



COMPANY LAW MEMO 2007

Newsletter Issue 10

December 2007

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Welcome to the *Company Law Memo 2007* 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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Disclaimer

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NEWS ROUND-UP

Price-fixing fines for supermarkets

See CLM: ¶651

The Office of Fair Trading (OFT) has been investigating price-fixing of dairy products by supermarkets and suppliers. Some of the parties have now admitted involvement in anti-competitive practices and have agreed to pay penalties which come to a total of £116 million. Other parties have not made such admissions and the cases against them continue.

Each party admitting its role will receive a significant reduction in the financial penalty which would otherwise have been payable, conditional upon co-operating fully with the OFT. The OFT has also taken into account information from the parties about the pressures they were under at the time to support British dairy farmers.

There are two key offences in competition law. Firstly, businesses might agree between themselves to act in an anti-competitive manner, e.g. by fixing prices. This was the issue in these cases. Secondly, it is an offence for one or more businesses to act in an unfair manner if they are dominant in the marketplace in question, e.g. by refusing to supply goods or services to a potential customer.

The OFT enforces both UK and EU competition law in the UK. Since the Competition Act 1998, both systems of competition law are, in effect, the same. The current offences seem to be purely UK matters. Offenders who are the first to “whistleblow” can have their fine waived, and those who co-operate with the regulators can be granted a 50% reduction in their fine. One of the companies involved in the milk investigation, Arla, had applied to the OFT for leniency and will receive complete immunity from financial penalties. As an offending business could be fined a maximum of 10% of its worldwide turnover, co-operation can reduce a fine by millions of pounds.

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Companies House opening times over the holidays

See CLM: ¶4040+

Companies House has announced its opening hours over the Christmas holidays. Companies with filing deadlines, especially for their accounts, at this time of year must bear these closures in mind as well as the seasonal postal services. Delays in transit are not accepted by Companies House as a valid excuse for filing accounts late.

Fri 21 Dec:	as normal
Sat 22 Dec:	offices closed; online services available (but help desk closed)
Sun 23 Dec:	offices closed; online services not available
Mon 24 Dec:	offices closed; online services available (but help desk closed)
Tues 25 Dec:	offices closed; online services not available
Wed 26 Dec:	offices closed; online services available (but help desk closed)
Thurs 27 Dec:	as normal
Fri 28 Dec:	as normal
Sat 29 Dec:	offices closed; online services available (but help desk closed)
Sun 30 Dec:	offices closed; online services available 7am – 8pm (but help desk closed)
Mon 31 Dec:	as normal except for the Contact centre/online services help desk, which will close at 5pm
Tues 1 Jan:	offices closed; online services available (but help desk closed)
Wed 2 Jan:	as normal except for the Edinburgh office, which will be closed



NEWS ROUND-UP cont...

Annual Returns and new Standard Industrial Classification codes

See CLM: ¶4063

Standard Industrial Classification (SIC) codes are used as a standard method of identifying companies' principal business activities. Companies are required to state their business activities using this method on their Annual Returns. The SIC codes have been updated (SIC 2007), and the new version will be adopted in the UK as of 1 January 2008. However, Companies House has announced that the new codes should not be used on Annual Returns yet. Its internal IT system is in the process of being upgraded and so it wants to wait until this is up and running before adopting the new codes. Until then, companies should continue to use SIC 2003. A list of these codes can be found in Companies House's guidance on the Annual Return: <http://www.companieshouse.gov.uk/about/guidance.shtml>.

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European Commission proposes a limit on auditors' liability

See CLM: ¶4301+

The European Commission is to recommend that member states take steps to limit the liability of auditors. One of the reasons for this is that there is concern about the dominance of audits of the largest companies by the "big four" auditing firms – PwC, Ernst & Young, KPMG and Deloitte. They undertake 85% of the audits of listed companies within the EU. If one of these firms disappeared then the auditing market would be seriously distorted. There was also concern that it should be made easier for smaller auditing firms to enter the market. Key barriers to entry include the exposure to lawsuits and limited insurance coverage. Mechanisms for limiting liability include a fixed cap and making the liability proportionate to the auditor's role. The Commission is also to launch a consultation on widening the ownership of auditing firms beyond the partners to allow for outside capital to be injected, presumably equivalent to the concept of "Tesco Law" in the UK legal market.

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Application of TUPE in share purchases and sales by private equity companies

See CLM: ¶4800+, ¶5771+

A bill has been laid before Parliament which, if enacted, will extend the application of TUPE to the acquisition and disposal of substantial shareholdings by private equity companies. TUPE (its full title is the Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/246) gives the employees of a business which has been transferred extra rights that protect their employment. It has the effect of making the buyer of the business step into the shoes of the seller, so that employees are employed on the same terms. It enables employees to pursue any unfair dismissal or redundancy claims they may have against the buyer, making it easier for them to enforce their rights.

TUPE usually only applies to asset sales, not share sales. This is because the identity of the employer (i.e. the company) does not change in a share sale, although those who control the company do change. However, earlier this year a court case held that TUPE does apply where the share sale results in a change in control of the company's day to day activities (*Millam v The Print Factory (London) 1991 Ltd* [2007] EWCA Civ 322, see *Issue 2*). So, if the shareholders take an active role in managing the business, the employees can rely on their TUPE rights. When a private equity company invests in another company, it will require a substantial shareholding in return. This gives it considerable control over how the company is run, and often private equity investors are chosen for their expertise in a particular field to help the target company improve its business.

News



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Private equity finance has come under scrutiny this year for its lack of transparency, amongst other things (see *Issue 4* for more on this general debate). In response, there have been a number of measures affecting this type of investment which aim to improve its image. For example, the British Venture Capital & Private Equity Association published new guidance for private equity firms last month (see *Issue 9*). Despite the increased transparency that the guidelines seek to achieve, the Treasury committee is still concerned that they do not ask enough of private equity firms. There is also a concern that non-private equity firms that engage in similar investment activities will not be subject to the new code of conduct. An example of such a business is the Virgin Group, in the news recently due to its bid for Northern Rock. The guidelines' author has called upon the Virgin Group to comply voluntarily with his transparency measures.

The Private Equity (Transfer of Undertakings and Protection of Employment) Bill 2007/8 received its first reading in the Commons on 5 December, but was not debated. It is due to receive its second reading in March next year.

City Code developments

See CLM: ¶6985

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The Takeover Panel has issued amendments to the City Code on Takeovers and Mergers to specifically address takeovers by scheme of arrangement (Takeover Panel Instrument 2007/1). A new Appendix 7 sets out particular rules that should be followed in the case of such a takeover, and various amendments have been made to the provisions of the Code itself (e.g. to the definitions and timescales) so that the Code can be applied more easily to schemes. The new Appendix also specifies which provisions of the Code do not apply to takeovers by scheme of arrangement. In certain cases, such as where the target board does not support the scheme, the Executive must still be consulted on how the Code should apply. As a result of these amendments, the Executive has announced that it intends to withdraw Practice Statement 14 of 2005 (which deals with schemes of arrangement) in due course.

These amendments to the Code will be effective from 14 January 2008. The Executive should be consulted about the application of the Code to transactions that straddle this implementation date. A copy of the Instrument can be found on the Panel's website: <http://www.thetakeoverpanel.org.uk/new/>.

Northern Rock – is administration on the cards?

See CLM: ¶8690+

The government has just announced that it has extended the guarantees given to the customers of the Northern Rock Bank. This has once again raised the issue of the future of the bank. Sale to another commercial organisation is the favoured route but nationalisation or putting the bank into administration are also possibilities that become more likely with the passage of time. Perhaps it is worth discussing the nature of an administration and what it is intended to do.

Administration is an insolvency procedure. So, it is used for businesses which either cannot pay their way on a day to day basis, or where the liabilities outweigh the assets. Administration is a rescue procedure. It is not intended to be the end of the company. Rather, the intention is to take a company in hand, possibly dispose of some assets, and to find a new owner for all or part of the business. Thus, the business may be sold as a going concern, or broken up and sold off piecemeal. Certainly, Northern Rock had difficulty paying its way before the government guaranteed its finances, so was apparently insolvent. The feeling in the press seems to be that, if it entered administration, Northern Rock would be sold off piecemeal. Even if it were nationalised by the government, the de facto route out of that situation would also seem to be a piecemeal sell-off.

News



NEWS ROUND-UP cont...

If an administration fails to rescue a business, then it is almost certain to enter the liquidation process. The intention is then to generate as much money as possible for the creditors of the company. It is the end of the company. Unsecured creditors will usually be paid very little in such circumstances. However, liquidation does not seem to be a possibility for Northern Rock, given that the government guarantees its finances.

Bank deposits in the UK are guaranteed by an industry scheme, currently up to £35,000 per customer. So, customers are protected up to that maximum, but shareholders and others would lose out in a liquidation and possibly also, to some degree, in an administration. The last run on a British bank was the City of Glasgow Bank in 1878. Under company law at that time, the shareholders had unlimited liability and 75% of them were apparently ruined by the collapse of the bank. Today's shareholders in Northern Rock are at least protected by having limited liability.

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Extradition of directors

In *Issue 8* and *Issue 9* of *Company Law Memo 2007 Newsletter*, we dealt with the case of three British bankers, the "Nat West Three", who had been extradited to the US under the Extradition Act 2003. The latest development in the saga is that they have reportedly entered into a plea bargain with the US prosecutor. This means that they pleaded guilty to one charge of "wire fraud". They were initially charged with seven counts each of wire fraud. They will serve a shorter sentence than if they had been convicted of the original charge. However, it does mean that the evidence against them will never be tested in court. There is always a concern with this system that someone might opt for a plea bargain simply because it is the lesser of two evils, even if they had not done anything illegal.

In case of the Nat West Three, press reports indicate that they will each serve a sentence of 3 years and 1 month. They could have served 35 years if they had stood trial and been convicted of the original charges. (As an indication of the severity of the US sentencing regime, by comparison someone convicted of murder in a British court could well be released after 20 years.) Some other EU states, notably France and Germany, do not allow their own nationals to be extradited in this manner.

In another case, three UK executives in the oil industry will be sent back from the US to the UK, where they have agreed to plead guilty to price-fixing. This was part of a plea bargain which they entered into in the US. Sentencing in the US court will be deferred, but the UK sentence would be deducted from any subsequent US sentence. If the UK sentence is long enough, then the US sentence would be waived. This mechanism has been hailed in some quarters as a new approach for dealing with British business people accused of transatlantic financial misdeeds.

News



RECENT CASES

Intention to grant a lender security; undue enrichment

See CLM: ¶4562+

Re Rusjon Limited (in liquidation), Conquest v McGinnis and another [2007] EWHC 2943 (Ch)

A liquidator applied to court for directions on the disposal of the balance of the proceeds of a liquidation. A building company had been in some financial difficulties. Mr McG had tried to rescue the business. As part of these efforts, he had deposited a sum of £100,000 with the company's bank. The bank held a floating charge over the company's assets. The rescue did not succeed and the bank subsequently put the company into administrative receivership. The debt to the bank was repaid in full. The company then went into a creditors' voluntary liquidation. However, there then remained a surplus. This action concerned who was entitled to any, or all, of that surplus. In particular, was Mr McG entitled to recover the £100,000?

The court held that the £100,000 had been paid to the bank as additional security for the company's overdraft. The issue was firstly whether this sum had become a secured debt by common intention between the company and Mr McG, and therefore ranked ahead of the unsecured debts in the liquidation. The court held that it had not become secured. An alternative argument was that the company would be unjustly enriched by failing to return the £100,000 to Mr McG. The court rejected this argument as well. The liquidator was therefore entitled to use the surplus to pay his costs and the unsecured creditors.

Administrative receivership is only available for charges granted before 15 September 2003. One of the arguments for phasing out administrative receivership was that the bank was likely to be paid in full, ahead of other creditors.

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Verbal guarantee not enforceable

See CLM: ¶4696+

Pitts and others v Jones [2007] EWCA Civ 1301

Messrs P, K, M and J were all shareholders in HMS Ltd. Of these shareholders, Mr J held the most shares (700). Mr M held 25, and Messrs P and K held 50 each. Mr J wanted to sell his shares to Mr A for £500,000. In order to do so, he would have to get Messrs P, K and M to waive their pre-emption rights. He told these other shareholders that Mr A had also agreed to buy their shares at a certain price. However, the deal actually involved Mr A purchasing Mr J's shares through a company, WGB Ltd. Mr J would receive the purchase price in instalments over a period of 4 months. Messrs P, K and M would be granted an option to require their shares to be bought after a further 2 months. When this deal structure was explained to Messrs P, K and M, they were reluctant to agree because they would have no security and would be left with no payment for their shares if WGB Ltd became insolvent. Their co-operation was required because the purchase of Mr J's shares was to be financed with the assistance of HMS Ltd (therefore requiring the shareholders' consent to the whitewash procedure). Mr J undertook to pay for the others' shares if WGB Ltd became insolvent. The parties discussed whether this should be put in writing, but Messrs P, K and M agreed to trust Mr J's word.

Mr J was only paid part of the purchase price of his shares and only Messrs K and M exercised their options. However, WGB Ltd went into liquidation. Messrs K and M sought to rely on Mr J's undertaking, which he denied having given.

Although the court found that Mr J had indeed given the undertaking, the nature of his promise constituted a guarantee. If a guarantee is not in writing, it is unenforceable (s 4 Statute of Frauds Act 1677). Messrs K and M were not, therefore, entitled to rely on this guarantee.

For recent announcements on the forthcoming repeal of the prohibition on private companies giving financial assistance, see *CA 2006 implementation*.



RECENT CASES cont...

Transfer of premises to a subsidiary in order to avoid an option to purchase

See CLM: ¶7125

Coles and others (Trustees of the Ward Green Working Men's Club) v Samuel Smith Old Brewery (Tadcaster) (an unlimited company) and Rochdale & Manor (Builders) (an unlimited company) [2007] CA (Civ Div) Lawtel 29/11/2007

The trustees of a working men's club rented premises from the brewery. Under the tenancy agreement, the trustees had an option to purchase the premises, which they exercised. The brewery sought to avoid the option by transferring the premises to its subsidiary. The Court of Appeal held that the transfer from the brewery to its subsidiary was valid, even though it was for a low price. However, it also held that there was no reason why an order for specific performance could not be made against the brewery. So, the Court made such an order, requiring the brewery to make its subsidiary transfer the premises to the trustees. The ploy of transferring the premises to a subsidiary therefore failed to thwart the option agreement.

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Transactions at an undervalue

See CLM: ¶7811+

Hill and Bangham v Haines [2007] EWCA Civ 1284

The concept of a transaction at an undervalue applies to both personal and corporate insolvency. The idea is that an insolvent person or company may try to hide assets from creditors by giving them away or selling them to third parties, typically friends or family. The provisions in the Insolvency Act 1986 allow a court to overturn such transactions and order that the assets should be handed over to the person in charge of the insolvency.

In this case, the issue arose in a personal insolvency where the husband had transferred a property to his ex-wife as part of earlier divorce proceedings. His trustee in bankruptcy had succeeded at the initial hearing in the High Court in arguing that this transfer had been a transaction at an undervalue as nothing of value (no "consideration") had been given by the ex-wife in exchange. The Court of Appeal overturned this decision and upheld the transfer of the property. They held that the wife could have applied under the relevant matrimonial legislation for a court order for transfer of the property. Foregoing a legal right counted as consideration.

UK court asked to overturn US judgment

Robert Clarke v Fennoscandia Ltd [2007] UKHL 56

The applicant alleged that the respondent company and other persons had conspired to stop him becoming president of a US company. He had failed to prove this in court proceedings in the US and the court had ruled against him. The House of Lords was asked to consider granting a declaration that the decision of the court in the US State of Delaware was void because of an alleged fraud on the court by the respondent and others. The House of Lords held that such a declaration could not be given as it was, in effect, simply a method of trying to use a UK court to overturn the judgment given by a US court. Decisions which were the product of a fair hearing in a foreign court could not be overturned in this way.



LEGISLATION

Cross-border mergers

See CLM: ¶6536+, ¶6755

SI 2007/2974

The Cross-Border Mergers Regulations came into force on 15 December. These regulations were discussed in *Issue 8*.

The Takeover Panel has published guidance on the circumstances in which the City Code on Takeovers and Mergers will apply to a cross-border merger (Practice Statement 18 of 2007). Broadly, these are where the Code applies to at least one transferor company in a merger by absorption or a merger by formation of a new company. Parties should consult the Panel Executive at an early stage when considering entering into any cross-border merger that may be subject to the Code. The new Practice Statement is available on the Panel's website: <http://www.thetakeoverpanel.org.uk/new/>.

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Consultation on new mergers and divisions regulations

See CLM: ¶6537

BERR has published a consultation on its draft regulations on the requirement for an expert's report on the draft terms of a merger or division. The draft regulations propose to add a new section to the Companies Act 2006 to enable companies engaged in a merger to opt out of the requirement if all of the shareholders consent. This would bring the mergers provisions in the new Act into line with those on divisions of public companies. The draft regulations would also amend the provisions of the new Act that prevent companies from holding their own shares, to make them consistent with EC law.

The draft Companies (Mergers and Divisions of Public Companies) (Amendment) Regulations 2008 are designed to implement EC Directive 2007/63. The regulations are expected to come into force on 6 April 2008, when the relevant provisions of the Companies Act 2006 (ss 902-941 CA 2006) also come into force.

A copy of the consultation paper and draft regulations can be obtained from the BERR website: www.berr.gov.uk.

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COMPANIES ACT 2006: IMPLEMENTATION

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

The Act received Royal Assent on 8 November 2006.

To see when specific sections of the Act will or have come into force, check the **implementation timetable** on the FL Memo 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 up to date to the recent announcements (see below).

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Implementation delays

Following last month's announcement of major changes to the implementation dates for the new Companies Act (see *Issue 9*), the Government announced the final timetable on 13 December.

In order to give Companies House time to alter its systems and processes to deal with the new filing requirements in the 2006 Act, most of the provisions which were due to come into force on 1 October 2008 will now come into force on 1 October 2009. The provisions that will be implemented on 1 October 2009 are listed below (although note that some individual provisions within the ranges given are already in force). Exceptions that will come into force sooner and changes to the previous announcement are set out below. Further detail on the provisions coming into force in 2008 can be found in the discussion on the Fifth Commencement Order below. Readers can also consult our updated *implementation timetable*.

October 2009

- » Company formation and constitution (ss 1-144)
- » Register of directors (ss 162-167)
- » Protection of directors' residential addresses (ss 240-246)
- » Power to make provision for employees on cessation/transfer of business (s 247)
- » Share capital (ss 540-657)
- » Acquisition of own shares (ss 658-737)
- » Annual returns (ss 854-859)
- » Charges (ss 860-894)
- » Dissolution and restoration (ss 1000-1034)
- » Non-Companies Acts companies (ss 1040-1042)
- » Overseas companies (ss 1044-1059)
- » Registrar of Companies (ss 1060-1120)
- » Foreign disqualification of directors (ss 1182-1191)
- » Business names (ss 1192-1208)
- » Misc provisions (ss 1180, 1181, 1283)

Exceptions and changes

In these lists, * denotes a new change in the implementation timetable from last month's announcement.

Due to come into force on 6 April 2008

- » Time limit for claims arising from entry in register of shareholders (s 128*)
- » Transferability of shares (s 544*)
- » Minimum share capital requirement for public companies (ss 761-767*)
- » Inspection of a public company's register of interests in its shares (ss 811(4), 812, 814*)
- » References to requirements of CA 2006 (s 1172*)
- » Removal of special provisions about accounts and audit of charitable companies (s 1175 (but only re. Part 1 Sch 9)*)
- » Definitions re. other provisions brought into force on 6 April 2008 (ss 1161, 1162, 1164, 1165, 1169, Sch 7*)

CA 2006



COMPANIES ACT 2006: IMPLEMENTATION cont...

Due to come into force on 1 October 2008

- » Objections to company names (ss 69-74)
- » Disclosure of company name (ss 82-85)
- » Requirements to have one "human" director and only directors over 16 (ss 155-159)
- » Remaining directors' duties: to avoid conflicts of interest and duty, not to accept benefits from third parties and to declare interests in proposed transactions (ss 175-177)
- » Shareholders ratifying breach of duty (remainder of ss 180-181)
- » Directors' duty to declare interests in existing transactions (ss 182-187)
- » Reduction of share capital by solvency statement (ss 641(1)(a), (2)-(6), 642, 643, 652, 654*)
- » Repeal of the prohibition in CA 1985 on financial assistance for acquisition of shares in private companies
- » Requirement for approval of donations to/expenditure relating to independent election candidates (ss 362-369)
- » Power of the court to grant relief from liability (s 1157)
- » Voting rights of institutional investors (ss 1277-1280)

Due to come into force on 1 October 2009, not 6 April 2008

- » Register of secretaries (s 270(3)(b)(ii)*; ss 275-279)

Not being implemented for the time being

- » Notice of appointment of proxies (ss 327(2)(c), 330(6)(c))
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Fifth Commencement Order

The Companies Act 2006 (Commencement No. 5, Transitional Provisions and Savings) Order 2007 (SI 2007/3495) was published on 17 December. This Fifth Commencement Order sets out the provisions that will come into force on 6 April, 29 June and 1 October 2008. In addition to timetabling these implementation phases, the Order also sets out numerous transitional provisions. The provisions to be brought into force and the most significant transitional measures are outlined below.

6 April 2008

The bulk of the provisions coming into force on 6 April 2008 concern **company accounts and audit** (ss 380-416, 418-462, 464-484, 489-539, 1209-1241, 1245-1264, Sch 10, 11, 13, 14; see CLM ¶4185+). Corresponding regulations on the subject will also come into force on the same date. Generally speaking, the requirements on the form and content of accounts and reports will apply to those prepared in respect of financial years beginning on or after 6 April 2008.

The provisions relating to **company secretaries** will release private companies from their obligation to appoint a company secretary (ss 270-274, 280; see CLM ¶4115+). Public companies, on the other hand, will still have to have a secretary. Note that the provisions relating to the register of secretaries are not due to come into force until 1 October 2009, in common with many of the other registers.

Some provisions relating to **shares** will be brought into force ahead of the implementation of most of the provisions on this topic:

- » **share transfers.** The general provisions relating to share transfers, which deal with issues such as certificates and registration of transfers, are being implemented (ss 544, 768-782; see CLM ¶1825+). The "paperless holding" provisions will also come into force, together with regulations on the subject (ss 783-790);
- » **distributions** (ss 829-853; see CLM ¶1600+);
- » the procedure for requesting to inspect or copy a public company's **register of interests in shares** (ss 811(4), 812, 814; see CLM ¶3990+);
- » the prohibition on **private companies** offering their shares to the public (ss 755-760; see CLM ¶986+); and

CA 2006



COMPANIES ACT 2006: IMPLEMENTATION cont...

- » the minimum share capital requirements for **public companies** (ss 761-767; see CLM ¶510+).

The provisions of the new Act relating to **debentures** will be brought into force at the same time (ss 738-754; see CLM ¶4581+).

The transactional provisions on **schemes of arrangement** (ss 895-901; see CLM ¶6500+) and **mergers and divisions** of public companies (ss 902-941; see CLM ¶6536+) will also be brought into force. See *Legislation* for new draft regulations on mergers and divisions, which propose changes to the CA 2006 provisions.

Various other miscellaneous provisions are included in this implementation phase:

- » **execution of documents** (s 44; see CLM ¶3486+). This is a significant provision, affecting all companies. It will allow documents to be executed by “two authorised signatories” or by one director whose signature is witnessed. Authorised signatories will be directors and secretaries. This will allow private companies with a sole director and no secretary to execute documents, while still allowing those secretaries that remain in office to be an authorised signatory;
- » **liquidation expenses** (s 1282; see CLM ¶7997). The effect of this provision was discussed in *Issue 7*, along with the Insolvency Service’s consultation on the subject;
- » two provisions relating to the **register of shareholders** will come into force early. This will reduce the time limit for bringing claims relating to making or deleting an entry in the register to 10 years (instead of the current 20 years), and therefore allow companies to remove entries 10 years after a shareholder has left the company (ss 121, 128; see CLM ¶3922, ¶3936);
- » consents required for certain **prosecutions** (s 1126; see CLM ¶7183);
- » a provision stating that references to the **requirements of the new Act** include requirements set out in regulations made under CA 2006 (s 1172); and
- » the **definitions** of certain words and phrases relating to the other provisions brought into force: “undertaking” etc, “banking company”, “banking group”, “insurance company” etc, “dormant company”, “credit institution” and “working day” (ss 1161, 1162, 1164, 1165, 1169, 1173).

As with other implementation phases, other provisions are brought into force as far as necessary to give effect to or to interpret the provisions brought fully into force (see our *implementation timetable* for details).

29 June 2008

The provisions setting out the duties of **third country auditors** are due to come into force on this date (ss 1242-1244, Sch 12).

1 October 2008

The implementation of most of the provisions that were originally due to come into force on this date has been postponed to 1 October 2009 (see above). However, certain provisions will still come into force on 1 October 2008.

The remaining provisions regarding **directors** will be implemented as planned:

- » **appointment** of directors (ss 155-159; see CLM ¶2230+). This includes the requirement for companies to have at least one “human” director. However, an important transitional provision gives some companies extra time for compliance (para 46 Sch 4 SI 2007/3495). If a company did not have a “human” director on 8 November 2006 (i.e. when CA 2006 received Royal Assent) but it complied with the requirements as to the number of directors that were in force at the time, it does not have to appoint a “human” director until 1 October 2010. This will be particularly useful for companies in large groups, where their parent companies are often directors, as it will give the groups time to adjust their structures as necessary;

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- » directors' **duties** (ss 175, 176; see CLM ¶2333+). The outstanding "general" duties to avoid conflicts of interest and not to accept benefits from third parties are finally going to be brought into force (the other general duties have been in force since 1 October 2007). The new Act allows directors without an interest in the matter to authorise conflicted directors to continue to act. Public companies will have to include a provision to this effect in their articles, but directors of private companies will be able to do this unless their articles state that they cannot. As a transitional arrangement for private companies incorporated before 1 October 2007, this option will only be available if the shareholders agree by ordinary resolution (para 47 Sch 4 SI 2007/3495); and
- » directors' **interests** (ss 177, 182-187; see CLM ¶3308+). These provisions require directors to disclose their interests in both proposed and existing transactions and arrangements.

A significant repeal will come into force on 1 October 2008, lifting the prohibition on **private companies** giving **financial assistance** for the purchase of their own shares (s 1295, Sch 16 repealing ss 151-153, 155-158 CA 1985 as they apply to private companies; see CLM ¶5557+). Therefore, private companies wishing to give financial assistance will be able to do so from October 2008 without having to follow the whitewash procedure. The Fifth Commencement Order specifically states that the repeal of this prohibition will not resurrect the effect of previous case law (if it did, then financial assistance by private companies would still be unlawful) (paras 51, 52 Sch 4 SI 2007/3495). This is to ensure that the repeal of the prohibition (in s 151 CA 1985) will be effective. However, the old case law laid down a wider prohibition than CA 1985. It held that a company could not reduce its paid up or nominal capital in any way that was not permitted by statute (*Trevor v Whitworth* (1887) 12 App Cas 409). Therefore, where the financial assistance would also result in a reduction of capital without following the proper procedures, the old case law will still prohibit the transaction.

The other provisions coming into force at the same time are:

- » the procedure for **objecting to a similar company name** in which the person objecting has goodwill (ss 69-74);
- » the **trading disclosures** requirements (ss 82-85; see CLM ¶585). These provisions and their related regulations set out the information that companies have to make public in different ways, e.g. including their registered name on all correspondence and websites;
- » the court's power to grant directors, other officers and auditors **relief from liability** in appropriate cases (s 1157; see CLM ¶2505+); and
- » provisions setting out the information that certain types of investment institutions (including pension schemes, unit trust schemes and open-ended investment companies) have to give to institutional investors (ss 1277-1280).

Again, other provisions are brought into force as far as necessary to give effect to or to interpret the provisions brought fully into force (see our implementation timetable for details).

Amendments to provisions in force

The Fifth Commencement Order addresses some problems that have come to light concerning provisions of the new Act brought into force in October 2007.

The general provisions on **resolutions at shareholder meetings** (ss 281, 282) do not allow resolutions to be carried by the **chairman's casting vote** (see CLM ¶3276). The Fifth Commencement Order enables companies with a provision in their articles before 1 October 2007 for the chairman to have a casting vote in their articles to rely on it, and for those companies that have removed the provision since 1 October 2007 because of the change to revert to it if they want to (para 2(5) Sch 5 SI 2007/3495). This change will be implemented on 14 January 2008.

Since 1 October 2007, private companies have not been required to hold **AGMs** (see CLM ¶3777+). However, if a private company's articles require it to hold AGMs, it is still under an obligation to do so. The Third Commencement Order (SI 2007/2194) clarified that Table A 1985 did not require companies to hold AGMs, even though some of its provisions required certain procedures to be followed at AGMs (e.g. the retirement of directors by rotation). However, Table A 1948 does require companies to hold AGMs. The Fifth Commencement Order includes a saving provision allowing private companies governed by Table A 1948 to benefit from the removal of the obligation, if they passed an elective resolution not to hold AGMs before 1



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October 2007 (para 2(6) Sch 5 SI 2007/3495). This change will be implemented on 31 December 2007.

Table A

BERR has announced that it will not be making any transitional amendments to Table A to account for the April changes because Table A does not conflict with any of the provisions in this implementation phase. One area of potential conflict was the company secretary. From 6 April 2008, private companies will no longer have to have a secretary. Although Table A includes provisions relating to company secretaries, it does not require private companies to have a secretary. To avoid any confusion, the Fifth Commencement Order includes a provision stating that provisions in articles dealing with the secretary (e.g. concerning his appointment, authority and role) do not imply an obligation to appoint a secretary (para 4 Sch 4 SI 2007/3495).

New regulations

In addition to the Fifth Commencement Order, BERR has announced that it has published a number of other regulations. Some are in draft pending approval by Parliament (affirmative resolution), others have been made and will be passed unless Parliament objects (negative resolution). The regulations mainly concern those parts of the new Act due to be brought into force on 6 April 2008.

Regulation	Status
Fifth Commencement Order (together with explanatory memorandum)	made, but subject to negative resolution
Small Companies and Groups (Accounts and Directors' Report) Regulations 2008 *	in draft pending affirmative resolution
Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008 *	
Companies Act 2006 (Amendment) (Accounts and Reports) Regulations 2008 *	
Statutory Auditors (Delegation etc) Order 2008 *	
Companies (Late Filing Penalties) Regulations 2008 *	
Statutory Auditors and Third Country Auditors Regulations 2007 *	made, but subject to negative resolution
Independent Supervisor Appointment Order 2007 *	
Companies (Fees for Inspection and Copying of Company Records) (No. 2) Regulations 2007	in draft pending affirmative resolution
Companies (Trading Disclosures) Regulations 2008 *	
Overseas Companies Regulations 2008	in draft, consultation open

The Fees Regulation was published on OPSI on 20 December (<http://www.opsi.gov.uk/si/si200735>). At the time of writing, the drafts of the regulations marked * were not yet available, although they should be added to the BERR and OPSI websites soon. Previous drafts of most of these regulations were published earlier this year (see *Issue 6*).

The draft **Overseas Companies Regulations 2008** have been published for the first time (for overseas companies generally, see CLM ¶140+). BERR has opened a consultation on these regulations. In a change to the Government's intentions described in the February consultation

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paper, the draft regulations apply to overseas companies with either a branch or a place of business in the UK ("Companies Act 2006 – A Consultative Document" (February 2007)). Branches and places of business are collectively referred to as "establishments" in the regulations. When the changes come into force, the same requirements will apply to all establishments in the UK, making compliance easier. Some of the regulations amend and adapt provisions of the 2006 Act for use by overseas companies.

The regulations will impose various **registration and filing** requirements on overseas companies with an establishment in the UK. These include requirements to file:

- » accounts and reports (either to the same level as stipulated by the overseas company's "home" law, or to comply with the standards set out in the regulations if the home law does not impose any such requirements);
- » details about any insolvency proceedings applicable to the establishment; and
- » the residential addresses of directors/permanent representatives. These details will be protected in a similar way to domestic directors' residential addresses.

The regulations also deal with certain "housekeeping" matters. UK establishments will be subject to **trading disclosure obligations** that are comparable to those that will apply to domestic companies. They also set out **how contracts can be executed** by establishments.

UK establishments will also have to register **charges** over their property in the UK. The regulations address the issue of overseas companies that have not registered a branch in the UK making precautionary registrations of charges (so-called "Slavenburg" companies), a practice that arose following case law on the subject. The regulations will only apply to overseas companies with a registered establishment. Therefore, Companies House will no longer have to maintain the "Slavenburg register".

The draft regulations and consultation can be found on BERR's website: <http://www.berr.gov.uk/bbf/co-act-2006/draft/page40411.html>. The consultation is open until 7 March 2008.

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