UK Corporate Briefing

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Welcome to the spring 2016 edition of Dentons' UK Corporate Briefing, a quarterly summary of the most significant recent and forthcoming developments in company law and corporate finance regulation in the UK.

In this issue...

Please contact us if you would like to discuss any subject covered in this issue.

Legislation update

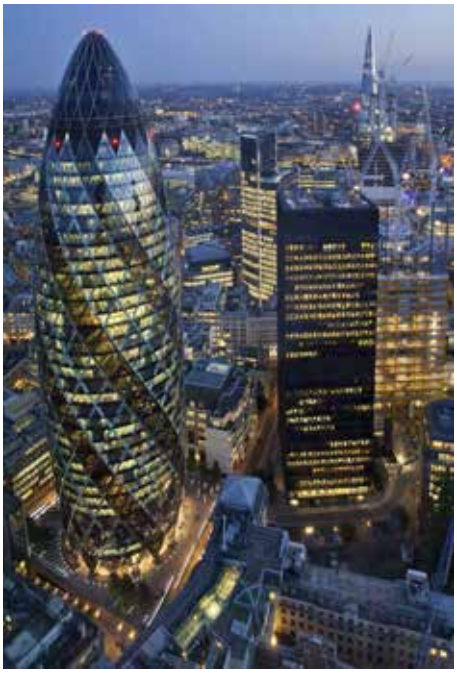
Companies Act 2006: people with significant control regime now in force

In a significant change to the UK Companies Act 2006, UK-incorporated companies must now collect and keep information about people with significant control over them. The new rules came into force on 6 April 2016. They apply to all UK companies, other than those that are already subject to the Financial Conduct Authority's Disclosure and Transparency Rule 5 or certain equivalent overseas regimes. They also apply to UK-incorporated LLPs. In this article we focus on the practical steps which companies (and LLPs) should be taking.

For a more general review of the new regime, see our winter 2015/2016 issue.

Duty to keep a register of people with significant control

Every company should now have a register of people with significant control over it (PSC Register). The PSC Register forms part of the company's statutory books. The company must keep its PSC Register with the company's other statutory books at the company's registered office or at the alternative inspection location which the company has



notified to Companies House. Failure to keep a PSC Register is an offence. Both the company and any officer who is in default may commit it.

Gathering information for the PSC Register

A company must take reasonable steps to find out whether there are any individuals (PSCs) or relevant legal entities (RLEs) who have significant control over it and meet the criteria for registration. (See the boxes "The conditions for being a PSC" and "The conditions for being an RLE" for a summary of these key terms.)

If a company has been notified that a person is a registrable PSC or registrable RLE and has all the necessary particulars about that person, it may not be necessary to conduct any further information gathering about that person. However, for a PSC (but not an RLE), it is a requirement that the individual has provided the information or that it has been provided with the individual's knowledge.

More generally, the company should send a notice to anyone it knows, or has reasonable cause to believe, is a registrable PSC or a registrable RLE. This should ask them to confirm whether they are or not, to confirm or correct any particulars included in the notice and to supply any that are missing. The company can also serve notice on anyone it knows, or has reasonable cause to believe, can identify a registrable PSC or registrable RLE or knows the identity of someone else likely to have that knowledge.

A recipient must comply with a notice within one month of its date. There is also a separate duty on a registrable PSC or registrable RLE to provide information to the company. This applies if: that person knows or ought reasonably to know they are registrable; their particulars are not on the PSC Register; they have not received a notice from the company; and this has continued for at least a month.

To ensure that information on the PSC Register is always up to date, there are also continuing information gathering duties on the company and continuing notification duties on registrable PSCs and registrable RLEs.

Failure by a company to comply with its information gathering duties is an offence. Any person who fails to comply with a notice from a company or with its own notification duties (or knowingly or recklessly provides false material particulars) also commits an offence. Any officer in default may also be liable.

The conditions for being a PSC

- An individual who holds, directly or indirectly, more than 25% of the shares in a company;
- An individual who holds, directly or indirectly, more than 25% of the voting rights in a company;
- An individual who holds the right, directly or indirectly, to appoint or remove a majority of the board of directors of a company;
- An individual who has the right to exercise, or actually exercises, significant influence or control over a company;
- An individual who holds the right to exercise, or actually exercises, significant influence or control over the activities of a trust or firm which is not a legal entity, but would satisfy any of the first four tests if it were an individual.

A company treats an individual as a **non-registrable** PSC if that individual only holds an interest in the company through having significant control of an RLE.

All other PSCs are **registrable.** There are detailed interpretive provisions on many of these terms. Every situation should be considered on a case-by-case basis.

The conditions for being an RLE

Any legal entity which the company would class as a PSC if it were an individual and:

- is itself either obliged to keep a PSC Register; **or**
- must comply with DTR 5; **or**
- is traded either on another EEA Regulated Market or on a specified market in Switzerland, the US, Japan or Israel.

An RLE is **registrable** unless it only holds an interest in the company through having significant control of another RLE.

Enforcement

A company may serve warning notices on anyone with a relevant interest in the company who has not responded to a notice from the company. A person with a relevant interest is a person who holds any shares or voting rights in the company or has the right to appoint or remove any board member. A warning notice tells that person that the company plans to issue them with a restrictions notice.

If, after one month of the warning notice, the information remains outstanding without a valid reason, the company may serve a restrictions notice. The law does not require the company to do this, but a company should consider whether it is right to do so to meet its duty to take reasonable steps. A restrictions notice disenfranchises the relevant interest in the company. For example, the company cannot pay dividends and no rights may be exercised in respect of the interest. A restrictions notice lasts until the information has been provided or certain other circumstances prevail.

What information must be included on the PSC Register?

A company's PSC Register cannot be empty. A company must always have information about its registrable PSCs or registrable RLEs and/or an update on the state of the company's information gathering on its PSC Register.

Information gathering

The Register of People with Significant Control Regulations 2016 (the Regulations) set out the statements that a company must include on its Register on the progress of its information gathering. For example, while a company is taking reasonable steps to find out if it has any registrable PSCs or registrable RLEs, its PSC Register should state: "The company has not yet completed taking reasonable steps to find out if there is anyone who is a registrable person or a registrable relevant legal entity in relation to the company."

Registrable PSCs

Where the company has identified a registrable PSC the following information about the PSC must be obtained, confirmed and entered on the PSC Register by the company:

- name;
- date of birth;
- nationality;
- country, state or part of the UK where the PSC lives;
- service address;
- usual residential address (though this is protected from public disclosure);

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- the date the individual became a PSC (this is 6 April 2016 for existing companies completing a PSC Register for the first time in April 2016);
- which of the five PSC conditions the individual meets (using the official wording set out in the Regulations); and
- any restrictions on disclosing the PSC's information that are in place (see below).

In stating which of the five conditions the PSC meets, the company must, where relevant, quantify the PSC's shareholding or voting rights, by reference to three bands:

- more than 25% but not more than 50%;
- more than 50% but not more than 75%; or
- 75% or more.

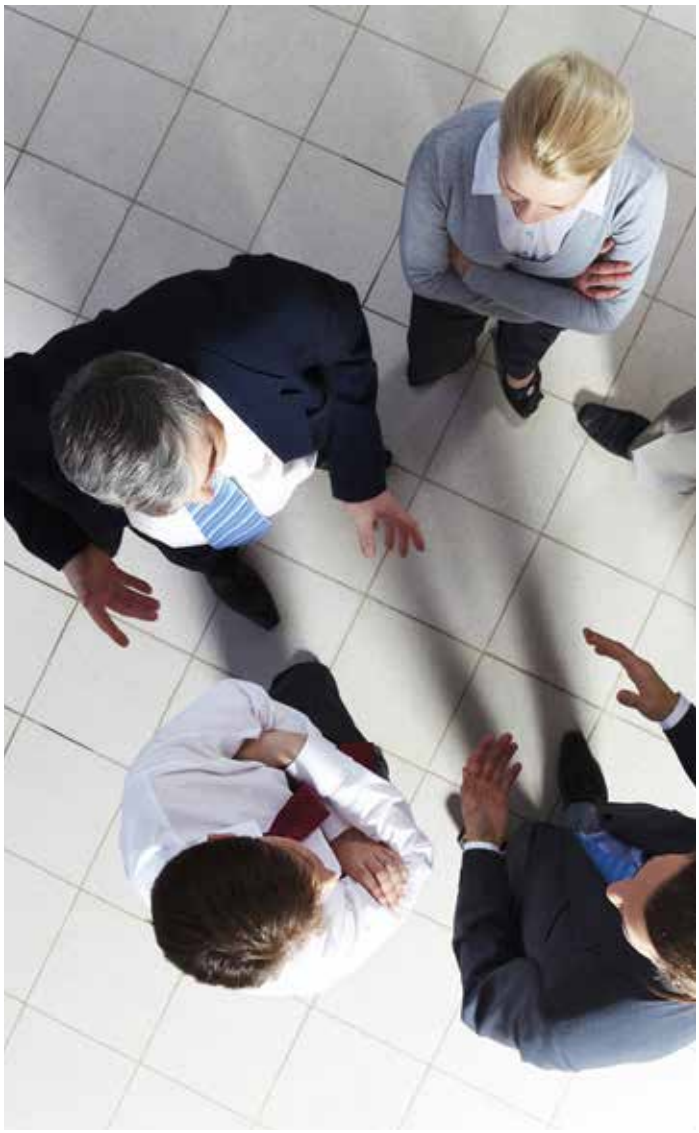
The company must not enter any of an individual's particulars in the register until they have been confirmed either by that person or by another person with the knowledge of that person.

Registrable RLEs
Where a company has identified a registrable RLE the following information must be obtained about the RLE and entered on the PSC Register by the company:

- the name of the legal entity;
- the address of its registered or principal office;
- the legal form of the entity and the law governing it;
- any register in which it appears (including details of the state) and its registration number;
- the date it became a registrable RLE (this is 6 April 2016 for existing companies completing a PSC Register for the first time in April 2016); and
- which of the five PSC conditions the RLE meets (using the official wording set out in the Regulations) quantified where relevant by reference to the three bands.

The required particulars must be entered on the Register once the company becomes aware of the entity's status as a registrable RLE. There is no equivalent of the confirmation requirement for individuals.

No registrable PSCs or RLEs
Where a company has taken all reasonable steps and knows or reasonably believes that it has no registrable PSCs or registrable RLEs, it must record that fact on its PSC Register.



Keeping the information up to date
A company must keep its PSC Register up to date by reflecting any relevant changes to its registrable PSCs and registrable RLEs. However, it cannot enter changes about an individual unless they have been confirmed.

Public access to PSC information

As one of a company's statutory books, its PSC Register must be accessible for inspection by any person. Any person can also ask for a copy of the Register. There is a charge of £12 per request. The only information on its PSC Register which a company must not disclose is a PSC's residential address.

The company must always tell the person wishing to inspect or have a copy of the PSC Register of the date when the PSC Register was last updated and whether there are further alterations to be made.

As with requests to inspect the register of members, anyone applying to inspect or have a copy of the PSC Register must provide their name and address and specify their purpose in seeking the information. The

company must respond to the request within five working days. In that time it must either comply with the request or, if it believes the request is not for a proper purpose, it can apply to court.

From 30 June 2016, as part of the new annual return regime, companies will have to provide annual information about their PSC Registers to Companies House.

This information will be publicly available, but there will be some safeguards from public disclosure. The day of date of birth and residential address information of PSCs will be subject to the same protections as for company directors and will not be available to the public.

Additionally, if a PSC considers that they or someone they live with would be at serious risk of violence or intimidation through their wider PSC information being publicly available, they can make a protection application to Companies House. A full protection application means that no information about the PSC is publicly available at Companies House or shared by Companies House with credit reference agencies. On the relevant company's PSC Register, a note that a protection application has been made replaces the usual information. Protection starts as soon as an application is made and, if it is granted, the PSC information has indefinite protection.

BIS Guidance

As already mentioned, every UK company within the new regime (and all UK LLPs) should now have a PSC Register and be taking appropriate steps to identify and record their registrable PSCs and registrable RLEs. For some, this will be a straightforward exercise, but for others it may be more complex. The government has produced detailed Guidance on the register of people with significant control to help companies meet their new obligations. The guidance includes the various statutory wordings mentioned above as well as example notices.

Other government guidance on the new regime (for example, specific guidance on the meaning of "significant influence or control") is available from the link below.

BIS webpage: PSC requirements for companies and limited liability partnerships

Director disputes: wrongly appointed directors

A change to the Companies Act 2006 provides a simpler method for a person who did not consent to act as a director to have their name removed from the public register at Companies House. The new process is available from 6 April 2016.

If Companies House receives such an application, it will ask the relevant company to provide evidence that the director has consented to act. If the company does not respond or cannot provide evidence (for example, a consent to act from the person concerned) within the allowed time, Companies House will remove the director's appointment from the public register.

Section 102 Small Business, Enterprise and Employment Act 2015 and Registration of Companies and Applications for Striking Off (Amendment) Regulations 2016

Registered office disputes

From 6 April 2016, a new process under the Companies Act 2006 will allow Companies House to change the registered office address of a company that is using an address without permission.

If Companies House receives an application from any person, it will (unless the application has no real prospect of success) give notice to the company. It will invite the company to provide evidence that it can use the address as its registered office (for example, evidence that the

company or a related group undertaking has a proprietary interest at the address). If the company fails to provide acceptable evidence, Companies House must change the address of the registered office to a default address.

The default address will be a PO Box at Companies House. The company cannot use this default address for keeping, or making available for inspection, its registers or other documents. Companies House will have no duty to open any documents delivered to the default address, and may destroy any documents uncollected after 12 months.

The applicant or the company may appeal a Companies House decision to the court within 28 days.

Section 99 Small Business, Enterprise and Employment Act 2015 and Companies (Address of Registered Office) Regulations 2016

LLP and partnership accounts: amending regulations

New regulations make changes to the accounting regulatory framework for LLPs to bring it into line with changes made in 2015 to the accounting regulatory framework for companies.

In particular the regulations:

- increase the thresholds used to determine the size of an LLP in line with those which apply to companies;
- align the audit provisions for LLPs with those for companies;
- make revisions to the small, medium-sized and dormant LLP accounting regimes; and
- introduce a micro-entity regime for LLPs.

The regulations also make certain related changes for qualifying partnerships.

The regulations apply to financial years on or after 1 January 2016. However, an LLP or qualifying partnership may apply the amended rules to financial years beginning on or after 1 January 2015 if it has not already delivered a copy of its accounts for that financial year to Companies House.

Limited Liability Partnerships, Partnerships and Groups (Accounts and Audit) Regulations 2016

Case law update

Deciding fair value under pre-emption provisions in a company's articles

A recent High Court decision involved interpreting the pre-emption provisions in a company's articles. In particular, the court had to consider the basis on which the appointed accountants should value the shares which the defendants wished to transfer.

Facts

The defendants were minority shareholders with a combined shareholding of 22% in the capital of each claimant company. As required by the pre-emption provisions in the companies' articles of association, they gave notice of their intention to sell their shares. Disagreement arose between the parties over whether it was correct to value each minority shareholding as a block (which might involve a minority discount) or on a per share basis. There was also disagreement over what information the accountants should receive to make their valuation.

The key part of the pre-emption clause which was relevant to both these points was as follows:

"The "prescribed price" shall be **such sum per share** as shall be agreed between the Vendor and the Company failing which it shall be the median price of the prices as determined and certified in writing by two independent chartered accountants as being in their opinion the **fair value thereof** as between a willing buyer and a willing seller valuing the Company on a going concern basis ... the said chartered accountant when determining and certifying **the fair value of the Transfer Shares** as aforesaid shall act as an expert and not as arbitrator..."

Decision

On the valuation issue, the court agreed with the defendants. The court held that the language of the clause was consistent with a per share valuation and not a block valuation. The "thereof" in the wording related to an individual share and not the "Transfer Shares". The

reference later in the drafting to the "Transfer Shares" did not displace this interpretation. The court also rejected the claimants' argument that the notional transaction between a willing buyer and a willing seller referred to in the drafting required a block valuation.

On the information issue, the claimants argued that the accountants should only receive publicly available information. Their argument was that, absent special arrangements, shareholders and outside third party buyers only have access to publicly available information. As the drafting referred to a transaction between a notional "willing seller" and a notional "willing buyer" and was silent about information, the accountants could only rely on the information that would be available to those notional parties.

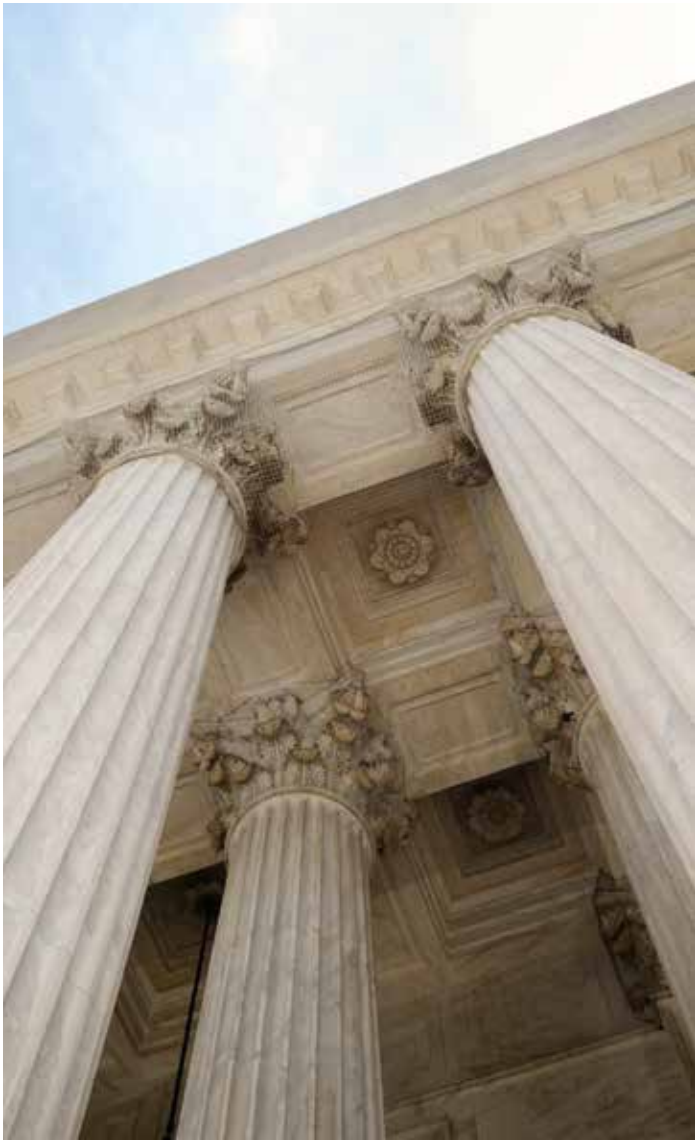
The defendants, on the other hand, argued the claimants had to provide the accountants with any information that the accountants might reasonably request. This was necessary to make the pre-emption provisions workable and to conform to the well understood process of expert resolution.

The court agreed with the defendants on this issue too. It held that the correct interpretation of the drafting was that it was for the accountants to decide what information they required to carry out their task. Alternatively, it was correct to imply a term to that effect. The court noted that, in previous cases on pre-emption clauses, the courts had consistently made clear that, when assessing "fair value", it was for the valuer to consider all relevant circumstances. The courts had avoided restricting those circumstances.

Comment

While the decision is unsurprising, it offers a useful reminder of the need to be clear about the basis of valuation in pre-emption provisions and about what information is taken into account.

In the judgment, the court reviewed and summarised the general principles of interpretation which apply to articles. The court noted that articles of association are a statutory contract between the members and between each member and the company. They must therefore be interpreted using the ordinary principles that apply to interpreting contracts. On the issue of when it is permissible to imply a term into a contract, the court applied the recent Supreme Court decision in *Marks and Spencer plc v. BNP Paribas Securities Services Trust Company (Jersey) Limited & Anor* [2015] UKSC 72. In that case, the Supreme Court clarified that for a term to be implied it must be necessary for business efficacy or, alternatively, be so obvious as to go without saying. *Cosmetic Warriors Ltd & Anor v. Gerrie & Anor.* [2015] EWHC 3718



Term sheet may be legally binding

A recent High Court decision has considered the contractual status of a document described as a "term sheet" which related to an investment in a joint venture company.

Background

Two individuals, Mr Kuznetsov and Mr Gusinski, entered a document described as a "term sheet" which related to a Latvian company, SIA Energokom, a joint venture company in which they were investors.

The term sheet was a short document setting out "principal terms and conditions of the Company share management and control". Most of it concerned Mr Gusinski's right to serve notice of share redemption on Mr Kuznetsov requiring him to buy Mr Gusinki's shares at the stipulated price. The parties signed the term sheet in 2010. In 2012 Mr Gusinski served notice on Mr Kuznetsov to buy the shares, but Mr Kuznetsov failed to do so.

He contended that the term sheet was not legally enforceable because it was never intended to be legally binding or, alternatively, that there was no consideration.

Decision

The court rejected both these arguments. On the issue of intention to create legal relations, the court noted that while the phrase "term sheet" may often describe a framework document, there is no absolute rule that "term sheets" are framework documents and cannot be contractual. Each case depends on its own particular wording and what the parties intended, viewed objectively. The court gave weight to the fact that the two men, both experienced businessmen, had asked their lawyers to draft the term sheet.

The court also found that the language in the term sheet was consistent with a legally binding agreement and not merely a document that was aspirational. It set out the rights and obligations in unqualified terms. The term sheet included detailed wording on the service of the notice of redemption and an express law and jurisdiction clause. In context, the reference in the preamble to the term sheet as "describing principal terms and conditions", i.e. suggesting the possibility of further agreement on other matters, did not mean that it was not contractual. An objective appraisal of the words and conduct of the two experienced men led to the conclusion that they did not intend agreement of any other terms to be a precondition to a legally binding agreement.

On the consideration issue, the fact the term sheet did not provide for Mr Kuznetsov to receive anything in return for granting Mr Gusinski his rights was not decisive. It was clear from the surrounding facts that the term sheet was Mr Gusinski's recompense for agreeing to arrange further funding for Energokom, and his agreement not to investigate Energokom's management.

Comment

This case shows that simply describing a document as a term sheet (or heads of terms or similar) is not enough to prevent it being legally enforceable. If a document is sufficiently certain and all the other elements necessary for a valid contract are present, it may be enforceable. A statement on the face of a document that it is subject to contract or non-binding is generally helpful to show that the parties do not intend a contract to come into being until they have signed the relevant agreement. But whether there is a binding contract before the parties sign a full, written agreement is ultimately a question of whether, objectively judged, the parties intended the agreement to bind them at an earlier stage.

New Media Holding LLC v. Kuznetsov [2016] EWHC 360

Regulatory update

Revised London Stock Exchange Admission and Disclosure Standards

New London Stock Exchange Admission and Disclosure Standards came into effect on 4 April 2016. The Admission and Disclosure Standards set out the Exchange's admission and continuing disclosure requirements, other than for AIM.

Most of the changes to the Standards relate to the structure of the Standards and are of an administrative or clarificatory nature. They include the following.

- The Specialist Fund Market has been renamed as the Specialist Fund Segment to clarify that it is a segment of the Regulated Market.
- The Executive Panel's ability to impose a fine has increased from a maximum of £50,000 to £100,000 per breach.
- New Schedule 1 brings together the detailed rules on admission procedures.
- The new Standards incorporate the High Growth Segment Rulebook as Schedule 5 to the Standards. The changes to this Rulebook include an exemption for life science companies (i.e. those that would be classified as scientific research-based issuers under the Listing Rules). This allows the Exchange to waive, at its discretion, certain issuer requirements for these companies.

LSE Admission and Disclosure Standards 2016

Financial Conduct Authority Prospectus Rules updated

In November 2015, the European Commission adopted a legislative proposal for a new Prospectus Regulation which will, in due course, repeal and replace the current Prospectus Directive and related implementing measures. Although the precise timeline for implementation of the new regulation is so far uncertain, it is unlikely to be applicable before mid-2017 at the earliest.

Meanwhile, some changes to the existing Prospectus Directive regime have been made by a Commission Delegated Regulation (Delegated Regulation) dealing with regulatory technical standards under the Omnibus II Directive.

Following consultations in September 2015 and December 2015 the Financial Conduct Authority has, effective 24 March 2016, made some changes to its Prospectus Rules sourcebook to align the UK rules with the regulatory technical standards in the Delegated Regulation. This covers the following areas.

Approval of prospectuses

The Delegated Regulation codifies the prospectus review and approval process to ensure consistency across the practices of competent authorities. The UK already largely follows the codified process.

Publication of prospectuses

The Delegated Regulation sets out further rules on the way a prospectus may be published. For example, when accessing a prospectus published electronically, users must not have to complete a registration process, accept disclaimers limiting legal liability or pay a fee.

Advertisements

The Delegated Regulation deals with correcting information in advertisements relating to a public offer or admission to trading of securities. It also includes a general requirement that information disclosed in oral or written form (whether for advertisement purposes of otherwise) must not:

- contradict information contained in the prospectus;
- refer to information which contradicts that information;
- present a materially unbalanced view of information in the prospectus; or
- contain alternative financial performance measures unless they are also in the prospectus.

Prospectus Rules Sourcebook (Omnibus 2 Directive Regulatory Technical Standards) Instrument 2016

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