

Company Secretary's Review

CA 2006 Evaluation

Simon W. Holden highlights the results of the post-implementation evaluation of the Companies Act 2006 published by the Department for Business, Innovation and Skills in January 2011.

Introduction

When the final provisions came into force on 1 October 2009 as part of its phased implementation, the Companies Act 2006 ("CA 2006") had the distinction of being the lengthiest piece of legislation in British Parliamentary history; it contains 1,300 sections and no fewer than 16 schedules. Whilst this feat has since been surpassed by the Corporation Tax Act 2009, it is a vast tome for company law practitioners and businesses of all sizes to be expected to digest on a daily basis.

CA 2006 codified company law in the UK, superseding the Companies Acts of 1985 and 1989, and thereby alleviated much of the need to cross-reference between numerous statutes. Some of its key provisions include:

- ◆ the introduction of various new provisions for private and public companies;
- ◆ the codification of certain existing common law principles, such as those relating to directors' duties and derivative claims by shareholders; and
- ◆ the implementation of the European Union's Takeover Directive.

CA 2006 objectives

The UK Government department responsible for overseeing implementation of CA 2006 is the Department for Business, Innovation and Skills ("BIS") – formerly named the Department for Business, Enterprise and Regulatory Reform and,

before that, the Department of Trade and Industry (better known by their respective abbreviations, BERR and DTI).

In January 2007, in a document entitled "Companies Act 2006 – Regulatory Impact Assessment", BIS stated that the purpose of the Act was to seek to ensure that British business operates within a legal and regulatory framework that promotes enterprise, growth, investment and employment. Further, it stated that in order to deliver this, CA 2006 had four key objectives:

- ◆ to enhance shareholder engagement and a long-term investment culture;
- ◆ to ensure better regulation and a "Think Small First" approach;
- ◆ to make it easier to set up and run a company; and
- ◆ to provide flexibility for the future.

CA 2006 evaluation

The reception of CA 2006 by legal practitioners and commentators has been lukewarm. Concerns have been expressed that too much detail has been inserted to seek to cover every eventuality. Whereas a complete overhaul of company law was promised, CA 2006 leaves much of the existing structure in place and only simplifies certain aspects at the margins. In other areas, it is said to have complicated and obfuscated previously settled law and may make doing business more difficult for those operating small companies.

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It is against this backdrop that BIS recently published a post-implementation evaluation of the main provisions of CA 2006 (the "Evaluation"), available on the BIS website (<http://www.bis.gov.uk/>). The stated purpose of the Evaluation was to assess the main outcomes of CA 2006 and the consequences of the regulatory changes for companies, shareholders and other stakeholders.

Evaluation objectives

CA 2006 provisions were selected for evaluation on the following criteria:

- ◆ provisions that were estimated, in the Regulatory Impact Assessment document (see above), to bring the biggest costs or savings;
- ◆ provisions that proved most contentious at the time of Parliamentary passage; and
- ◆ provisions that have been highlighted by business as being of particular interest or importance.

Central to the Evaluation was a survey by ORC International (one of the leading

customer, employee engagement and financial research specialists in the UK) of a random sample of 1,000 companies of all sizes, supported by a series of company case studies and interviews with stakeholders such as business representative groups.

The ORC International survey presents the first primary research amongst companies and stakeholders into the awareness and impact of CA 2006, says BIS, and is therefore an important barometer at assessing the impact that the Act has had so far.

Overall awareness

The results show that 85% of the companies interviewed were aware of the changes to UK company law brought in by CA 2006. Small private companies had the lowest awareness levels, with 40% being aware that changes had been made compared with over nine in ten quoted companies (94%).

In relation to individual measures, awareness was highest regarding the change to directors' addresses (85% of all companies), access to company information and filing times (84%, public and quoted companies only), and the business review (81%, large private, public and quoted companies).

Given that the highest awareness levels were experienced by larger companies, specifically those that were public and quoted, one assumes that more work needs to be done at engaging those who run smaller companies; arguably the very essence for company law reform. The Evaluation is keen to explain the variances – it states that adoption levels of the measures brought in by CA 2006 (and by this, we can assume BIS implies awareness by companies) were found to be highest amongst companies who used BIS publications or alerts, amongst others, as their source of awareness of changes to company law.

Complexity and cost

The results show that nearly half of the companies who had made a change found the changes in the law "easy" to understand (49%) whilst 16% found it "difficult". Understanding of the changes was highest among financial intermediation businesses and lowest in wholesale and retail trade companies.

Time-wise, the results show that one third of companies (33%) spent 10 hours or less on all changes they had made. Just over a fifth of companies (21%) estimated that they had spent over 40 hours.

Quoted companies were most likely to have spent over 40 hours responding to the changes in company law.

Compliance and adoption costs incurred were noted in terms of hours spent split by job roles involved, and any costs for external professional services. The results show that almost two-fifths (38%) of companies had purchased external professional services; 53% of quoted companies.

The Evaluation notes that whilst it was disappointing that respondents to the company survey were unable in many cases to quantify savings from the various changes introduced by CA 2006 it is still quite early after final implementation. If it is indeed considered to be quite early after final interpretation, one wonders if BIS is jumping the gun in assuming that there are savings to quantify, at least significant enough to justify the reforms.

Other observations

Other observations in the Evaluation include the following:

- ◆ On the whole the changes are not seen as overly burdensome by companies. Key deregulatory measures such as the removal of the requirement for private companies to hold annual general meetings and the greater use of written resolutions have been welcomed.
- ◆ CA 2006 was enabling in nature and therefore awareness and adoption levels are likely to rise over time as familiarisation with it increases.
- ◆ Stakeholders and those companies with a better understanding of company law had a greater recognition of the deregulatory benefits brought about by CA 2006.
- ◆ Stakeholders in particular noted a number of positives resulting from CA 2006, including a reduction in bureaucracy, greater privacy for directors and shareholders, greater clarity on directors' duties (it is worth noting that there is plenty of commentary to suggest CA 2006 has not actually done this and common law principles will still have to be relied upon), and greater engagement with shareholders.

Room for improvement?

The Evaluation identifies a number of areas where respondents suggested that further improvements could be made. The suggestion that greater clarity is needed on narrative reporting in the business review requirement (CA 2006, s 417) is timely, says BIS, as it has recently consulted on issues relating to corporate narrative reporting and will consider this area in more depth as part of its wider review into corporate governance and economic short-termism.

Some of the suggestions concern the nature of guidance on CA 2006 changes. BIS and Companies House review guidance to ensure it remains fit for purpose, and this feedback has been noted as helpful.

The Government has taken the other suggestions on board, but states that it does not believe there is a need for further significant reform of the company law framework underpinned by CA 2006. However, BIS has confirmed that is aware of a number of minor and technical corrections which are necessary to CA 2006 and a number of issues where further changes may be warranted.

Conclusion

Although the Evaluation makes clear that it is probably too soon to state categorically that the objectives of CA 2006 have been met, it notes positive progress in terms of the Evaluation's three objectives. In retrospect, it was always going to take time for a statute as lengthy and detailed as CA 2006 to bed down within an already existing, and rapidly changing, legal framework.

More pressing are the issues raised by the Evaluation about how best to communicate with the smallest companies. Since these issues have been flagged, one presumes that BIS will continue to review this particular area and seek to enhance the methods it uses to inform of company law requirements and changes across the broad spectrum of companies that exist in the UK; for example, directing more tailored communications to small companies. As the adage goes, only time will tell.

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