

**DRAFT REGULATIONS
FOR COMMENT**

The Companies (Share
Capital and Acquisition by
Company of its Own Shares)
Regulations 2009

MARCH 2009

The Companies (Share Capital and Acquisition by Company of its Own Shares) Regulations 2009

DRAFT REGULATIONS FOR COMMENT

March 2009

The Department for Business, Enterprise and Regulatory Reform (BERR) invites your views on the draft **Companies (Share Capital and Acquisition by Company of its Own Shares) Regulations 2009**.

We welcome your comments on the draft regulations, by 17 April 2009.

Comments should be sent, preferably by email, to:

Julie Ford
Corporate Law and Governance Directorate
Department for Business, Enterprise and Regulatory Reform
1 Victoria Street
London
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Email: Julie.ford@berr.gsi.gov.uk
Tel: 020 7215 2162
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Additional copies of this document may be made without seeking permission or be downloaded from the Department's website on:

<http://www.berr.gov.uk/whatwedo/businesslaw/co-act-2006/draft/page40411.html>

You may also contact Julie if you would rather meet to discuss any issues in person.

Confidentiality: Your comments may be made public by BERR. If you do not want your name or all or part of your response made public, please state this clearly in the response. Any confidentiality disclaimer that may be generated by your organisation's IT system or included as a general statement in your fax cover sheet will be taken to apply only to information in your response for which confidentiality has been requested.

We will handle any personal data you provide appropriately in accordance with the Data Protection Act 1998.

The Companies (Share Capital and Acquisition by Company of its Own Shares) Regulations 2009

DRAFT REGULATIONS FOR COMMENT

March 2009

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The Companies (Share Capital and Acquisition by Company of its Own Shares) Regulations 2009

Part 1: An Overview of the Draft Regulations

1.1 The regulations attached at Annex A are intended to implement measures aimed at improving the efficiency and competitiveness of companies by making it easier for them to react more efficiently to market developments.

1.2 The draft regulations amend provisions in Part 17 (A Company's Share Capital) and Part 18 (Acquisition by a Limited Company of its Own Shares) of the Companies Act 2006 (2006 Act) as follows:

- They reduce the minimum pre-emption rights issue subscription period set out in section 562(5) of the 2006 Act from 21 days to 14 days as recommended by the Rights Issue Review Group in November 2008.
- They introduce a new requirement in section 646 of the 2006 Act so that, when creditors object to a reduction in a company's capital, they should demonstrate that their claim is at risk and that the company has not provided adequate safeguards. A requirement already implemented in the Companies Act 1985.
- They remove the 10% cap on companies holding shares in treasury and extend the period for which authorisation may be given for the purchase of shares from 18 months to 5 years.

1.3 We intend to bring the draft Regulations into force from 1 October 2009.

1.4 Before finalising the regulations we welcome your comments on any issues arising from them.

The Companies (Share Capital and Acquisition by Company of its Own Shares) Regulations 2009

Part 2: Pre-emptive Rights Issues

2.1 To reduce the minimum period of notice for pre-emption rights issues from 21 to 14 days in line with Article 29 (3) of Second Company Law Directive (77/91/EC)¹, as recommended by the Rights Issue Review Group (RIRG) in November 2008².

2.2 In June 2008, a high level Group of senior practitioners and experts was established to examine aspects of current market practices concerning equity capital raising by public companies admitted to trading on UK markets and their interaction with company law, and regulatory requirements. The role of the Group was to examine and report on whether there are measures which could be taken to make equity capital raising more efficient and orderly, while continuing to take proper account of the rights of shareholders and the need to promote financial stability. The findings and recommendations of the Group were published as part of the Government's Pre-Budget Report on 24 November 2008. In reaching its recommendations the RIRG met with 50 consultees.

2.3 One of recommendations of the Group was to reduce the rights issue subscription period. At present a rights issue can take at least 39 days from the date of being formally launched and can take considerably longer. Together with other recommendations made by the group this measure could contribute to a significant reduction to the period when a company (and its reputation) is at risk and its share price open to potential abuse.

2.4 Rights issues are a common capital raising technique for companies in the United Kingdom. When making a rights issue, companies can depending on circumstances choose to use a statutory route where, shares must be offered to existing shareholders in proportion to their existing holdings (pre-emption rights) in accordance with provisions in the 2006 Act. Or they can with the agreement of shareholders choose to take a "non-statutory" route

¹ A copy of Directive 77/91/EEC is available from the following link:
http://europa.eu.int/eur-lex/en/consleg/pdf/1977/en_1977L0091_do_001.pdf

² A copy of the report is available from: http://www.hm-treasury.gov.uk/d/pbr08_rightsissue_3050.pdf

which may disapply some or all of the shareholders rights of pre-emption as set out in the 2006 Act.

2.5 On 12 January 2009 the Financial Services Authority published a Consultation Paper (CP09/4) covering another recommendation of the RIRG, to reduce the Listing Rules' requirement for the minimum duration of non-statutory rights issue subscription periods, which has since been implemented³. The regulations attached at Annex A amend the minimum period of subscription for statutory rights issues.

2.6 The benefits of a shorter subscription period for Pre-emptive Rights Issues include:

- increased speed of access to finance,
- a reduction in the length of time to which companies are exposed to change in market and financial conditions,
- a reduction in the length of time to which companies are exposed to possible market abuse.

2.7 Although the subscription period shareholders will be reduced – this approach will retain pre-emption rights and the widespread availability of electronic communication should help to counteract the shorter period of notice. There is a risk that pre-emptive rights issues will become increasingly unattractive if the approach is considerably slower than methods when there is a need to raise capital quickly.

2.8 **Regulation 2 of the draft Companies (Share Capital and Acquisition by a Company of its Own Shares) Regulations 2009**, attached at Annex A, takes forward the recommendation in respect of the statutory rights issues. Regulation 2 amends section 562(5) (Communication of pre-emption offers to shareholders) of the 2006 Act to reduce the minimum period of notice for pre-emption rights from 21 days to 14 days in line with Article 29(3) of the Second Company Law Directive 77/91/EEC, Article 29(3).

³ A copy of the FSA consultation document and the response is available from: http://www.fsa.gov.uk/pages/Library/Policy/Policy/2009/09_02.shtml

The Companies (Share Capital and Acquisition by Company of its Own Shares) Regulations 2009

Part 3: Standardised Creditor Protection

3.1 To implement a requirement that creditors objecting to a reduction in a company's capital should demonstrate that their claim is at risk and that the company have not provided adequate safeguards as required by EC Directive 2006/68.

3.2 In February 2007 the Government consulted on the implementation of the Simplification of Capital Maintenance Directive (2006/68/EC)⁴ which amends the Second Company Law Directive on Capital Maintenance (77/91/EEC)⁵. The aim of Directive 2006/68/EC is to improve the efficiency and competitiveness of companies by making it easier for them to react more efficiently to market developments. Article 1(9) of Directive 2006/68 requires that Member States ensure that creditors are authorised to apply to an appropriate administrative or judicial authority for adequate safeguards, provided they can demonstrate that due to the reduction their claim is at stake and that no adequate safeguards have been obtained from the company. The purpose of this measure is to standardise creditor protection in the EU.

3.3 The Companies Act 1985 and the 2006 Act both set out a procedure in which the court produces a list of creditors of the company entitled to object to the reduction. If this procedure is followed the court must be satisfied, before it approves the capital reduction, that all of the listed creditors have consented to the reduction or have had their claims paid or secured by the company. The court can disapply the procedure if it is satisfied that the company's creditors are adequately protected, and routinely does so.

3.4 The proposed regulations amending the 2006 Act enable the court, when seeking satisfaction from a company that its creditors are protected, to disregard the objection of a creditor who is unable to show that they are at risk.

3.5 Consultation on the provisions in Directive 2006/68 formed Chapter 6 of the consultation on the implementation of the Companies Act 2006 in

⁴ A copy of Directive 2006/68/EC is available from the following link:
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006L0068:EN:NOT>

⁵ A copy of Directive 77/91/EEC is available from the following link:
http://europa.eu.int/eur-lex/en/consleg/pdf/1977/en_1977L0091_do_001.pdf

February 2007⁶. Those responding indicated that the government should take up the options in the directive as they were deregulatory and that this particular provision should be taken up for purposes of clarity. The government agreed to consider implementation of this mandatory provision to avoid the risk of non compliance with the directive.

3.6 Following further consultation, on 6 April 2008 BERR brought into force regulations amending the Companies Act 1985. The Companies (Reduction of Capital) (Creditor Protection) Regulations 2008 (SI 2008/719)⁷ amend section 136(3) of the Companies Act 1985 to reflect the requirement that creditors objecting to a reduction in a company's capital should:

“show that there is a real likelihood that the reduction would result in the company being unable to discharge his debt or claim when it fell due,”.

3.7 The amendment to the 1985 Act was light touch in that it introduced the requirement for creditors objecting to a reduction in capital to demonstrate that their claim is at risk without changing existing procedures. The same approach will be adopted to amending the 2006 Act.

3.8 **Regulation 3 of the draft Companies (Share Capital and Acquisition by a Company of its Own Shares) Regulations 2009** attached at Annex A inserts the requirement for creditors to show that their claim is at risk, and that the company have not taken adequate safeguards, when objecting to a reduction in a company's capital, in section 646 of the 2006 Act.

⁶ The consultation on the implementation of the Companies Act 2006 can be found together, with the government response at: <http://www.berr.gov.uk/consultations/page37980.html>

⁷ A copy of SI 2008/719 is available from the following link:
http://www.opsi.gov.uk/si/si2008/pdf/uksi_20080719_en.pdf

The Companies (Share Capital and Acquisition by Company of its Own Shares) Regulations 2009

Part 4: Acquisition of Own Shares (including Treasury Shares)

4.1 To implement an option provided in EC Directive 2006/68 to remove the 10% cap on companies holding their own shares and to extend the period for which authorisation for the purchase of shares may be given from 18 months to 5 years.

4.2 Directive 2006/68 offers Member States the option to remove the cap on companies holding their own shares and to extend the period of authorisation for the purchase of shares from 18 months to 5 years. The purpose of this provision is to enhance flexibility and reduce the administrative burden for companies which have to react promptly to market developments affecting the price of their shares.

4.3 At present in the UK, companies can with shareholder authorisation, purchase up to 10% of their own shares to hold in Treasury as set out in section 724 of the Companies Act 2006. Purchases should be made out of distributable profit and the company must register itself as the holder of the shares. A company must not exercise any rights in respect of treasury shares held by it. The pre-emption rights of existing shareholders apply to the sale of treasury shares. Purchases, sales, transfers and cancellations of treasury shares must be notified to Companies House.

4.4 Only "qualifying shares" as defined in section 724 of the 2006 Act can be held as treasury shares. Broadly speaking, "qualifying shares" are shares listed on the Official List, officially listed in an EEA state or traded on AIM or a regulated market of another EEA state.

4.5. The current period of authorisation is 18 months and set out in sections 694(5) Authority for off-market purchase, 697(4) variation of contract for off-market purchase and 700(4) release of company's right under contract for off-market purchase, and 701 (5) authority for market purchase.

4.6 The consultation on the Directive 2006/68 formed Chapter 6 of the consultation on the implementation of the Companies Act 2006⁸. Most of those responding indicated that the government should take up the

⁸ The consultation on the implementation of the Companies Act 2006 can be found together, with the government response at: <http://www.berr.gov.uk/consultations/page37980.html>

flexibilities offered by the directive. Respondents to the earlier consultation on the proposed directive also supported the take up of this flexibility.⁹

4.7 The draft regulations reflect proposals to take up the full flexibility offered in directive 2006/68. Companies and shareholders would then have the flexibility to determine within those limits, arrangements that best suit their particular circumstances. There are a number of factors which would limit the purchase of shares to be held in treasury including:

- the availability of distributable profits
- terms and conditions of purchases require the agreement of shareholders
- availability of shares for purchase
- a limited company may not purchase its own shares if as a result of the purchase there would no longer be any issued shares of the company other than redeemable share or shares held as treasury shares (section 690 (2) of the 2006 Act)
- market conditions

4.8 We are also planning to take full advantage of the option to extend the period of authorisation of purchases from 18 months to 5 years; this provision will apply to public and private limited companies.

4.9 Shareholder approval is still required for purchases of shares and the pre-emption rights of existing shareholders still apply to sales of treasury shares. In addition companies will continue to comply with measures aimed at preventing insider dealing and market abuse such from the Criminal Justice and Financial Services and Markets (FSMA) Acts as well as UK listing authority rules and the City Code on Takeovers and Mergers as they apply to the treatment of treasury shares.

4.10 **Regulation 4(1) The Companies (Share Capital and Acquisition by Company of its Own Shares) Regulations 2009** increases from 18 months to 5 years the amount of time for which a public company may be authorised by special resolution of its members to make off-market purchases of its own shares, vary a contract for off-market purchase of its own shares or release its rights under a contract for off-market purchase of its own shares. **Regulation 4(2)** increases from 18 months to 5 years the amount of time for which a public or private company may be authorised by ordinary resolution of its members to make market purchases of its own shares. **Regulation 5** removes from public and private companies the restriction that the maximum

9 European Company Law and Corporate Governance:
<http://www.berr.gov.uk/consultations/page14583.html>

amount of their own shares which they may hold as treasury shares is limited to 10% of the nominal value of their issued share capital (or of the class of issued share capital in question).

Part 5: Timetable for Implementation

5.1. Depending on the nature of comments received, we aim to bring the regulations into force from 1 October 2009.

How to Comment

5.2. The Department for Business, Enterprise and Regulatory Reform invites comments on the draft regulations.

5.3. When responding please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.

5.4 Comments on the draft regulations should be submitted by **17 April 2009**, preferably by email, to:

Julie Ford
Corporate Law and Governance Directorate
Department for Business, Enterprise and Regulatory Reform
1 Victoria Street
London
SW1H 0ET

Email: julie.ford@berr.gsi.gov.uk
Telephone: 020 7215 2162
Fax: 0207 215 0235

You may also contact Julie should you wish to arrange a meeting to discuss any of the issues in person.

5.5 The Department will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

D R A F T S T A T U T O R Y I N S T R U M E N T S

2009 No. 0000

COMPANIES

**The Companies (Share Capital and Acquisition by Company of
its Own Shares) Regulations 2009**

Made - - - - - **** 2009*

Coming into force - - - *1st October 2009*

The Secretary of State makes the following Regulations in exercise of the powers conferred by sections 562(6)(a), 657(1), 737 and 1292(1)(c) of the Companies Act 2006⁽¹⁰⁾.

In accordance with sections 562(7), 657(4), 737(4) and 1290 of that Act, a draft of these Regulations has been laid before Parliament and approved by a resolution of each House of Parliament.

Citation and commencement

1.—1.1 These Regulations may be cited as the Companies (Share Capital and Acquisition by Company of its Own Shares) Regulations 2009.

(1) They come into force on 1st October 2009.

Rights issues

2. In section 562(5) of the Companies Act 2006 (communication of pre-emption offers to shareholders: minimum period during which offer may be accepted) for “21 days” substitute “14 days”.

Reduction of capital: creditor protection

3. In section 646(1) of the Companies Act 2006 (application to court for order confirming reduction of share capital: creditors entitled to object)—

(a) after “who” insert “— (a)”, and

(b) after “admissible in proof against the company” insert—

“, and

(b) can show that there is a real likelihood that the reduction would result in the company being unable to discharge his debt or claim when it fell due.”.

⁽¹⁰⁾2006 c.46.

Acquisition by company of its own shares

4.—(1) In each of sections 694(5), 697(4) and 700(4) of the Companies Act 2006 (authority for off-market purchase, variation of contract for off-market purchase and release of off-market purchase rights: public companies) for “18 months” substitute “five years”.

(2) In section 701(5) of the Companies Act 2006 (authority for market purchase) for “18 months” substitute “five years”.

Treasury shares

5.—(1) Section 725 of the Companies Act 2006 (treasury shares: maximum holdings) is repealed.

(2) Any outstanding obligation to dispose of or cancel excess shares arising under section 725(3) of that Act (duty to dispose of excess shares) shall cease to exist on 1st October 2009, whether or not the period mentioned in that provision has expired, but this is subject to paragraph (3).

(3) This amendment does not affect any liability under section 732 of that Act (treasury shares: offences) in respect of a failure to comply with section 725(3) where the period mentioned in that provision ended before 1st October 2009.

Date

Name
Economic and Business Minister,
Department for Business, Enterprise and Regulatory Reform

EXPLANATORY NOTE

(This note is not part of the Regulations)

Regulation 2 of these Regulations amends section 562 of the Companies Act 2006 so that the minimum period for which rights issues must be kept open for acceptance is reduced from 21 days to 14 days.

Regulation 3 implements in respect of the Companies Act 2006 the amendment made to Article 32(1) of Council Directive 77/91/EEC (OJ L 26, 31.1.1977, p. 1) by Directive 2006/68/EC of the European Parliament and of the Council (OJ L 264, 25.9.2006, p. 32) (that Directive was implemented in respect of the Companies Act 1985 by the Companies (Reduction of Capital) (Creditor Protection) Regulations 2008 (S.I. 2008/719)). The latter Directive amended the former as regards the formation of public companies and the maintenance and alteration of their capital. Regulation 3 also makes corresponding amendments to the law as it relates to private companies.

Regulation 3 amends section 646 of the Companies Act 2006. Under section 645 a company may reduce its share capital by special resolution subject to confirmation by the court. Section 646 provides a procedure for identifying and producing a list of creditors entitled to object to a proposed capital reduction. Under section 648, before the court may confirm a reduction it must be satisfied that the consent of the listed creditors has been obtained or their claims have been discharged or have determined or have been secured by the company. Regulation 3 amends section 646 to exclude from the list of creditors those who cannot show that there is a real likelihood that the proposed capital reduction would result in the company being unable to discharge their debts or claims when they fell due.

Regulation 4(1) increases from 18 months to five years the amount of time for which a public company may be authorised by special resolution of its members to make off-market purchases of its own shares, vary a contract for off-market purchase of its own shares or release its rights under a contract for off-market purchase of its own shares. Regulation 4(2) increases from 18 months to five years the amount of time for which a public or private company may be authorised by ordinary resolution of its members to make market purchases of its own shares.

Regulation 5 removes from companies the restriction that the maximum amount of their own shares which they may hold as treasury shares is limited to 10% of the nominal value of their issued share capital (or of the class of issued share capital in question). This regulation is subject to transitional provisions.

[A transposition note has been prepared which sets out how Directive 2006/68/EC is to be transposed into UK law. It is available from the Department for Business, Enterprise and Regulatory Reform, Corporate Law and Governance Directorate, 1 Victoria Street, London, SW1H 0ET or at <http://www.berr.gov.uk>. A full regulatory impact assessment of the effect that this instrument will have on the costs of business and the voluntary sector is available [from/at] ... [and is annexed to the Explanatory Memorandum which is available alongside the instrument on the OPSI website].]

Summary: Intervention & Options

Department /Agency: The Department for Business and Regulatory Reform (BERR)	Title: The Companies (Share Capital and Acquisition by Company of its Own Shares) Regulations 2009	
Stage: Implementation	Version: One	Date: March 2009
Related Publications: A Report to the Chancellor of the Exchequer: by the Rights Issue Review Group		

Available to view or download at: http://www.hm-treasury.gov.uk/d/pbr08_rightsissue_3050.pdf

Contact for enquiries: Julie Ford

Telephone: 020 7215 2162

What is the problem under consideration? Why is government intervention necessary?

At present a rights issue can take at least 39 days from the date of being formally launched. This could make share prices open to potential abuse and hinder market efficiency. The Government intervention is necessary to speed up the rights issue process and increase the speed of access to equity capital, and help the market to function more effectively.

What are the policy objectives and the intended effects?

To make equity raising more efficient and orderly by reducing the time required by companies to raise equity and reduce exposure by companies raising capital to market volatility and abuse by implementing a recommendation from the Rights Issue Review Group: "FSA and BERR to consult on reducing the rights issue subscription period from 21 to 14 days".

What policy options have been considered? Please justify any preferred option.

1. Amend the Companies Act to reduce the period of notice for pre-emption rights issues from 21 days to 14 days.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

Five years after implementation – 2014.

Ministerial Sign-off For final proposal/implementation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:

..... Date:

Summary: Analysis & Evidence

Policy Option: 1

Description: Amend the Companies Act to reduce the period of notice for pre-emption rights issues from 21day to 14 days.

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' There are no specific monetary costs associated with this measure.
	One-off (Transition)	Yrs	
	£ 0.00		
	Average Annual Cost (excluding one-off)		
	£ 0.00		
Total Cost (PV)			£ 0.00
Other key non-monetised costs by 'main affected groups' The reduction in the period of notice may have an impact on shareholders decision making ability but may be offset by electronic communication, it may stop companies using other means of raising capital that may dilute their holding or pre-emption rights.			

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups'
	One-off	Yrs	
	£ 0.00		
	Average Annual Benefit (excluding one-off)		
	£ 0.00		
Total Benefit (PV)			£ 0.00
Other key non-monetised benefits by 'main affected groups' The option to reduce the time taken to undertake a Pre-emptive Rights Issue will speed up access to capital and reduce exposure to market volatility and abuse.			

Key Assumptions/Sensitivities/Risks

This is an optional flexibility for public companies trying to raise capital they can continue to apply a 21 day period of notice if it suits their requirements.

Price Base Year 0	Time Period Years 0	Net Benefit Range (NPV) £ 0	NET BENEFIT (NPV Best estimate) £ 0
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What is the geographic coverage of the policy/option?	UK			
On what date will the policy be implemented?	01 October 2009			
Which organisation(s) will enforce the policy?	BERR			
What is the total annual cost of enforcement for these organisations?	£ not known			
Does enforcement comply with Hampton principles?	Yes			
Will implementation go beyond minimum EU requirements?	No			
What is the value of the proposed offsetting measure per year?	£ 0			
What is the value of changes in greenhouse gas emissions?	£ 0			
Will the proposal have a significant impact on competition?	No			
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large
Are any of these organisations exempt?	No	No	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)				(Increase - Decrease)
Increase of	£ 0	Decrease	£ 0	Net £ 0

Key: Annual costs and benefits: Constant Prices (Net) Present Value

The Companies (Share Capital and Acquisition by Company of its Own Shares) Regulations 2009: Rights Issues

PROPOSAL

1. To reduce the period of notice for pre-emption rights issues in section 562 (5) of the Companies Act 2006, from 21 to 14 days in line with Article 29 (3) of the Second Company Law Directive (77/91/EEC)¹¹, as recommended by the Rights Issue Review Group (RIRG) in November 2008¹².

OBJECTIVE

2. The objective of the proposed change is to help make equity raising more efficient and orderly by reducing time required by companies to raise equity and reduce exposure by companies raising capital to market volatility and abuse.

BACKGROUND

3. The spring and summer of 2008 saw an unusually busy period of capital raising. Companies raised some £23 billion through rights issues, which was a considerable achievement in the market conditions, but it also highlighted a number of vulnerabilities in the process. Increasing the efficiency of pre-emptive rights can benefit the market, companies and shareholders by helping to ensure that this model of capital raising retains its place in the UK market.

4. In light of the concerns expressed regarding the UK rights issues the Chancellor of the Exchequer set up the Rights Issue Review Group (RIRG) to examine and report to him on measures which could be taken to make equity raising more efficient and orderly.

5. Rights issues are a common capital raising technique for companies in the United Kingdom. Many of the problems that emerged with the financial sector capital raisings were caused or exacerbated by the duration of the rights issues process. For example, potentially abusive trading strategies are aided by the longer period from announcement to completion; and significant market movements that erode discounts are more likely over a longer time spell.

6. At present a rights issue can take at least 39 days from the date of being formally launched. The process can take considerably longer – for example HBOS took 83 days and Bradford & Bingley 96 days.

¹¹ A copy of Directive 77/91/EEC is available from the following link: http://europa.eu.int/eur-lex/en/consleg/pdf/1977/en_1977L0091_do_001.pdf

¹² A copy of the report is available from: http://www.hm-treasury.gov.uk/d/pbr08_rightsissue_3050.pdf

7. The statutory period of notice for rights is currently set at 21 days under section 562 (5) of the Companies Act 2006. The Second Company Law provides us with an option to reduce the statutory period of notice from 21 days to 14days. In its report the RIRG recommended that the FSA and BERR to consult on reducing the rights issue subscription period from 21 to 14 days.

8. Do nothing is not a viable option if it puts companies at risk due to market volatility or abuse. A shorter period of notice would help to reduce the time required to undertake a Rights Issue. Providing companies with the option to reduce the period of notice to 14 days will not compel them to undertake all rights issues in the shortest possible time. It will however provide them with the option to speed up the process to suit market conditions. The current statutory period of notice for statutory /pre-emptive rights issue is 21 days but we have an option to reduce the subscription period to 14 days in line with EU law.

9. Together with other recommendations made by the RIRG reducing the period of notice could lead to a significant improvement in the time required to undertake a rights issue. It would increase speed of access to capital and help to reduce the period when a company (and its reputation) is at risk and its share price open to potential abuse. At present the statutory period of notice is set at 21 days however Article 29 (3) of the Second Company Law Directive (77/91/EC) provides the UK with the option to reduce this statutory option to 14 days.

COSTS AND BENEFITS

10. There would be no direct costs or benefits if UK legislation is left unchanged. However, if the statutory period of notice remains at 21 days, the UK could be accused of exposing companies to risk of market volatility and abuse when using statutory or pre-emptive rights issues to raise capital. EC Directive 77/91 (the Second Company Law Directive) provides us with an option to reduce the period to 14 days. UK companies would bear the impact of such exposure.

Costs

11. A shorter subscription period should not lead to additional costs.

Benefits

12. The proposed reduction in the pre-emptive rights subscription period would give issuers the opportunity to speed up the rights issue process (by one week). The benefits of this include:

Increase speed of access to equity capital: issuers would be able to complete rights issues seven days earlier than they can now. This would help issuers in need of raising equity capital quickly.

Market and financial risk: if issuers choose to complete rights issues seven days earlier than is currently possible, this would reduce the risk of changes in market and financial conditions.

Market abuse: recent experience suggests that firms are more vulnerable to market abuse when undertaking rights issues than at other times. A reduction in the rights issue subscription period should reduce the risk of market abuse during rights issues. This is because certain market abuse strategies – e.g. spreading rumours – are easier to implement if more time is available.

RISKS

13 A possible consequence of reducing time available to undertake a rights issue - shareholders may not have sufficient time for decision making. However the use and accessibility of electronic communication has increased since this legislation was introduced and this should help offset some of the time lost. There is a danger that if we do not introduce this change then the pre-emptive or statutory method of raising capital, which offers investors maximum protection, will become increasingly less attractive than other methods that the company can adopt.

WHO WILL BE AFFECTED?

14. This change will affect all companies other than those private companies which have excluded the provisions of section.562 of the Companies Act 2006 from their articles.

ISSUES OF EQUITY AND FAIRNESS

15. The Government considers that these measures will not bring disproportionate benefits or have disproportionate affects on particular groups.

SMALL FIRMS IMPACT TEST

16. There is no change in nature or number of the overall population of companies affected by these provisions.

ENFORCEMENT AND SANCTIONS

17. Enforcement of the current provisions in the Companies Act 2006 - which are subject to criminal penalties for non-compliance – is the responsibility of the Department for Business Enterprise and Regulatory Reform. The Department will be responsible for enforcing the amended law.

CONSULTATION

18. The RIRG held meetings with over 50 consultees in reaching its recommendations. On 12 January 2009 the Financial Services Authority published a Consultation Paper (CP09/4) covering another recommendation of the RIRG, to reduce the Listing Rules' requirement for the minimum duration of non-statutory rights issue subscription periods, which has since been implemented

COMPETITION ASSESSMENT

19. The competition filter has been applied. It is considered that the Directive will not give rise to disproportionate costs of entry or administrative costs for either small or large business. The Directive is not anticipated to restrict innovation in sectors characterised by rapid technological change and would not impair freedom to provide services

Specific Impact Tests: Checklist

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Y	N
Small Firms Impact Test	Y	N
Legal Aid	N/A	N
Sustainable Development	N/A	N
Carbon Assessment	N/A	N
Other Environment	N/A	N
Health Impact Assessment	N/A	N
Race Equality	N/A	N
Disability Equality	N/A	N
Gender Equality	N/A	N
Human Rights	N/A	N
Rural Proofing	N/A	N

Summary: Intervention & Options

Department /Agency: The Department for Business and Regulatory Reform (BERR)	Title: The Companies (Share Capital and Acquisition by Company of its Own Shares) Regulations 2009	
Stage: Implementation	Version: One	Date: March 2009
Related Publications: Implementation of Companies Act 2006 Consultative Document February 2007		

Available to view or download at: <http://www.berr.gov.uk/consultations/page37980.html>

Contact for enquiries: Julie Ford

Telephone: 020 7215 2162

What is the problem under consideration? Why is government intervention necessary?

To implement a requirement introduced by Directive 2006/68/EC that the creditors of a public company can only object to a reduction in the company's share capital if they can demonstrate that their claims are at stake as a result of the proposed reduction

What are the policy objectives and the intended effects?

To improve the efficiency and competitiveness of companies by making it easier for them to react more promptly and at less cost to developments in the markets without reducing the protection offered to shareholders and creditors.

What policy options have been considered? Please justify any preferred option.

1. Reflect the requirement for creditors to be able to credibly demonstrate that their claims are at stake if they object to a reduction of capital

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

Five years after implementation – 2014

Ministerial Sign-off For final proposal/implementation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:

..... Date:

Summary: Analysis & Evidence

Policy Option: 1	Description: Reflect the requirement for creditors to be able to credibly demonstrate that their claims are at stake if they object to a reduction of capital
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COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups'
	One-off (Transition)	Yrs	
	£ 0.00		None - in practice the regulations should not lead to any additional costs for any of the parties involved.
	Average Annual Cost (excluding one-off)		
	£ 0.00		
Total Cost (PV)		£ 0.00	
Other key non-monetised costs by 'main affected groups' The conditions requiring that creditors can only object if they can show that as a result of the reduction the company			

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups' In theory the provisions should reduce burdens for companies - if only those creditors that can prove their claim is at stake and has not been adequately safeguarded - however in practice it is unlikely that the courts would ever have processed a claim with insufficient evidence.
	One-off	Yrs	
	£ 0.00		
	Average Annual Benefit		
	£ 0.00		
Total Benefit (PV)		£ 0.00	
Other key non-monetised benefits by 'main affected groups'			

Key Assumptions/Sensitivities/Risks

The regulations will apply to public and private limited liability companies

Price Base Year 0	Time Period Years 0	Net Benefit Range (NPV) £ 0	NET BENEFIT (NPV Best estimate) £ 0
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What is the geographic coverage of the policy/option?	UK			
On what date will the policy be implemented?	01 October 2009			
Which organisation(s) will enforce the policy?	The courts			
What is the total annual cost of enforcement for these organisations?	£ not known			
Does enforcement comply with Hampton principles?	Yes			
Will implementation go beyond minimum EU requirements?	No			
What is the value of the proposed offsetting measure per year?	£ 0			
What is the value of changes in greenhouse gas emissions?	£ 0			
Will the proposal have a significant impact on competition?	No			
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large
Are any of these organisations exempt?	No	No	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)			(Increase - Decrease)
Increase of	£ 0	Decrease	£ 0
Net		£ 0	

Key: Annual costs and benefits: Constant Prices (Net) Present Value

The Companies (Share Capital and Acquisition by Company of its Own Shares) Regulations 2009: Creditor Protection

PROPOSAL

1. On 29 October 2004 the European Commission published its proposal for a directive of the European Parliament and of the Council to amend Council directive 77/91/EEC as regards the formation of public limited liability companies and the maintenance and alteration of their capital (The Second Company Law Directive). The amending Directive (2006/68/EC) was published on 25 September 2006. Member states are required to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 15 April 2008

OBJECTIVE

2. The Companies (Reduction of Capital) Regulations 2008 implement an amendment to UK law required by Directive 2006/68/EC which shifts the burden of proof in the case of a reduction in a companies capital from the company to the creditor. The Directive sought to simplify capital maintenance provisions across the EU, and to improve the efficiency and competitiveness of companies by making it easier for them to react more promptly and at less cost to developments in the markets without reducing the protection offered to shareholders and creditors.

BACKGROUND

3. Under UK law, subject to confirmation by the court, a public company may reduce its share capital. The 1985 Act also requires the company to be authorised by its articles of association before it can reduce its capital: but this is not a requirement of the 2006 Act. Under section 646 of the 2006 Act, any creditor of the company is entitled to object to a reduction.

4. Directive 2006/68/EC requires creditors be given the right to seek relief in respect of a capital reduction scheme "where they can credibly demonstrate that due to the reduction in subscribed capital the satisfaction of their claim is at stake". If the right of creditors to object to a reduction of capital is limited in line with the Directive, companies engaged in capital reduction schemes would benefit as fewer creditors would be able to apply to the courts to object.

5. Even without such express provision in UK law, it is difficult to conceive of circumstances in which a significant creditor could not object if it could credibly demonstrate to the court that its claim was at stake due to a reduction in capital. The notion of capital maintenance holds that capital is a reserve that underpins the security of the claims of creditors. If the company reducing capital is concerned that a creditor cannot demonstrate that a reduction would affect the satisfaction of its claim, it can ask the court to take this factor into consideration.

6. BERR published a consultation on implementation of the provisions in Directive 2006/68/EC in February 2006, the consultation closed on 31st May 2007. There was

a small response to the consultation. However respondents indicated that, for purposes of clarity, BERR should amend the requirement in respect of safeguards for creditors to reflect the shift in the burden of proof from the company to the creditor when objecting to a reduction of capital.

7. Therefore in the interests of clarity, the Companies Act 1985 was amended to introduce this requirement from 6 April 2008. The current proposal is to introduce a similar amendment to the Companies Act 2006 from 1 October 2009.

8. The aim is to provide the clarity that stakeholders required and ensure compliance with the provision in the Directive. Although there will be shift in the burden of proof from the company to the creditor, creditor safeguards will be maintained for those creditors entitled to object and there may be small reduction admin burdens for companies involved in such cases.

COSTS AND BENEFITS

9. There would be no change in costs and benefits if UK legislation is left unchanged. However, if UK legislation is left unchanged there is risk of non-compliance and infraction proceedings may lead to UK being fined for infraction.

10. There may be some benefits to companies who would no longer be required by the courts to publish the reasons for a reduction in capital. In 2005, PWC estimated the cost of this burden to be in the region of £544K per year based on 168 applications to the court a year. Provisions which require that the courts do not confirm a reduction unless the consent of those creditors entitled to object has been obtained should ensure creditor protection is maintained.

RISKS

11. UK law already permits creditors to object to capital reduction schemes through the courts. There is, however, no express requirement that the creditor must demonstrate that its claim is at risk, as the amending Directive requires. If UK law is not amended lack of clarity may lead to non compliance.

WHO WILL BE AFFECTED?

12. These provisions will apply to public limited companies.

ISSUES OF EQUITY AND FAIRNESS

13. The Government considers that these measures will not bring disproportionate benefits or have disproportionate affects on particular groups. Although the burden

of proof has shifted - creditors still have access to the courts in the case of a complaint.

SMALL FIRMS IMPACT TEST

14. There is no change in nature or number of the overall population of companies affected by these provisions. The shift of the burden of proof from the company to its creditor in the case of a reduction of capital should not adversely affect small companies.

ENFORCEMENT AND SANCTIONS

15. Existing Companies Act provisions apply.

CONSULTATION

16. The consultation on the implementation of the amendments to the 2nd Company Law Directive (Simplification of the Capital Maintenance Rules) was published on 28th February 2007. It formed part of Chapter 6 of the consultation on "Implementation of the Companies Act 2006" the consultation process closed on 31 May 2007 the government response is available from BERR website at: <http://www.berr.gov.uk/bbf/eu-company-law/directives/page19528.html>.

COMPETITION ASSESSMENT

17. The competition filter has been applied. It is considered that the Directive will not give rise to disproportionate costs of entry or administrative costs for either small or large business. The Directive is not anticipated to restrict innovation in sectors characterised by rapid technological change and would not impair freedom to provide services

Specific Impact Tests: Checklist

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed ?</i>
Competition Assessment	Y	N
Small Firms Impact Test	Y	N
Legal Aid	N/A	N
Sustainable Development	N/A	N
Carbon Assessment	N/A	N
Other Environment	N/A	N
Health Impact Assessment	N/A	N
Race Equality	N/A	N
Disability Equality	N/A	N
Gender Equality	N/A	N
Human Rights	N/A	N
Rural Proofing	N/A	N

Summary: Intervention & Options

Department /Agency: The Department for Business and Regulatory Reform (BERR)	Title: The Companies (Share Capital and Acquisition by Company of its Own Shares) Regulations 2009	
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Contact for enquiries: Julie Ford

Telephone: 020 7215 2162

What is the problem under consideration? Why is government intervention necessary?

To implement an option provided in EC Directive 2006/68 to remove the 10% cap on companies holding their own shares and to extend the period for which authorisation for the purchase of shares may be given from 18 months to 5 years

What are the policy objectives and the intended effects?

To enhance flexibility and reduce the administrative burden for companies which have to react promptly to market developments affecting the price of their shares.

What policy options have been considered? Please justify any preferred option.

1. Remove the 10% cap on companies holding their own shares and extend the period for which authorisation for the purchase of shares may be given from 18 months to 5 years.
2. To set a cap at a specific level above 10%, and a period of authorisation within 5 years for all companies with qualifying shares.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

Five years after implementation – 2014

Ministerial Sign-off For final proposal/implementation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:

..... Date:

Summary: Analysis & Evidence

Policy Option: 1

Description: Remove the 10% cap on companies holding their own shares and extend the period for which authorisation for the purchase of shares may be given from 18 months to 5 years.

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups'
	One-off	Yr	
	£ 0.00		There should not be any additional costs for companies eligible to take up the increased flexibilities.
	Average Annual Cost (excluding one-off)		
£ 0.00		Total Cost (PV)	£ 0.00
Other key non-monetised costs by 'main affected groups@			

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups'
	One-off	Yr	
	£ 0.00		
	Average Annual Benefit (excluding one-off)		
£ 0.00		Total Benefit (PV)	£ 0.00
Other key non-monetised benefits by 'main affected groups' The additional flexibility should provide more options for companies when restructuring their capital.			

Key Assumptions/Sensitivities/Risks

Price Base Year 0	Time Period	Net Benefit Range (NPV) £ 0	NET BENEFIT (NPV Best estimate) £ 0
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What is the geographic coverage of the policy/option?	UK			
On what date will the policy be implemented?	01 October 2009			
Which organisation(s) will enforce the policy?	The courts			
What is the total annual cost of enforcement for these	£ not known			
Does enforcement comply with Hampton principles?	Yes			
Will implementation go beyond minimum EU requirements?	No			
What is the value of the proposed offsetting measure per	£ 0			
What is the value of changes in greenhouse gas emissions?	£ 0			
Will the proposal have a significant impact on competition?	No			
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large
Are any of these organisations exempt?	No	No	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)			(Increase - Decrease)
Increase	£ 0	Decrease	£ 0
		Net	£ 0

Key:

Annual costs and benefits: Constant Prices

(Net) Present Value

Evidence Base (for summary sheets)

The Companies (Share Capital and Acquisition by Company of its Own Shares) Regulations 2009: Treasury Shares

PROPOSAL

1. On 29 October 2004 the European Commission published its proposal for a directive of the European Parliament and of the Council to amend Council directive 77/91/EEC as regards the formation of public limited liability companies and the maintenance and alteration of their capital (The Second Company Law Directive). The amending Directive (2006/68/EC) was published on 25 September 2006. Member states are required to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 15 April 2008, however the provision under consideration is optional.

2. This impact assessment covers our intention to implement an option provided in EC Directive 2006/68 to remove the 10% cap on companies holding their own shares and to extend the period for which authorisation for the purchase of shares may be given from 18 months to 5 years. We aim to implement this measure from 1 October 2009.

OBJECTIVE

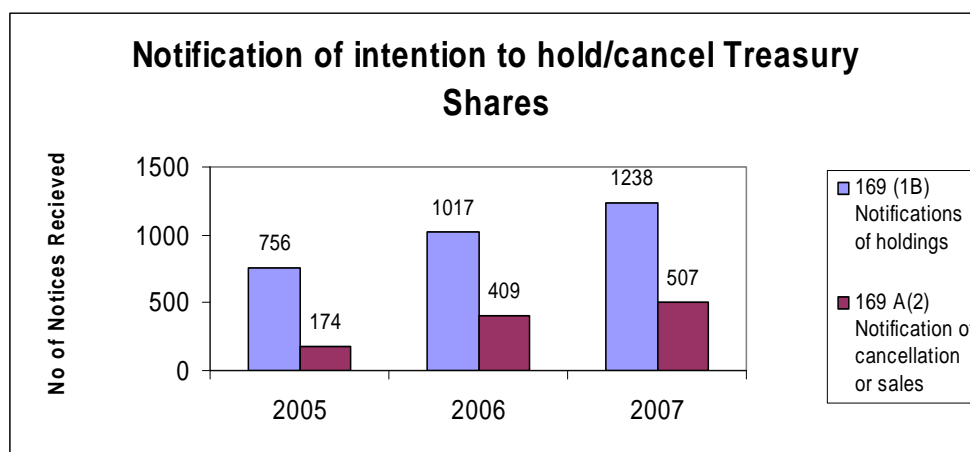
3. The aim of this provision is to enhance flexibility and reduce the administrative burden for companies which have to react promptly to market developments affecting the price of their shares.

BACKGROUND

4. At present in the UK Companies can with shareholder authorisation, purchase up to 10% of their own shares to hold in Treasury such purchases can be authorised for a period of 18 months. For the purposes of company law, shares held as treasury shares are generally treated as if they had been cancelled and any sale of treasury shares is generally treated in the same way as a new an issue of shares. The ability to hold treasury shares provides companies with additional options when managing levels of capital and in balancing debt and equity. Management of treasury shares can provide an alternative to rights issues.

5 Only "qualifying shares" as defined in section 724 of the 2006 Act can be held as treasury shares. Broadly speaking, "qualifying shares" are shares listed on the Official List, officially listed in an EEA state or traded on AIM or a regulated market of another EEA state. There are an estimated 1670 that fall into this category companies in this category. The number of notifications of

companies' intentions to hold and cancel shares, received by the registrar since 2005, is shown below:



Options for implementing the Companies (Reduction of Capital) Regulations 2009: Treasury Shares

8. The provision in the directive is optional and the UK does not have to take it up. However it offers companies greater flexibility to respond to market pressures and UK companies may be disadvantaged if we do not take up the option and other member states do.

OPTION 1: Remove the 10% cap on companies holding their own shares and extend the period for which authorisation for the purchase of shares may be given from 18 months to 5 years.

9. Allowing companies the option of holding shares in treasury will give them the ability to adjust their share capital to achieve optimum levels of debt and equity without the costs of issuing new shares and might therefore lead to a reduction in companies' overall cost of capital. It could, as a result, stimulate investment. Companies will have the option of reselling treasury shares in small lots through the market at the full market price. This option will provide an alternative to other approaches such as rights issues and placing of shares which often involve significant underwriting costs. Also increase availability for employee share schemes.

OPTION 2: To set a cap at a specific level above 10%, and a period of authorisation within 5 years for all companies with qualifying shares

10. If Member States set a cap on the purchase of shares - 10% is the minimum permitted. The current Cap in the UK is set at 10%. An alternative cap was not suggested during previous consultations – most of those responding indicated that the UK should adopt the maximum flexibility and leave companies and their shareholders and the markets to influence actual take up. As the circumstances which lead to the purchase and holding of shares will vary from company to company, the maximum flexibility should

ensure that all possible circumstances are covered. Therefore we are proposing to adopt option 1.

COSTS AND BENEFITS

11. No direct costs or benefits accrue from maintaining the status quo and to do so may put UK companies at a disadvantage should other Member States adopt the provisions in Directive 2006/68.

Costs

12. The ability to purchase larger numbers of shares for a longer period of time should not result in additional costs. There should be time and cost savings if a company does not have to seek authorisation for a purchase within a 5 year period rather than the current 18 months and if it can purchase a greater number of shares.

Benefits

13. The company will be able to purchase a greater number of its shares if it wishes and thereby take even more advantage of the flexibility offered by Treasury shares when managing levels of capital and balancing debt and equity. Management of treasury shares can provide an alternative to rights issues – and help to reduce the costs associated with new rights issues.

RISKS

14. The government supports the objective and believes that the modest change is unlikely to make a radical difference to the way companies operate when wanting or needing to restructure their capital. Shareholder approval is required for purchases of shares and the pre-emption rights of existing shareholders will apply to sales of treasury shares. In addition companies also need to comply with the insider dealing regime under the Criminal Justice Act and the market abuse regime under the Financial Services and Markets Act 2000 (FSMA) and requirements under the Listing Rules and the City Code on Takeovers and Mergers

15. If other Member States take up these options and UK companies are not permitted to do so there is a risk that they will be disadvantaged.

WHO WILL BE AFFECTED?

16. The flexibility to purchase and hold shares to the limit of distributable profit will apply only to public companies with shares that are quoted on the London Stock Exchange's main market or the Alternative Investment Market, and a small number of public companies with shares that are not quoted on either of these two markets but are quoted on an equivalent of them in

another EEA State. There were an estimated 1,670 such companies¹³ in February 2009.

17. The extended period of authorisation will apply to private and public limited companies.

ISSUES OF EQUITY AND FAIRNESS

18. The Government considers that these measures will not bring disproportionate benefits or have disproportionate effects on particular groups.

SMALL FIRMS IMPACT TEST

19. There is no change in nature or number of the overall population of companies affected by these provisions.

ENFORCEMENT AND SANCTIONS

20. Enforcement of the current provisions in the Companies Act 2006 - which are subject to criminal penalties for non-compliance - is the responsibility of the Department for Business Enterprise and Regulatory Reform. The Department will be responsible for enforcing the amended law.

CONSULTATION

21. The consultation on the Directive 2006/68 formed Chapter 6 of the consultation on the implementation of the Companies Act 2006¹⁴. Most of those responding indicated that the government should take up this particular flexibility. Respondents to the earlier consultation on the proposed directive also supported the take up of this flexibility¹⁵

COMPETITION ASSESSMENT

22. The competition filter has been applied. It is considered that the Directive will not give rise to disproportionate costs of entry or administrative costs for either small or large business. The Directive is not anticipated to restrict innovation in sectors characterised by rapid technological change and would not impair freedom to provide services

¹³ FAME - (Financial Management Made Easy) database February 2009.

¹⁴ The consultation on the implementation of the Companies Act 2006 can be found together, with the government response at:
<http://www.berr.gov.uk/consultations/page37980.html>

¹⁵ **European Company Law and Corporate Governance:**
<http://www.berr.gov.uk/consultations/page14583.html>

Specific Impact Tests: Checklist

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Y	N
Small Firms Impact Test	Y	N
Legal Aid	N/A	N
Sustainable Development	N/A	N
Carbon Assessment	N/A	N
Other Environment	N/A	N
Health Impact Assessment	N/A	N
Race Equality	N/A	N
Disability Equality	N/A	N
Gender Equality	N/A	N
Human Rights	N/A	N
Rural Proofing	N/A	N

