

October 2006

## Companies House Newsletter

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### **POLICY GUIDANCE ON RETURN OF ALLOTMENT FORMS**

Companies House were asked to comment on the phrase which appears in the Return of Allotments form - "*Amount paid or due and payable on each such share*".

In some cases this wording has been revised by company managers to read, "*Amount paid on each such share*"

In a particular case the revised wording caused a problem because despite this statement the shares were unpaid. There was a conflict between the statement filed at Companies House, which is a matter of public record, and the actual position.

It is important to note that section 1 of the Companies Rules states that "*The forms set out in the Schedule hereto shall be used for the purposes of the Act and the particulars contained therein are hereby prescribed as the particulars required under the Act.*"

It should also be noted that section 60 (1) (a) of the Companies Ordinance requires registration of "*a return of allotments, stating...the amount (if any) paid or due and payable on each share...*"



It is still the case that despite this statutory guidance the statement in the Return of Allotment form verifying the “amount paid or due and payable on each such share” has caused confusion and in many cases mistakes have been made.

The information that should be inserted in this section of the form should simply state the nominal value of the share plus any premium payable.

*Example 1*

In the case of a share with a nominal value of £1 and no premium is payable the amount paid or due and payable on the issue of such a share should be stated as £1.

*Example 2*

In the case of a share with a nominal value of £1 and premium of £99 is payable the amount paid or due and payable on the issue of such a such should be stated as £100 i.e.  $£1 + £99 = £100$ .

It should be clear from this that there is no need to change the prescribed statutory form nor is there any need to mark or strike out any part of the statutory wording. Indeed in the UK if a statutory form is marked or changed it will be rejected. We will take a more robust approach in Gibraltar.

**However please note that with effect from 1 January 2007 where the wording in a Return of Allotment form has been amended or deleted and therefore deviates from the prescribed statutory wording it will be returned.**

**Companies House will continue to accept Return of Allotment forms where the statutory wording has been marked or struck out. It is hopefully clear from the above that there is no need to mark or strike out the wording.**

## **THE NEW RULES ON FRACTIONAL SHARES**

Amendments were made to the Companies Ordinance by the Companies (Amendment) Ordinance 2006. These changes were introduced with effect from 18 May 2006.

As a consequence a company that is a licensed collective investment scheme may now issue fractional shares. In addition the limitation of 50 shareholders has been lifted for these types of company and there is also an exemption from filing a prospectus.



Consequently a private limited company carrying on business as a licensed collective investment scheme may issue shares or fractional shares to more than 50 shareholders without having to file a prospectus at Companies House.

The intention behind these changes is to make Gibraltar a more attractive jurisdiction for the fund industry. There are of course regulatory implications, which are handled by the Financial Services Commission.

### **LIQUIDATIONS - SECTION 273 COMPANIES ORDINANCE**

In order to wind up a company voluntarily as a members' voluntary winding up the directors must comply with s 273 of the Companies Ordinance.

This statutory provision states that the statutory declaration must be delivered to the Registrar at Companies House before the notices are sent out to the company's members to convene the general meeting at which a resolution to wind up the company will be considered and passed as a special resolution. If this requirement is not met, the statutory declaration will not be effective.

There is however no statutory guidance on the time period for swearing the statutory declaration. The position in the UK is clear and unambiguous as a time period is specified in s 89 of the Insolvency Act, 1986. This is the statutory equivalent of s 273. However the Gibraltar statutory provision does not specify any time periods and therefore causes uncertainty.

The Registrar will accept Statutory Declarations made within the 10 weeks immediately preceding the date of the passing of the resolution wind up.

Two points should be noted:

- 1) Unless a general meeting is convened on short notice or the special resolution is passed by written resolution then the notice convening the general meeting must give 21 days' notice. As such, the statutory declaration must be sworn within 7 weeks of the date that the notices are sent out.
- 2) The Statutory declaration must still be delivered to the Registrar before the notices are sent out to comply with s 273 (2).

Additional information on liquidations is contained in Circular 12.



There is another point to bear in mind. After the special resolution has been passed resolving to wind up the company the liquidation cannot be suspended or reversed without an Order of the Supreme Court.

## **SHARES AND DECIMAL PLACES**

The requirements for the memorandum of a company having a share capital are set out in section 4 (4) (a) of the Companies Ordinance '... the memorandum must also...state the amount of the share capital... and the division thereof into shares of a fixed amount'. The question on the meaning of a 'fixed amount' was discussed in the case *Re Scandinavian Bank Group plc* [1988] Ch. 87 and it was accepted that there is no requirement for the share capital to be expressed in amounts capable of legal tender. Indeed there are companies that have issued shares with a nominal value of 0.1p. The statutory provisions prescribe the maximum number of shares, which the company can issue without increasing its authorised capital.

Historically the Registrar took the view that the use of decimal place shares for private limited companies should be restricted because of the limitations on the number of members imposed under section 40 of the Companies Ordinance.

However we have seen particularly with the development of the fund industry and more sophisticated capital arrangements that the use of decimal place shares is now more commonplace. Consequently our policy has been reviewed in light of modern developments and is now more flexible.

## **CORPORATE MOBILITY**

Three important cases (listed in full below): *Centros*, *Uberseering* and *Inspire Art* have enabled businesses to freely choose jurisdictions across national borders.

*C-212/97, Centros Ltd. V. Erhvervs – Selskabsstyrelsen – 9 March 1999*

*C-208/00 Uberseering B.V., v. Nordic Construction Company Baumanagement GmbH – 5 November 2002*

*C-167/01 Kramer von Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd – 30 September 2003*

If anyone is interested in reading these cases in full they can be downloaded free of charge from [http://ec.europa.eu/internal\\_market/index\\_en.htm](http://ec.europa.eu/internal_market/index_en.htm)

Consequently an entrepreneur can choose where he incorporates a company in the EU irrespective of where the real activity takes place. This means that an entrepreneur can



choose the regulation of the new company formation (minimum capital and procedures) and the fees involved (registration costs and notary fees).

The Court of Justice has consistently held that, except where an abuse of process is found to have been committed in individual cases, a company may be formed in a particular Member State for the sole purpose of enjoying the benefit of more favourable legislation even if that company conducts its activities entirely or mainly in another Member State.

It is possible that Gibraltar could benefit from these EU developments. Notes from the Companies House presentation at the Finance Centre on 26 July 2006 are attached.

**In our next Newsletter we will deal with the proposed new Certificate of Status, which was discussed, with ATCOM at the meeting on 4 October 2006. This Certificate will confirm the same details contained in a profile but will be issued in the form of a Certificate.**

**For more information please contact Chris Keightley-Pugh at Companies House.**

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## **Introduction**

There have been some interesting developments on the corporate mobility of new company formations caused by the de regulation of company law. The purpose of this presentation is to discuss the recent European Court of Justice Rulings.

## **Situation before the European Court of Justice Rulings**

Before the Rulings Member States enjoyed a monopoly in company law. This meant that an entrepreneur with a project usually had to incorporate a company in the Member State where the real activities took place. Consequently the entrepreneur had to comply with the regulations and procedures (including the minimum capital requirements) and pay the costs associated with registration imposed by the state. In some cases, notably civil law jurisdictions this would include the notary's fees, which add to the level of cost.

## **After the European Court of Justice Rulings**

Three important cases: Centros, Uberseering and Inspire Art Rulings have enabled business to freely choose jurisdictions across national borders.

Consequently an entrepreneur can choose where he incorporates a company in the EU irrespective of where the real activity takes place. This means that an entrepreneur can choose the regulation of the new company formation (minimum capital and procedures) and the fees involved (registration costs and notary fees).

The Court of Justice has consistently held that, except where an abuse of process is found to have been committed in individual cases, a company may be formed in a particular Member State for the sole purpose of enjoying the benefit of more favourable legislation even if that company conducts its activities entirely or mainly in another Member State.

## **The UK phenomenon**

This has given rise to a development, which has been called the "UK phenomenon". This raised a great deal of interest with the delegates at the recent European Commerce Registers' Forum in Amsterdam, which is interesting in its own right as the ECRF is represented by high profile Registrars from all over Europe.

There appears to have been a movement towards incorporation of new companies in EU jurisdictions driven by relative prices. In particular minimum capital requirements, incorporation costs and time to gain legal recognition.

The main beneficiary so far has been Companies House in the UK.

## **Freedom of Establishment under Articles 43 and 48 of the Treaty**

The first paragraph of Article 43 EC provides that restrictions on the freedom of establishment shall be prohibited:

*Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital.*

Article 48 EC extends entitlement to freedom of establishment to companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community.

*Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States. 'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.*

Companies formed in accordance with the law of a Member State have the same rights of establishment under the Treaty as natural persons.

### **European Court of Justice decisions**

If anyone is interested in reading these cases in full they can be downloaded free of charge from [http://ec.europa.eu/internal\\_market/index\\_en.htm](http://ec.europa.eu/internal_market/index_en.htm)

*C-212/97, Centros Ltd. V. Erhvervs – Selskabsstyrelsen – 9 March 1999*

Centros Ltd was incorporated in the UK.

In this important decision the ECJ ruled that a UK company cannot be denied registration on the Danish Business Register on the grounds that the company operates entirely within Denmark having no real activities in the UK.

ECJ ruled that a branch office must be allowed to register in Denmark even if the branch amounts to the complete operation of the firm, without the firm having to incorporate in Denmark.

The fact that the company was incorporated in the UK to circumvent stricter Danish incorporation requirements concerning minimum capital requirements was irrelevant.

The Judgment

**It is contrary to Articles 43 and 48 of the EC Treaty for a Member State to refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the State in which that branch is to be created, while avoiding the need to form a company there, thus evading application of the rules governing the formation of companies which, in that State, are more restrictive as regards the paying up of a minimum share capital. That interpretation does not, however, prevent the authorities of the Member State concerned from adopting any appropriate measure for preventing or penalising fraud, either in relation to the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of a company, to evade their obligations towards private or public creditors established in the territory of the Member State concerned.**

*C-208/00 Uberseering B.V., v. Nordic Construction Company Baumanagement GmbH – 5 November 2002*

Uberseering B.V incorporated in the Netherlands, but operated its main business in Germany.

This company acquired land in Germany and contracted with NCC to refurbish a garage and motel on the site.

Uberseering made a claim in the German Courts for defective works carried out by NCC.

The German Regional Court and the Higher Regional Court rejected the claim on the grounds that the Dutch company lacked capacity to bring proceedings in Germany.

The Highest Court (Bundesgerichtshof) referred the case to the ECJ for guidance.

ECJ state that Uberseering as a company validly incorporated in the Netherlands having its registered office there is entitled to exercise its freedom of establishment in Germany under Articles 43 and 48.

The ECJ ruled that Uberseering had capacity to bring proceedings in Germany.

The Judgment

- 1. Where a company formed in accordance with the law of a Member State (A) in which it has its registered office is deemed, under the law of another Member State (B), to have moved its actual centre of administration to Member State B, Articles 43 EC and 48 EC preclude Member State B from denying the company legal capacity and, consequently, the capacity to bring legal proceedings before its national courts for the purpose of enforcing rights under a contract with a company established in Member State B.**
- 2. Where a company formed in accordance with the law of a Member State (A) in which it has its registered office exercises its freedom of establishment in another Member State (B), Articles 43 EC and 48 EC require Member State B to recognise the legal capacity and, consequently, the capacity to be a party to legal proceedings which the company enjoys under the law of its State of incorporation (A).**

*C-167/01 Kramer von Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd – 30 September 2003*

Inspire Art is incorporated in the UK, but operated in the Netherlands in the art business. Inspire Art wanted to register a branch in the Netherlands.

The Chamber of Commerce took the view that the company should register as a formally foreign company, which would have meant additional obligations under Dutch law, which imposed directors' liability and minimum capital requirements.

An application was made to the Dutch courts which upheld that while the company could legally operate in the Netherlands, it must adhere to legislation in place for foreign companies which imposed the more onerous conditions. The court was concerned with the compatibility of the Dutch law with Community law and therefore decided to stay proceedings and refer the matter to the ECJ.

The ECJ set out some of the basic principles, which were established in the Centros case. It is immaterial, having regard to the application of the rules on freedom of establishment that the company was formed in one Member State only for the purpose of establishing itself in a second Member State. The reasons for this, except in the case of fraud are irrelevant. In addition if the reason the company was formed in a particular Member State is to enjoy a more favourable legislation that does not constitute an abuse of process.

The fact that Inspire Art was incorporated in the UK for the purpose of circumventing Netherlands company law which has stricter minimum capital requirements does not mean that

the company's registration of a branch is not covered by freedom of establishment principles as provided in Article 43 and 48.

The ECJ did not agree with the arguments put forward by the Dutch Authorities that the Dutch law imposing minimum capital requirements and directors' liability could be justified on the grounds of public interest or the protection of creditors.

The ECJ ruled that the actions of Inspire Art were in line with EU law even if the only reason for incorporating in the UK was to circumvent Dutch minimum capital requirements for limited liability companies since "the fact that the company was formed in a particular member state for the sole purpose of enjoying the benefit of more favourable legislation does not constitute abuse even if that company conducts its business entirely or mainly in that second state".

#### The Judgment

- 1. It is contrary to Article 2 of the Eleventh Directive for national legislation such as Dutch Law on Formally Foreign Companies to impose on the branch of a company formed in accordance with the laws of another Member State disclosure obligations not provided for by that directive.**
- 2. It is contrary to Articles 43 EC and 48 EC for national legislation to impose on the exercise of freedom of secondary establishment in that State by a company formed in accordance with the law of another Member State conditions provided for in domestic company law in respect of company formation relating to minimum capital and directors' liability. The reasons for which the company was formed in that other Member State, and the fact that it carries on its activities exclusively or almost exclusively in the Member State of establishment, do not deprive it of the right to invoke the freedom of establishment guaranteed by the EC Treaty, save where the existence of an abuse is established on a case-by-case basis.**

These decisions of the ECJ have caused considerable legal debate.

However there is now broad consensus that the decisions of the court have established the right of businesses to choose their legal seat within the EU irrespective of the geographical location of their directors, owners or real activity.

The choice to incorporate in the UK follows from the fact that it has the simplest incorporation procedures and the lowest incorporation costs in the EU. Of course it should be noted that the costs and procedures are not dissimilar in Gibraltar.

In these three cases the ECJ therefore established the incorporation principle throughout the EU and upheld the freedom of firms to incorporate in one Member State to do business in another. Consequently branches from other EU countries must be registered unconditionally.

### **A quick word on branches**

Generally a branch is defined as an organisational unit of a founding entity, where the founding entity is a foreign firm. The branch itself does not amount to a separate legal entity. Most EU countries require that a foreign company must register a branch with the local authorities if it engages in real activity in that jurisdiction.

Within the EU the 11th Company Law Directive deals with the disclosure requirements of branches. This Directive has already been implemented in Gibraltar.

For example a UK incorporated company carrying on real activities in Germany must register a branch.

In a Centros type limited company the branch is the sole centre of economic activity, while the parent company – the private limited company incorporated in the UK has no real activity.

Economically the branch is the true parent company and the legal parent company is a shell without real activity.

It has been observed that since branches are not legal entities the registration of the branch is not strictly enforced. Observers of the UK phenomenon suggest that many of the UK incorporated companies carrying on business in Germany have not registered branches.

The implications of this are that the corporate mobility of the Centros type companies has a low probability of detection.

However most businesses need to register for VAT. In order to register in the Member State where the company is doing business it would be necessary to register a branch and therefore it is probable that a branch would be formally registered with the appropriate authorities in most cases.

### **Extent of the UK phenomenon**

Between 2002 and 2005 it has been estimated that over 52,000 new private limited companies were set up from other EU Member States in the UK. The largest flow of companies was from Germany, France, the Netherlands and Cyprus with over 24,000 companies from Germany alone. Most of these incorporations were small companies with one or two directors.

It would appear that the issue of corporate mobility is restricted to private limited companies.

It would appear that a small difference in set up costs and capital requirements have a large effect on the decisions of entrepreneurs to incorporate in the UK rather than their home jurisdiction.



On the other hand factors such as legal uncertainty, language barriers and stronger enforcement of disclosure standards seem to be no deterrent.

One of the reasons that price seems to be such an important consideration is that intermediaries and registration agents who are in a position to minimise the cost of incorporation in different jurisdictions have penetrated the company incorporation market. Intermediaries with the experience can easily assist a client incorporate in jurisdiction A instead of jurisdiction B.

### **Some of the tax implications**

The corporate mobility of a Centros type company generally has no tax consequences. Using a company incorporated in the UK, which carries on its business activities in Germany as an example – upon incorporation the company becomes liable to tax in the UK with its worldwide income. The Double Taxation Convention between Germany and the UK however rules that if the permanent establishment of the firm is in Germany and it generally has no economic interest in the UK, the company is taxable in Germany only.

The company may have to file a zero tax return in the UK or apply for exemption from filing for having non-resident status. Such a company is therefore taxable as a Germany company and subject to corporate tax, business tax and value added tax in Germany.

If this arrangement is structured legally there are therefore no tax consequences in the UK. However advice would need to be sought on the applicable double taxation agreements, which would add to the costs involved.

Whilst Gibraltar currently does not have in place any double taxation agreements it is possible that the same results could be achieved as a Gibraltar non resident company may have no liability to pay corporation tax in Gibraltar whilst the company could register to pay tax in the jurisdiction where the company is doing business. In fact this option may be easier and cheaper and therefore more attractive.

### **Regulatory responses**

As a consequence of corporate mobility regulatory competition will inevitably force change.

Already Germany and the Netherlands are reviewing and looking to reform company law to compete with the more attractive English company law.

France has already reduced the minimum capital requirements from €7,500 to €1 and as thereby lowered the cost of incorporation.

## **Conclusions**

As a consequence of the Centros case and related rulings of the ECJ there appears to be evidence of a significant flow of private limited company incorporations from all EU Member States to the UK.

There has been a dramatic increase in the number of companies incorporated in the UK the sole purpose of which are to carry on business in another Member State.

It seems clear that the cost of incorporating is the major factor including the minimum capital requirements makes large differences in the rate of capital formations. In addition indirect costs of incorporation such as the number of procedures to be completed and the time to obtain legal status also drive the decisions to incorporate abroad.

## **Can the Gibraltar Finance Industry benefit?**

Good location in Europe.

Well-regulated industry, which deals with the incorporation and management of companies.

Industry experience

Incorporation and management of UK companies – another source of income?

Marketing non-resident Gibraltar companies for the same purpose subject to tax considerations.

What is Gibraltar's international status – IMF World Bank FATF, etc? There is a need for the industry, Government and Companies House to work together to take advantage of the opportunities.

## **Brite**

David has already spoken of ERB and the Brite project.

Business Register Interoperability Throughout Europe

EBR has responsibility for co coordinating this EU funded project. The key aim of the Brite Project is to eliminate administrative barriers to the freedom of establishment and movement of companies by implementing a branch disclosure system between EU Registries.

The purpose of this scheme is to enable a Registry where a branch is registered under the 11th Company Law Directive to:

- Determine the status of the home Register.



- To ensure that the Registries are notified of any changes in the status of the company

## **Other Developments**

### **Developments on redomiliation**

Generally in the EU (with some notable exceptions) a firm cannot leave its country of incorporation without facing mandatory dissolution, taxation, notary and other costs. However as we have seen the transfer of the de facto head office can be resolved (in favour of freedom of establishment) under the Rulings I have been discussing.

Indeed it would seem to be contrary to the Treaty provisions on freedom of establishment to prevent the transfer of registered office. However until these recent developments there has been some resistance from Member States – notably Germany.

However there seems to be a pressing need to allow companies to transfer their registered office from one Member State to another without having to wind up in their home member state. The advantages are twofold:

1. To allow the company to adapt its location or organisation structure to market changes and to changes in its position in those markets by choosing the national law which best meets its requirements.
2. To be relieved of the obligation, when carrying out such adaptations to go through liquidation proceedings.

This is logically the next step on from the Centros case and the related decisions of the ECJ. This will allow a company to transfer its registered office to another Member State, and to change its legal personality which will facilitate its freedom of establishment.

A draft European Commission Directive– 14th Company Law Directive on the cross border transfer of companies registered offices has been proposed and the EU Commission has already launched a consultation process. If implemented this will bring the rest of the EU in line with Gibraltar, which implemented legislation allowing redomiliation some time ago.

The object of the Directive would be the cross border transfer of the registered office by way of freedom of establishment.

After this Directive has been effectively implemented the transfer of registered office between Gibraltar and the rest of Europe will become easier.



### **Cross border mergers**

Sevic Systems AG – recently decided case that concluded that Articles 43 EC and 48 EC allow cross border mergers.

Directive 2005/56/EC – The European Commission has now adopted and published in the Official Journal a Directive for the cross border merger of companies.

End