

MODERN COMPANY LAW

For a Competitive Economy

Registration of Company Charges

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INTRODUCTION

This document is issued under the authority of the Company Law Review Steering Group¹ and consults on proposals in respect of **registration of company charges**. This is one of the single issue consultation documents we foretold in our consultation document, *Developing the Framework*².

Like the other consultation documents published during the course of the Review, this document does not necessarily represent the views of any particular individual or group that has participated in the Review. Nor does it represent Government policy.

This consultation is particularly directed at the legal and financial advisers of the parties to company borrowing. This document is being sent to all those who have indicated an interest in receiving Review documents, those who normally receive Departmental consultation documents on company law matters, and those participating in the Review; a list is on the Review pages on the Department's Internet site, <http://www.dti.gov.uk/cld/review.htm>. We would welcome suggestions about anyone else to whom this document should be sent.

This document is also available on the Internet site. Alternatively, additional copies may be obtained by telephoning 0870 1502 500 and requesting publication URN 00/1213.

We would welcome comments on the issues raised in the document. For ease of reference, the questions not only appear in the body of the text but are also summarised in Annex A. The **deadline for comments is 5 January 2001**.

Responses should be in writing and should be sent – by e-mail whenever possible – to:

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In accordance with the code of practice on open government, comments made on this document will be made publicly available unless consultees specifically request otherwise.

¹ *Modern Company Law for a Competitive Economy*, published March 1998, outlines the nature of the problems which the Review is designed to address, its proposed objectives, and the scope and process envisaged. The Review's terms of references and the principles on which it is based were set out in *The Strategic Framework*, URN 99/654, published February 1999.

² URN 00/656, published March 2000.

We intend to produce one further major consultation document in autumn this year. That will be followed by a final report to Ministers in spring 2001.

In this document, references to the 1985 Act are to the Companies Act 1985, and unless otherwise specified references to parts, sections and schedules are references to parts, sections and schedules of that Act. References to the 1989 Act are to the Companies Act 1989. Neither the 1985 nor the 1989 Act applies to companies registered in Northern Ireland (see section 745 of the 1985 Act) although they do apply to those registered in Scotland and Wales. Company law matters relating to Scotland are reserved to Parliament under the Scotland Act 1998, and those relating to Wales have not been transferred to the National Assembly for Wales under the Government of Wales Act 1998.

SUMMARY

Part I of this document describes the present system for the registration of company charges and its history. It describes the proposals over the last 30 years to revise the system.

Part II sets out two alternative ways forward: developing a new system or improving the present system.

Part III of this document describes proposals to improve the present system by providing more information, simplifying procedures and, where possible, reducing costs both in the business and professional communities and at Companies House.

PART I Present Law and Recent Developments

Present Law

1.1 The law on the registration of company charges is set out in Part XII of the 1985 Act. Particulars of certain categories of charges along with the instrument creating the charge (in Scotland, a certified copy of the instrument) must be delivered to the Registrar of Companies within 21 days of the creating of the charge. The Registrar then checks that the form giving the particulars has been completed, enters the particulars in the register, and returns the instrument to the presenter. The Registrar also provides the company with a certificate to the effect that all the requirements of registration have been complied with. Such a certificate (commonly described as the conclusive certificate) gives assurance, which is legally conclusive, that the charge cannot be void for want of registration (or for any defect in registration). The particulars are kept on a register available for public inspection.

1.2 If the particulars are not properly delivered to the Registrar within a period of 21 days after the creation of a charge, the charge is void against a liquidator or administrator and against a creditor. This “sanction of invalidity” provides a powerful incentive for the chargee (i.e. the lender) to ensure registration. But if the charge is properly registered, the sanction does not apply and the charge is valid against the liquidator and creditors as from its creation. This creates the “21 day invisibility problem” as against later creditors referred to in detail below (see paragraphs 3.79 and 3.80).

1.3 Many, but not all charges over the company’s property are registrable (see paragraph 1.7 below). For example, specific or fixed charges over shares and insurance policies, other than floating charges over the company’s undertaking or property, are not registrable. Moreover, charges on the property of a company which arise by operation of law and not through the agreement of companies to their creation are also not registrable. Charges granted by companies incorporated outside Great Britain but with a place of business or branch here (“oversea companies”)³ are registrable if the property over which the charge is given is located in Great Britain.

Purposes and Development of the System

1.4 The requirement to register charges with the Registrar was first introduced in 1900 for companies registered in England and Wales. The requirement was extended to companies registered in Scotland by the Companies Floating Charges (Scotland) Act 1961. The 1900 provisions followed the report of the Davey Committee which had identified mischiefs arising from the failure of companies to maintain a register of charges at their registered offices; this enabled them to obtain credit from unsecured creditors who had no means of discovering that extensive security had already been granted over the assets they saw as free and available to pay unsecured debts. In a number of cases the court, having to decide between two sets of innocent parties, the unsecured creditors

³ The consultation document, *Reforming the Law Concerning Oversea Companies*, URN 99/1146, published October 1999, contained the Review’s proposals on reforming the law relating to such companies.

and the secured creditors who were not responsible for the failure to register, found that the law required them to uphold the validity of the charges in question and thus protected the position of the secured creditors, even though their interests were not visible to subsequent creditors. English law permitted a range of non-possessory security interests in property (particularly property other than land) which enabled a company to be the apparent beneficial owner of assets which were in fact charged. This gave a highly misleading public impression of their financial position. The same problem did not arise under Scots law. This was because Scots law did not permit a non-possessory security over corporeal moveable property. The requirement to register the particulars of securities granted by companies registered in Scotland was made as part of the introduction, by statute, of the floating charge to Scots law in 1961, which permitted the creation of security interests in corporeal moveables in floating charge form.

1.5 The 1900 Companies Act introduced, in England and Wales, the requirement for the registration with the Registrar of four classes of charge: a charge for the purpose of securing an issue of debentures; a charge on the uncalled capital of the company; an interest registrable as a bill of sale if created by an individual; and a floating charge. Documents relating to the charge were required to be delivered to the Registrar within 21 days of its creation and the penalty for failure was the voidness of the charge in the way described above. The express intention of the legislators was to penalise the concealment of secured credit. The invalidity of the charge was seen as vital for the purpose of ensuring compliance. The function of filing was both to give public notice of a security interest and also to regulate the legal effect of the giving of such notice, or failure to give it, on third parties, including other secured parties.

1.6 Although, in its fundamentals, the registration of charges system has not been altered, it has changed both in extent and in the way it has been perceived by the legal and business communities. It now serves several different purposes. It provides information for credit reference agencies and persons proposing to deal with the company so that they can assess its credit-worthiness. The information may similarly be of use to financial analysts and those considering whether to invest in a company. A prospective secured creditor can check whether the property in question is already affected by a charge (subject to the “21-day invisibility problem” mentioned in paragraph 1.2 above), and a company can give assurance that its property is unencumbered. A liquidator can ascertain whether an alleged charge is valid against him. Also, as Gough on *Company Charges*⁴ points out, although not originally intended as a statutory priority system, the charges register has over time become increasingly viewed in that light. The sanction of invalidity inevitably has some effect on the priority of charges given by a company and proposed changes under the 1989 Act would have increased the impact of the statutory registration system on charge priorities (see paragraphs 3.4 - 3.11 below).

1.7 The other main development has been the extension of the registration system to further categories of charge. The categories now required to be registered are, in broad terms, as follows:

⁴ W.J.Gough, *Company Charges*, Second Edition 1996, ISBN 0 406 15693X, p.458.

England and Wales⁵

- (a) a charge for the purpose of securing any issue of debentures;
- (b) a charge on uncalled share capital of the company;
- (c) a charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale⁶;
- (d) a charge on, or on any interest in, land (wherever situated) but not including a charge for any rent or other periodical sum issuing out of the land;
- (e) a charge on book debts of the company;
- (f) a floating charge on the company's undertaking or property;
- (g) a charge on calls made but not paid;
- (h) a charge on a ship or aircraft, or any share in a ship; and
- (i) a charge on goodwill, on a patent, trade mark, registered design, copyright or design right or a licence under or in respect of any such property right.

Scotland⁷

- (a) a security over land or any interest in land (not including a charge for rent, etc in respect of the land);
- (b) a security over the uncalled share capital of the company;
- (c) a security over the incorporeal moveable property of any of the following categories:
 - (i) the book debts of the company;
 - (ii) calls made but not paid;
 - (iii) goodwill;
 - (iv) a patent or licence under a patent;
 - (v) a trademark;
 - (vi) a copyright or licence under a copyright;
 - (vii) a registered design or licence in respect of such a design;
 - (viii) a design right or a licence under a design right;
- (d) a security over a ship or aircraft or any share in a ship; and
- (e) a floating charge.

⁵ Section 396 of the 1985 Act.

⁶ This effectively incorporates into the 1985 Act the relevant provisions of the Bills of Sale Acts 1878 and 1882 and the Bills of Sale Act 1890 as amended in 1891. Essentially the security interest involved here is that vested in the holder by their having the title to, or property in, the goods or chattels while the chargor remains in possession.

⁷ Section 413 of the 1985 Act.

1.8 Registration under the Companies Act operates in parallel with specialist registers for certain specific types of property, e.g. land, aircraft, fishing vessels, ships, trade marks, registered designs, patents, and copyrights. The specialist registers do not serve the same purpose as that at Companies House. Registration under the other systems is generally necessary to ensure the *creation*, as well as the protection, of legal rights e.g. title to, or an interest in, land. Registration under the company charge registration system is necessary to *preserve* legal rights in certain respects. In many cases, a charge has to be registered both under the company registration system and under one of the other systems. The tension between the two types of registration system has caused difficulties (see paragraph 3.13 below).

Crowther and Diamond Reports

1.9 Despite the rapidly changing commercial and legal environment, no major change in the law of companies' security interests in property in England and Wales has taken place since the establishment of the charges registration system (for changes relating to charges created by Scottish companies see paragraph 1.4 above).

1.10 In 1971, an official committee, chaired by Lord Crowther, published the Crowther Report⁸ which included recommendations for a new legal structure to apply uniformly to all forms of security interest. The proposed structure was largely based on Article 9 of the American Uniform Commercial Code, which had been adopted by all but one of the United States (it has now been enacted in all States and has been adopted by most of the Canadian Provinces in the form of a Personal Property Security Act). Under the Crowther scheme, priority in relation to competing claims to personal property (i.e. other than land) would in most instances be determined by the date of filing at a public office of a notice (called a financing statement) describing the property over which a party has or intends to take security. There would also have been some statutory rules, particularly relating to enforcement on default, superimposed on the contractual relationship between the parties to the credit transaction. In their subsequent White Paper⁹, the Government said that:

“[They] accept that there are aspects of the existing law in this field which cause difficulty but they do not have sufficient evidence either of a need for such a major recasting of the law on new principles or of general support for the particular solution proposed by the Committee. They intend to institute consultations with those most closely concerned”

1.11 The general thrust of the Crowther Committee's recommendations was endorsed by the Cork Committee in its 1982 report¹⁰. In the 1980s, the DTI commissioned a study of security interests in property other than land from Professor Diamond. The Diamond report¹¹ was eventually published in February 1989 and dealt with two substantive matters; Part II of the report set out a scheme for a comprehensive register of security interests drawing upon the scheme of Article 9 of the United States Uniform

⁸ *The Report of the Committee on Consumer Credit*, HMSO, Cmnd. 4596, 1971.

⁹ *Reform of the Law on Consumer Credit*, HMSO, Cmnd. 5427, 1973.

¹⁰ *Insolvency Law and Practice, Report of the Review Committee*, HMSO, Cmnd. 8558, 1982.

¹¹ *A review of Security Interests in Property*, by Professor A L Diamond, HMSO, ISBN 011 514664 4, 1989.

Commercial Code, while Part III of the report suggested changes in the existing system of company charges registration. The Diamond Report adopted the same approach as the Crowther Report.

1.12 Part IV of the 1989 Act introduced a comprehensively restructured system of company charge registration, incorporating some of the proposals of the Diamond Report including reducing the scope of the conclusive certificate. However the changes in the effect of the conclusive certificate proved unwelcome to presenters and users. Furthermore problems of interaction between Part IV and the land registration system were foreseen. Therefore, in 1991, the Government announced that, pending further study, they did not propose to proceed with the implementation of the restructured regime.

Present Position

1.13 Following the decision not to proceed with implementation of Part IV of the 1989 Act, the DTI undertook further discussions with representatives of users of the company charges registration system and legal practitioners specialising in this area of company law. The result of these discussions was a consultation document published in November 1994¹². This document asked for views on the following approaches to future legislation on the registration of company charges:

Option A: retain the present legislation in Part XII of the 1985 Act;

Option B: retain the main core procedural provisions of the present legislation, including the Registrar's conclusive certificate, but incorporate certain improvements introduced in the unimplemented Part IV of the 1989 Act, including the updating of the list of registrable charges and the new provisions for oversea companies;

Option B variant: option B combined with a procedure for the provisional registration of newly created charges as a means of overcoming the "21-day invisibility" problem (see paragraphs 3.79 and 3.80 below).

Option C: a more radical option, involving the replacement of the present "transaction" filing system (registration only after a charge has been created) with a "notice" filing system (with registration before or after creation of a charge).

1.14 The response to the consultation was strongly in favour of Option B as described above. This would involve no major changes in the scope and operation of the charges registration system.

¹² *Company Law Review: Proposals for Reform of Part XII of the Companies Act 1985*, URN94/635.

PART II The Way Forward

Improvements to the Present System?

2.1 The results of previous consultations and the work carried out by the group set up under the Review to consider changes to the registration of charges system have led us to the view that the system performs a useful commercial function and is a means of providing information on the financial position of companies which the business community and its professional advisers find important and helpful. There has been little or no call for the abolition of the system, so far as we are aware. We are not, therefore, proposing such abolition in this consultative document.

Question 1: Do you agree that a system is still needed for the registration of company charges?
see paragraph 2.1

2.2 It must be remembered that the company charge registration system does not cover all types of charge. As well as charges created by operation of law (see paragraph 1.3 above), there are a number of categories of voluntarily created charge which are not registrable other than in the company's own register of charges (see paragraphs 3.70 - 3.73 below). Moreover, the registration system only applies to companies; as a result, there are large numbers of businesses which, not being Companies Act companies and, therefore, not subject to the system, cannot register charges. Fundamental change to the system for registering company charges would probably generate significant transitional costs. If such changes were part of a wider change to a universal system of security interest registration on the lines recommended by Diamond, then the benefit of such a change might justify the costs. But these costs might be substantially less justifiable where the changes were limited to the system of company charge registration.

2.3 Part III of this document describes proposals to improve the present system by providing more information, simplifying procedures and, where possible, reducing costs both in the business and professional communities and at Companies House. The approach is essentially Option B, as proposed in the 1994 consultation document (see paragraph 1.13 above).

2.4 Proposals for provisional registration and an official registration procedure along the lines of the system operated by the Land Registry, both canvassed in the 1994 Consultation Document, were considered and rejected by the Review. While these might deal with the 21-day invisibility problem, those with experience in lending considered that they would result in more work for lenders and that the changeover from the present system would cause major disruption in existing lending and security taking procedures with attendant costs. In short, the costs would have been heavy and the benefits a little speculative.

2.5 However there are problems under the present regime particularly relating to questions of priority (described in paragraphs 3.4 - 3.11 below). In view of these

inherent problems and because it would be difficult to reconcile a system requiring examination of documents with a wholly electronic registration system, we have also given further consideration to Option C, “notice-filing”, as outlined in the 1994 Consultation Document (see paragraph 1.13 above). Under this alternative, registration would cease to be a mere perfection requirement: it would become a priority point.

Notice Filing: an Alternative to the Existing System?

2.6 Under the existing system registration is a perfection requirement conditioned by the sanction of invalidity. An alternative would be to abandon the rule requiring registration within 21 days or any other specified time prior to the advent of liquidation, and also the requirement that the charge instrument be presented with the application for registration. (Similarly under a notice filing system of the kind provided by Article 9 of the American Uniform Commercial Code and by the Canadian Personal Property Security Acts, all that is filed is a notice (financing statement) giving particulars of the property over which the filer has taken or intends to take security, and certain other details, including the name and address of the creditor from whom a person searching the register can obtain further information.)

2.7 Article 9 allows the steps to perfection of a security interest to be taken in any order. So a financing statement can be filed before the making of the security agreement and the advance, but once these have been made priority goes back to the time of filing. This enables an intending secured creditor to protect his priority pending negotiations and fulfils much the same function as the priority notice found in some specialist registry systems, such as land registration, but without their time limits. Notice filing and the priority rule which gives priority back to the date of filing have been operative in the United States for nearly 50 years and in Canada for nearly 30 years and it is understood that they have proved very convenient and successful. It would be possible to introduce a similar regime in Great Britain.

2.8 Under this alternative, registration would establish priority between registrable charges. This requires four rules.

Rule 1: Except as otherwise ordered by the court, a registrable charge is void against the liquidator and creditors if the debtor company goes into liquidation [or administration] and the charge has not been registered before the presentation of the winding up [or administration] petition or the convening of a meeting to pass a resolution for creditors’ voluntary winding up. (This rule reflects the present law and the practice of the courts as regards winding up. It is for consideration whether to extend this to administration as provided by the 1989 Act, and this option is provided by the words in parentheses.)

Rule 2: In the case of a charge registrable only at Companies House (i.e. not also registrable at a specialist registry such as the Land Registry), failure to register subordinates the charge to a subsequent registered charge, whether or not the later chargee has knowledge of the earlier charge, and renders the unregistered charge void against any other purchaser for value. (The effect of this rule is that as between competing charges priority is determined by the order of registration, so that registration ceases to be a mere perfection requirement and will become a priority point, so cutting out the “21-day invisibility” problem

and allowing an intending chargee who obtains a clear search to make its advance immediately. In addition, failure to register invalidates the charge against an outright purchaser, whose priority at present depends not on the Act but on the principle of common law protecting a bona fide purchaser for value of the legal title without notice. This roughly tracks the unimplemented section 399(1) inserted by the 1989 Act.)

Rule 3: In the case of a charge also registrable at a specialist registry to which special priority rules apply, the priority determined by those rules is not to be affected by registration or non-registration at Companies House. (This rule displaces the current requirement whereby the charge is registrable in a specialist registry to which special priority rules apply, leaving priority to be determined solely by those rules. It thus avoids the double jeopardy of the present law. Registration of such charges under the Companies Act would still be a requirement in order to give those searching the companies register a proper picture of the company's financial position – with penalties for default – but would not be a condition of validity or priority of the charge. It might be possible for arrangements to be made for entry at Companies House through the specialist registry at the same time as the registration in that registry.)

Rule 4: Failure to register a charge at Companies House or in a specialist registry does not affect the priority of the charge against a subsequent chargee or other purchaser for value who agrees to take subject to the charge. (This rule gives effect to subordination agreements, and expresses the substance of the unimplemented provisions of section 405(1) of the 1985 Act as inserted by the 1989 Act.)

2.9 These four rules would provide the basis for a system under which the relative priority of registered charges would be determined by their dates of registration at Companies House. This proposal's main effect would be on the application of the invalidity sanction (see paragraphs 3.2 - 3.11 below). The period between creation and registration would cease to be relevant: there would be no period of invisibility. This proposal does not affect other aspects of the proposals in Part III of this consultation document to improve the operation of the present system (for example, the updating of the categories of charge to be registered).

2.10 The system of priorities would not, however, be complete. It would not cover priority between unregistrable charges or between unregistrable and registrable charges which would be determined by the general law. While the system could be changed to make all charges registrable (or all charges created by the company), the evidence is that this would not be feasible, e.g. for charges over securities. Furthermore, in theory, it could in some circumstances expose unsecured creditors to more risk than under the present system as in a liquidation preference would be given to a recently registered charge that had been created some time before its registration (but there is a significant protection for unsecured creditors from the rules on undue preferences, transactions at an undervalue, etc.). We believe that, under the present system, existing unsecured creditors are protected by any court order granting late registration as the removal of invalidity is normally prospective. However as it is normally in a chargee's interest to ensure that charges are registered promptly, it is likely that, in practice, unsecured creditors would be at no more risk than at present.

2.11 Notice-filing is simple both in concept and in practice. It has operated successfully for decades in the United States and Canada. But further work would be needed on developing a detailed notice-filing scheme before it could be introduced in Great Britain. The introduction of a new but incomplete system of priorities may have an overall complicating effect which could outweigh some of the benefits that could be derived from such a system. Material changes inevitably result in increased costs for the users of the system, not least in the learning costs unavoidable in the business and professional communities adapting to such changes. Such costs need to be set against any benefits that might accrue.

2.12 As we indicated at paragraph 1.13 above, the possibility of introducing such a scheme was consulted upon in November 1994 and strongly rejected. In view of this, we would be inclined to contemplate developing such a scheme only if there is a strong call for it. In particular, consideration would need to be given to the related question of the scope of the sanction for failure to register, or to register properly, and the scope of any conclusive certificate. It might not be possible to complete the detailed work involved in developing a scheme before the end of the Review.

Question 2: Do you consider that a new system which dispenses with the need to present the charge instrument for examination and under which registration becomes a priority point would offer sufficient benefits compared with the present system to make it worthwhile to commission work on developing a detailed notice-filing scheme to replace the present system?
see paragraphs 2.8-2.9

Question 3: If a notice-filing system is developed, should the invalidity of a registrable charge which has not been registered apply in an administration as well as a liquidation?
see paragraph 2.8 (Rule 1)

PART III Proposals for Improvements to the Present System

3.1 We consider that, subject to the outcome of consultation on Question 2, the best approach is to continue along the broad lines of Option B as proposed in the 1994 Consultation Document (see paragraph 1.13 above). Our proposals for changes to the present system, in particular to the conclusive certificate, are aimed at improving the present system by providing more information, simplifying procedures and, where possible, reducing costs both in the business and professional communities and at Companies House. These proposals include adoption of those provisions from Part IV of the 1989 Act (as yet, not implemented) which we consider would be useful improvements to the present system. Insofar as a system of notice-filing would adopt elements of the present system, for example the categories of charges to be registered, these proposals would apply also if that system were to be adopted.

Invalidity

3.2 The principal effect of registration is that it ensures the security is not invalid under the Act as against the liquidator and creditors. Under the 1985 Act¹³, if the particulars of a charge are not properly delivered to the Registrar within a period of 21 days after its creation, the charge is void against a liquidator or administrator and against a creditor.

3.3 The invalidity sanction does not invalidate or render void altogether a charge that is not registered in time. As against the company giving the charge it remains fully valid and enforceable until the commencement of the winding up of that company when it becomes void against the liquidator. Where the unregistered charge is enforced against the company before the occurrence of those events and the chargee has received satisfaction of his debt by way of that enforcement, the charge no longer exists and the proceeds of enforcement are beyond the reach of the liquidator, the administrator and the unsecured creditors. In effect the unsecured creditors can only benefit from the invalidity provision where there is a liquidation or administration.

3.4 Secured creditors are in a different position. As regards them, the invalidation provisions affect the determination of priority between holders of successively created charges. The position is complicated and the law incomplete. Gough¹⁴ summarises the position as follows:

- a) an unregistered charge, following expiry of its registration compliance period, is void against and therefore loses priority to a subsequently created, registered charge;
- b) where both charges are unregistered the rules of the general law apply to determine priority;
- c) where both charges are duly registered within their respective registration periods rules of general law apply to determine priority; and

¹³ Section 395.

¹⁴ Op cit, pp.744-746.

- d) during the period when both charges are unregistered, but the respective time periods for registration of each charge have not yet expired, the rules of general law apply to determine priority.

Gough goes on to point out that it is unclear at what particular point in time the invalidation provision takes effect as between a duly registered and an unregistered charge. Moreover, it is unclear as to whether or not an unregistered charge holder enforcing his charge has to account to the holder of a subsequently created, registered charge in relation to the proceeds of enforcement. This uncertainty arises, as Gough points out, from the fact that the system was originally designed to assist primarily unsecured creditors through public disclosure of prior charges. It was never particularly directed at resolving charge priority between secured creditors. The approach of the courts has meant that over time the system has been adapted to regulate priority contests between secured creditors, a purpose for which it was never specifically intended or designed.

3.5 Registration is, in principle, merely a perfection requirement, not a priority point. So long as registration is effected within the 21-day period, priority is determined by the order of creation of the competing charges, not by order of registration¹⁵. Failure to register has the effect of subordinating the unregistered charge to a subsequent registered charge, whether or not taken with notice of the unregistered charge. The court may extend the time for registration on such terms as it thinks fit or where the court is satisfied that the failure to register was accidental or due to inadvertence or some other sufficient cause. In practice, the court almost invariably gives leave to register out of time, without prejudice to the rights of intervening secured creditors, if the company is not in liquidation and winding up is not imminent. Registration out of time requires the chargee to incur the trouble and expense of obtaining a court order. Moreover, since registration is not a priority point, registration pursuant to such an order would give the charge priority over subsequent charges taken prior to the registration, and it is therefore necessary for the order to include a proviso to protect chargees whose charges had been created later than the creation of the charge subject to the proceedings and been properly registered.

3.6 The 1989 Act¹⁶ would have made clearer the current law as to the effect of voidness on a secured obligation: if the charge is not duly registered, the sum secured is payable forthwith on demand even if the sum secured is also the subject of another security. This seems to be a useful clarification of the position.

3.7 As already explained (paragraph 3.2 above) under the 1985 Act, registration ensures a charge is not invalidated against the liquidator and creditors¹⁷. Under the 1989 Act¹⁸, in addition to the liquidator, an unregistered charge would also have been invalidated against “any person who for value acquires an interest in or right over

¹⁵ Except that in Scotland, under section 464(4), priority between competing floating charges is determined by their dates of registration.

¹⁶ Section 407 as inserted by the unimplemented section 99 of the 1989 Act in effect replaces sections 395(2) and 415(3) of the 1985 Act.

¹⁷ According to *Gower's Principles of Modern Company Law*, Sixth Edition, 1997, ISBN 0-421-52480-4, p.379, footnote 51, for this purpose, creditor means secured creditor: *Re Teleomatic Ltd* [1994] 1BCLC 90 at 95.

¹⁸ Section 399(1)(b) of the 1985 Act as inserted by the unimplemented section 95 of the 1989 Act.

property subject to the charge”. The essential difference between the provisions of the 1985 and 1989 Acts is the effect of registration of a charge on a purchaser of the secured property (or of an interest in such property): under the 1989 Act, but not the 1985 Act, want of registration invalidates the charge in the event that the company sells or disposes of an interest (including a security interest) in the charged property. The 1989 Act¹⁹ would also have provided that a charge be not void “against a person acquiring an interest in or right over property where the acquisition is expressly subject to the charge”. We endorse those provisions.

3.8 If a charge has not been registered within 21 days of its creation, under the 1985 Act²⁰, either the company or the chargee may apply to the court for an order extending the period for its registration (see paragraph 3.5). Normally, provided that the company is not being wound up, the court will allow registration on terms that do not prejudice rights of unsecured creditors acquired between the date of the charge’s creation and its registration. Under the 1989 Act²¹, if delivery of the particulars of a charge were made after the expiry of the period for filing, the invalidity sanction would not apply after the particulars were delivered. There would be no protection during the period between the due date for delivery and the date of actual delivery and no protection if the company was insolvent at the time the particulars were delivered. The advantage of this approach is that it saves the costs of either a re-execution of the charge or an application to the court while striking a fair balance between the interests of the chargee and the other creditors of the company.

3.9 However, the 1989 Act²² would have invalidated such late-registered charges as against the liquidator or administrator, where certain conditions were satisfied. These were:

- (a) that at the date of delivery of the particulars to the registrar the company was unable to pay its debts, or
- (b) that it became so because of the transaction which gave rise to the charge, and
- (c) that the company became subject to insolvency proceedings within a period of 2 years, 1 year or 6 months after the delivery of the particulars (the period in question varying according, respectively, to whether the charge was a floating charge in favour of a connected person, a floating charge not so in favour, or a fixed charge).

This would appear to be an unnecessary and undesirable complication in insolvency law. The apparent intention is to protect the position of a creditor whose claim arose before an out of time registration of a charge, but any additional benefit conferred by this complex provision would accrue to creditors whose claim arose after registration and who therefore were deemed to be aware of the existence of the charge. It is not clear why such creditors should receive this benefit merely as a result of the delay in registration. Nor does it seem equitable to penalise a creditor if the company were solvent at the time the charge was created, and indeed for some period afterwards, and

¹⁹ Section 405(1) as inserted by the unimplemented section 99 of the 1989 Act.

²⁰ Section 404.

²¹ Section 400(1) of the 1985 Act as inserted by the unimplemented section 95 of the 1989 Act.

²² Sections 400(2), (3) and (4) of the 1985 Act as inserted by the unimplemented section 95 of the 1989 Act.

only became insolvent for other reasons shortly before the late registration was effected. We do not propose, therefore, that these provisions in the 1989 Act should be introduced.

3.10 The 1989 Act²³ would also have provided that the charge would not be made void by the company creating the charge becoming insolvent after it has disposed of the whole of its interest in the property subject to the charge. We understand there are concerns that the introduction of this provision could have, in certain circumstances, unintended results.

3.11 When a registrable charge has not been registered in time, another issue arises if the chargee sells the secured assets of the insolvent chargor. In these circumstances, should the sale be valid? The 1989 Act²⁴ would have made provision for validating the effect of the exercise of the power of sale of charged property when the charge in question is void for non-delivery of particulars. There are no equivalent provisions expressly set out in the 1985 Act. We consider the introduction of such express provisions would be a helpful clarification of the position as regards powers of sale under charges which are subject to invalidity under the Act.

Question 4: Do you agree that there should be the civil sanction that the sum secured is payable on demand if the charge is not duly registered?
see paragraph 3.6

Question 5: Do you agree that an unregistered charge should be void against a purchaser?
see paragraph 3.7

Question 6: Do you agree that the law should expressly validate the exercise of powers of sale of charged property when the charge in question is invalid under the Companies Act?
see paragraph 3.7

Question 7: Do you agree that late registration should be possible without application to the court?
see paragraph 3.8

Question 8: Do you agree that, in the event of late registration, the sanction of invalidity should cease from the date of registration?
see paragraphs 3.8-3.9

Question 9: Do you consider a late-registered charge should be made void by the insolvency of the company creating it, if insolvency proceedings take place shortly thereafter? Why?
see paragraph 3.9

Question 10: Should the charge not be made void by the chargor becoming insolvent after it has disposed of its interest in the charged property? Why?
see paragraph 3.10

²³ Section 405(2) as inserted by the unimplemented section 99 of the 1989 Act.

²⁴ Section 406 as inserted by the unimplemented section 99 of the 1989 Act.

Question 11: Do you agree that invalidity should not operate where property subject to a charge otherwise invalid for non-registration is acquired expressly subject to that charge?
see paragraph 3.11

Conclusive Certificate

3.12 The problem of the conclusive certificate has been the most difficult obstacle to changes in the company charge registration system. The present law²⁵ requires the Registrar to give a certificate that “is conclusive evidence that the requirements of this Chapter as to registration have been satisfied”. At face value, this would appear to require Companies House to compare the statutory forms and the charge documentation delivered to it, to verify the relevant data, to make legal assessments, and then to enter on the public record the details set out in the 1985 Act which include short particulars of the property charged. The certification is conclusive evidence that these tasks have been properly performed, without error. It might be argued that if they have not, the certificate would be misleading.

3.13 The conclusive certificate protects the holder of the security as it is evidence of the validity and priority of the charge so far as the invalidity imposed by the Act for failure to satisfy its requirements is concerned. A problem arises where the charge is also registrable in a specialist registry: for example, charges over registered land, and ship and aircraft mortgages. Registration of a charge in the specialist registry does not give the chargee protection from the invalidation under the 1985 Act if he does not also register it at Companies House. The need to file also at Companies House, with the usual sanction of avoidance, means that registration in the specialist register is not sufficient to preserve priority despite the priority rule applicable to charges in that register. In such cases, the rule of priority by order of registration is displaced by the stronger provisions of the Companies Act, i.e. priority is according to the date of creation provided that the charge was registered within 21 days of the date of creation. In short, the double registration requirement operates to produce conflicting priority rules, with the invalidity deriving from the Companies Act registration requirement prevailing to the extent that it is applicable.

3.14 Part IV of the 1989 Act was intended to replace the 1985 Act’s provisions on company charges. One of the main reasons for its non-implementation was its proposal to replace the Registrar’s conclusive certificate with a certificate conclusive only as to the date on which particulars were delivered while leaving the sanction of invalidity operative in respect of **any** breach of the registration requirements. This proposal was unwelcome both to presenters and to users of the register. A particular problem appeared to be created by the interaction between Part IV and the Land Registration System. At present, the existence of a conclusive certificate assures the Land Registry in England and Wales that a charge is not void under the 1985 Act. The Part IV certificate would have given no assurance that the particulars were accurate. Accordingly, notwithstanding the issue of the certificate, the charge might be wholly or partially void on the ground that the requirements of the Act as to the particulars to be filed had not

²⁵ Sections 401, 417 and 418 of the 1985 Act.

been satisfied. This would have created problems for the Land Registry which would have had to assure itself in some way that the rights created under the Land Registration System were not rendered invalid by failures to comply with the Companies Act requirements. The consensus has been that Part IV could not be implemented given, in particular, this problem.

3.15 It is generally believed that the conclusive certificate is essential for the systems, such as the Land Registry System, under which title to property is created. The invalidity of a charge through non-compliance with the company charge requirements inevitably prejudices the title to, and other rights and interests in, the property charged. Conclusive validation for Companies Act purposes of a charge subject to the company charges registration system creates a certainty which, the legal community has argued, is vital to the smooth running of business. This suggests that the total abolition of the conclusive certificate is not a practical option. Some such evidence would also be essential for any system of notice-filing.

3.16 At present, the system is different with respect to securities over land situated in Scotland, regardless of where in GB the company is incorporated. In particular, the charge is created not on execution or delivery of the Standard Security but on its registration in the property register. This means that the date of creation is not apparent to the Registrar from the face of the charge document. Once the Keeper of the Registers of Scotland is satisfied that registration has met his requirements, he issues a letter of confirmation of registration. The company or chargee then submits the particulars and a certified copy of the standard security to the Registrar at Companies House in Edinburgh for registration for company law purposes. The Registrar then issues the conclusive certificate, which the company or chargee subsequently sends to the Keeper.

3.17 The Keeper relies on the conclusive certificate for the date of delivery of the charge to Companies House and he uses it to calculate whether or not the charge has been registered timeously. Reliance on the conclusive certificate goes beyond the date, however. The Keeper relies on the whole stated particulars of the charge (inadequate as they are) for identification of the registered standard security to which, it is represented to him, the certificate relates. It is thus on the strength of the whole content of the Registrar's certificate that the Keeper indemnifies the creditor's title. If the sanction of invalidity is to be retained, it will therefore remain essential that the Keeper be able to rely on the Registrar's certificate to the same extent as at present.

3.18 A further problem arises from the requirement that the charge instrument be presented with the application for registration, which apparently presupposes that the instrument will be examined by the Companies House staff, a process for which they are not equipped and which is incompatible with modern electronic registration systems (including that operated by Companies House) under which registrations and searches can be processed automatically by computer without human intervention.

3.19 However reliance on the registered particulars as a reliable indication of the nature of the registered charge would not in fact be prudent even if the conclusive certificate is regarded as a guarantee that the Registrar has properly recorded the particulars. Unless there were an enforceable requirement to register any variation to a registered charge, it is doubtful whether the certificate can in practice be useful as evidence of anything other than timeliness of the registration of charge. While the

Companies House register would reveal the existence of any registrable charge on a company's property, it would be imprudent for anyone to rely on the register for a current view of the extent of the encumbrances on a company's property.

3.20 The present requirements mean that the role and responsibilities of Companies House relating to the registration of company charges differ significantly from those for the registration of other documents, where the Registrar is tasked with registering what is presented and not with verifying the content of information registered. In practice, Companies House is not able fully to carry out this role. Nevertheless, the certificate is conclusive evidence that the charge has been properly registered so far as the Act is concerned. It is arguable that, as Companies House is now able to respond to requests for information specifically directed to charges, this may expose the Registrar to legal liability for loss arising through an error on the public record. It is clear as a matter of policy however, and this was recognised by Professor Diamond, that the burden of ensuring compliance with the registration requirements should fall upon the presenters of the documentation; they are best placed to determine whether what they deliver complies with the registration requirements. Any liability arising from inaccuracy in the record should lie with whoever presented the inaccurate information for registration. Any certificate issued by the Registrar must be conclusive only so far as it is practicable for it to be so.

3.21 It would be possible to limit the sanction of invalidity so that it only applies to a failure to register the existence of a charge falling within the statutory categories. The function of Companies House could then be correspondingly reduced. Whoever, whether the company or its creditor, submits the form²⁶ for registering the charge would be responsible for ensuring the accuracy of the particulars. The particulars would need to be prescribed to include sufficient information to identify the chargor, the chargee, and the charge, and also to reveal whether the charge was indeed registrable and had been registered in time. Companies House would merely check that the form was complete, that the particulars showed the same date as the instrument in respect of the date on which the charge had been created, and that the form and instrument creating the charge had been delivered within 21 days of its creation. Companies House would then file those particulars. The conclusive certificate would then only validate those facts: it would be conclusive only as to the timeliness, i.e. as to notice of the charge having been registered within the statutory period. (Under the notice-filing alternative described in paragraphs 2.8 - 2.9 above, the certificate would be conclusive as to the date of registration.) However this would create problems for securities created under Scots law, because the date of creation is not on the face of the instrument for charges over land, ships, and aircraft or in the case of an assignation in security of an incorporeal right, such as a book debt. There would also be technical problems that would need to be addressed in respect of the date of the creation of charges granted by Scottish registered companies under a law other than Scots law²⁷. However we believe that these problems would be resolved if the system were simplified further.

²⁶ Presently Form 395 in England and Wales; Form 410 in Scotland.

²⁷ Section 410(5) of the 1985 Act provides that "references to the date of the creation of a charge are
(a) in the case of a floating charge, the date on which the instrument creating the floating charge was executed by the company creating the charge, and

3.22 The 1985 Act²⁸ imposes the duty to register the charge on the company but registration may be effected by any person interested in it. If the charge is not duly registered, the company and every officer who is in default is liable to a fine. As noted by Diamond²⁹, the fear of insolvency is probably the main reason why security is taken. Therefore the sanction that the charge will be void in insolvency is potent. The effectiveness of this civil sanction is evidenced by the vast majority of registrations being made by the creditors rather than the companies. The criminal sanction has proved unnecessary in practice and it is debatable whether it has been needed in addition to the sanction of invalidity. However if the sanction of invalidity were only to apply to a failure to register the existence of a charge falling within the statutory categories, then a criminal sanction might still be needed to ensure compliance with the detailed requirements for registration; in which case, the question is whether the criminal sanction should fall upon the creditor or the company. The 1985 Act³⁰ also requires a company which acquires property subject to a charge, which is not released or discharged on acquisition, to deliver prescribed particulars and a certified copy of the instrument of charge to the Registrar for registration within 21 days after the day on which the acquisition is completed. There is no sanction of invalidity in this case, but there is a criminal sanction which needs to be retained.

3.23 The system in England and Wales could be further simplified by not requiring the delivery of the actual charge documents, but of either the document or a certified copy. This would remove the timing problem that arises when the documents have also to be delivered to a specialist registry. The present requirement in Scotland for a certified copy to be delivered has not created any problems.

3.24 The system could be simplified even further by dispensing entirely with the delivery of either the document creating the charge or a certified copy of it. Instead, the requirement might be for the company only to submit the particulars of the charge, which would include the date of its creation. In this case, Companies House would simply certify that the required particulars had indeed been filed on time. This would involve a simple check of the date of creation of the charge shown in the particulars against the date on which the particulars were received at Companies House. If the delivery of the particulars of a charge were to be sufficient for its registration, then the system for Scotland might be essentially the same as for England.

3.25 This option would simplify further the task of Companies House in handling charge registration documentation. But it would mean that the Registrar's certificate would not have been associated with the instrument of charge, or even a certified copy of it. So as to avoid confusion and error where, for example, several similar charges were

(b) in any other case, the date on which the right of the person entitled to the benefit of the charge was constituted as a real right”.

The provision in paragraph (b) above may be adequate for the purposes of charges created under Scots law, where the concept of a real right has a distinct meaning. It creates uncertainty, however, in respect of charges granted under the laws of other jurisdictions by companies registered in Scotland. That is so especially where the property law of the other jurisdiction is not framed in terms of real rights. This provision will, accordingly require revision to avoid these uncertainties.

²⁸ Section 399.

²⁹ Op cit, paragraph 24.1.2.

³⁰ Section 400.

submitted together, it would be essential for the particulars to include a unique company reference number that cross-refers to the instrument.

3.26 Under this option, Companies House would still treat the registration of charges differently from the registration of all other information, as there would still be a requirement to check that the delivery of the statutory particulars was within time (although this check would not be needed under notice-filing). However in all other respects, Companies House would be able to handle the information relating to company charges in the same way as it handles other company information that it has to place on the public record. The presenters would be fully responsible for the information appearing on the public record. The presence of a charge on the record would put a searcher on notice. As now, it would then be up to the searcher to ascertain the details of the charge.

3.27 Any such change to the scope of the conclusive certificate would involve a reduction in the degree of assurance that, it is generally believed, is given by the certificate of registration under the current arrangements. There would be no assurance that the information contained in the particulars would be accurate. Information about charges (other than the timeliness of their registration) would have the same status as all other information relating to the company on the public record. Companies House depends essentially on the honesty and good faith of presenters in relation to the accuracy of information supplied to it. This would be supported by the proposal already made in the Steering Group's consultation document, *Developing the Framework*, to make it an offence to deliver false information to Companies House³¹.

3.28 There is an argument that the issuing of a conclusive certificate by Companies House confirming that the charge was registered within the statutory period does not serve any greater purpose than an acknowledgement of receipt. The form as presently prescribed contains details of the date on which the charge was created, as would its equivalent under the new legislation. It should therefore be clear from the company's public file and the computer records held by Companies House whether it was delivered in time. The image of the form would carry a bar code label including the date received in Companies House, whether it was delivered on paper or electronically. The computer record held on Companies House's database would also show the date of registration, i.e. the date of receipt. Anyone searching Companies House's records would be able to tell whether information was delivered on time.

3.29 Under this scenario, it is questionable whether there is a need for a conclusive certificate, as such. If presenters require a formal acknowledgement of registration of the charge they can, at present, ask for that when they deliver it. Going a step further, Companies House could, for registration of charges forms, send confirmation of registration in addition to acknowledgement of receipt. Alternatively it might be argued that evidence on the register of the date of registration should itself be sufficient.

Question 12: Do you agree that whoever presents the particulars of a charge should be responsible for any liability arising from inaccuracies in those particulars?
see paragraphs 3.18-3.21

³¹ Op cit, Question 10.12.

Question 13:
see paragraphs
3.21-3.25

Do you agree that the particulars of a charge should be:

- the name and Companies House registration number of the company granting the charge;
- the name of the person in whose favour the charge has been granted;
- the amount secured, i.e. whether “all monies” or a specific figure;
- the property charged;
- whether the charge is fixed or floating;
- the date of creation; and
- the company’s reference number that uniquely cross-refers the particulars to the instrument?

**If not, which of the above particulars should be omitted?
Alternatively, which particulars should be added?**

**It would be particularly helpful to have views of respondents on
the Scottish aspects of this proposal.**

Question 14:
see paragraph
3.22

Do you consider that it is necessary to have an offence, subject to a criminal sanction, for failure to ensure the delivery of the specified particulars of a registrable charge? If so, should it fall upon the creditor or the company?

Question 15:
see paragraph
3.23-3.26

Do you consider that delivery of the particulars of a charge should be sufficient for its registration? If not, what else should be required: the instrument of charge or a certified copy or either?

Question 16:
see paragraphs
3.26-3.27

Do you agree that the certificate or evidence of registration should only be conclusive that the requirement to register in time has been satisfied?

Question 17
see paragraphs
3.28-3.29

Do you consider that evidence of registration on the Companies House register should itself be conclusive evidence of the date on which the charge was registered, i.e. do you agree that a conclusive certificate, as such, should no longer be necessary?

Categories of Charges to be Registered

3.30 The proposals, embodied in the 1989 Act, to update and extend the categories of registrable charges were welcomed, and the 1994 consultation confirmed that this approach was thought desirable by the legal and business communities. Accordingly, we consider that this approach should be taken forward and make the proposals set out below.

3.31 The term “charge” is defined by the common law for England and Wales but has no technical significance in Scotland. Scottish property law is also different from English

law. The 1985 Act therefore separately specifies the categories of charges that are registrable for England and Wales and for Scotland. The 1989 Act³² attempted to define a “charge” for the purposes of the charges registration system. Opinion has been divided upon whether a statutory definition is desirable but the preponderance of views appears to be against a definition. It has been suggested that the 1989 Act formulation and, in particular, the use of the term “security interest”, may create a doubt as to whether certain rights which are not charges under English common law would nonetheless be treated as charges under this legislation. Moreover, although “charge” has no technical significance under Scots law, the current provisions of section 410 of the 1985 Act make it clear that the categories of registrable charge apply in respect of “security” granted over the company’s property, or any part of it. Given that we intend to maintain separate provision for the specification of the categories of registrable charge in England and Wales and in Scotland, on balance we take the view that it is best to leave the current position on the use of the term “charge” unchanged.

3.32 The categories of charge that must be registered are set out in paragraph 1.7 above. We propose the following changes.

Goods

3.33 For England and Wales, the 1985 Act³³ requires registration of a charge “created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale”; there is no comparable requirement for Scotland. The 1989 Act³⁴ would have had separately specified for England and Wales, on the one hand, and for Scotland, on the other, what charges are registrable. This recognises, for instance, that Scots law does not currently allow for non-possessory securities over corporeal moveable property, in distinction to the position under English law. For England, it would have removed the outmoded reference to a bill of sale by making a charge on goods or any interest in goods registrable other than a charge under which the chargee was entitled to possession either of the goods or of the document of title to them; this was to apply throughout Great Britain. The 1994 Consultation Document raised the question of whether the exception should be limited to the case where the chargee takes actual possession of the goods in question, or the document of title to them, rather than extending it to cases where he has a right to take possession. There clearly may be difficulty in some cases in determining whether, as a question of fact, possession of goods was taken at the time of the creation of the charge. Mere entitlement to goods is not visible to third parties if they were to see the debtor in possession and exercising control over the goods. We are inclined to the view that the exception should be confined to where the chargee is in possession of the goods, whether actual or constructive, e.g. by possession of the documents of title or by a third party’s acknowledgement that it holds possession for the chargee. An alternative would be that the pledging of goods held by a third party to the order of a pledgor³⁵ should be made registrable.

³² Section 395 as inserted by the unimplemented section 93 of the 1989 Act.

³³ Section 396(1)(c).

³⁴ Section 396(1)(b) of the 1985 Act as inserted by the unimplemented section 93 of the 1989 Act.

³⁵ This would remove what is, in effect, a blanket exemption for the whisky industry from registering that its stocks are subject to third party security for borrowing.

Question 18: Should there continue to be a requirement to register under the Companies Act charges that are required to be registered with a specialist register?
see paragraphs 1.7-1.8.

Question 19: Do you agree that all charges on goods should be registered except those under which the chargee has possession, whether actual or constructive?
see paragraph 3.33

Question 20: Do you consider that a clarification in terms of entitlement to possession of goods or documents of title would create any difficulty for the Scottish law concept that possession can be established by “civil possession” through another party (such as an independent warehouse keeper)?
see paragraph 3.33

Debts

3.34 The 1985 Act³⁶ requires charges over book debts to be registered. A charge over a negotiable instrument given to secure the payment of book debts is not registrable. The meaning of “book debt” has always been the subject of some discussion. A book debt is a somewhat indeterminate concept and the courts have looked at a whole range of different types of legal transaction and classified them as book debts or not on a case by case basis. Gough³⁷ lists examples of transactions that the courts have decided are or are not book debts. In the former category come, for example, progress payments under contracts, purchase price adjustments, litigation proceeds and inter-company loans. In the latter category come payment retention clauses, fiduciary obligations to account and, possibly, credit bank balances.

3.35 The 1994 Consultation Document raised the question whether the concept of “book debts” should be replaced by the wider concept of “receivables” defined as follows:

“Receivables means any amounts due or to become due to a company in respect of goods supplied or to be supplied or services rendered or to be rendered by a person (whether or not company) in the course of that person’s business; however, a debenture which is part of an issue or series shall not be regarded as a receivable; and the deposit by way of security of a negotiable instrument given to secure the payment of receivables shall not be treated as a charge over receivables; and a shipowner’s lien on subfreights shall not be treated as a charge over receivables or as a floating charge for the purposes of defining any amounts due or to become due to a company.”

By making charges over a wider category of money obligation registrable, substituting “receivables” for “book debts” might substantially expand the category of registrable transactions, while still restricting registration to that small class of money obligations which underpins a company’s cashflow. Certainly many of those transactions which the

³⁶ Section 396(1)&(2) for England; section 410(4) for Scotland. Section 396 as inserted by the unimplemented section 93 of the 1989 Act also includes “book debts” and also excludes negotiable instruments given to secure the payment of book debts.

³⁷ Op cit, pp. 681-686.

courts have decided are not book debts may well come within this definition of receivables. There would remain uncertainties, even under the expanded definition.

3.36 An alternative is to retain the concept of “debt” as the operative concept while dropping the reference to “book”. This would be likely to exclude certain types of money obligation. However, it would be a larger category than the current one of “book debts”.

3.37 A further issue is whether the scope of registration should be extended to securities over contractual rights. These are not book debts and they are not cash flow. Express provision might be made to ensure that contingent debts, i.e. where the right depends on the happening of some external event, were included in the definition of registrable debts. Contingent debts include not only rights under insurance policies but also the securities over rights and contingent rights which underpin much project finance. At present, charges over such debts are not registrable because they are not regarded as book debts – and this is consistent with the relevant accounting standard³⁸.

3.38 The 1994 Consultation Document proposed that all charges over insurance policies should be required to be registered. This proposal drew strong support from those who responded to that document. Accordingly, we propose that all charges on insurance policies should be expressly made registrable whether or not other contingent debts are registrable.

3.39 The underlying question is whether the categories of registrable debt should be extended beyond the present formulation of “book debts”. It is for consideration whether the registrable categories should extend as far as all money obligations. Any brief description of the types of obligation that are registrable will have uncertainty at its edges. This is inevitable short of a complete list of all individual types of legal transactions that are to be registered. The question is whether any of the options discussed above represent an improvement on the current position as to the identification of what should be registered and whether an expansion of the types of obligation whose charging should be registrable is justified.

Question 21: Which categorisation of debt should be the basis for defining
see paragraphs 3.34-3.39 **registrable charges: book debts; all debts; or receivables?**

Question 22: Do you consider charges over credit bank balances should be
see paragraphs 3.34-3.35 **registrable?**

Question 23: Do you consider that charges over debts which are contingent
see paragraph 3.37 **should be registrable?**

³⁸ FRS12, paragraph 12 “Contingent assets are not recognised in financial statements . . .”.

Question 24: Do you agree that all charges over insurance policies should be see paragraphs 3.37-3.38 **registrable?**

Retention of Title

3.40 Contracts for the sale of goods may include a clause whereby the seller retains title to the goods as security for the payment for all or some of the goods. Retention of title clauses are considered “simple” when the security applies to the goods as supplied; these simple clauses may be extended so that the seller’s rights extend to a claim to receive the price to which he is entitled out of any proceeds obtained by the buyer from the re-sale of the goods. “Complex” retention of title clauses apply to goods even when they have been altered or changed (e.g. by incorporation into other goods, or by processing), or to the proceeds of sale of such goods. Such “retention of title” clauses have generated a considerable volume of case law.

3.41 In England and Wales, the broad thrust of this case law is that simple retention of title clauses, whether or not extended, do not constitute a charge under common law. However, complex retention of title clauses are generally regarded as charges, and thus registrable. We believe that the present distinction is a sensible and workable one. While we are inclined to the view that these questions, which give rise to difficult issues in a developing area of commercial practice, are best left to the courts, we would be grateful for views on whether the distinction should be expressly embodied in statute.

3.42 In Scotland, retention of title provisions do not produce a right in security. The purchaser of goods has to acquire title to them before he can grant the lesser right of security in that property. That rule applies whatever the nature of the retention of title provisions deployed. Retention of title may perform a similar function to a security, but under Scots law such a provision would not amount to a registrable charge.

Question 25: Do you consider that there should be a statutory definition of see paragraphs 3.40-3.42 **those retention of title clauses that are to be registrable?**

Shares

3.43 At present, fixed charges over shares are not registrable. The exclusion may seem unprincipled and at odds with economic reality given that land (a form of property which modern companies decreasingly own) is within the registrable list whereas investments held by a company through the common medium of equity shareholding in other companies are outside the registrable list. Nevertheless, the blanket exclusion of shares from the registrable list has been supported on practical grounds. It has been argued that where fixed charges are given over portfolios of shares the ability of a chargor company to negotiate the right to substitute shares with the portfolio from time to time would be unduly limited if the validity of the security over the substituted shares

were to be dependent upon the registration process at Companies House. Such a burden, it has been said, would be particularly acute in relation to certain operations of the capital markets since shifting portfolios of shares may be charged by fixed security to market intermediaries such as brokers in order to secure short term market financing. The force of that particular argument has been accepted in the past, and the 1989 Act did not alter the present blanket exclusion. It may however be necessary to establish whether the existence of particular circumstances justify a general exclusion (as opposed to a limited exclusion) of shares from the class of registrable property. Does the particular argument apply, for example, to fixed securities over portfolios of shares which are not intended to be turned over with rapidity or over shares which are not listed or marketable? Do the needs of market intermediaries justify the exclusion of securities over shares outside those particular financial market dealings which create the needs? We would welcome views from consultees on these questions.

3.44 The Diamond Review also considered the particular situation in which a fixed security may be granted by a company over shares held by it in another company. The situation is that which arises when the shares which are charged are shares in a subsidiary of the chargor company and so form part of the undertaking of its wider group. Here again an argument as to practicality has been advanced against making shares in subsidiaries a special category for registrability. The practical problem in this case, however, relates to the searchers of the register and not to the problems of chargees. It is said that a rule which required a company to register a fixed charge over shares in its own subsidiary could apply only where the subsidiary relationship existed at the date of creation of the charge. It would not apply to shares in a company which was not a subsidiary of the chargor at that date, and so would not apply to the charged shares in a company which **became** a subsidiary at a later date. Accordingly, a searcher of the register might assume – wrongly – that the absence of a registered charge over shares in a subsidiary at a given time indicated that those shares were not the subject of any security. Similar issues would arise when a company registered a charge over shares in its subsidiary and the subsidiary relationship ceased while the charge remained. Against that background, the 1989 Act would not have changed the present law and it follows that a company which creates a fixed security over shares in its own subsidiary (or over shares in a company in which it has a strategic interest of a lesser extent) would not create a registrable charge.

Question 26: Do you agree that no charges on shares should be registrable? If see paragraph 3.43-44 **not, what categories of charges on shares should be registrable?**

Negative Pledges

3.45 Negative pledges are covenants or undertakings by the charging company not to create other charges ranking in priority to, or equal with, the charge to which the covenants or undertakings relate. In England and Wales, negative pledges are not registrable provisions in themselves; there is no express provision for the content of such covenants or undertakings to be included in the filed particulars. In Scotland, the position is different: notice must be given, through the prescribed particulars, of a

limitation imposed on an incident of a security which is to be presented for registration in respect of floating charges. Thus in Scotland (but not in England or Wales), notice of negative pledges is required to be given and placed on the public record; this does not appear to have created any problems.

3.46 The 1989 Act³⁹ would have enabled the Secretary of State to prescribe that filed particulars could include negative pledges. We consider that enabling parties to register negative pledges if they so wished should be permitted (we do not propose making inclusion of such pledges in the particulars compulsory). There are advantages to the lending community in giving negative pledges some form of protective status. They protect the floating charges against subsequently registered fixed charges and thus enhance the value and effectiveness of such charges.

3.47 The effect of allowing (but not requiring) negative pledges to be registered in England and Wales would be to provide for constructive notice of the pledge either from the date of creation of the charge or from its date of registration. It might be necessary to make express provision for the latter if registration of negative pledges were to be allowed in England and Wales. This would require a review of the relevant sections⁴⁰.

3.48 Allowing negative pledges to be registered in England and Wales on a permissive basis would raise some practical problems. It would clearly be inequitable for the beneficiary of the pledge to be free to register such a pledge, with the consequences for third parties which that entails, at any time during its effective life. Therefore the beneficiary of such a pledge would have to deliver particulars of the pledge as part of the particulars of the charge to which it relates. If a negative pledge was not included in those particulars, it could not then be invoked against a subsequent chargee. In effect negative pledges could be registered only as part of the original charge within the same time limits.

Question 27: Do you agree that provision should be made for the voluntary registration of negative pledges in England and Wales? If so, do you agree that provision should be made that notice should arise from the date of registration?
see paragraphs 3.45-3.48

Question 28: Do you agree that Scots law relating to negative pledges should be left undisturbed?
see paragraph 3.45

Alterations of Floating Charges

3.49 There is no obligation to register an alteration of an existing charge in England and Wales. If the alterations were such as to result, in law, in the creation of a new charge, then that would require registration in the usual way.

³⁹ Section 415(2)(a) of the 1985 Act as inserted by the unimplemented section 103 of the 1989 Act.

⁴⁰ Sections 416 and 711A of the 1985 Act as inserted by the unimplemented sections 103 and 142 of the 1989 Act.

3.50 In Scotland, under the 1985 Act⁴¹, the requirements to register charges apply also to “instruments of alteration” of floating charges, i.e. to instruments which:

- (a) prohibit or restrict the creation of any fixed security or any other floating charge having priority over, or ranking with, the floating charge;
- (b) vary, or otherwise regulate the order of, the ranking of the floating charge in relation to fixed securities or to other floating charges;
- (c) release property from the floating charge; or
- (d) increase the amount secured by the floating charge.

Various technical criticisms have been levelled at this provision. For instance, failure to register particulars of an instrument of alteration in most instances has no adverse consequences, as none of the situations referred to in (a) to (c) above amounts to conferring security (which would otherwise be denied effect) and there appears to be no criminal penalty for failure to register; also in respect of (d) above a registered “all sums” floating charge would already cover an increase in the amount secured whereas, in any other case, an increase in the amount secured would require the grant of a new security, itself requiring registration; it is restricted to ranking agreements affecting floating charges and fixed charges, but there are no equivalent requirements in respect of ranking agreements affecting fixed charges alone; and there is no requirement for a company to keep copies of instruments of alteration in its own register of charges.

3.51 One approach to dealing with the absence of a sanction would be to provide that failure to register an instrument of alteration would attract the application of the statutory invalidity to the alteration. A more radical point of view, however, is to question why in Scotland there should be any statutory requirement for the registration of particulars of instruments of alterations concerned with ranking agreements. A ranking agreement is primarily of concern to the secured creditors and does not affect the rights of unsecured creditors, or others who might consult the register at Companies House. Alternatives would be either to repeal the provision or to retain it only insofar as it relates to negative pledges⁴².

Question 29: Do you consider that, in Scotland, failure to register an instrument of alteration should lead to statutory invalidity for the alteration?
see paragraphs 3.50-3.51

Question 30: Alternatively, do you consider that the obligation in Scotland to register instruments of alteration should be repealed?
see paragraphs 3.50-3.51

⁴¹ Under section 466 of the 1985 Act, which applies only in Scotland, the requirements of section 410(2) and (3) and section 420 on the registration of charges are attracted to “instruments of alteration” of floating charges, as defined in section 466(4).

⁴² *AIB Finances Ltd v. Bank of Scotland* 1993 SCLR 851 demonstrated the problems that can arise where a negative pledge has been created but has not yet appeared on the register of charges.

Memoranda of Satisfaction

3.52 The 1985 Act⁴³ provides a means whereby satisfied charges can be shown as discharged on the public record. This facility is not mandatory and in practice it is common for charges to be satisfied but memoranda not to be filed. The only sufferer in these circumstances is the company itself as allowing a satisfied charge to remain on the register gives an impression to actual and prospective creditors of the company that its assets are more encumbered than is actually the case. In any event, it is difficult to see what more effective sanctions could be applied to compel the registration of satisfaction of a registered charge when the Registrar would have no means of knowing, in the absence of a burdensome notification system, which in itself would require sanctions, whether a charge had indeed been satisfied. We propose, therefore, that the delivery of memoranda of satisfaction should remain voluntary.

3.53 We also propose to follow the 1989 Act⁴⁴ which would have extended the law by requiring that where memoranda were filed they must be signed by both the chargee and the chargor. (Under arrangements for the electronic filing of charges memoranda would be authenticated by appropriate methods rather than signed.) This would reduce the possibility of fraud by preventing a company from filing a memorandum of satisfaction where the charge had not been satisfied and thereby misleading potential creditors to the company of its credit-worthiness.

3.54 Moreover, the approach in the 1989 Act focuses on the situation where a charge ceases to affect a company's property. This avoids some of the current difficulties where memoranda of satisfaction are concerned either with the satisfaction of the debt or with the release of part of the charged property. Furthermore, the 1985 Act, unlike the 1989 Act, does not deal with a situation where the debt remains outstanding but the whole of the secured property has been released.

Question 31: Do you agree that filing memoranda of satisfaction should remain voluntary?
see paragraph 3.52

Question 32: Do you agree that memoranda of satisfaction, if filed, should be signed by both the chargee and the chargor? If not, what alternative safeguard do you suggest?
see paragraphs 3.53-3.54

Crystallisation of Charges

3.55 Crystallisation is defined in Gough⁴⁵ as "the process of conversion of the security from being floating in character into being specific or fixed". On crystallisation, the secured creditor obtains a fixed charge over the assets of the company existing at the time of crystallisation. What has prompted concern over the process of crystallisation is the increasing use of "automatic crystallisation clauses" under which floating charge

⁴³ Sections 403 and 419.

⁴⁴ Section 403 as inserted by the unimplemented section 98 of the 1989 to replace sections 403 and 419.

⁴⁵ Op cit. p.135.

holders provide for crystallisation to occur on the happening of particular events. Previously crystallisation was understood to occur only when the chargee appointed a receiver or upon the commencement of a winding up. In such cases the fact that the chargee has now a fixed charge on the assets and that the chargor or company had no further power to deal with the assets is advertised by the public nature of a winding up of the appointment of a receiver. In the case of automatic crystallisation there is no public notice of the important legal change that has occurred.

3.56 The desirability of automatic crystallisation has generated some debate. The Cork Committee Report⁴⁶ recommended that automatic crystallisation be prohibited because of the prejudice to third parties which it creates. This proposal was not taken up in the Insolvency Act 1986. Others have strongly supported the ability of chargeholders to contract for automatic crystallisation. Gough⁴⁷ extensively criticises the approach of Cork, pointing out that the prejudice to third parties is greatly overstated by Cork, although he supports the idea of placing the terms of automatic crystallisation clauses in security agreements on the public record.

3.57 The Insolvency Act 1986 made some provision in respect of automatic crystallisation clauses. It provided that for the purpose of the rules relating to the priority of claims in a receivership or liquidation a floating charge is defined as a charge which, as created, was a floating charge. The effect of this is that even if a floating charge crystallises automatically before the commencement of a receivership or liquidation it will not be treated as a fixed charge in that receivership or liquidation and thus rank before the preferential creditors. The 1989 Act⁴⁸ would have given the Secretary of State power, for England and Wales only, to make regulations requiring notice to be given of the crystallisation of a floating charge and requiring automatic crystallisation clauses to be entered on the public record at Companies House. The regulations could have also provided that the crystallisation was ineffective if the required notice was not given.

3.58 Gough considers that “counter productive results” would flow from rendering crystallisation clauses ineffective if required notice was not given. It should also be noted that the courts have generally favoured the contractual freedom of the parties to agree automatic crystallisation clauses. In *Re Brightlife Ltd*⁴⁹, Hoffman J, having upheld an automatic crystallisation clause, said that it was not open to the courts to restrict the contractual freedom of parties to a floating charge. Given the limited extent to which Parliament had intervened in this area, he considered that it was wholly inappropriate for the courts to impose additional restrictive rules on the grounds of public policy.

Question 33: Does the current legal and commercial practice relating to automatic crystallisation clauses create practical problems? If so, what is the appropriate means of dealing with them?
see paragraphs 3.55-3.58

⁴⁶ *Insolvency Law and Practice*, Report of the Review Committee, Cmnd. 8588, paragraph 1575.

⁴⁷ *Op cit*, pp.408-431.

⁴⁸ Sections 410 and 413 of the 1985 Act as inserted by the unimplemented sections 100 and 101 of the 1989 Act.

⁴⁹ [1987] 2 W.L.R. 197; [1986] 3 All E.R. 673.

Question 34: Do you consider provision should be made for dealing with automatic crystallisation clauses as part of the company charge registration system?
see paragraphs 3.57-3.58

Company Trustees

3.59 The creation of a charge, falling within the category of registrable charges, by a company which is acting as a trustee, over property of which it is a trustee, gives rise to difficulties under the company charge registration system. At the outset there is the question of whether such a charge is registrable at all. The general, but not universal view, is that a charge created by a trustee company is not registrable. This conclusion is based on the fact that the sanction of invalidity would be irrelevant in such a case because the liquidator of the trustee would obtain no benefit if the unregistered charge were void against him, because the trustee would not be the beneficial owner of the charged property, which would not be available to the trustee company's creditors in any event. The contrary view is that the sanction of invalidity is not the only sanction for non-registration and is not the only rationale for the requirement to register. There are two other sanctions: the making of the money secured by the non registrable charge immediately payable⁵⁰; and the fine for the contravention of the requirement to register the charge⁵¹. As trustee, the charging company is the legal owner of the trust property and, in that sense, the property is the company's property for the purposes of registering any charge upon it.

3.60 The types of trustee company are many and varied. In their simplest form, they include companies which are bare trustees for a beneficiary who is an individual or a company. In such cases the "trustee" merely holds the legal ownership of the property. Other trust situations are more complex as, for example, where a company acts as the trustee of a unit trust where the assets of the unit trust are vested in the trustee and there may be a power to charge the assets of the trust as security for a loan for leveraging purposes. Other examples of the use of the trust may occur in the case of a group of companies where a custodian company is the registered owner of all securities owned by the group and has a power to enter into a floating charge over all of them. In such cases if neither the trustee nor the beneficial owners of the assets were obliged to register the floating charge with the Registrar, unsecured creditors (or a creditor lending on the security of another floating charge) might be misled.

3.61 The current practice of Companies House is to register a charge submitted by a trustee where the trustee makes its status as trustee known to Companies House, but to record on the register that the chargor is acting as the trustee. This assists the trustee by making it clear on the face of the register that the creation of the charge does not reflect on the credit-worthiness of the chargor. This is important particularly where the trustee is a bank as banks are very sensitive to any adverse implications which the registration of a charge might have upon their financial standing.

⁵⁰ Sections 395(2), 410(2).

⁵¹ Sections 399(1), 415(3).

3.62 There are a number of options. The law could be clarified by providing that such charges:

- (a) are not registrable by the trustee or by the beneficial owner; or
- (b) are not registrable by the trustee but are registrable by the beneficial owner where the trust is a bare trust. This raises difficulties for the chargee who would not necessarily know of the existence or identity of the beneficial owner. It would seem necessary to disapply the invalidity sanction, either generally in the case of such a charge irrespective of the knowledge of the chargee as to the parties involved, or only in the case of a chargee who is able to establish to the satisfaction of the court that he was not aware of the existence or identity of the beneficial owner of the charged property when the charge was created; or
- (c) are registrable by the trustee notwithstanding that the invalidity sanction would not be applicable to an unregistered charge; or
- (d) are registrable both by the trustee and by the beneficial owner (if either is a registered company) but disapply the invalidity sanction at least where the existence or identity of the beneficial owner is not known to the chargee when the charge is created.

But none of these options provides an easy and obvious solution. In the case of trusts which are more complicated than a bare trust of an asset for a single beneficiary, there would be great problems if the beneficiaries were to have obligations and responsibilities placed upon them. There are also likely to be cases with extremely large numbers of beneficiaries, for example in the case of beneficiaries of pension funds held in trust, or unit trusts where the beneficiaries are the owners of the units. It may be that the problems created by each of these options would be greater than those existing under the current law. A more attractive option would be to clarify the law to the effect that:

- (e) company trustees charging trust property should register such charges and disclose in the particulars that they do so as trustee of the charged property.

The alternative would be to clarify the law to the effect that:

- (f) company trustees charging trust property should not register such charges.

Question 35: Do you consider the law should be clarified to the effect that
see paragraph 3.62 **company trustees charging trust property should register such charges and disclose in the particulars that they do so as trustee of the charged property?**

Overseas Companies

3.63 Under the 1985 Act⁵², charges granted by companies incorporated outside Great Britain (“overseas companies”) which have an established place of business in England and Wales or a place of business in Scotland are registrable if the property over which the charge is given is located respectively either in England and Wales or in Scotland. This requirement applies notwithstanding that the overseas company creating the charge may not have registered its place of business with the Registrar of Companies in either Cardiff or Edinburgh.

3.64 The present law suffers from a number of problems. One is that a chargee will not necessarily know whether an overseas company has a place of business here. Although there is a requirement for such a company to deliver particulars about itself to the Registrar, the requirement to register charges applies to the company whether or not it has delivered its particulars. Accordingly, the chargee will not know with any certainty whether a charge should be registered here in order to protect him from the avoidance sanction.

3.65 The other main problem is that the present law applies only to property located here and makes no mention of property that is located overseas when the charge is created but which is brought into Great Britain at a later date. In *NV Slavenburg’s Bank v. Intercontinental Natural Resources Ltd*⁵³, the court decided that such properties were within the scope of Part XII. The result in some circumstances is a nonsense. The charge cannot be registered at the time of creation because the property is not within the jurisdiction of Great Britain; but the 21-day registration period may have elapsed when the property comes within the jurisdiction. Not only is the charge void for lack of registration but the company is also in breach of its duty to register the charge. If, as is often the case, the charging company has not registered its place of business at Companies House, there will be no company on the record against which the charge could be registered.

3.66 A further problem identified with the present law is in relation to the location of property. Some kinds of property are, by their nature, not located in a single place. Goods and, in particular, vehicles, may be moved in and out of Great Britain.

3.67 We do not favour the radical option of removing all requirements relating to the registration of charges on overseas companies. Complete abolition would enable businesses wholly carried on in Great Britain to be operated by means of a corporate vehicle formed under the laws of another jurisdiction so as to avoid the requirements to register charges.

⁵² Sections 409 and 424. Note that an overseas company with an established place of business in England or Wales, but not in Scotland, is not required to register a charge on property situated in Scotland, nor *vice versa*.

⁵³ [1980] 1 W.L.R. 1076; [1980] 1 All E.R. 955.

3.68 We therefore propose a simplified system of registration of charges for overseas companies which avoids the problems of the present law but does not go as far as removing all requirements relating to the registration of charges on the property of overseas companies. Adoption of such a scheme would, however, result in a reduction of the number of charges created by overseas companies that require to be filed and, consequently, in the information available in this country about such companies. The proposal is as follows:

- (a) the registration requirement would apply only to charges given by overseas companies that had actually registered their place of business at Companies House (and had not given notice to the Registrar that they had ceased to have an established place of business in Great Britain or been deregistered);
- (b) such companies would be required to deliver to Companies House particulars of:
 - (i) charges they create over property situated in Great Britain;
 - (ii) charges that already exist over property in Great Britain which they acquire; and
 - (iii) charges which already apply to property brought into Great Britain;
- (c) such companies would be required to register particulars of the charge within 21 days of its creation or the date of acquisition or bringing into Great Britain;
- (d) there would be an exception from the registration requirement for property, otherwise subject to it, that was taken out of Great Britain before the expiry of the period set for registration, i.e. 21 days;
- (e) a company with property located in Great Britain subject to a charge which would have been registrable if the company had been a British registered company and which was not registered as an overseas company should, on registering as an overseas company, be required to register the charge within a period of 21 days of registering as an overseas company;
- (f) the 1989 Act's provisions⁵⁴ for determining whether property is situated or located in Great Britain would be applied for the purposes of the proposal; and
- (g) the same criminal and invalidity sanctions as are applied to registration of charges by companies incorporated under the Companies Act would apply in relation to charges given by overseas companies.

Question 36: Do you agree that those overseas companies that have registered their place of business at Companies House should be subject to a simplified system of registration of charges?
see paragraph 3.68

⁵⁴ Section 703 J of the 1985 Act as inserted by the unimplemented section 105 of, and Schedule 15 to, the 1989 Act.

Unregistered Companies

3.69 Unregistered companies, as defined by section 718 of the 1985 Act (including, for example, most companies incorporated by special Act or Royal Charter), are not numerous. However, they do include some of our leading companies. Section 718 applies many of the external regulatory provisions of the Companies Act to such companies; e.g. the requirement to file accounts. There seems no reason why the registration of charges provisions should not be applied to such companies. The 1989 Act made provision for the Secretary of State to extend (by regulations) the company charges provisions to unregistered companies. We propose that this approach should be implemented.

Question 37: **Do you agree that the company charges registration provisions**
see paragraph **should be extended to unregistered companies?**
3.69

Companies' Own Registers

3.70 The 1985 Act⁵⁵ requires companies to retain complete copies of instruments containing registrable charges and to keep a register of basic information (property, amount, chargee) for all charges over their property, whether registrable at Companies House or not. Both the copies of the instruments and the register must be open to inspection; this is free to members of the company and to existing creditors. Anyone else may inspect the instruments and the register for a maximum fee of 5p.

3.71 Having what is, in effect, two separate systems for registering charges – one centralised but not fully comprehensive; the other decentralised and, at least in theory, fully comprehensive – results in duplication. It can be argued that there is no need for companies to keep a formal register of their own. The 1985 Act⁵⁶ also requires them to keep accounting records; the relevant details of their charges should be included in such records.

3.72 On the other hand, there are arguments for the maintenance of registers by companies. It is good discipline and it is not a great burden on companies. (However, although failure to make an entry renders a company's officer liable to a fine, not all companies maintain accurate registers.) A company's register ensures that valuable information on a company's indebtedness is clearly collected in one place; this is particularly useful to insolvency practitioners as the company's register is required to be comprehensive. Moreover the 21-day invisibility period does not affect companies' own registers. If the proposal set out above (paragraphs 3.12 - 3.29) for reducing the scope of the conclusive certificate were to be adopted, the company's register would provide a valuable means for confirming the particulars of a charge.

3.73 The argument for retention of company registers relies heavily on the fact that it imposes little material burden on companies. The burden might be increased if greater

⁵⁵ Sections 406, 407, 421 and 422.

⁵⁶ Section 221.

use were made by potential creditors of such registers. But company registers can be kept on an electronic basis⁵⁷. The maintenance by companies of their own registers may, as the use of electronic storage and retrieval facilities increases, become the base of a decentralised and comprehensive company charge registration system which would provide more information than the centralised Companies House system without the costs and burdens of extracting and delivering information to a central registry. Changing technology may well open up further options of this kind. Abolition of the requirement for a company to maintain its own register might remove the basis for the development of such a wider decentralised system.

Question 38: Do you consider that companies' own registers are a useful source of information to others? Are they widely used? Is their maintenance a burden on companies?
see paragraphs 3.70-3.73

Question 39: Do you agree that the present requirement for companies to maintain registers of their own charges should be retained?
see paragraphs 3.70-3.73

Question 40: Are the existing sanctions on companies for non-compliance with the requirement to maintain their own registers adequate? If not, how might better compliance be secured?
see paragraph 3.72

Separate Register of Charges Maintained for Each Company by Companies House

3.74 Companies House registers and maintains information about charges in two formats.

3.75 First, it places prescribed forms relating to charges delivered to the Registrar on the company's public record. This register of charges is comprised of extracts from companies' registration forms; it is not the actual charge instruments. For England and Wales, these forms are:

- 395 registration of details of the charge;
- 400 registration of charge over property acquired;
- 397 registration of a series of debentures;
- 397a further issues of debentures;
- 403a registration of full or partial satisfaction; and
- 403b registration of release of property.

All these forms are made available for public inspection in accordance with the Registrar's general duty under the 1985 Act⁵⁸. Equivalent information is filed in respect of companies with their registered office in Scotland, with an additional form registering an alteration to a floating charge. The Act contains separate sections dealing with companies registered in Scotland and the forms have, consequentially, different numbers.

⁵⁷ Sections 722 - 723A of the 1985 Act.

⁵⁸ Section 709.

3.76 Second, the Registrar maintains a register of charges for each company, usually referred to as the company's mortgage register. This is effectively a summary of the prescribed forms delivered. These registers record the receipt of the forms and give very brief details of their content. They also record the appointment and removal of receivers. Searchers examining these registers are advised to refer to the prescribed forms if they require detailed information.

3.77 The maintenance of the summary information for each company in a separate register is a statutory obligation placed on the Registrar⁵⁹. This requirement is another example of the unusual treatment afforded to charges. No other information held by Companies House is subject to this form of treatment. It places an additional administrative burden on Companies House, but adds nothing to the totality of information already available. It might be suggested that the separate registers make some of the information more easily accessible. However, in practice, Companies House can produce a package of charge information held for any specified company.

Question 41: Do you consider Companies House's separate registers of charges for each company serve a useful purpose? If so, what reasons would you put forward for their retention?
see paragraphs 3.76-3.77

Constructive Notice

3.78 As explained (see paragraphs 1.5 - 1.6), one of the main functions of the system is to give public notice of the possible existence of a security interest. The 1985 Act is silent as to who receives notice. However the courts have taken the view that, if the legislature has made information about a company available to all at a public office, then it is the responsibility of any person dealing with the company to avail himself of that information. As recommended by Diamond⁶⁰, the 1989 Act⁶¹ would have provided that the only person deemed to have notice of a registered charge is a new chargee who takes a registrable charge. Such a chargee is deemed ". . . to have notice of any matter requiring registration and disclosed on the register at the time the charge is created."

Question 42: Whom do you consider should be deemed to have notice of a registered charge?
see paragraph 3.78

⁵⁹ Sections 401 and 417 of the 1985 Act.

⁶⁰ Op cit, paragraph 11.9.5.

⁶¹ Section 416 as inserted by the unimplemented Section 103 of the 1989 Act.

21-day Invisibility Problem

3.79 The sanction of invalidity takes effect if the particulars of a charge are not properly delivered to the Registrar within 21 days of its creation. This results in the 21-day invisibility problem, as a charge may not be visible on the register until 21 days after its creation. An intending chargee searching the register cannot rely on a clear search, because there may be an earlier chargee whose time for registration has not expired. This period can, in practice, be longer than 21 days as it takes time for a document, once delivered, to be processed by Companies House and for the charge to be entered on the register. We understand that in practice this “21-day invisibility” problem is of less practical importance than might be thought. Nevertheless, the inability to rely on a clear search is plainly a weakness in the present system.

3.80 Our proposals do not include a solution to the 21-day invisibility problem, which we consider is greater in theory than in practice. Our proposals may reduce the problem, as they would facilitate electronic transmission for delivery of the required particulars; furthermore electronic processing by Companies House should be quicker than manual. We considered further reducing the problem by shortening the period to 10 days. However, lenders can, under the terms on which they lend, ensure that money is not released to the borrower until any pending charge will have appeared on the register. The evidence of practitioners participating in the Review is that the 21-day period, in itself, does not prejudice lenders. Where they are prejudiced, it is not due to two competing charges being registered but to fraudulent behaviour by the company.

Concluding Question

Question 43: Are there any other aspects of the company charges registration system that you consider need to be changed? If so, please indicate the changes you think desirable with the arguments in support of such changes.

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ANNEX A SUMMARY OF QUESTIONS

Responses should be in writing and should be sent – by e-mail whenever possible – to:

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The deadline for comments is 5 January 2001.

In accordance with the code of practice on open government, comments made on this document will be made publicly available unless consultees specifically request otherwise.

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| Question 1, Page 9
see paragraph 2.1. | Do you agree that a system is still needed for the registration of company charges? |
| Question 2, Page 12
see paragraphs 2.8-2.9 | Do you consider that a new system which dispenses with the need to present the charge instrument for examination and under which registration becomes a priority point would offer sufficient benefits compared with the present system to make it worthwhile to commission work on developing a detailed notice-filing scheme to replace the present system? |
| Question 3, Page 12
see paragraph 2.8
(Rule 1) | If a notice-filing system is developed, should the invalidity of a registrable charge which has not been registered apply in an administration as well as a liquidation? |
| Question 4, Page 16
see paragraph 3.6 | Do you agree that there should be the civil sanction that the sum secured is payable on demand if the charge is not duly registered? |
| Question 5, Page 16
see paragraph 3.7 | Do you agree that an unregistered charge should be void against a purchaser? |
| Question 6, Page 16
see paragraph 3.7 | Do you agree that the law should expressly validate the exercise of powers of sale of charged property when the charge in question is invalid under the Companies Act? |
| Question 7, Page 16
see paragraph 3.8 | Do you agree that late registration should be possible without application to the court? |

- Question 8, Page 16
see paragraphs
3.8-3.9 Do you agree that, in the event of late registration, the sanction of invalidity should cease from the date of registration?
- Question 9, Page 16
see paragraph 3.9 Do you consider a late-registered charge should be made void by the insolvency of the company creating it, if insolvency proceedings take place shortly thereafter? Why?
- Question 10, page 16
see paragraph 3.10 Should the charge not be made void by the chargor becoming insolvent after it has disposed of its interest in the charged property? Why?
- Question 11, Page 17
see paragraph 3.11 Do you agree that invalidity should not operate where property subject to a charge otherwise invalid for non-registration is acquired expressly subject to that charge?
- Question 12, Page 21
see paragraphs
3.18-3.21 Do you agree that whoever presents the particulars of a charge should be responsible for any liability arising from inaccuracies in those particulars?
- Question 13, Page 22
see paragraphs
3.21-3.25 Do you agree that the particulars of a charge should be:
- the name and Companies House registration number of the company granting the charge;
 - the name of the person in whose favour the charge has been granted;
 - the amount secured, i.e. whether “all monies” or a specific figure;
 - the property charged;
 - whether the charge is fixed or floating;
 - the date of creation; and
 - the company’s reference number that uniquely cross-refers the particulars to the instrument?
- If not, which of the above particulars should be omitted?
Alternatively, which particulars should be added?
- It would be particularly helpful to have views of respondents on the Scottish aspects of this proposal.
- Question 14, Page 22
see paragraph 3.22 Do you consider it is necessary to have an offence, subject to a criminal sanction, for failure to ensure the delivery of the specified particulars of a registrable charge? If so, should it fall upon the creditor or the company?
- Question 15, Page 22
see paragraphs
3.23-3.26 Do you consider that delivery of the particulars of a charge should be sufficient for its registration? If not, what else should be required: the instrument of charge or a certified copy or either?

- Question 16, Page 22
see paragraphs 3.26-3.27 Do you agree that the certificate or evidence of registration should only be conclusive that the requirement to register in time has been satisfied?
- Question 17, Page 22
see paragraphs 3.28-3.29 Do you consider that evidence of registration on the Companies House register should itself be conclusive evidence of the date on which the charge was registered, i.e. do you agree that a conclusive certificate, as such, should no longer be necessary?
- Question 18, Page 24
see paragraphs 1.7-1.8 Should there continue to be a requirement to register under the Companies Act charges that are required to be registered with a specialist register?
- Question 19, Page 24
see paragraph 3.33 Do you agree that all charges on goods should be registered except those under which the chargee has possession, whether actual or constructive?
- Question 20, Page 24
see paragraph 3.33 Do you consider that a clarification in terms of entitlement to possession of goods or documents of title would create any difficulty for the Scottish law concept that possession can be established by “civil possession” through another party (such as an independent warehouse keeper)?
- Question 21, Page 25
see paragraphs 3.34-3.39 Which categorisation of debt should be the basis for defining registrable charges: book debts; all debts; or receivables?
- Question 22, Page 25
see paragraphs 3.34-3.35 Do you consider charges over credit bank balances should be registrable?
- Question 23, Page 25
see paragraph 3.37 Do you consider that charges over debts which are contingent should be registrable?
- Question 24, Page 26
see paragraphs 3.37-3.38 Do you agree that all charges over insurance policies should be registrable?
- Question 25, Page 26
see paragraphs 3.40-3.42 Do you consider that there should be a statutory definition of those retention of title clauses that are to be registrable?
- Question 26, Page 27
see paragraphs 3.43-3.44 Do you agree that no charges on shares should be registrable? If not, what categories of charges on shares should be registrable?
- Question 27, Page 28
see paragraphs 3.45-3.48 Do you agree that provision should be made for the voluntary registration of negative pledges in England and Wales? If so, do you agree that provision should be made that notice should arise from the date of registration?

- Question 28, Page 28
see paragraph 3.45 Do you agree that Scots law relating to negative pledges should be left undisturbed?
- Question 29, Page 29
see paragraphs 3.50-3.51 Do you consider that, in Scotland, failure to register an instrument of alteration should lead to statutory invalidity for the alteration?
- Question 30, Page 29
see paragraphs 3.50-3.51 Alternatively, do you consider that the obligation in Scotland to register instruments of alteration should be repealed?
- Question 31, Page 30
see paragraph 3.52 Do you agree that filing memoranda of satisfaction should remain voluntary?
- Question 32, Page 30
see paragraphs 3.53-3.54 Do you agree that memoranda of satisfaction, if filed, should be signed by both the chargee and the chargor? If not, what alternative safeguard do you suggest?
- Question 33 Page 31
see paragraphs 3.55-3.58 Does the current legal and commercial practice relating to automatic crystallisation clauses create practical problems? If so, what is the appropriate means of dealing with them?
- Question 34, Page 32
see paragraphs 3.57-3.58 Do you consider provision should be made for dealing with automatic crystallisation clauses as part of the company charge registration system?
- Question 35, Page 33
see paragraph 3.62 Do you consider the law should be clarified to the effect that company trustees charging trust property should register such charges and disclose in the particulars that they do so as trustee of the charged property?
- Question 36, Page 35
see paragraph 3.68 Do you agree that those oversea companies that have registered their place of business at Companies House should be subject to a simplified system of registration of charges?
- Question 37, Page 36
see paragraph 3.69 Do you agree that the company charges registration provisions should be extended to unregistered companies?
- Question 38, Page 37
see paragraphs 3.70-3.73 Do you consider that companies' own registers are a useful source of information to others? Are they widely used? Is their maintenance a burden on companies?
- Question 39, Page 37
see paragraphs 3.70-3.73 Do you agree that the present requirement for companies to maintain registers of their own charges should be retained?
- Question 40, Page 37
see paragraph 3.72 Are the existing sanctions on companies for non-compliance with the requirement to maintain their own registers adequate? If not, how might better compliance be secured?

Question 41, Page 38 Do you consider Companies House's separate registers of
see paragraphs charges for each company serve a useful purpose? If so, what
3.76-77 reasons would you put forward for their retention?

Question 42, Page 38 Whom do you consider should be deemed to have notice of a
see paragraph 3.78 registered charge?

Question 43, Page 39 Are there any other aspects of the company charges registration
(Concluding system that you consider need to be changed? If so, please
Question) indicate the changes you think desirable with the arguments in
support of such changes.

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ANNEX B Membership of the Company Law Review Steering Group, Consultative Committee, and others consulted during the preparation of this consultation document

Steering Group

Chairman: Richard Rogers The Right Honourable Lady Justice Arden DBE Robert Bertram Sir Bryan Carsberg	Director, Company Law and Investigations Department of Trade and Industry Court of Appeal, formerly Chairman of the Law Commission formerly partner Shepherd and Wedderburn WS Secretary-General, International Accounting Standards Committee
Paul Davies	Professor of Commercial Law, London School of Economics and Political Science
Sir Stuart Hampson	Chairman, John Lewis Partnership plc
John Kay*	London Economics
John Parkinson	Professor of Law, University of Bristol
Colin Perry	Chairman, LTE Scientific Ltd
John Plender	Broadcaster and journalist
Rosemary Radcliffe CBE	Chief Economist, PricewaterhouseCoopers
Jonathan Rickford	Company Law Review Project Director
Bryan Sanderson	Group Managing Director, BP Amoco plc
Martin Scicluna	Chairman, Deloitte & Touche
Richard Sykes QC	formerly Erskine Chambers

* until March 2000

Consultative Committee as at 15 September 2000

Chairman: Catherine Bell	Director General, Corporate and Consumer Affairs, Department of Trade and Industry
Members of the Steering Group Andrew Baker Jonathan Baskerville	CISCO Herbert Smith (for the British Chambers of Commerce)
Stuart Bell	Pensions and Investment Research Consultants Limited
David Bennett	Bennett & Robertson Solicitors (for the Law Society of Scotland)
Joan Bingley	Institute of Chartered Secretaries and Administrators
Simon Blunt	The Forum of Private Business
John Brace	Harwood Hutton (for the Association of Chartered Certified Accountants)
David Cranston Roger Davis	National Association of Pension Funds PricewaterhouseCooper (for the Institute of Chartered Accountants of England and Wales)
Andrew Davison Maggie Dwyer	Eversheds (for the Law Society) Trades Union Congress

Mary Francis	Association of British Insurers
Paul Geradine	UK Listing Authority
Mark Goyder	Centre for Tomorrow's Company
Dilwyn Griffith	HM Treasury
Rodney Insall	BP Amoco plc (for the Confederation of British Industry)
Nick Janmohamed	Speechly Bircham Solicitors (for the National Consumer Council)
Toby Keynes	UK Shareholders Association
Jeremy King	Proshare (UK) Ltd
Rob Lake	Traidcraft Exchange
Nick MacAndrew	Schroders plc (for the 100 Group of Finance Directors)
Charles Monaghan	for the Institute of Chartered Accountants of Scotland
Paul Monaghan	The Co-operative Bank
Robert Monks	Lens Investment Management
Roger Myddelton	Diageo PLC (for the Committee of Inquiry)
Paul Myners	Gartmore Investment Management
Lord Newton	Institute of Directors
Tom Preece	Federation of Small Businesses
Ken Rushton	The Institute of Business Ethics
Clive Sherling	Apax Partners & Co. Ventures Ltd

Others consulted during the preparation of this consultation document

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Jeremy Donaldson	HM Land Registry
Robert Ferris	Civil Aviation Authority
Sarah Fleming	Law Society of Scotland
Sir Roy Goode QC	Norton Rose Professor of English Law, Oxford University
Peter Graham	Paisner & Co, representing the Law Society
Geoff Harding	HSBC plc
Jim Harrison	Lloyds Register of Shipping
Jim Henderson	Companies House for Scotland
John Holden	The Registrar, Companies House
Peter Lawrence	Patent Office
Charles Mullin	Office of the Solicitors to the Advocate General of Scotland
Bruce Patrick	Maclay, Murray and Spens
William Rankin	Registers of Scotland