

Companies Bill 2005 - The Final Chapter



Introduction

For those of you who have not received our previous papers, or indeed have been on a desert island for much of the last year – a quick update.

More than eight years in preparation, with over 1,200 sections and 15 appendices, and designed to save UK companies an estimated £250 million per year as a result of its intended emphasis on deregulation, the Companies Bill 2005 finally reached the statute books on 8th November. The Secretary of State for Trade and Industry has characterised the legislation as one third purely a restatement of existing laws, one third as almost a restatement – putting the legislation in simpler language – and one third genuinely new. We will look at these comments below. Before you all rush to buy your copy of the Act (in fact it is not likely to be available until the end of the month), you should know that you will have plenty of time to read it. Only a few sections are coming into force either at once or very soon – those specifically connected with the EU takeover transparency directives and some relating to e-commerce and shareholders' information. In February 2007 the Government will provide us with a full implementation timetable. Latest comments suggest the Act will not be fully in force until October 2008, some ten years after it first started on its long journey. So we will all have plenty of time to try and understand it.

Why the delay?

Despite the enormous size of the Act itself there is also a vast amount of secondary legislation to be implemented. Depressingly, in our view, rather too many sections provide for the making of supplemental regulations by the Secretary of State. If the financial services legislation is anything to go by, we could be looking at hundreds of further pages of new rules in addition to the Act itself. The Government has also still to finalise its proposals as to how the Act will be implemented with regard to the several million existing UK companies. The consultation process has finished and we await the results.

Was it worth it?

It will be several years before we will be able to give some sort of realistic answer to this question but it is worth considering a few points. Despite the furore in the press over the last few weeks in connection with some very specific clauses (dealing predominantly with the requirement of certain companies to disclose relevant information relating to their supply chains and other relationships in their annual business review), let's not forget the purpose of the Act and to which companies it will predominantly apply. The original idea was to modernise and simplify UK company law and to make life easier through extensive deregulation. One result hoped for was keeping the UK in the forefront of investors' minds when they look for places to set up

businesses. Interestingly (and this is where the phrase “joined up government”, might be relevant), there are currently significant mutterings by some of those in the multi-national part of the business community expressing concerns as to the levels and complexity of certain areas of UK taxation. The Treasury is making comforting noises and has just set up some heavy-weight working parties to address the issues. However, there is not a lot of point rewriting UK company law to attract foreign businesses if the tax rules then drive them abroad! We would hope these matters are treated with the urgency they require.

We should also say that the structure of the Act is not encouraging. The largest ever piece of UK legislation is not as radical as we had hoped. Professor Len Sealey, in an excellent critique last month in the Sweet & Maxwell Company Law Newsletter, expressed his disappointment with several aspects of the legislation; comments with which we agree. Almost all of the basic structure of company law essentially remains as it was before this process started. Often the draftsman has removed the requirement to take certain actions, only to require another set of rules to be complied with. What there has not been to our mind (despite the Minister's above comments) is a radical overhaul of the law. To form a company (which is probably as quick, simple and cost effective here as anywhere else in the world) currently requires the preparation and filing of only four documents. It will still do so in the future but now one of them (the Memorandum of Association – the Constitution) can be one page rather than several pages long.

Instead of broad principles the draftsman seems to have continued the trend in UK drafting these days (to be much deplored) of trying to spell out too many eventualities in minute detail. Will small companies and their advisors, if they even have any, be prepared to spend the time and money required getting to grips with this legislation? We very much doubt it. The larger and quoted companies will presumably already have advisors preparing for the Act's implementation.

One of the most difficult areas – and this arose in the first instance from the commendable idea of a statutory definition of directors' duties – has resulted in a list of statutory matters which directors will need to consider when fulfilling their duties as such. These will include the impact of those decisions on customers and suppliers and on the environment and employees. Again, for the larger companies, this may not be a practical (although it may be a legal) problem, but it will not be so easy for the five-person firm trying to keep its head above water. We also need to remember that 90% or more of UK companies are small, family run organisations, and the legislation is supposed to be directed at them. However, until the DTI issues its guidelines on this part of the Act next year we can not say much more. We will in any case be putting together a much more detailed paper on certain technical areas of this topic in the next few weeks to lay the groundwork for later commentaries.

We conclude by saying that it is probably an opportunity missed, although the Act does simplify many areas of existing company law. This is certainly welcome. For now though it would probably be best for all concerned if judgment was reserved.

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