HFW

CORPORATE | DECEMBER 2018

THE COMPANIES, LIMITED LIABILITY PARTNERSHIPS AND PARTNERSHIPS (AMENDMENT ETC.) (EU EXIT) REGULATIONS 2018

As a result of the United Kingdom's decision to leave the European Union, important changes are required to the existing company law framework. In this briefing we examine the proposed changes to the UK's existing company law framework to make it fit for purpose following the UK's exit from the European Union.

"An explanatory memorandum published by the Department for Business, Energy and Industrial Strategy (BEIS) alongside the Regulations explains that the amendments are being proposed in order to address deficiencies in retained EU law.".

A draft of the *Companies, Limited Liability Partnerships and Partnerships (Amendment etc.) (EU Exit) Regulations 2018* (the "Regulations") was published on 31 October 2018 under the auspices of the European Union (Withdrawal) Act 2018. When enacted, the Regulations will come into force on exit day,[1] together with a whole raft of similar legislative instruments. The Regulations do not directly address deficiencies in the area of accounting and audit which are being dealt with in separate instruments.

The amendments contained in the Regulations can be broadly placed in two categories; (i) those that make technical and consequential changes so that the legislation can continue to operate in the same way as before exit day; and (ii) those that make changes so that preference is not given to EEA countries after exit day. This second category of changes is required in order bring the post-exit legislative framework into compliance with the WTO Most Favoured Nation rules (the "WTO Rules"). Existing legislation which gives special treatment to EEA businesses will no longer be legal under the WTO Rules once the UK leaves the EU. Under the WTO Rules, any preferential treatment afforded to EEA states following exit day would have to be given to all other WTO members. This would have a negative impact on the UK's bargaining power when negotiating future trade deals outside the EU.

The current suite of company law contains references to the EU and EEA throughout, with the UK treated as an EEA state and EU member state. The existing legislation provides for treatment of EEA companies and listing on the EEA regulated market in the context of the single market and refers to EU specific arrangements between the UK and EU member states, such as the cross-border merger regime and e-Justice portal. Some of these arrangements will no longer be relevant after exit day.

An explanatory memorandum published by the Department for Business, Energy and Industrial Strategy (BEIS) alongside the Regulations explains that the amendments are being proposed in order to address deficiencies in retained EU law. The BEIS comments further by saying that the Regulations' purpose is to ensure that the UK's company law framework will be able to function effectively, providing clarity and a smooth transition for business on and after exit day, while preserving the company law framework unchanged as far as possible. The Regulations, grouped together in one instrument of miscellaneous changes, amend more than 25 individual pieces of primary and secondary legislation.

The key amendments can be summarised as follows:

- **Changes to definition of "regulated market"** – the term *regulated market* is used in various provisions of the Companies Act 2006 and, as currently drafted in, is defined as the UK and EU markets together. The draft Regulations now split the definition by defining the *UK regulated market* and the *EU regulated market* separately.
- **Filing requirements in respect of EEA corporate directors and secretaries** – amendments are being proposed so that, from exit day, UK companies that already have an EEA company appointed as a corporate director or secretary, or a company wishes to make such an appointment in future, will be required to provide the same information to the Registrar as they must for non-EEA corporate directors and secretaries. Companies will benefit from a three-month transition period following exit day to comply with the new filing requirements for those

1. Defined as 29 March 2019 at 11:00pm

corporate directors and secretaries appointed before exit day.

- **Overseas Companies Regulations 2009** – the amendments being proposed will mean that from exit day, all overseas companies will have the same registration, filing and disclosure requirements irrespective of whether they are incorporated in the EEA or not.
- **Documents subject to Directive disclosure requirements** – with respect to company documents which must be published by way of public notice, technical amendments are being proposed so that all references in the Companies Act 2006 to *documents subject to Directive disclosure requirements* are replaced by references to *enhanced disclosure documents*. The list of documents subject to the disclosure requirements will remain unchanged.
- **Permitted disclosure provisions** – amendments are being proposed to various existing regulations so that, from exit day, EEA credit reference agencies, credit institutions and financial institutions will no longer be given preferential treatment with respect to regulations permitting the Registrar to disclose protected information to public authorities. A transitional period of one year will apply so that affected businesses who wish to continue receiving data from the Registrar will have time to restructure and make other necessary arrangements.
- **Political parties and expenditure** – the Regulations will amend the Companies Act 2006 provisions dealing with controls on political donations and expenditure to political parties or organisations that carry out political activities. References to *EU member states* are being removed. After exit day the description of political expenditure incurred in respect of the preparation, publication, or dissemination of news material only captures the intention to influence voters in referendum in the UK.
- **e-Justice portal** – the Regulations remove the requirements under the Companies Act for the Registrar to provide certain information for publication on the European e-Justice portal as the UK will no longer form part of the e-Justice portal after exit day.
- **Cross-border mergers revocation** – the Regulations will revoke the Companies (Cross-border Mergers) Regulations 2007. This means that, after exit day, the UK will no longer have access to the regime designed for mergers to occur between limited liability companies of the UK and EEA states.
- **Registered name of overseas companies** – after exit day checks to company names submitted to Companies House for registration will apply to EEA companies in the same was as they apply to other overseas companies.
- **Communication of pre-emption offers to shareholders** – the draft Regulations propose substituting references to *EEA state* with *UK or an EEA state* to ensure that after exit day, the rules on communication of pre-emption offers to shareholders remain as they did before exit day. This means that if a shareholder has no registered UK or EEA address, then the pre-emption offer may be made via the *Gazette*.

The process of drafting the Regulations involved a limited informal consultation with the Law Society. The BEIS memorandum explains that impact on business, as a result of the Regulations, will be less than £5 million and therefore no wider impact assessment or consultation with business was required. The memorandum states that the main direct cost to businesses will be so-called *"familiarisation costs"* incurred by companies in familiarising themselves with the new filing and disclosure requirements and the cost of submitting additional information to Companies House, including the preparation and filing of accounts and non-financial information statements.

Companies will have time to make adjustments in order to comply with the Regulations but should start thinking about how they might want to restructure and implement new processes now.

For further information please contact the authors of this briefing:

ALEX KYRIAKOULIS
Partner, London
T +44 (0)20 7264 8782
E alex.kyriakoulis@hfw.com

ALEX SMITH
Associate, London
T +44 (0)20 7264 8049
E alex.smith@hfw.com

HFW has over 550 lawyers working in offices across Australia, Asia, the Middle East, Europe and the Americas. For further information about our Corporate capabilities, please visit hfw.com/corporate

hfw.com

Americas | Europe | Middle East | Asia Pacific