Issue 1 - Spring 2015

UK Corporate Briefing

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Welcome to the first edition of Dentons' UK Corporate Briefing, a quarterly summary of the most significant recent and forthcoming developments in company law and corporate finance regulation in the UK.

Legislation update

Changes to increase transparency and accountability, remove red tape and prevent abuse

The Small Business, Enterprise and Employment Act received Royal Assent on 26 March 2015. It covers a diverse range of subjects, including changes to companies legislation. These are designed to increase corporate transparency and accountability, remove red tape around company administration and prevent abuse.

Transparency:

There are three key elements to the transparency provisions.

- UK-incorporated companies will have to collect information about any person with significant control over the company (a **PSC**). This is broadly an individual who, directly or indirectly, holds over 25 per cent of the shares or voting rights in the company, can appoint or remove a majority of the directors or who can otherwise exercise significant influence or control over a company. Companies will have to keep a register of PSCs and file information about them at Companies House. These rules will apply to all UK-incorporated companies other than publicly traded companies that have to make disclosures under Disclosure and Transparency Rule 5 and any companies specifically designated under secondary legislation.
- There will be a ban on corporate directors, though the Government may by regulation make exceptions to this. The Government has been consulting on what form the exceptions should take. The latest proposal on which it is now consulting is to allow corporate directors provided all the directors of the corporate director are natural persons and their details are available in a public searchable register.

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Please contact us if you would like to discuss any subject covered in this issue.

- There will be a ban on bearer shares. Existing holders of bearer shares will be able to convert their shares into registered shares, subject to following the procedures and timetable in the legislation.

In its timetable, BIS has indicated that companies will have to keep a PSC register from January 2016 and file PSC information at Companies House from April 2016. The ban on non-exempt corporate directors is likely to come into force in October 2015, with a one-year transition for existing non-exempt corporate directors. The ban on bearer shares will come into force two months after Royal Assent, with a nine-month surrender period.

Accountability:

There are changes to the rules on shadow directors, directors' disqualification and the powers of insolvency practitioners. The key changes are as follows.

- The general statutory duties of directors in the Companies Act 2006 will apply to shadow directors (i.e. those whose instructions and decisions the other directors accept and implement) where and to the extent that they are capable of applying.

- UK directors' disqualification proceedings will be possible where a person has committed an offence in connection with running a company overseas. It will also be possible, subject to a public interest test, to bring disqualification proceedings against a person who, though not a director, caused a director's unfitness resulting in that director's disqualification. New powers will enable the Secretary of State to apply for a compensation order against a disqualified director where the misconduct has caused identifiable loss to creditors.

- The ability to bring wrongful and fraudulent trading actions, currently available to liquidators, will additionally be available to administrators. Both administrators and liquidators will be able to assign those claims, as well as claims for preferences and transactions at an undervalue, to third parties.

Removing red tape:

The key changes are as follows.

- Companies will (probably from April 2016) no longer have to file an annual return. Instead they will have to check and confirm that they have delivered, or are delivering with their confirmation statement, the information they were required to deliver to Companies House during the preceding 12 months.

- Private companies will (probably from April 2016) be able to opt out of keeping all or any of their registers of members, directors, directors' residential addresses, secretaries and PSCs. A company doing so will have to ensure that equivalent information is available at Companies House, where it will be on the public register and available for inspection.

- On a statement of capital it will (probably from October 2015) no longer be necessary to specify the amount paid up and unpaid on each share. Instead companies will have to state the total amount unpaid on all shares.

- Companies House will (probably from October 2015) be able to strike companies off the public register more quickly. For voluntary strike-off, the time will come down from 3-4 months to about 2 months. For compulsory strike-off, it will come down from 5-6 months to about 3.5 months.

- Simplification of the Companies House, audit authority and shareholder notification requirements imposed on a company and its auditor when the auditor resigns, is removed or not reappointed. (These auditor-related changes are in the Deregulation Act 2015, which also received Royal Assent on 26 March 2015. There is as yet no commencement date.)

Prevention of abuse:

There will be some changes to Companies House filing procedures designed to help prevent abuse.

- The day of a director's date of birth will be kept off the public record at Companies House to reduce the risk of identity theft. (This will not apply to private companies opting to use the public register in place of a private register.)
- There will be a procedure under which third parties can object to a company's choice of registered office where the company has no authority to use that address.
- On appointment of a director or secretary it will be the company that must confirm to Companies House that the person has consented to act rather than the person themselves. There will be a procedure under which someone appearing at Companies House as a director can apply to have their name removed if they did not consent to act.

Small Business, Enterprise and Employment Act 2015; Deregulation Act 2015

Clarification of share buyback rules

Regulations introduced in 2013 relaxed certain Companies Act 2006 rules that would otherwise apply when a company undertakes a buyback of its shares.

New regulations, which came into force on 6 April 2015, make further changes to clarify some provisions introduced by the 2013 regulations. The new regulations clarify that:

- A private company, if authorised by its articles, can make small buybacks out of capital in a financial year without being subject to payment out of capital rules which usually apply;
- The maximum total price the company can pay under this exemption is the lower of £15,000 and the nominal value of 5 per cent of the company's fully paid share capital at the beginning of the financial year; and
- The accounting treatment of buybacks made under these provisions is consistent with conventional buybacks out of capital.

Where a company is funding a buyback out of capital under the reduced procedural rules introduced in 2013 specifically for employee share schemes, the new regulations clarify the timing between surrender of the shares and payment for them.

The Companies Act 2006 (Amendment of Part 18) Regulations 2015

An end to cancellation schemes in takeovers

Regulations preventing the use of cancellation schemes of arrangement in takeovers came into force on 4 March 2015. This is significant as, in recent years, over half of UK takeovers have been by cancellation scheme. Cancellation schemes involved cancelling the target's shares through a reduction of capital and reissuing new shares in the target to the bidder, so avoiding the stamp duty that would usually arise on a transfer of shares. The Chancellor's Autumn Statement announced the end of cancellation schemes as an anti-avoidance measure.

The Companies Act 2006 now prevents a company from reducing its share capital as part of a scheme, the purpose of which is the acquisition of all the shares, or all the shares in a class, of the company. There is a carve-out to allow a scheme to insert a new holding company into a group. However, all or substantially all the members of the company must become members of the new holding company and their shareholdings must remain in substantially the same proportions. It will therefore still

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be possible to use cancellation schemes in transactions such as demergers. Schemes of arrangement in takeovers will still be possible, provided they are transfer schemes.

The Companies Act 2006 (Amendment of Part 17) Regulations 2015

Simpler rules for company and business names

New regulations, which came into force on 31 January 2015, have simplified the rules regulating the words that companies may use in their registered and trading names.

Under the new regulations over 20 fewer words and expressions are designated "sensitive", meaning that their use no longer requires the approval of the Secretary of State. Those removed include: European, group, holding, international, national and United Kingdom.

Fewer words are also now disregarded when deciding whether one name is the "same as" another on the register at Companies House. Those removed include: exports, group, holdings, imports, international and services. So, for example, XYZ Limited and XYZ Services Limited are no longer regarded as the same name, whereas previously they would have been. There have also been updates to the list of permitted characters, signs, symbols and punctuation that companies may use in their names.

The rules on a company displaying its registered name at locations shared by six or more companies have also been relaxed. Previously each company had to display its registered name for at least 15 continuous seconds at least once every three minutes. Now, an alternative is for the company's registered name to be on a register available for inspection on demand at that location. Where five or fewer companies use the same location there is no change; each company must continue to ensure that its name is displayed continuously.

All these changes also apply to limited liability partnerships.

The Company, Limited Liability Partnership and Business Names (Sensitive Words and Expressions) Regulations 2014; The Company, Limited Liability Partnership and Business (Names and Trading Disclosures) Regulations 2015

Case law update

Dealing with requests to inspect a company's register of members

The High Court has considered two issues regarding a request to inspect a company's register of members. First, whether a request is valid if it does not contain all the information required by the Companies Act 2006 and, secondly, the circumstances in which a request by a non-member satisfies the proper purpose test to which the Act refers.

Background:

Section 116 of the Companies Act 2006 gives members of a company and others the right to inspect and ask for a copy of the company's register of members. The section prescribes the information which the request must contain. This includes the purpose for which the information will be used and whether it will be disclosed to any other person, in which case the request must also include certain details about the recipient.

A company must within five working days of receipt of a section 116 request either comply with it or apply to court. If the court considers that the request is not

The court concluded that, on the facts, the defendant's activities would not be in the interests of the Burberry shareholders and that, therefore, the request was not for a "proper purpose".

for a proper purpose, it must direct the company not to comply. The Act does not set out what is, or is not, a proper purpose.

Facts:

Burberry Group plc received a section 116 request from the defendant, who ran an agency tracing lost members in public quoted companies. His stated purpose was to help members of the company who might otherwise be unaware of their rights to reassert them. However, his request did not include the names and addresses of the "specialist researchers" to whom the information from the register would be disclosed.

Decision:

The court held that the defendant's request was invalid as it had not included all the information which section 116 requires. Receipt of an invalid request did not set running the five working days in which the company had to comply with a request or refer the matter to court.

On the proper purpose question, the court took into account guidance published by the Institute of Chartered Secretaries and Administrators. This provides examples of what ICSA considers should form a proper purpose and what is likely to be an improper purpose. Among the likely improper purposes it identifies a request made by an agency specialising "...in identifying and recovering unclaimed assets for their own commercial gain by then contacting and extracting commission or fees from the beneficiaries, where the company is not satisfied that such activity is in the interests of shareholders.".

In this case the court concluded that, on the facts, the defendant's activities would not be in the interests of the Burberry shareholders and that, therefore, the request was not for a "proper purpose". It had regard in particular to the fact that Burberry had already employed tracing agents on better terms and to the company's concerns about how the defendant would share the information.

Comment:

Although the case makes clear that companies do not need to comply with a request that does not meet the full requirements of the Act, companies should be aware that the five working day time limit is otherwise a strict one. Any company which considers it might receive a section 116 request should make sure it has procedures in place which will enable it to deal with the request promptly.

On the proper purpose test, the court distinguished between requests by members and requests by non-members. For the former there is a strong presumption of shareholder democracy. This means a member should usually be granted access where the purpose concerns his or her rights. On the other hand, a member of the public seeking access is an outsider. The emphasis switches from shareholder democracy to protecting the shareholders as a class.

Burberry Group plc v. Richard Charles Fox-Davies [2015] EWHC 222 (Ch)

Share purchase agreement: validity of earn-out notice

The Court of Appeal has considered whether a notice setting out a buyer's calculation of an earn-out was invalid because the buyer failed to comply with the terms of the underlying share purchase agreement in preparing the calculation.

Background:

Where a transaction involves an earn-out (i.e. deferred payment calculated by reference to the post-completion performance of the target), the share purchase agreement will set out in detail how the earn-out is to be calculated. In this case, which involved the sale of two groups of companies, the agreement provided for the earn-out to be by reference to the pre-tax profits of those groups for the two calendar years ending 31 December 2011.

Following completion, the buyer changed the accounting reference date of the groups. This meant the audited accounts for the period required by the share purchase agreement were not available when the buyer came to calculate the earn-out. As a result, the buyer based the earn-out on the audited consolidated accounts of the buyer's group for a different period and otherwise on management accounts. The court had to consider whether this invalidated the notice, i.e. made it of no effect, or simply rendered it defective but capable of correction by expert determination under the terms of the share purchase agreement.

Decision:

The Court of Appeal held that the buyer had not served a valid notice. The court held that there is a boundary between errors of the kind which do not invalidate a notice, such as accidental mathematical mistakes, and substantial departures from the contractual terms, which do. In this case the wholly non-compliant basis on which the buyer presented the notice was on the invalidity side of that line.

Comment:

This decision is not surprising on its facts. However, it is a reminder that it is important to ensure that an earn-out calculation follows the exact requirements of the underlying share purchase agreement. It is also a reminder that the party which makes the calculation, usually the buyer, must be in a position to comply with those requirements and should not prejudice its ability to do so.

Treatt plc v. Barratt and others [2015] EWCA Civ 116

Regulatory update

Takeover Code:

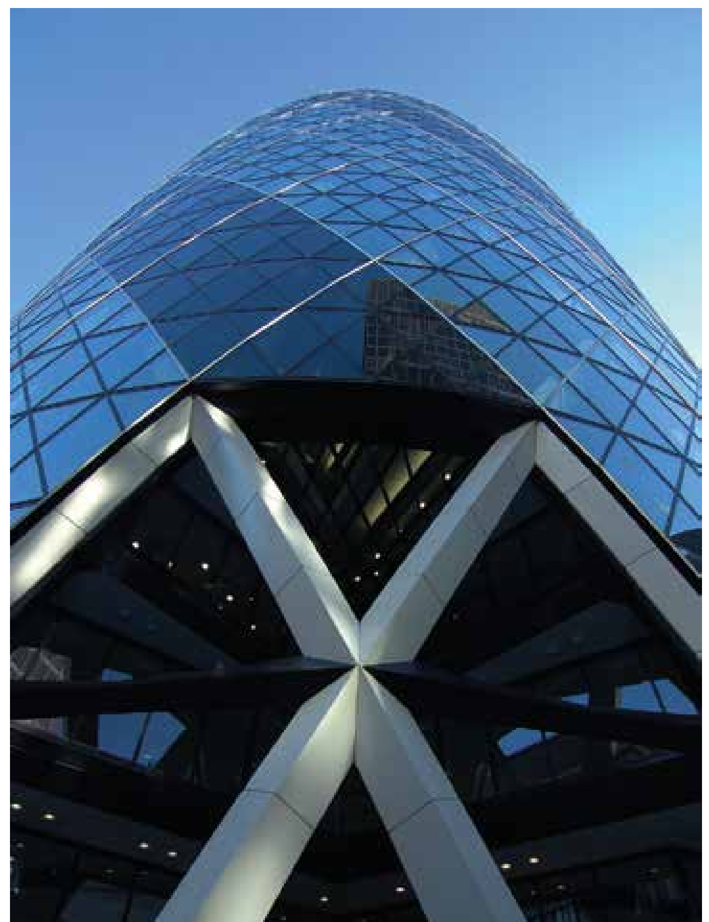
Miscellaneous changes and post-offer undertakings and intention statements

January 2015 saw the Takeover Panel introduce two sets of changes to the Takeover Code.

On 1 January various changes, largely clarificatory or to reflect current practice, took effect. These included:

- Changes to the disclosure regime for irrevocable commitments, letters of intent and interests in securities;
- Requiring potential competing bidders to clarify their position within a fixed Day 53 deadline after the first bidder's offer document;
- Codifying the Panel's existing default auction procedure with some adjustments;
- Increasing the regulation of "no increase" and "no extension" statements.

On 12 January, the new framework put forward by the Panel for post-offer undertakings and intention



statements took effect. Following Pfizer Inc.'s possible offer for AstraZeneca plc in 2014, the Panel concluded that the Code did not distinguish adequately between voluntary commitments, on the one hand, and statements of intention, on the other. The new framework addresses this issue and gives the Panel increased powers to monitor commitments. The key features are as follows.

- A post-offer undertaking is a commitment by a party to an offer to take, or not take, a particular course of action after the end of the offer period. A party giving a post-offer undertaking must comply with it for the period specified in the commitment, unless a specific qualification or condition set out in the undertaking applies.
- A post-offer intention statement is a statement of intention by a party to an offer to take, or not take, a particular course of action after the end of the offer period. It must be an accurate statement of the party's intentions at the time it is made and must be based on reasonable grounds.
- A party wishing to give a post-offer undertaking must consult the Panel before giving it. Once the undertaking is in place, the Panel may require the party to file written reports regarding its compliance with the undertaking. The Panel can also require the party to appoint an independent supervisor to monitor compliance.
- A party which has given an intention statement and wishes to depart from it must consult with the Panel.

Miscellaneous amendments to the Takeover Code RS2014/1; Post-offer undertakings and intention statements RS2014/2

Listing, Prospectus, Disclosure and Transparency Rules:

Miscellaneous changes

The Financial Conduct Authority has implemented several relatively small changes to the Listing, Prospectus and Disclosure and Transparency Rules. These largely clarify existing rules and update and correct guidance.

One development that will be helpful to issuers is that the FCA has narrowed the range of circulars requiring its advance approval. From 1 April 2015 only the following will require advance approval:

- Class 1 circulars;
- Related party circulars;
- Circulars relating to share buybacks where the Listing Rules require a working capital statement;
- Circulars relating to a reconstruction or refinancing where the Listing Rules require a working capital statement;
- Circulars proposing cancellation of a premium listing; and
- Circulars proposing a transfer of a premium listing into or out of the investment company category or a transfer from premium listing to standard listing.

The FCA anticipates that narrowing the scope of its review will remove uncertainty, cost and inconvenience to issuers without damaging shareholder protection.

The Listing, Prospectus and Disclosure and Transparency Rules (Miscellaneous Amendments No 3) Instrument 2015.

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CSCS27904-UK Corporate Briefing Newsletter_V3 — 16/04/2015