

UK corporate update.

Companies Act 2006: publication of draft statutory instruments

The DTI has published certain draft statutory instruments to be made under the Companies Act 2006, namely:

- The Companies (Registration) Regulations 2007 (to come into force on 1 October 2008) dealing with certain aspects of forming a company under the Companies Act 2006;
- The Companies (Shares, Share Capital and Authorised Minimum) Regulations 2007 (to come into force on 1 October 2008) addressing issues concerning shares, share capital and a company's authorised minimum capital, including issues relating to reductions of share capital; and
- The Companies (Fees for Inspection and Copying of Company Records) Regulations 2007 (to come into force on 1 October 2007) giving details of the fees for the right to inspect and acquire a company's records.

Further detail on the content of each of the draft regulations is covered below:

The Draft Companies (Registration) Regulations 2007

The draft Companies (Registration) Regulations 2007 dealing with certain aspects of forming a company under the Companies Act 2006 will come into force on 1 October 2008. These draft regulations:

- Set out the form of the memorandum of association under section 8 of the Companies Act 2006 (for both a company having a share capital and a company not having a share capital). In both cases, the memorandum takes the form of a single statement that the subscribers to the memorandum wish to form a company under the Act and that they agree to become members of the company (and, in the case of a company having a share capital, that they agree to take at least one share each).
- Prescribe that the statement of capital and initial shareholdings under section 10(3) of the Companies Act 2006 must contain the names and addresses of the subscribers to the memorandum.

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- Prescribe that the statement of guarantee under section 11(2) of the Companies Act 2006 must contain the names and addresses of the subscribers to the memorandum.
- Set out the form of assent for each of:
 - the re-registration of a private limited company as an unlimited company; and
 - the re-registration of a public company as a private unlimited company.

The draft Companies (Registration) Regulations 2007 can be found at:

<http://www.dti.gov.uk/files/file39533.doc>

The Draft Companies (Shares, Share Capital and Authorised Minimum) Regulations 2007

The draft Companies (Shares, Share Capital and Authorised Minimum) Regulations 2007 will come into force on 1 October 2008. These regulations:

- Prescribe the euro equivalent to the £50,000 authorised minimum in relation to the nominal value of a public company's allotted share capital.
- Prescribe how the authorised minimum is calculated where the share capital is denominated in currencies other than sterling or euros where the effect of a
- Company's reduction in share capital is that the share capital has been reduced to below the authorised minimum.
- Set out the procedure for a public company to follow when it is required to re-register as a private company following a re-denomination of its shares and a related reduction of capital.
- Provide the limited circumstances in which a reserve arising from a reduction of capital may be distributed by way of exceptions to the prohibition on the distribution of reserves arising from the reduction of a company's share capital under section 654(1) of the Companies Act 2006. The prohibition on distribution will not apply where:
 - the reduction is a court-confirmed reduction under sections 645 to 651 of the Companies Act 2006;
 - the reduction is supported by a solvency statement under sections 642 to 644 of the Companies Act 2006 but only to the extent that the reserve is treated as a realised profit; or
 - the company is an unlimited company.
- Prescribe when a reserve is to be treated as a realised profit for the purposes of Part 23 of the Companies Act 2006 (distributions).
- Prescribe the particulars of shares that must be included in any statement of capital under the Companies Act 2006.

- Prescribe the information to be included in a return of allotment under the Companies Act 2006.
- Set out the requirements for the form of a solvency statement to be made by the directors of a private company using the non-court route to reduce its share capital under section 643 of the Companies Act 2006.
- Set out the requirements for the form of the directors' statement in connection with a payment out of capital by a private company for the redemption or purchase of its own shares under section 714 of the Companies Act 2006.
- State that a settlement under CREST is to be regarded as cash consideration for the purposes of sections 583(3)(e) (meaning of payment in cash) and 727(2)(e) (disposal of treasury shares) of the Companies Act 2006.

To accompany the draft regulations, the DTI has published an impact assessment of the regulations containing a cost and benefit appraisal.

The draft Companies (Shares, Share Capital and Authorised Minimum) Regulations 2007 can be found at:

<http://www.dti.gov.uk/files/file39538.doc>

The impact assessment accompanying the Companies (Shares, Share Capital and Authorised Minimum) Regulations 2007 can be found at:

<http://www.dti.gov.uk/files/file39529.doc>

The Draft Companies (Fees for Inspection and Copying of Company Records) Regulations 2007

The draft Companies (Fees for Inspection and Copying of Company Records) Regulations 2007, giving details of the fees for the right to inspect and acquire a company's records, will come into force on 1 October 2007.

The DTI states in its accompanying impact assessment of these regulations that its preferred option is to adjust the current fees that companies may charge for access to specified records to reflect inflation and changes in other costs. Their stated intention is to ensure that the prescribed fees are no more than sufficient to ensure a company can recover its reasonable costs in meeting a requirement for access.

Table 1 in the impact assessment for these regulations compares the position regarding access to company records under the Companies Act 2006 with the current position under the Companies Act 1985.

The draft Companies (Fees for Inspection and Copying of Company Records) Regulations 2007 can be found at:

<http://www.dti.gov.uk/files/file39531.doc>

The impact assessment accompanying the Companies (Fees for Inspection and Copying of Company Records) Regulations 2007 can be found at:

<http://www.dti.gov.uk/files/file39530.doc>

Takeover Appeal Board statement: reasons for decision that Eurotunnel shareholders with travel privileges are not a separate class

The Takeover Appeal Board has published its reasons for rejecting an appeal by two individuals representing Eurotunnel unit holders with travel rights against an earlier decision of the Hearings Committee. The individuals had claimed that the offer made by Groupe Eurotunnel SA for their units as part of the restructuring of Eurotunnel was in breach of several provisions of the Takeover Code (the "Code") as it did not take account of travel privileges they held that would be lost if they accepted the offer. The Takeover Appeal Board did not agree that the Code had been breached as it did not accept that the travel privileges created a specific and separate class of share for the purposes of Rule 14.1 or 14.2 of the Code. It also did not think that unitholders with travel privileges had to be offered additional consideration to achieve equivalence for the purposes of General Principle 1 of the Code. It also believed that shareholders had been treated fairly in respect of the rights which attached to their shares and that the Code did not exist to ensure fair treatment in respect of any other rights shareholders may have in relation to the offeree company.

This appeal is the first appeal to be handled by the Takeover Appeal Board since the changes to the structure of the Panel's constitution which took effect on 20 May 2006 as part of the implementation of the Takeovers Directive (when the Takeover Appeal Board replaced the Appeal Committee).

Background

Structure of the offer

The Eurotunnel Group consists of Eurotunnel P.L.C ("EPLC") and its French sister company, Eurotunnel S.A. ("ESA"). Under the terms of EPLC's articles of association, its shares are stapled to the shares of ESA and ESA's by-laws contain reciprocal stapling provisions. Shareholders hold units consisting of one EPLC share and one ESA share each (the units).

Eurotunnel Group is undergoing a restructuring which has involved the making of an offer to holders of units in Eurotunnel by a newly formed French company, Groupe Eurotunnel S.A. (GET SA). Under the offer, unit holders would receive one new GET SA share and one warrant in GET SA for every Eurotunnel unit held. GET SA announced and posted its offer on 10 April 2007.

EPLC is a company to which the Takeover Code applies under section 3(a)(i) of the Introduction to the Code and, since the offer for the units effectively comprises an offer for EPLC, it is subject to the Code. In the same

way, the offer for the units also effectively comprises an offer for ESA and is therefore subject to regulation by France's Autorité des Marchés Financiers (AMF). As a result, the Panel and the AMF jointly regulate the offer.

The offer was made on the same terms to both shareholders entitled to certain travel privileges on Eurotunnel shuttles and to other shareholders in Eurotunnel. Assuming the offer completes, unit holders who accept the offer in respect of all their units will no longer be entitled to receive any Eurotunnel travel privileges as they will no longer hold the necessary qualifying units, although they will, subject to holding a minimum number of GET SA shares, benefit from new privileges being put in place by GET SA. Unit holders who decline to accept the offer in respect of at least the minimum number of qualifying units for travel privilege purposes will continue to benefit from their existing travel privileges under the relevant Eurotunnel travel privileges scheme.

Unit holders having travel privileges submitted to the Executive of the Takeover Panel (the "Executive") that certain breaches of the Code had taken place.

Alleged breaches of the Code

The unit holders submitted to the Executive that there had been the following breaches of the Code:

- **General Principle 1** - that all shareholders of the same class should be afforded equivalent treatment. On the basis that the unit holders would be required to give up their travel privileges if they accept the offer (whilst other holders without such travel privileges would not have to do this), it was submitted that the shareholders had not been afforded equivalent treatment.
- **Rule 14.1** - which requires a comparable offer to be made for each class of shares. The unit holders with travel privileges contended that their shares should be treated as a separate class of equity share capital of Eurotunnel and that GET SA has not made a comparable offer for each such class.
- **Rule 14.2** - where an offer is made for more than one class of share, Rule 14.2 requires separate offers must be made for each class. The unit holders with travel privileges contended that Rule 14.2 has been breached as GET SA has not made separate offers for each class.
- **The general nature and purpose of the Code (para 2(a), the Introduction to the Code)** - The unit holders with travel privileges argued that, when establishing the terms of the offer, GET SA has not treated the shareholders fairly.

The Executive ruled that the offer does not breach any of the above provisions of the Code (and did not require GET SA to roll over the unit holders' existing travel privileges into similar new privileges).

On 9 May 2007, the Hearings Committee of the Takeover Panel (the "Hearings Committee") heard an appeal against the decision of the Executive by Mr Russell Ford and Mr John Webley as holders of travel privileges. The Hearings Committee dismissed the appeal.

On 14 May 2007, Messrs Ford and Webley lodged an appeal against the decision and rulings of the Hearings Committee and EPLC, GET SA and the Executive lodged their responses. The appeal was heard by the Takeover Appeal Board (the "Appeal Board") who, by unanimous decision, resolved to dismiss the appeal and to confirm the decision of the Hearings Committee.

Decision

The principal grounds for the Appeal Board's decision included the following:

- The holders of travel privileges do not constitute a separate class of shareholders under Rules 14.1 and 14.2 of the Code. Consequently, separate offers are not required to be made to them.
- The requirement of equivalent treatment of shareholders under General Principle 1 does not extend to requiring compensation or making arrangements in the terms of the offer to deal with personal rights (as opposed to rights attached to the shares).

Separate Classes under Rule 14.1 and 14.2?

In determining whether those holders who have travel privileges constitute a separate class, the Appeal Board looked at whether the travel privileges were "attached to" or an integral part of the share rights. If this was not the case, there could not be more than one class of equity shares. The Appeal Board considered that the original prospectus that granted the travel privileges indicates that the privileges are a separate and distinct contract or scheme between the company and the relevant individuals rather than a right attaching to the shares. "Personal" rights enforceable by an individual against the company which are not attached to his shareholding are not sufficient to create or constitute separate classes of capital for the purposes of Rule 14.1.

The Executive had also considered the travel privileges to be personal rather than attached to the shares of the company on the basis that:

- The travel privileges were granted only to specific private individuals (but not institutional or other shareholders).
- They were not transferable apart from in certain very limited circumstances such as death of the holder.
- The directors of EPLC have the power to vary the travel privileges to a limited extent without class approval of the unit holders having the travel privileges.

- If rights are attached to shares otherwise than by the articles or by a shareholder resolution, the company is obliged to file a form 128 under the Companies Act 1985 - no such form was filed.

The appellants had relied heavily on the decision of Scott J. (as he then was) in *Cumbrian Newspaper Group Limited v Cumberland & West Moreland Herald Newspaper & Printing Co. Ltd* [1987] Ch. Div 1. Scott J. considered that special rights granted by the defendant's articles to the plaintiff by name were rights that, although not attached to any particular shares, were conferred on the plaintiff in its capacity as a shareholder and were attached to the shares for the time being held by the plaintiff. On that basis, the plaintiff had "rights attached to a class of shares" which under section 125 of the Companies Act 1985, could not be varied without the consent of the class members. The plaintiff's consent would therefore be needed before such special rights could be varied.

The Appeal Board found that there is no evidence that Eurotunnel intended to create a separate class of share through its travel privileges scheme, either through the prospectus or otherwise. No rights attaching to the shares have been incorporated in the articles of association of the company which, if the intention was to create a separate class of shares, would normally be the case. EPLC's articles of association did empower the directors to issue shares "with such rights or restrictions as the company may by ordinary resolution determine". Apparently, no such resolution was passed at any material time in relation to the shares and privileges in question. Significant factual differences were identified between the Eurotunnel offer and the Cumbrian case. In the Cumbrian case, the articles had been expressly amended to provide for the plaintiff's rights and to deal with the position on altering such rights. The nature of the privileges in the Cumbrian case were also considered to be very different from those in the Eurotunnel matter. The rights in the Cumbrian company's articles could, it was considered, be seen as part of the arrangements for the ownership and corporate structure of the company.

With regard to Rule 14.2 of the Code, the Appeal Board held that, unless it is established that there is more than one class of shares for the purposes of Rule 14 (which has not been established in this case), Rule 14.2 does not apply at all.

Equivalent Treatment under General Principle 1?

The Appeal Board believed that it would be wrong to take General Principle 1 to imply that the effect of an offer on all shareholders must be the same. Instead, the Code only requires that an offer made to shareholders of the same class should be equivalent. In this case, the Appeal Board decided that there could be no obligation on the offeror to take account of the fact that accepting unit holders having travel privileges would no longer qualify under the relevant schemes for travel privileges. All that the Code should

regulate is that they receive equivalent treatment in respect of the rights attaching to their shares. Provided that the offer to each shareholders was identical, as was the case here, equivalent treatment was being given.

Fair Treatment of Shareholders?

The final alleged breach was that the shareholders had not been treated fairly which is against the nature and purpose of the Code (under paragraph 2(a) of the Introduction to the Code). In view of the conclusions arrived at in relation to Rules 14.1, 14.2 and General Principle 1 of the Code, the Appeal Board held that this ground was not made out. The Hearings Committee confirmed that the Code exists to ensure that shareholders are treated fairly in respect of the rights which attach to the shares which they hold and not in respect of any other rights which they have in relation to the offeree company.

The statement by the Takeover Appeal Board can be found at:

<http://www.thetakeoverappealboard.org.uk/statements/DATA/2007-02.pdf>

Block Trades and the Market Abuse Regime

The Financial Services Authority (the “FSA”), in the latest edition of Market Watch, discusses how it sees the Code of Market Conduct applying to block trades as regards the investment banks involved in such transactions. The focus of its discussion is on trades which involve the disclosure of “trading information” which is inside information.

Pre-Mandate

The FSA confirms that existing standard practice whereby banks, when pricing potential blocks before receiving any mandate, obtain permission from the vendor to make potential clients insiders, is reasonable. The FSA would expect certain procedures to be followed in this pre-mandate stage (such as either binding the potential clients by confidentiality agreements or formally notifying them that they are being made insiders) when contacting potential clients about a forthcoming block trade in order to avoid improper disclosure. The FSA also confirms that it believes that any parties which have been made insiders about a potential block trade who then sell stock before the block trade becomes public could be guilty of insider dealing and that it may take action in such a situation.

Marketing of the Block Trade

The FSA seeks to address the divergent practices currently in place as to what announcement, if any, is made before a block trade is launched. When undertaking block trades, where firms disclose inside information solely to offer the stock to the person receiving the information, the FSA believes that this could (in certain circumstances) be considered as disclosure in the

proper course of a employment, profession or duties and therefore comply with the market abuse regime. The circumstances that are relevant are:

- The information disclosed consists only of trading information
- The information is disclosed only to the extent necessary, and solely to offer the investment to, or acquire investments from, the person receiving the information
- It is reasonable for the person to make the disclosure to enable the proper functions of their employment, profession or duties.

The FSA proposes, after a consultation process, to amend the Code of Market Conduct to clarify the above position.

The FSA discussion in Market Watch can be found at:

http://www.fsa.gov.uk/pubs/newsletters/mw_newsletter20.pdf

Shareholder Activism

The FSA, in the latest edition of Market Watch, seeks to clarify some high-level principles relating to market participants who implement strategies involving buying shares in quoted companies with a view to a subsequent exercise of shareholder rights and a corporate re-structuring of the target.

The FSA does not believe that such conduct is market abuse if the participant is carrying out such acquisitions on the basis of its intentions and knowledge of its strategy. The strategy is not to be treated as inside information which needs to be disclosed to the market as a whole. However, if other market participants trade in shares independently on the basis of another participant's strategy and therefore avoid making any market disclosures that would otherwise be required if the shares were acquired by a single entity, the FSA might regard such behaviour as market manipulation under MAR 1.7.2 E. In any market abuse analysis one would also need to examine whether the behaviour of the other parties amounted to market abuse if they deal for their own account (or for the account of others) on the basis of their knowledge of another participant's intentions and strategy, however obtained and it is likely that any person who discloses such information to such parties may have engaged in market abuse.

The FSA also flags the potential in such a scenario for market abuse if a participant deliberately sets out to generate a false rumour or expectation of some future corporate action in the knowledge that it, or others associated with it, may be able to take advantage of a short term movement in the price of the target's securities.

The FSA clarification on shareholder activism can be found at

http://www.fsa.gov.uk/pubs/newsletters/mw_newsletter20.pdf

Institute of Directors consults on health and safety guidelines

The Institute of Directors has been asked by the Health and Safety Commission to produce health and safety guidelines for directors. It published a draft set of guidelines for consultation on 14 May 2007. The draft guidelines set out a number of actions for planning the direction of health and safety policy and for the delivery, monitoring and review of health and safety. They also include a checklist of key questions, a summary of the legal liability of directors for health and safety failures and a list of resources and references for implementing the guidelines in detail.

The closing date for comments is 22 June 2007.

The draft set of guidelines can be found at:

http://www.iod.com/intershoproot/eCS/Store/en/pdfs/policy_health_safety_cons.pdf

Shareholder rights: Government response to DTI consultation on proposed directive

The DTI has published the government's response to its October 2006 consultation on the (then-proposed) directive on the exercise of voting rights by shareholders. The proposed directive was adopted with amendments on 15 February 2007. The response gives an overview of the responses received.

The Government considers that the changes made to the adopted text of the directive have addressed most of the issues raised by respondents to the DTI consultation. In particular, the original proposal for at least 30 days' notice for AGMs was changed in the adopted directive to at least 21 days for AGMs and at least 14 days for EGMs subject to certain conditions.

The government response to the consultation on a directive on the exercise of voting rights by shareholders can be found at:

<http://www.dti.gov.uk/files/file39362.pdf>

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