

MODERN COMPANY LAW

For a Competitive Economy

Trading Disclosures

A Paper by The Company Law Review Steering Group

1. Registration as a company confers legal personality (i.e. a separate entity which enters into legal relationships) and usually limited liability which renders its owners immune from suit for its liabilities. It is essential, therefore, that the company's legal identity, i.e. its name and legal status, is revealed to all who have, or may wish to have, dealings with it so that they are warned of its limited liability status and can discover all the other information which the company is required to reveal about itself. The Companies Act 1985 (the Act) therefore imposes various requirements on companies to disclose their names and other particulars. Where a company trades under some other name, then the Business Names Act 1985 also applies. This imposes similar obligations.

2. The current requirements, penalties and exceptions are described in paragraphs 3-13 below. We consider whether these are still appropriate or whether they need to be revised, updated or changed in any other way in paragraphs 14-25. We do not propose any fundamental change to these requirements but consider there is scope to simplify, to clarify and to update them all and, possibly, to extend their application. We seek your views on the questions in paragraph 26.

Background

Requirements

3. The present position is that the Act¹ requires the company's name to be displayed in easily legible letters:

- in a conspicuous position,
- on the outside,
- of every office or place in which its business is carried on.

The Act² also requires the company's name to appear legibly in:

- all its business letters,
- all its notices and other official publications,
- all bills of exchange, promissory notes, endorsements, cheques, orders for money or goods purporting to be signed by or on behalf of the company, and
- all bills of parcels, invoices, receipts, letters of credit.

In addition, business letters and order forms have to include³ fuller particulars, i.e.

- (a) the company's place of registration and the number with which it is registered,
- (b) the address of its registered office,
- (c) in the case of an investment company⁴, the fact that it is such a company, and

¹ Section 348, Companies Act 1985.

² Section 349, Companies Act 1985.

³ Section 351, Companies Act 1985.

(d) in the case of a limited company exempt from the obligation to use the word “limited” as part of its name⁵, the fact that it is a limited company.

4. A company’s business letters must⁶ either include the names of all its directors - individual, corporate and shadow - or not include the name of any of its directors other than in text or as a signatory. The Act does not require the company to state its share capital, but if it chooses to do so, it must⁷ state its paid-up capital.

5. The Act applies to companies incorporated in Great Britain i.e. it does not apply to companies incorporated in Northern Ireland. However overseas companies that operate in Great Britain (including companies incorporated in Northern Ireland) are subject to similar requirements⁸ including that relating to directors’ names.

6. It is an offence under the Act⁹ for a person who is not a public company to trade under a name ending with the words “public limited company” or its Welsh equivalent; there is a similar offence relating to the use of “limited”. It is also an offence for a public company to give the impression that it is private in circumstances where the difference is likely to be material.

7. If a company which has a place of business in Great Britain carries on business in Great Britain under a name which is not its corporate name, then the Business Names Act 1985 also applies. (It also applies to any individual whose trading name is not simply their surname and to partnerships where the name is not the surnames of individual partners and the corporate names of corporate partners. It does not apply to bodies such as Building Societies, Friendly Societies, Industrial and Provident Societies. These bodies are outside the Review's terms of reference and are subject to other regulatory controls including controls over names.) The Business Names Act¹⁰ requires the company to include its corporate name and service address (i.e. the address at which service of any document relating to the business will be effective) in all business letters, written orders for goods or services, invoices and receipts, and written demands for payment. The corporate name and service address must also be displayed in a prominent position in any premises where the business is carried on so that they can easily be read by its customers and suppliers.

Penalties and Civil Sanctions

8. The penalty for a company failing to display its name, to publish it in various documents as required, and for any breach of the requirement relating to disclosure of share capital, is a fine falling upon the company and every officer of it who is in default. Furthermore whoever issues the document, whether an officer of the company or another person on its behalf, is liable to a fine.

9. There are further consequences for a breach of the requirement to include the company’s name on bills of exchange, promissory notes, endorsements, cheques, orders for money or goods purporting to be signed by or on behalf of the. Whoever signs or authorises the signing, whether an officer of the company or another person on

⁴ As defined in Section 266, Companies Act 1985.

⁵ Either because it meets the requirements in Section 30(2) of the Companies Act 1985 or because it is an unregistered company to which Section 351 of the Companies Act 1985 applies by virtue of its Section 718.

⁶ Section 305, Companies Act 1985.

⁷ Section 351(2), Companies Act 1985.

⁸ Section 693, Companies Act 1985.

⁹ Section 33 and 34, Companies Act 1985.

¹⁰ Section 4, Business Names Act 1985.

its behalf, is liable to a fine. Also, if the company does not duly pay, whoever signed or authorised the signing is personally liable for the amount.

10. In the event of a default in complying with the requirement relating to disclosure of directors' names, the company and every officer in default is liable to a fine: this is more typical of other administrative offences under the Act.

11. With regard to the requirements of the Business Names Act, the penalty for contravention without reasonable excuse is a fine. There is also a civil sanction¹¹. If a company brings legal proceedings to enforce a business contract, those proceedings must be dismissed (unless the court is satisfied that it is just and equitable to permit them to continue) if the defendant can show that he has a claim against the company arising out of the same contract which he has been unable to pursue, or has suffered some financial loss in connection with the contract, by reason of the company's breach of the requirement to include its corporate name and service address in a document.

Exceptions

12. Some of the Companies Act's requirements for trading disclosures do not apply to all companies. In *Completing the Structure*¹², we argued that the appropriate parts of the new Companies Act should be applied to unregistered companies. At present, only some of the disclosure requirements apply to only some unregistered companies¹³.

13. Furthermore there is an exemption¹⁴ from the requirements to publish its name for any private company limited by guarantee which is exempt from the requirements to use "limited" as part of its name.

Issues

Display at Premises

14. The requirement for a company to display its name outside every place in which its business is carried on may be clear for most companies, but there may be companies for which the requirement is not clearcut. For example, companies whose premises are, say, a floor at the top of a skyscraper or that regularly operate from exhibition sites or premises provided temporarily by some other body or from the directors' homes or from websites. However every company must at all times have a registered office to which all communications may be addressed and where certain documents must be available for inspection (eg register of members). In addition to the registered office, some companies may have additional "service addresses" (ie addresses at which service of any document relating to the business will be effective);

¹¹ Section 5, Business Names Act 1985.

¹² Paragraphs 9.13-9.18, *Modern Company Law for a Competitive Economy – Completing the Structure*, November 2000, URN 00/1335.

¹³ Under Section 718(2) of the Companies Act 1985, none of its provisions apply to:

- (a) any body incorporated by or registered under any public general Act of Parliament,
- (b) any body not formed for the purpose of carrying on a business which has for its object the acquisition of gain by the body or its individual members,
- (c) any body for the time being exempted by direction of the Secretary of State,
- (d) any investment company with variable capital within the meaning of the Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996.

For other unregistered companies, Section 718(1) applies the provisions listed in Schedule 22. Bizarrely, these include the requirements (section 351) for a company to disclose its registered number and the address of its registered office but exclude those relating to displaying and publishing its name (sections 348 and 349).

¹⁴ Under Section 30(2) of the Companies Act 1985. Those licensed under Section 19 of the Companies Act 1948 are also exempt.

others may use the provisions in the Act that permit documents to be available for inspection at premises other than the registered office.

15. We question whether there is a real need for a company's name to be outside **every** place where its business is carried out. It might be argued that cheap and easy electronic access to information about companies at Companies House makes all such displays unnecessary. However, in our view, it is essential that every company's name be displayed at its registered office and at any service address. We consider that any further requirement might be limited to those premises to which customers or suppliers have access or, alternatively, to where the company normally or regularly carries on business. We also considered whether a company should be required to display its name at premises where it keeps documents for inspection. We would welcome consultees' views on this.

16. We consider that the requirement under the Business Names Act that the display be "in a prominent position so that it may easily be read" is probably more practicable than that under the Companies Act that the display be "outside . . . in a conspicuous position". What is essential is that name should be easily read by any member of the public.

17. The Business Names Act requires any company trading under a name that is not its corporate name, to display not only the corporate name but also the company's service address. This must be displayed at all premises where the company carries on business. The display of the service address is clearly essential for those others to whom the Business Names Act applies as no information about them is available from Companies House. However, we do not consider that companies need be required to display their service address in addition to their name.

18. More generally, the coverage and detail of the controls under the Companies Act and the Business Names Act need to be revised to ensure there are no anomalies.

Name to appear in Correspondence, etc

19. We consider that the requirement for a company to include its name on a wide range of documents should be retained but that the list of documents covered should be updated (e.g. "bills of parcel" appears not to be in current use). It is arguable whether this requirement applies to equivalent electronic communications such as emails and publications on web sites. We consider that the Act should apply regardless of the method of delivery. In any event, the Act should be clear in this respect.

20. Also it is not immediately apparent whether the Act's requirements for the company's name to appear in all its notices and official publications apply to any advertisements. Advertising is subject to self-regulation through the Advertising Standards Authority which requires all advertisements to be decent, legal and honest. There is no requirement for the advertiser to reveal itself. We tend to the view that the Act's requirement for the company to disclose its name should not apply to advertisements which seek to raise awareness, e.g. those on hoardings and stickers, but that they should apply to any advertisement that is a direct attempt to persuade someone to enter into a contract. However this distinction may not be easy to define.

21. We support the requirement for companies to include not only their name but also fuller particulars in business letters and order forms. We do not consider there is scope to reduce this requirement. With regard to what should be the "fuller particulars", we have considered two suggestions put to us which would increase the required disclosures in business letters and order forms:

- (i) that an unlisted public limited company should include a statement that it is not listed on a recognised stock exchange. Such a requirement would help to avoid the public being misled, given that it is apparently a commonly held assumption that plcs must be large companies whose shares are traded on a stock market. However we concluded that this would be unduly onerous;
- (ii) that, where the requirement to include the address of the company's registered office results in more than one address being included, it should be made clear which is the registered office. We consider that this would be sensible.

We would welcome consultees' views on what should be the "fuller particulars" required in business letters and order forms and on whether there are other documents in which fuller particulars should be required.

Misleading Names

22. At present a company called ABC Ltd may trade under the name XYZ Ltd, provided it meets the requirements to reveal its corporate name. We are concerned that it may be misleading if a company includes the term "public limited company" or "limited" or their Welsh equivalents as part of a trading name that differs from its corporate name.

Penalties

23. In *Completing the Structure*¹⁵, we considered on whom criminal liability should fall for the various types of offences under the Act. It was noted that the provisions for trading disclosures are part of a small category of provisions where removal of the criminal sanction would leave no sanction at all against the company. We argued that this might well be justified if the real mischief can be dealt with by targeting the managers alone. In determining who should be liable, we noted that a wide distribution of potential liability would be appropriate in relation to trading disclosures. We have sought consultees' views on a definition of "officer" along the lines of, but narrower than, that contained in the Australian Corporations Law¹⁶.

24. We do not consider it appropriate that, if there is any breach of the requirement for the company's name to be included on the document and the amount is not duly paid by the company, then whoever signs, or authorises the signing of, cheques, etc should be personally liable either for fines or for the amount concerned. Under this provision, relatively junior employees may find themselves liable if the company becomes insolvent. We consider that both criminal responsibility and civil liability

¹⁵ Paragraphs 13.82-13.101, *Modern Company Law for a Competitive Economy* – , November 2000, URN 00/1335.

¹⁶ Under Australian Corporations Law, "officer" of a corporation means:

- "a director or secretary of the corporation; or a person:
 - who makes, or participates in making, decisions that affect the whole, or substantially the whole, or a substantial part, of the business of the corporation;
 - or who has the capacity to affect significantly the corporation's financial standing;
 - or in accordance with whose instructions or wishes the directors are accustomed to act (excluding advice given by a person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation);
 - or a receiver, or receiver and manager, of the property of the corporation; or an administrator of the corporation;
 - or an administrator of a deed of company arrangement executed by the corporation;
 - or a liquidator of the corporation;
 - or a trustee or other person administering a compromise or arrangement made between the corporation and someone else."

should fall only upon officers of the company, noting that a definition for “officer” is proposed.

25. We consider it would be appropriate if there were also a civil sanction similar to that provided by the Business Names Act. This would ensure that if someone has suffered financial loss in connection with a business contract, by reason of the company’s breach of the requirement to include its corporate name and service address in a document, the court would be able to dismiss legal proceedings brought by the company to enforce the contract.

Summary of Questions

26. We would welcome views on the following questions.

- Question 1:** Do you agree that a company should be required to display its name at its registered office and at any service address? Should companies be required to display their names at any other premises? If so, where?
- Question 2:** Do you agree that company’s name should be required to be in a prominent position so that it can be easily read by any member of the public?
- Question 3:** Should a company trading under a name that is not its corporate name be required to display its service address alongside its corporate name? If so, at which premises and in which documents?
- Question 4:** Do you consider that the requirement for the company to disclose its name should apply to any advertisement that is a direct attempt to persuade someone immediately on reading the advertisement to enter into a contract?
- Question 5:** Do you agree that the Companies Act should make clear that the requirements which apply to physical documents apply equally to equivalent electronic communications? If so can such communications be more closely defined?
- Question 6:** On which documents do you consider that companies need to include only their name, and on which documents should they also have to include fuller particulars? What should these “fuller particulars” be?
- Question 7:** Do you agree that the Companies Act should prohibit the use of “public limited company”, “limited” and their Welsh equivalents except as part of a company’s registered name so that it should no longer be possible to include such a suffix in a trading name other than the company’s own corporate name?
- Question 8:** Do you agree that, in the event of breach of any of the requirements for trading disclosure, liability should fall upon the company and any “officer in default” (noting that there is a separate proposal for a definition of “officer” similar to but narrower than that in the Australian Corporations Law)?

Question 9: Should there be a civil sanction, comparable to that provided by the Business Names Act 1985, if a company is in breach of the requirements to include information in documents?

Question 10: Should any type of company be exempt from all or any of these requirements relating to the publication of its name, its service address, its fuller particulars, or directors' names? If so, which types of company should be exempt from what requirements?

Responses should be in writing and should be sent, by e-mail if possible, to:

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The deadline for responses is **12 April 2001**.

27. In accordance with the code of practice on open government, comments will be made publicly available unless consultees specifically request otherwise.

28. This paper is also on the Review pages of the Department's Internet site, <http://www.dti.gov.uk/cld/review/htm>

The Consultation Process

29. This consultation is part of the Company Law Review launched by Margaret Beckett, then Secretary of State for Trade and Industry, in March 1998. The Department's consultation paper¹⁷, published then, outlined the problems the Review was designed to address and its proposed objectives, scope and process. The Company Law Review Steering Group published its first major consultation document in February 1999¹⁸, the second in March 2000¹⁹, and the third²⁰ in November 2000. The deadline for comments for the third is 28 February.

30. A code of practice for written consultations applies to consultation documents issued by UK government departments after 1 January 2001. Other public bodies are encouraged to follow the code. The code applies the following criteria to all UK national public consultations on the basis of a document in electronic or printed form.

¹⁷ *Modern Company Law for a Competitive Economy*, March 1998.

¹⁸ *Modern Company Law for a Competitive Economy – The Strategic Framework*, February 1999, URN 99/654.

¹⁹ *Modern Company Law for a Competitive Economy – Developing the Framework*, March 2000, URN 00/656.

²⁰ *Modern Company Law for a Competitive Economy – Completing the Structure*, November 2000, URN 00/1335.

The Consultation Criteria

- A. Timing of consultation should be built into the planning process for a policy (including legislation) or service from the start, so that it has the best prospect of improving the proposals concerned, and so that sufficient time is left for it at each stage.
 - B. It should be clear who is being consulted, about what questions, in what timescale and for what purpose.
 - C. A consultation document should be as simple and concise as possible. It should include a summary, in two pages at most, of the main questions it seeks views on. It should make it as easy as possible for readers to respond, make contact or complain.
 - D. Documents should be made widely available, with the fullest use of electronic means (though not to the exclusion of others), and effectively drawn to the attention of all interested groups and individuals.
 - E. Sufficient time should be allowed for considered responses from all groups with an interest. Twelve weeks should be the standard minimum period for a consultation.
 - F. Responses should be carefully and open-mindedly analysed, and the results made widely available, with an account of the views expressed, and reasons for decisions finally taken.
 - G. Departments should monitor and evaluate consultation, designating a consultation coordinator who will ensure the lessons are disseminated.
31. The code requires an explanation of any departure from these criteria and confirmation that they have otherwise been followed.
32. The planning of this consultation predates this code of practice. However wide consultation is an integral part of Company Law Review and has been built into it from the start.
33. This consultation does not include a draft regulatory assessment as these proposals are part of the fundamental review of company law. We understand that the Government will wish to make such an assessment when they consult over their proposals for implementing the Review's recommendations.
34. In all other regards, this consultation complies with the code of practice on written consultation.
35. If you have any complaint or comment about the consultation process, you should contact:

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