

PART 7

SUPPLEMENTARY

*Regulations and orders***73 Regulations and orders**

- (1) Any power to make an order or regulations which is conferred by this Act on the Secretary of State is exercisable by statutory instrument.
- (2) Any statutory instrument made under this Act may –
 - (a) contain such incidental, supplemental, and transitional provision as the Secretary of State considers appropriate; and
 - (b) make different provision for different cases.
- (3) An order or regulations under any power conferred by this Act to amend provisions of this Act may –
 - (a) repeal and re-enact any of those provisions with modifications of form or arrangement, whether or not they are modified in substance;
 - (b) make consequential amendments or repeals in other provisions of this Act, or in other enactments.

74 Parliamentary control of statutory instruments

- (1) The following regulations –
 - (a) regulations under section 12 which add to the information which must be delivered under section 5(1), and
 - (b) regulations under section 49,
 shall not be made unless a draft of the regulations has been laid before Parliament and approved by a resolution of each House.
- (2) An order shall not be made under section 15 unless a draft of the order has been laid before Parliament and approved by a resolution of each House.
- (3) A statutory instrument containing any other regulations or order under this Act shall be subject to annulment in pursuance of a resolution of either House of Parliament.

*Definitions***75 “Company”, “public” and “private” companies and company “type”**

- (1) In this Act “company” means [a company formed under this Act].
- (2) In this Act –

“public company” means [a public company limited by shares]; and

“private company” means [a private company limited by shares], [a private company limited by guarantee] or [an unlimited private company].
- (3) Any reference in this Act to –
 - (a) a private company limited by shares,
 - (b) a public company limited by shares,

(c) a private company limited by guarantee, or
(d) an unlimited private company,
[is to a company formed under this Act which is a company of that type].

- (4) References in this Act to a company's type are to be read in accordance with section 1(1).
- (5) The definitions in this section apply unless the context otherwise requires.

76 “Members” of a company

- (1) A person becomes a member of a company when –
- (a) he becomes a member as a result of section 9(3)(b) (membership on formation of company under this Act); or
 - (b) he has agreed to become a member of the company and his name is entered in the company's register of members.
- (2) A person ceases to be a member of a company when an entry is made in the company's register of members to the effect that he has ceased to be a member.

77 “Subsidiary”, “holding company” and “wholly-owned subsidiary”

- (1) A company is a “subsidiary” of another company, its “holding company”, if that other company –
- (a) holds a majority of the voting rights in it, or
 - (b) is a member of it and has the right to appoint or remove a majority of its board of directors, or
 - (c) is a member of it and controls alone, pursuant to an agreement with other shareholders or members, a majority of the voting rights in it,
- or if it is a subsidiary of a company which is itself a subsidiary of that other company.
- (2) A company is a “wholly-owned subsidiary” of another company if it has no members except that other and that other's wholly-owned subsidiaries or persons acting on behalf of that other or its wholly-owned subsidiaries.
- (3) In this section “company” includes any body corporate.
- (4) This section is to be read with section 78.

78 Provisions supplementing section 77

- (1) The provisions of this section explain expressions used in section 77 and otherwise supplement that section.
- (2) In section 77(1)(a) and (c) the references to the voting rights in a company are to the rights conferred on shareholders in respect of their shares or, in the case of a company not having a share capital, on members, to vote at general meetings of the company on all, or substantially all, matters.
- (3) In section 77(1)(b) the reference to the right to appoint or remove a majority of the board of directors is to the right to appoint or remove directors holding a majority of the voting rights at meetings of the board on all, or substantially all, matters; and for the purposes of that provision –
- (a) a company shall be treated as having the right to appoint to a directorship if –

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- (i) a person's appointment to it follows necessarily from his appointment as director of the company; or
 - (ii) the directorship is held by the company itself; and
 - (b) a right to appoint or remove which is exercisable only with the consent or concurrence of another person shall be left out of account unless no other person has a right to appoint or, as the case may be, remove in relation to that directorship.
- (4) Rights which are exercisable only in certain circumstances shall be taken into account only –
- (a) when the circumstances have arisen, and for so long as they continue to obtain; or
 - (b) when the circumstances are within the control of the person having the rights;
- and rights which are normally exercisable but are temporarily incapable of exercise shall continue to be taken into account.
- (5) Rights held by a person in a fiduciary capacity shall be treated as not held by him.
- (6) Rights held by a person as nominee for another shall be treated as held by the other; and rights shall be regarded as held as nominee for another if they are exercisable only on his instructions or with his consent or concurrence.
- (7) Rights attached to shares held by way of security shall be treated as held by the person providing the security –
- (a) where apart from the right to exercise them for the purpose of preserving the value of the security, or of realising it, the rights are exercisable only in accordance with his instructions;
 - (b) where the shares are held in connection with the granting of loans as part of normal business activities and apart from the right to exercise them for the purpose of preserving the value of the security, or of realising it, the rights are exercisable only in his interests.
- (8) Rights shall be treated as held by a company if they are held by any of its subsidiaries; and nothing in subsection (6) or (7) shall be construed as requiring rights held by a company to be treated as held by any of its subsidiaries.
- (9) For the purposes of subsection (7) rights shall be treated as being exercisable in accordance with the instructions or in the interests of a company if they are exercisable in accordance with the instructions of or, as the case may be, in the interests of –
- (a) any subsidiary or holding company of that company; or
 - (b) any subsidiary of a holding company of that company.
- (10) The voting rights in a company shall be reduced by any rights held by the company itself.
- (11) References in any provision of subsections (5) to (10) to rights held by a person include rights falling to be treated as held by him by virtue of any other provision of those subsections but not rights which by virtue of any such provision are to be treated as not held by him.
- (12) In this section “company” includes any body corporate.

79 Power to amend sections 77 and 78

- (1) The Secretary of State may by regulations amend sections 77 and 78 so as to alter the meaning of the expressions “holding company”, “subsidiary” or “wholly-owned subsidiary”.
- (2) Any amendment made by regulations under this section does not apply for the purposes of enactments outside [this Act] unless the regulations so provide.
- (3) So much of section 23(3) of the Interpretation Act 1978 (c. 30) as applies section 17(2)(a) of that Act (effect of repeal and re-enactment) to deeds, instruments and documents other than enactments shall not apply in relation to any repeal and re-enactment effected by regulations made under this section.

80 Point when shares are “allotted”

In relation to an allotment of shares in a company, the shares are to be taken for the purposes of this Act to be allotted when a person acquires the unconditional right to be included in the company’s register of members in respect of those shares.

81 Meaning of payment up of shares in “cash”

- (1) This section applies for the purposes of this Act to determine whether any payment up of a share in a company (that is, of the share’s nominal value or of any premium on it) is in, or otherwise than in, “cash”.
- (2) Payment up is in cash if it is payment up by any of the following means—
 - (a) cash received by the company;
 - (b) a cheque received by the company in good faith which the directors have no reason for suspecting will not be paid;
 - (c) a release of a liability of the company for a liquidated sum; or
 - (d) an undertaking to pay cash to the company at a future date.
- (3) For the purposes of any paragraph of subsection (2), the cash, cheque or sum may be in foreign currency.
- (4) Payment up by—
 - (a) payment of cash to a person other than the company,
 - (b) any undertaking to pay cash to such a person, or
 - (c) any other means not mentioned in subsection (2),is payment up otherwise than in cash (and in paragraphs (a) and (b) “cash” includes foreign currency).
- (5) The Secretary of State may by order amend subsection (2) by the addition to it of means of payment up.

82 “Non-cash asset”

- (1) In this Act “non-cash asset” means any property or interest in property other than cash; and for this purpose “cash” includes foreign currency.
- (2) A reference in this Act to the transfer or acquisition of a non-cash asset includes a reference to the creation or extinction of an estate or interest in, or a right over, any property and also the discharge of any person’s liability, other than a liability for a liquidated sum.

83 “Liquidation” and “insolvent liquidation”

- (1) For the purposes of this Act, a company goes into liquidation if it passes a resolution for voluntary winding up or an order for its winding up is made by the court at a time when it has not already gone into liquidation by passing such a resolution.
- (2) For the purposes of this Act, a company goes into insolvent liquidation if it goes into liquidation at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the winding up.

84 General definitions

In this Act, unless the context otherwise requires—

- “allotted”, in relation to a share or share capital, is to be read with section 80;
- “authenticated”, in relation to information, means [authenticated by such means as the registrar may stipulate];
- “the authorised minimum” has the meaning given by section 15;
- “body corporate” does not include a corporation sole or a Scottish firm, but does include a company incorporated elsewhere than in Great Britain;
- “in cash”, in relation to payment up of a share, has the meaning given by section 81;
- “certified”, in relation to a copy or translation, means [certified by such means as the registrar may stipulate];
- “company” has the meaning given by section 75(1);
- “contributories” has the meaning given by section 79(1) of the Insolvency Act;
- “the court”, in relation to a company, means the court having jurisdiction to wind up the company;
- “debenture” includes debenture stock, bonds and any other securities of a company, whether constituting a charge on the assets of the company or not;
- “deliver”, in the context of delivery of information to the registrar, means [deliver in such form and manner as the registrar may stipulate];
- “director” includes any person occupying the position of director, by whatever name called;
- “document” includes a document in electronic or any other form;
- “EEA State” means a State which is a contracting party to the agreement on the European Economic Area signed at Oporto on 2 May 1992 as it has effect for the time being;
- “electronic communication” means a communication transmitted (whether from one person to another, from one device to another or from a person to a device or vice versa)—
 - (a) by means of a telecommunication system; or
 - (b) by other means but while in an electronic form;
- “employees’ share scheme” means a scheme for encouraging or facilitating the holding of shares or debentures in a company by or for the benefit of—

- (a) the bona fide employees or former employees of the company, the company’s subsidiary or holding company or a subsidiary of the company’s holding company; or
- (b) the wives, husbands, widows, widowers or children or step-children under the age of 18 of such employees or former employees;

“financial year” means [.....]

“founder member” –

- (a) in relation to a company not yet formed, has the meaning given by section 5(1)(e);
- (b) in relation to a company already formed, means a person who became a member on formation as a result of section 9(3)(b);

“holding company” has the meaning given by section 77;

“information” includes any document or translation and any notification, application, statement or opinion, and is not restricted to information in legible form;

“the Insolvency Act” means the Insolvency Act 1986 (c. 45);

“insolvent liquidation” has the meaning given by section 83;

“joint stock company” means [.....];

“liquidation” has the meaning given by section 83;

“member”, in relation to a company, has the meaning given by section 76;

“non-cash asset” has the meaning given by section 82;

“officer”, in relation to a [company], includes a director, manager or secretary;

“an officer who is in default” means [.....]

“ordinary resolution”, in relation to a private company, means –

- (a) [an ordinary resolution within the meaning of the Companies Act 1985]; or
- (b) a written ordinary resolution under section 70;

and in relation to a public company means [an ordinary resolution within the meaning of the Companies Act 1985];

“oversea company” means any company which –

- (a) is incorporated outside Great Britain; and
- (b) has an established place of business in Great Britain;

“prescribed” means prescribed by regulations made by the Secretary of State;

“private company” has the meaning given by section 75(2);

“private company limited by guarantee” has the meaning given by section 75(3);

“private company limited by shares” has the meaning given by section 75(3);

“public company” has the meaning given by section 75(2);

“public company limited by shares” has the meaning given by section 75(3);

“register of members” means [.....];

“registered office” means [.....];

“the registrar” means [.....];

“regulations” means regulations made by the Secretary of State;

“the relevant model constitution” has the meaning given by section 5(4);

“share” means share in the share capital of a company, [and includes stock (except where a distinction between shares and stock is express or implied)];

“special resolution”, in relation to a private company, means –

(a) [a special resolution within the meaning given by s. 378 Companies Act 1985]; or

(b) a written special resolution under section 70;

and in relation to a public company means [a special resolution within the meaning given by s. 378 Companies Act 1985];

“subsidiary” has the meaning given by section 77;

“telecommunication system” has the same meaning as in the Telecommunications Act 1984 (c. 12);

“trading certificate” has the meaning given by section 13(1);

“type”, in relation to a company, has the meaning given by section 75(4);

“unlimited private company” has the meaning given by section 75(3);

“wholly-owned subsidiary” has the meaning given by section 77;

“written resolution”, in relation to a private company, has the meaning given by section 70.

SCHEDULES

SCHEDULE 1

Section 5.

INFORMATION REQUIRED AS RESPECTS DIRECTORS AND SECRETARY

1

SCHEDULE 2

Section 17.

GENERAL PRINCIPLES BY WHICH DIRECTORS ARE BOUND

Obeying the constitution and other lawful decisions

- 1 A director of a company must act in accordance with—
- (a) the company's constitution, and
 - (b) decisions taken under the constitution (or by the company, or any class of members, under any enactment or rule of law as to means of taking company or class decisions),
- and must exercise his powers for their proper purpose.

Promotion of company's objectives

- 2 A director of a company must in any given case—
- (a) act in the way he decides, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole (excluding anything which would breach his duty under paragraph 1 or 5); and
 - (b) in deciding what would be most likely to promote that success, take account in good faith of all the material factors that it is practicable in the circumstances for him to identify.

Notes

- (1) In this paragraph, “the material factors” means—
- (a) the likely consequences (short and long term) of the actions open to the director, so far as a person of care and skill would consider them relevant; and
 - (b) all such other factors as a person of care and skill would consider relevant, including such of the matters in Note (2) as he would consider so.
- (2) Those matters are—

- (a) the company's need to foster its business relationships, including those with its employees and suppliers and the customers for its products or services;
 - (b) its need to have regard to the impact of its operations on the communities affected and on the environment;
 - (c) its need to maintain a reputation for high standards of business conduct;
 - (d) its need to achieve outcomes that are fair as between its members.
- (3) In Note (1) a “person of care and skill” means a person exercising the care, skill and diligence required by paragraph 4.
- (4) A director's decision as to what constitutes the success of the company for the benefit of its members as a whole must accord with the constitution and any decisions as mentioned in paragraph 1.

Delegation and independence of judgement

- 3 A director of a company must not, except where authorised to do so by the company's constitution or any decisions as mentioned in paragraph 1 –
- (a) delegate any of his powers; or
 - (b) fail to exercise his independent judgement in relation to any exercise of his powers.

Note

Where a director has, in accordance with this Schedule, entered into an agreement which restricts his power to exercise independent judgement later, this paragraph does not prevent him from acting as the agreement requires where (in his independent judgement, and according to the other provisions of this Schedule) he should do so.

Care, skill and diligence

- 4 A director of a company must exercise the care, skill and diligence which would be exercised by a reasonably diligent person with both –
- (a) the knowledge, skill and experience which may reasonably be expected of a director in his position; and
 - (b) any additional knowledge, skill and experience which he has.

Transactions involving conflict of interest

- 5 A director of a company must not –
- (a) in the performance of his functions as director, authorise, procure or permit the company to enter into a transaction, or
 - (b) enter into a transaction with the company,
- if he has an interest in the transaction which he is required by this Act to disclose to any persons and has not disclosed the interest to them to the extent so required.

Personal use of the company's property, information or opportunity

- 6 A director or former director of a company must not use for his own or anyone else's benefit any property or information of the company, or any opportunity of the company which he became aware of in the performance of his functions as director, unless—
- (a) the use has been proposed to the company and the company has consented to it by ordinary resolution; or
 - (b) the company is a private company, the use has been proposed to and authorised by the board, and nothing in the constitution invalidates that authorisation; or
 - (c) the company is a public company, its constitution includes provision enabling the board to authorise such use if proposed, and the use has been proposed to and authorised by the board in accordance with the constitution.

Notes

- (1) In this paragraph “the board” means the board of directors acting without the participation of any interested director.
- (2) This paragraph does not apply to a use to which the director has a right under a contract or other transaction that he has entered into with the company, or that he has in the performance of his functions authorised, procured or permitted the company to enter into.

Benefits from third parties

- 7 A director or former director of a company must not accept any benefit which is conferred because of the powers he has as director or by way of reward for any exercise of his powers as such, unless the benefit is conferred by the company or—
- (a) acceptance of the benefit has been proposed to the company and the company has consented to it by ordinary resolution; or
 - (b) the benefit is necessarily incidental to the proper performance of any of his functions as director.

[Special duty where company more likely than not to be unable to meet debts]

- 8 At a time when a director of a company knows, or would know but for a failure of his to exercise due care and skill, that it is more likely than not that the company will at some point be unable to pay its debts as they fall due—
- (a) the duty under paragraph 2 does not apply to him; and
 - (b) he must, in the exercise of his powers, take such steps (excluding anything which would breach his duty under paragraph 1 or 5) as he believes will achieve a reasonable balance between—
 - (i) reducing the risk that the company will be unable to pay its debts as they fall due; and
 - (ii) promoting the success of the company for the benefit of its members as a whole.

Notes

- (1) What is a reasonable balance between those things at any time must be decided in good faith by the director, but he must give more or less weight to the need to reduce the risk according as the risk is more or less severe.
- (2) In deciding in any case what would be most likely to promote the success of the company for the benefit of its members as a whole, the director must take account in good faith of all the material factors that it is practicable in the circumstances for him to identify.
- (3) The Notes to paragraph 2 apply also for the purposes of this paragraph.
- (4) In this paragraph, “due care and skill” means the care, skill and diligence required by paragraph 4.]

Special duty where no reasonable prospect of avoiding insolvent liquidation

- 9 At a time when a director of a company knows, or would know but for a failure of his to exercise due care and skill, that there is no reasonable prospect of the company’s avoiding going into insolvent liquidation –
- (a) neither paragraph 2 nor paragraph 8 applies to him; and
 - (b) he must, in the exercise of his powers, take every step with a view to minimising the potential loss to the company’s creditors that a person exercising due care and skill would take (excluding anything which would breach his duty under paragraph 1 or 5);
- and “due care and skill” here means the care, skill and diligence required by paragraph 4.