in *CLM 2008 Newsletter Issue 2*.



COMPANIES ACT 2006: IMPLEMENTATION cont...

Record-keeping

See *CLM* ¶¶3869, ¶¶3894+, ¶¶3915+, ¶¶4019, ¶¶4060+

Provisions affected: ss 112-115, 120, 122-127, 129-144, 162-167, 240-246, 275-579, 854-859, 1134-1136, 1137(2), (3), (5)(a), 1138-1142 CA 2006

The provisions relating to the **annual return** will come into force on 1 October 2009 and will apply to annual returns made with a return date on or after implementation. Some of the changes will effectively be brought into force early by amendments to CA 1985 which will take effect on 1 October 2008, see *Legislation*. Otherwise, the new Act will largely restate the current requirements.

Changes to the **register of directors** will also take effect on 1 October 2009, although any additional information required by the new provisions about directors already in office by this date only has to be provided when the company has filed an annual return made up to 1 October 2009 or later (or when it should have done so).

The main change is that **directors' residential addresses** will be protected from the public. Their service addresses will appear on the register, with their residential addresses being kept on a separate register (only disclosed to specific public authorities and credit reference agencies). Any addresses on the register when the relevant provisions are implemented will be deemed to be service addresses, so directors wishing to take advantage of this new protection will have to change their details. This also applies to the register kept at Companies House, so if a director's residential address is already on the register by 1 October 2009, it can be disclosed to the public even though it is treated as a service address (unless a confidentiality order is in place). Therefore, directors who want this address to be protected will have to file a new service address at Companies House.

Companies will be able to remove information from their registers that is not required under the new Act, and must remove any information relating to shadow directors. For example, the new Act does not require details of directors' other directorships to appear on the register and the type of former names that must be recorded will change so companies may wish to remove this information.

Most of the provisions relating to the company secretary came into force on 6 April 2008, but the **register of secretaries** was held back to come into force at the same time as the register of directors. Similar implementation measures apply, so any residential addresses on the register will be treated as service addresses and any secretary wishing to keep this information private will have to change his details. The company will be able to remove information required under CA 1985 only from 1 October 2009, such as any former names that do not fall within the new definition. Information required by CA 2006 only does not have to be provided until the company has filed an annual return made up to 1 October 2009 or later (or when it should have filed such a return).

The remainder of the provisions dealing with the **register of shareholders** will also be implemented on 1 October 2009 (those dealing with the inspection and copying procedure were brought into force on 1 October 2007 and the time limits for keeping information on the register came into force on 6 April 2008). The new provisions will largely restate the current rules, but will introduce a new obligation to disclose the date on which the register was last updated to any recipient of copies.

The associated regulations dealing with the obligation to make registers and other records available for **inspection and copying** will also come into force on 1 October 2009 (draft Companies (Company Records) Regulations 2008). The rules governing the accessibility of private companies' records will be relaxed, enabling them to make their records available on request. Public companies will still have to make their records available every business day.

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COMPANIES ACT 2006: IMPLEMENTATION cont...

Companies House

See CLM ¶14040+

Provisions affected: ss1060-1067, 1068(1)-(4), (6), (7), 1069-1076, 1081-1084, 1093-1101, 1108-1110, 1112-1120, 1154, 1155 CA 2006

The provisions of the new Act relating to Companies House will be implemented on 1 October 2009. Most of the requirements relating to **filing documents** (e.g. their form and quality, fees payable for filing) will remain the same. The registrar will, however, have various new powers to **correct mistakes** on the register and **remove unnecessary information**. One of the biggest changes concerning Companies House will be the **new forms**. In a consultation paper last year, Companies House indicated that it would be replacing all forms with new versions to match the requirements of the new Act that would not be based on the relevant section numbers ("Working with Companies House: a consultation on the registrar's rules and related provisions which will apply under the Companies Act 2006"). The new forms have not yet been published, but Companies House plans to do so in advance of the final implementation phase.

Charges

See CLM ¶14500+

Provisions affected: ss 860-894, 1180 CA 2006

The provisions of the new Act dealing with company **charges and their registration** will come into force on 1 October 2009, largely restating the current law. They will apply to charges created on or after this date, or to existing charges over property acquired on or after this date. The only change is in relation to **overseas companies**. Where an overseas company has registered an establishment in the UK, it will have to register any relevant charges over property in the UK. This will replace the current system, under which overseas companies not registered in the UK register their charges to be on the safe side (the Slavenburg Index).

Dissolution and restoration

See CLM ¶17491+

Provisions affected: ss 1000-1034 CA 2006

The provisions relating to dissolution, striking off and restoration to the register will come into force on 1 October 2009. Most of the rules are restated in the new Act, but there will be three significant changes:

- » **public companies** will be able to apply to be struck off the register;
- » a new "**administrative restoration**" **procedure** will aim to restore a company quickly and simply where it should not have been struck off in the first place; and
- » the **time limit** for restoring a company to the register where it has been dissolved will be extended from 2 to 6 years. See above for the change to the time limit on restoration after dissolution in personal injury and fatal accident cases, which will be brought into force on 1 October 2008 by the 7th Commencement Order.

Miscellaneous

See CLM: ¶12984, ¶18066

The provision of the new Act enabling the company to **award termination payments to employees** where the business is transferred or wound up will come into force on 1 October 2009 (s 247 CA 2006). This is a restatement of the CA 1985 provision.

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COMPANIES ACT 2006: IMPLEMENTATION cont...

The other provisions due to come into force are:

- » the **definitions** of a company and various other terms (ss 1, 3-6 CA 1156, 1158-1160, 1163- 1166, 1168, 1171, 1173, 1174, Sch 8 2006);
- » **UK companies not formed under companies legislation**, but authorised to register (ss 1040-1042 CA 2006);
- » **overseas companies** (ss 1044-1059 CA 2006);
- » Companies Acts **offences** (ss 1121-1123, 1125, 1127-1133 CA 2006); and
- » the **disqualification of directors overseas** (ss 1182-1191 CA 2006).

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Limited liability partnerships' accounts

See *CLM* ¶177+

The following finalised regulations on how the accountancy provisions of the new Companies Act apply to LLPs have been published in their final form:

- » the Limited Liability Partnerships (Accounts and Audit) (Application of Companies Act 2006) Regulations 2008 (SI 2008/1911);
- » the Large and Medium-sized Limited Liability Partnerships (Accounts) Regulations 2008 (SI 2008/1913); and
- » the Small Limited Liability Partnerships (Accounts) Regulations 2008 (SI 2008/1912).

These regulations will come into force on 1 October 2008. Other changes relevant to LLPs under the new Act will be implemented on 1 October 2009 (see *CLM 2008 Newsletter Issue 3* for how BERR intends to apply the new Act to LLPs).

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