

SECTION 81 COMPANIES ACT: RESTRICTION ON PUBLIC OFFERS BY PRIVATE COMPANIES

During the discussions with the Treasury in 2001 about the need to amend the Official Listing of Securities Regulations to confirm that unlimited companies were able to have their covered warrants listed in the UK, the City Liaison Group argued that private companies (and specifically unlimited companies) should be able to list a wider range of investments in the UK. The Treasury said that it would consider this with the UKLA (letter from Paul Johnston HMT 28 September 2001). We would like to return to this issue, in particular because there has been some debate about the current position as explained below.

Pre-FSMA

Section 81 of the Companies Act 1985 (the "Companies Act") prohibits a private company from, inter alia, offering shares or debentures to the public (as defined in section 59 of the Companies Act). Section 81 was repealed with effect from February 1987 but only to the extent that the shares or debentures are listed on London or are the subject of an application to list on London. However, section 143(3) of the Financial Services Act 1986 provided that no application should be made for listing on London in respect of shares or debentures to be issued by a private company.

It therefore remained necessary to structure an issue by a private company so that it did not constitute an offer to the public. Sections 59 and 60 set out the definition of "offer to the public" and the exceptions, respectively. Section 59 provided that "offer to the public" included any offer to "any section of the public, whether selected as members or debenture holders of the company concerned...or in any other manner". Section 60(1) provided that there was no offer to the public if the offer "can properly be regarded, in all circumstances, as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation...".

Therefore, English private companies could only do old style private placements. That involved (i) restricting the number of offerees to, say, no more than twenty and (ii) obtaining a letter from each investor acquiring the relevant securities in which the investor confirms that the securities are being acquired for its own account, for the purpose of an investment and not with a view to their being offered or resold.

Post-FSMA

The FSMA Consequential Order repealed sections 59 and 60 of the Companies Act and introduced a new definition of "offer to the public" at section 742A.

Subsection (7) is the important exception for these purposes. However, it is important to note that its use is restricted in as much as the Financial Services and Markets Act 2000 (Official Listing of Securities) Regulations 2001 – made under section 75(3) FSMA – provide that shares or debentures issued by a private company cannot be listed on London.

On the face of it, therefore, the regime applying to English private companies has been liberalised to the extent that securities issued by such companies can be listed on any EEA Exchange other than London, e.g. Luxembourg, and offered to "a person whose ordinary business it is to buy or sell shares or debentures (whether as principal or agent)", i.e. "professionals", without such companies committing an offence under section 81.

However, the view has been expressed that the liberalisation of the regime was an unintentional side effect of the amendment to the definition of "offer to the public" and that the main intention behind the new section 742A(7) appears to have been to apply EU "passport" mutual recognition provisions to broadly harmonise stock exchanges' rules across the EU. (There are other deficiencies in the drafting of the FSMA Order which may be said to support this argument, for example, the reference in section 742A(7) to "this Part" where section 81 is in Part IV of the Companies Act.)