

# Corporate Focus

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## Public company

### Relax your aim – new route to market for high-growth companies

Hannah Doherty & Susie Buckler

The Department for Business, Innovation and Skills (**BIS**) has announced that it is developing proposals with the London Stock Exchange to encourage fast growing companies looking to finance further expansion, particularly internet and technology companies, to conduct their flotation in London. *Why now - and is this good news?*

The London markets increasingly face competition from US markets, where there is speculation that recently passed US legislation – the Jumpstart Our Business Startups Act – will lead to a spate of IPOs by smaller companies. There are also proposals in the US to create a stock exchange that would specialise exclusively in smaller companies. Neither of these risks has yet materialised - but BIS may have decided to take pre-emptive action now.

The proposals will include a planned new route to the UK IPO market for high-growth companies, which will complement the UK's existing markets. BIS describes the proposals as a 'launch pad' for companies seeking a full Premium Listing.

BIS has indicated that the new route to market is likely to feature reformed rules for high-growth companies on the following matters:

- **Reduction of the free float** – At the moment, at least 25% of the shares of a company applying for a premium or standard listing must be held by the public, unlike in the US where there are no free float requirements. However, the FSA has recently proposed removing the requirement for a minimum absolute percentage free float for standard listings, provided that sufficient liquidity is present. If that proposal is adopted, it would be good news for companies wishing to list on the standard market, but bad news for the new route to market because one of its unique selling points would disappear.
- **Easing of reporting requirements** – This may mean that companies may not have to trade for as long before they can list and they may need to show financial information for a shorter period. Whilst good news for companies, this may be bad news for investors.

Further details on the eligibility criteria and benefits of the new route to market are due to be published before the end of 2012. We shall keep you posted on developments.



## Game changer

### *A parent company can now owe a direct duty of care to the employees of its subsidiary*

Hannah Doherty

Acquisitions of companies in the industrial sector now merit even more rigorous due diligence from a health and safety perspective, because the buyer may be liable for the historic failings of defunct subsidiaries. In terms of ongoing operations, parent companies should ensure that compliance procedures for health and safety are the duty of the officers of the subsidiaries, whilst making sure that any knowledge on particular risk factors is passed on to them by the parent. Care needs to be taken where companies in a group structure have overlapping businesses.

Mr Chandler was an employee of a subsidiary of Cape PLC between 1959 and 1962, during which time he was exposed to asbestos in the course of his work. After contracting asbestosis in 2002 he brought a claim against Cape PLC, because the subsidiary had been dissolved some years earlier.

The Court of Appeal held that Cape PLC owed a direct duty of care to the employees of its subsidiary.

The Court of Appeal restated the legal principle that parent companies have a separate legal personality and that it is not usually possible to pierce the “corporate veil”. The judgment made it clear that the question was not whether the corporate veil should be pierced in this instance, but whether the parent company should be liable in tort.

The Court stressed that the parent’s conduct did not have to be out of the ordinary in a parent-subsiary relationship or amount to absolute control. As long as the parent company exercised some control over its subsidiary, such as providing high level advice or help, the duty of care could arise.

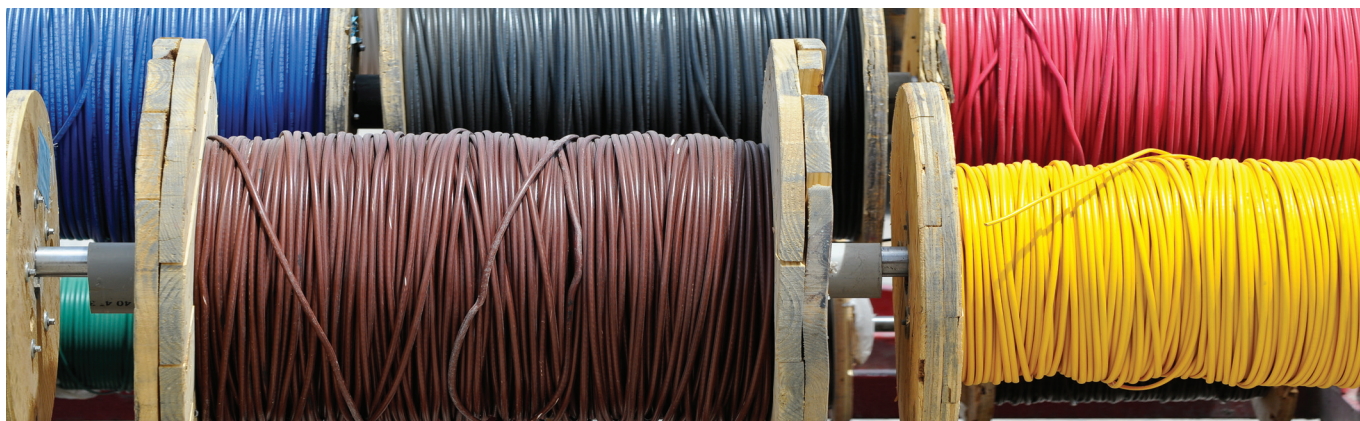
Cape’s controlling conduct is detailed in the box below.

*Chandler v Cape PLC [2011] EWCA Civ 525*

### **Where did they go wrong?**

The duty owed by a parent company to a subsidiary’s employees is not one that arises automatically, but did so in this case because:

- The parent company and its subsidiary had a relatively similar business, which included dealing with asbestos
- The parent company knew, or ought to have known, that the subsidiary’s system of work was unsafe
- The parent company knew, or ought to have known, that the subsidiary or its employees would rely on its superior knowledge of health and safety matters for the protection of the subsidiary’s employees
- The parent company had a practice of intervening in the trading operations of the subsidiary in relation to production and funding issues



## Game changer

### ***A company can now be liable for the failure of a joint venture company in which it participates to comply with European competition law***

John Milligan

Where two or more companies form a joint venture company they will be liable for any infringements of competition law by the joint venture company unless it is allowed to operate independently from its parents. To avoid competition liability, parent companies must avoid having a decisive influence over the joint venture company or giving it “specific instructions or guidelines on individual elements of commercial policy”. Where the parent companies do have such a decisive influence or give such specific guidelines or instructions they should put in place a robust competition compliance programme.

Earlier this year the European Union General Court held that Dow Chemical Co and EI du Pont de Nemours & Co were jointly and severally liable for the anti-competitive conduct of a joint venture company in which they each had a 50% interest. The joint venture company (DDE) had participated in an illegal price-fixing and market-fixing cartel in relation to chloroprene rubber.

The General Court established this liability by regarding the joint venture company as an “undertaking” with each parent company. The General Court also found that both of the parent companies had been in a position to exercise “decisive influence” over the conduct of DDE and had actually done so.

The box below details the ways in which DDE was decisively influenced by its parents.

The General Court stated that parent companies have “a specific responsibility to ensure that all subsidiaries over which they hold decisive influence comply with competition law”.

*Dow Chemical Co v European Commission (T-77/08) and EI du Pont de Nemours & Co v European Commission (T-76/08) (Appeal pending)*

### **Where did they go wrong?**

“Decisive influence” was considered as being exercised in this case because:

- DDE’s Members Committee was established to supervise and manage the business, yet DuPont and Dow each had an absolute right of veto over decisions made by the Committee
- The top managers in DDE were individuals from senior management positions of the parent companies. These individuals were involved in anti-competitive meetings
- The Members Committee agreed to the closure of a DDE production plant, which could not have happened without the agreement of the parent companies, which appeared to be acting through the Members Committee
- The parent companies had conducted an internal investigation to establish whether DDE had participated in the cartel. This highlighted that the parent companies believed that they had the means of requiring the joint venture to abide by their competition rules

# Tax

## Unlocking the Patent Box

Phil Norton

The Patent Box is part of the UK Government's policy goal to make the UK the best country in the world for innovation. Initial feedback suggests that the Patent Box is being viewed favourably by industry. While there is complexity at some stages of the process, it may well be worth "unlocking the box" to see what can be found.

The Patent Box enables companies to apply a lower rate of Corporation Tax (10%) to profits earned after 1 April 2013 from its patented inventions and certain other innovations. The relief will be phased in from 1 April 2013 until 1 April 2017 when the full benefit of the regime will be available.

### Which patents are eligible?

A company can benefit from the Patent Box if the company owns or exclusively licenses-in patents granted by the UK Intellectual Property Office, the European Patent Office and certain countries in The European Economic Area. There is an extension for rights similar to patents such as supplementary protection certificates relating to medicinal products and also to companies granted marketing authorisation for reference medicinal products for human use.

In addition, the company (or another group company) must also have undertaken qualifying development for the patent by making a significant contribution to either the creation or development of the patented invention or a product incorporating the patented invention.

### How and when to claim

It is necessary to make an election to benefit from the reduced rate of Corporation Tax that applies to the Patent Box. This can be done in the computations accompanying the company tax return or separately in writing. No particular wording is required and the election must be made within two years after the end of the accounting period in which the relevant profits and income arose.

### What profit is "within the box"?

The Patent Box is unlikely to apply to all profits. There are broadly three stages to calculate the profit which can benefit from the Patent Box.

1. **Identify** the profits attributable to income arising from exploiting patented inventions ("relevant IP income")
2. **Remove** a routine profit (this reflects the fact that a business would be expected to earn a profit even if it had no access to patented technology or intellectual property)
3. **Remove** the profit associated with intangible assets, such as brand or other marketing assets (the Patent Box is not designed to reward other forms of IP)

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## Stop press... Workplace pensions

On 1 October 2012, new workplace pensions laws came into effect which require employers in the UK to automatically enrol their employees into a pension scheme. The new laws will affect you:

- If you have one or more workers in the UK. There is no exemption for small employers
- Regardless of whether you already provide a pension scheme for your employees, you will need to ensure the scheme meets the necessary quality requirements and automatically enrol all those employees who have not yet chosen to join the scheme

For further information please contact our pensions partner Mark Howard, [mark.howard@clydco.com](mailto:mark.howard@clydco.com).

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