

DORMANT COMPANY SIMPLIFICATIONS

A CONSULTATIVE DOCUMENT

MARCH 1999

Company Law and Investigations Directorate
(Financial Reporting)
Department of Trade and Industry
Area 4.D.37
1 Victoria Street
London SW1H 0ET

Tel: (0171) 215 0412
Fax: (0171) 215 0235

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DORMANT COMPANY SIMPLIFICATIONS

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SECTION A1: INTRODUCTION

Introduction

1.1 The purpose of this consultation document is to expose to comment various aspects of the current legislative framework for dormant companies. The Department of Trade and Industry has developed various proposals for reform and would welcome your comments.

1.2 The consultation document consists of four parts, as follows:-

- A - Introduction
 - provides some background information on dormant status
- B - Simplification Measures for Dormant Companies
 - explores the following issues:-
 - i) removal of separate dormant company provisions;
 - ii) removal of the need for dormant companies to file special resolutions;
 - iii) the merit in dormant companies filing accounts; and
 - iv) relaxation of the definition of dormant company status.
- C - Regulation of Dormant “Agent” Companies
 - this explores the issue of “agent companies” and dormant status
- D - Other Dormant Company Issues

1.4 The Department would welcome comments on the proposals outlined in this document. A quick-fill questionnaire is included at the back of this document. Please send comments by 31 May 1999 to:

Simon Lancaster
Company Law and Investigations Directorate (Financial Reporting)
Room 4.D.37
1 Victoria Street
London SW1H 0ET

FAX: 0171 215 0235

1.5 Call 0171 215 0232 (or fax as above) for additional copies. If you have any queries or there are any points you would like to discuss, do not hesitate to call Simon Lancaster on 0171 215 0412.

Background information:-

1.6 Several dormant company issues were initially exposed in the 1995 consultative documents “Accounting Simplifications” issued by the Department. For ease of reference, the Summary of Responses to “Accounting Simplifications” is

attached at Annex D. This consultation document shows how our proposals have developed since “Accounting Simplifications”.

1.7 The legislative framework for dormant companies is contained within the Companies Act 1985 (“CA85”). The various relevant sections from the Act which relate to dormant companies are contained in Annex A.

Costs Savings and Benefits

1.8 Views would be welcomed on any costs (both recurring and non-recurring), savings or other benefits that would be expected to result from the proposals and the approximate value and source of these costs/savings/benefits. The information will help in assessing the value of implementing the proposals.

Open Government

1.9 Under the Code of Open Government your comments may be made publicly available unless respondents specifically request otherwise. Please let us know if you wish your response to remain confidential. A summary of responses will be prepared and sent to all who respond and to anyone else who requests it. The summary will not identify respondents.

Company Law Review

1.10 This Consultation Document represents part of the Department’s continuing maintenance of the current regulatory regime while a longer term and fundamental review of core company law continues. This wider review, which was announced by the Department in March 1998, is considering all aspects of company law, with the exceptions of the Insolvency Acts and the regulation of Financial Services. Its aim is to simplify and modernise the law to create a framework for modern competitive companies that will last well into the 21st century. The review is due to present its final report in March 2001 and the intention is that this would be followed by a White Paper outlining the Government’s proposals for legislation in the light of its outcome.

SECTION A2: DORMANT STATUS

What is dormancy?

2.1 Companies House records indicate that almost 170,000 companies claimed dormant status in their last financial period. Dormant status is designed to distinguish between those companies which are actively trading and those which are not. Those companies which are not trading must satisfy various criteria to be eligible for dormant status and must file a special resolution at Companies House (see B2 below). They are then able to claim audit exemption in respect of the production of their annual accounts.

Who can claim dormancy?

2.2 A dormant company is defined (s.250(3) CA85) as one which has not carried out any “significant accounting transactions” either since formation or since the end of the previous financial accounting year. A significant accounting transaction is one which should be entered into the company’s accounting records, pursuant to s.221 CA85. Whilst the taking of shares in the company by a subscriber to the memorandum pursuant to an undertaking in the memorandum is expressly excluded, the execution of *any* other accounting transaction by a company will render that company ineligible for dormant status.

2.3 Certain types of company cannot claim dormancy, i.e. banking or insurance companies, and companies which are authorised persons under the Financial Services Act 1986. To be dormant, a company must also be entitled to claim accounting exemptions as a small company, and not be required to prepare group accounts.

Why choose dormancy?

2.4 Whilst there are many different reasons why a company may choose to adopt dormant status, some of the scenarios which lead to this are:-

- i) the company was acquired as part of the acquisition of a group of companies and its business has been transferred to another part of the group;
- ii) the company was incorporated to protect a name;
- iii) the company’s only purpose is to own an asset of some kind, for example a freehold or leasehold;
- iv) the company was incorporated for a specific commercial reason which subsequently failed to materialise, but the company is being kept as a standby
- v) registration agents have incorporated the company for sale as an “off the shelf” company.

Effect of Audit Exemption on Dormant Company Status

2.5 Since 1994, very small companies (initially defined as those with a turnover of £90,000 or less, subsequently increased to £350,000) have been able to claim exemption from audit¹. We consider that the obligations involved with claiming dormant status should be re-examined in the light of this. Dormant companies are no longer the only companies which can claim exemption from audit. For the purposes of clarity, this consultation document is not intended to seek comments on the audit exemption regime.

¹ Section 249A to E CA85; for very small charitable companies the threshold for audit exemption is £90,000 - between £90,000 and £250,000 a reporting accountant's report must be obtained.

SECTION B1: IS DORMANT STATUS STILL REQUIRED?

3.1 Dormant companies may claim audit exemption under either section 250 or section 249A of the CA85. Section 250 is designed specifically for dormant companies whereas section 249A applies to most very small companies which wish to claim audit exemption. The question therefore arises as to whether there is still any need for a separate dormant company regime. Annex B details the differences between the two regimes.

3.3 As Annex B shows, there are a number of types of company which are only eligible for exemption from audit by using the provisions contained in section 250. Arguably, the most important of these include public limited companies and members of a group whose total turnover exceeds the audit threshold. Members of the latter category includes, for example, subsidiaries which are kept on the register to protect a name. If section 250 were to be repealed, the accounts of these companies would have to be audited. In these circumstances, you may feel that the provisions of section 250 do provide important benefits for these classes of company.

Do you consider there is still a need for the dormant company provisions in section 250 CA85?

SECTION B2: HOW SHOULD DORMANT COMPANIES CLAIM DORMANT STATUS?

Is there a need for a special resolution?

4.1 Section 250 requires dormant companies to pass a special resolution in order to be exempt from audit. The special resolution may be passed (either at a meeting of the company or by written resolution) at any time after copies of the annual accounts for the previous financial year have been sent out to shareholders. A copy of the resolution must be sent to the registrar of companies within 15 days after it has been passed (section 380 CA85).

4.2 However, companies eligible under section 249A do not have to pass a special resolution to claim audit exempt status. This is subject to the safeguard in section 249B that 10% or more of the company's shareholders may require the company to obtain an audit. The Department sees no need for dormant companies to continue to be required to pass the special resolution under section 250.

Do you consider that we should remove the duty for dormant companies to pass a special resolution to gain audit exemption under section 250?

If the duty to pass a special resolution were removed, are alternative safeguards necessary?

4.3 The requirement for a special resolution enables members casting more than 25% of the votes at a meeting to block it. This protection will be removed if the special resolution is abolished. A possible substitute is to instate a similar safeguard to that which exists for small companies claiming audit exemption, where 10% or more of shareholders can overturn the decision and demand an audit (s 249B CA85). The May 1995 consultation did not show a clear consensus on this - it is arguably more onerous than the current special resolution requirement.

4.4 A 10% safeguard could provide protection against rogue directors filing inappropriate dormant accounts. It could also protect the interests of minority shareholders and creditors where a dormant company has significant assets and liabilities. However, given that there are already sanctions available (eg s.221 or 233 CA85) for dealing with filing such inappropriate accounts, you may feel that the 10% safeguard is not necessary as a replacement for the special resolution.

Do you consider 10% or more of shareholders should be able to demand an audit if the requirement for a special resolution is abolished?

SECTION B3: SHOULD DORMANT COMPANIES BE REQUIRED TO FILE ACCOUNTS?

5.1 Many commentators have indicated that the requirement for dormant companies to file accounts annually is anomalous. Why should there be a requirement for dormant companies to submit financial information when, by definition, no financial events can have occurred for them to report on?

5.2 Dormant companies will continue to be required to file accounts for the foreseeable future as the Fourth European Company Law Directive² states that all limited companies must file accounts. No amendments to this area of the Directive are being contemplated by the European Commission at present. The Department would however be interested to know consultees' views on the advantages and disadvantages of seeking to remove dormant companies from the scope of the Fourth Directive.

5.3 The Department considers that there are possible advantages in doing so, as follows:-

- it would be a deregulatory measure, removing what some see as an unnecessary burden;
- there would be negligible adverse regulatory repercussions as, by definition, a dormant company will have no new creditors and will not be trading.

5.4 However, the Department has identified the following potential disadvantages:-

- it would remove the existing discipline of dormant companies having to address their position annually
- third parties would be deprived of up-to-date confirmation of dormant status
- dormant companies could still have creditors who would have an interest in seeing new accounts.

5.5 In these circumstances, the Department considers that dormant companies should still have to file accounts annually. The development of the new standard format for dormant company accounts, which was produced in 1997 and has now been adopted by numerous dormant companies as a way of preparing accounts, has simplified the filing regime for dormant companies substantially. The Department considers that the current arrangements represent proportionate and fair regulation of dormant companies.

Does the requirement for dormant companies to file annual accounts represent fair and proportionate regulation?

² Council Directive 78/660/EEC of 25 July 1978

SECTION B4: SHOULD THE DEFINITION OF DORMANCY BE RELAXED?

6.1 As stated in paragraph 2.2 above, a company may only claim dormant status if it has conducted no significant accounting transactions³.

6.2 An accounting transaction can occur although a company has to all intents and purposes remained dormant. For instance, if a company files its accounts late it becomes liable to a civil penalty which may be recovered by the registrar of companies.⁴ Where a late filing penalty is recovered, an accounting transaction is unavoidably created and the company loses its dormant status. A further example applies in respect of annual returns, which every company must submit, together with a fee, to the registrar of companies every year⁵. If the company or a third party whom the company is liable to reimburse pays the fee, the company loses its dormant status.

6.3 There are therefore certain circumstances in which a company might lose its dormant status because of payments made to the registrar of companies, although the company effectively remains a non-trading entity. The Department wishes to explore whether it should enable companies which make such payments to continue to claim dormant status, notwithstanding that they have carried out transactions which should be entered in their accounting records.

6.4 Section 250(3) currently excludes “any transaction arising from the taking of shares in the company by a subscriber to the memorandum in pursuance of an undertaking of an undertaking of his in the memorandum” from the definition of a significant accounting transaction. The Department would consider adding the following other transactions to this list:-

- the annual return fee (section 363)
- late filing penalties (section 242A)
- change of name fee (section 28)
- re-registration fee (sections 43 and 55)

Should certain specified payments to the registrar of companies be excluded from the definition of a “significant accounting transaction” for the purposes of assessing whether dormant status applies? If so, which payments should be excluded?

³ A significant accounting transaction is one which should be entered in the company’s accounting records, pursuant to section 221 CA85

⁴ Section 242A CA 85 - it is the company which becomes liable for the filing penalty and no other party

⁵ The annual return fee can be paid by directors, other third parties, or the company and an accounting transaction does not therefore necessarily have to be entered in the company’s records.

SECTION C: AGENCY COMPANIES USING DORMANT COMPANY STATUS

Background

7.1 Companies House has received a number of complaints from third parties who claim that companies which have entered into contracts, issued invoices for payment, or been parties to court proceedings, have nevertheless filed dormant company accounts with the registrar of companies. A common reason given for this is that the company is acting as an agent, without disclosing this fact to the third party.

Should companies be accounting for transactions carried out as an agent on behalf of a principal?

7.2 The law of agency, and its interaction with section 250 CA85, is complex. Furthermore, two long-established rules of the law of agency are that an agent may act for an undisclosed principal, or may disclose the existence, but not the name, of the principal.

7.3 Whether a company which is acting as an agent qualifies as a dormant company has to be determined on a case-by-case basis having regard to the terms of the agreement between the agent and the principal, and their actual relationship. Companies should seek professional advice if they are unsure of the implications for their dormant status of acting as an agent.

7.4 Factors which will be relevant to whether or not a so-called “agency company” is dormant are:-

- a) whether the agent has disclosed the existence of a principal - if it has not, and the agent acquires rights and assumes liabilities under contracts entered into on behalf of its principal, these should be reflected in the accounting records of the agent;
- b) even if the agency company has disclosed the existence, and even the name, of its principal, it may still in the particular circumstances of the case, have assumed liabilities which result in “significant accounting transactions” within section 221;
- c) whether the agent has incurred rights against, or a liability towards its principal which must be entered in the accounting records eg where it has received money for which it is liable to account to the principal.

7.5 Companies House will consider acting on any reports of companies which are wrongly claiming dormant status. Companies House may seek revision of the company’s accounts.

Should agent companies be subject to additional disclosure requirements?

7.6 The Department has considered whether there is a case for improving the transparency of dormant agency companies. Agency companies could also be required to disclose the fact that they act as agents in their annual accounts (but should not, in the Department's opinion, be asked to disclose the name of the principal or principals for which they act, since such disclosure would alter the nature of their liabilities under the law of agency). Agency companies could also be required to disclose the fact that they act as agents on their letterheads (although this would require primary legislation). Alternatively, companies which act as agents could simply be barred from claiming dormant status under section 250. It is often the impression of non-activity that dormant status confers that misleads third parties. The Department would only however consider making such additional regulation after a very careful assessment of the extent of the problem underlying the need for change and the impact that such additional regulation would have.

7.7 As stated above, it would appear likely that many agency companies should not be eligible for dormant status and therefore, in most cases, the transactions should be fully reflected in the annual accounts. In such circumstances, there would seem little call for any additional regulation of agency companies. In the case that an agency company is eligible for dormant status, then the transacting company should be able to assess the accounts of the principal company. It is of course recommended that third parties make full enquiries (including conducting a company search) before entering into transactions with companies. The Department would welcome comments.

7.8 In terms of the financial security of businesses who transact with agency companies, Insolvency Act provisions provide some protection and, in certain circumstances, the transacting company could sue both the agent company and the principal company. The transacting company could therefore arguably be in a better position than it would be when contracting with only one company. In these circumstances, the Department does not consider there are any adverse implications in terms of financial security. Again, we would welcome views on this interpretation.

Do you have any views, experience or knowledge of agent companies? We would welcome comments.

SECTION D: OTHER DORMANT COMPANY ISSUES

STANDARD FORMAT FOR DORMANT COMPANIES

8.1 The Department is currently undertaking work on a standard format of accounts for small companies (as defined by section 247 CA85). There is already a standard format of accounts for dormant companies. This is currently available from Companies House. A copy of the format is enclosed at Annex C for information.

8.2 The format is only suitable for companies which have been dormant since incorporation. The Department has not produced an equivalent format for dormant companies which have traded as they are more likely to have assets and liabilities which would complicate the disclosure requirements. The Department believes that it would be more appropriate for such companies to use the format which is being developed for small companies, when it is available.

CLARIFICATION OF AMENDMENTS TO SECTION 250 IN S.I. 220/97

8.3 On 1 March 1997, regulations came into force which amended the accounting schedule for small companies (Schedule 8 CA85⁶). One minor and consequential amendment in the regulations was an amendment to Section 250(4). We have received queries as to whether the effect of the amendment is that dormant companies can only take advantage of the exemptions in Section 246(2) CA85 and not the further exemptions contained in Section 246(3) to (6).

8.4 The Department considers that if a dormant company is to be treated as a company entitled to prepare accounts in accordance with section 246(2), when the only thing that would otherwise prevent it from being such a company is because it is a member of an ineligible group, then all the consequences of being treated flow - including the ability to take advantage of section 246(3) to (6).

8.5 However, the Department agrees that it would be clearer if the reference in section 250(4) were to section 246 alone.

⁶ The Companies Act 1985 (Accounts of Small and Medium-sized Companies and Minor Accounting Amendments) Regulations 1997 (SI 1997/220)

SECTION E: QUESTIONNAIRE/ANNEXES

1. Do you consider there is still a need for the dormant company provisions in Section 250?

Yes

No

Comments.....
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2. Do you consider that we should remove the requirement for dormant companies to pass a special resolution in order to gain audit exemption?

Yes

No

Comments.....
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3. Do you consider that 10% or more of shareholders should be able to demand an audit?

Yes

No

Comments.....
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4.. Does the requirement for dormant companies to file annual accounts represents fair and proportionate regulation of these companies?

Yes

No

Comments.....
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4. Should certain specified payments to Companies House be excluded from the definition of a “significant accounting transaction” for the purposes of assessing whether dormant status applies?

Yes

No

Comments.....
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5. Do you have any views on dormant agent companies? We would welcome your views.

Comments.....
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ANNEXES

Annex A: Legislation

Annex B: Summary of Differences between Section 249A and Section 250

Annex C: Draft Regulatory Impact Assessment

Annex D: Questionnaire on Consultative Procedures

ANNEX A: SECTION 250 OF THE COMPANIES ACT 1985

250 -(1) A company may by special resolution make itself exempt from the provisions of this Part relating to the audit of accounts in the following cases -

- (a) if the company has been dormant from the time of its formation;
- (b) if the company has been dormant since the end of the previous financial year and
 - (i) is entitled in respect of its individual accounts for that year to prepare accounts in accordance with Section 246(2), or would be so entitled but for the application of subsection (1)(a)(i) or (b) of Section 247A, and
 - (ii) is not required to prepare group accounts for that year,

by a special resolution passed at a general meeting of the company at any time after copies of the annual accounts and reports for that year have been sent out in accordance with Section 238(1).

(2) A company may not pass such a resolution if it is -

- (a) a banking or insurance company, or
- (b) an authorised person under the Financial Services Act 1986.

(3) A company is “dormant” during a period in which no significant accounting transaction occurs, that is, no transaction which is required by Section 221 to be entered in the company’s accounting records; and a company ceases to be dormant on the occurrence of such a transaction.

For this purpose there shall be disregarded any transaction arising from the taking of shares in the company by a subscriber to the memorandum in pursuance of an undertaking of his in the memorandum.

(4) Where a company is, at the end of a financial year, exempt by virtue of this section from the provisions of this Part relating to the audit of accounts -

- (a) sections 238 and 239 (right to receive or demand copies of accounts and reports) have effect with the omission of references to the auditors’ report;
- (b) no copies of an auditors’ report need be laid before the company in general meeting;

(c) no copy of an auditors' report need be delivered to registrar, and if none is delivered, the copy of the balance sheet so delivered shall contain a statements by the directors, in a position above the signature required by section 233(4), to the effect that the company was dormant throughout the financial year; and

(d) the company shall be treated as a company entitled to prepare accounts in accordance with section 246(2) notwithstanding that it is a member of an ineligible group.

(5) Where a company which is exempt by virtue of this section from the provisions of this Part relating to the audit of accounts -

(a) ceases to be dormant, or

(b) would no longer qualify (for any other reason) to make itself exempt by passing a resolution under this section,

it shall thereupon cease to be so exempt.

ANNEX B: DIFFERENCES BETWEEN SECTION 249A AND 250

<i>section 249A</i>	<i>section 250</i>
company does not require a special resolution	company requires a special resolution
<p>company <u>not</u> eligible if it is a:</p> <ul style="list-style-type: none"> • banking company; • insurance company; • authorised person/appointed representative under the Financial Services Act 1986; • public company; • insurance broker enrolled under the Insurance Brokers (Registration) Act 1977; • special register body/employers' association under the Trade Union and Labour Relations (Consolidation) Act 1992; • parent company/subsidiary undertaking (unless dormant for the period during which it was a subsidiary, or a member of a group whose total turnover does not exceed the audit threshold). 	<p>company <u>not</u> eligible if it is a:</p> <ul style="list-style-type: none"> • banking company; • insurance company; • authorised person under the Financial Services Act 1986.
Any shareholder(s) holding at least 10% of the nominal value of issued share capital/of any class of shares or, in the case of a company limited by guarantee, 10% of its members in numbers, can require the company to obtain an audit.	If more than 25% of shareholders agree, the company can be required to obtain an audit.
<p>Directors must make a number of statements on the balance sheet:</p> <ul style="list-style-type: none"> • that the company was entitled to the exemption; • that shareholders have not requested an audit; • that they acknowledge their responsibilities for keeping proper accounting records, and preparing accounts which give a true and fair view of the state of affairs of the company and otherwise comply with Companies Act requirements, so far as applicable to the 	Directors must state on the balance sheet that the company was dormant throughout the financial year.

ANNEX C: DRAFT REGULATORY IMPACT ASSESSMENT

1. Title

Dormant company simplifications

2. Purpose and Intended Effect of the Measure

Issue and Objective

The issue is whether we can improve the regulatory framework for dormant companies. We wish to simplify and ensure the cost efficiency of the framework. To this end, we are consulting on a series of proposed measures designed to achieve this objective. As an additional measure for consultation, we are also seeking to explore in detail the implications of agent companies who claim dormant status.

Risk Assessment

There is a risk that, if these proposed measures are not carried out then i) certain dormant companies may be inadvertently losing their dormant status as a result of the perceived inflexibility of the definition of dormant; and ii) dormant companies may incur unnecessary costs as a result of an inability to understand the current framework.

3.i Options

- (a) Do nothing
- (b) Consult on the proposed measures before considering how to proceed

3.ii Issues of Equity or Fairness

Option a):- Is it equitable that companies who are carrying out no trading activities should not be able to operate under the most straightforward legal framework possible?

Option b):- Is it fair to expose the arguments for consultation now?

4.i Identify the Benefits

The benefit is to create an improved legislative framework for dormant companies which is easier for companies to understand and more cost-efficient for them.

4.ii Quantifying and Valuing the Benefits

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We are keen to use this consultation to analyse the full benefits and risks involved in our proposals. We would welcome any quantitative or qualitative comments on the benefits and risks.

5. Compliance Costs

Business sectors affected

The proposals will affect all sectors of business who choose to use dormant companies within their corporate structures.

Compliance costs for a typical business

These proposals are designed to reduce the costs burdens involved with running a dormant company.

We are keen to know of any costs associated with these proposals. We would welcome any quantitative comments on the costs involved indicating whether these would be on a recurring or non recurring basis.

6. Consultation with Small Business

We are particularly keen to obtain the views of small businesses on these proposals.

Do you see these proposals as helpful? What costs and benefits do you see associated with them, with illustrative figures if at all possible?

7. Other Costs

We are keen to identify any other costs associated with these proposals.

What other significant costs can you identify?

ANNEX D: QUESTIONNAIRE ON CONSULTATIVE PROCEDURES

URN 99/706 - CONSULTATION PROCEDURES

We are keen to improve our consultation procedures. Please tick the correct box where appropriate.

1. Mailing

1a Was this consultation document sent to the right person and properly addressed? YES NO

If **No**, please give the correct person/address (please print).

1b Are you on DTI Company Law and Investigations Directorate's standard mailing list? YES NO

If **No**, would you like to be? If so, please give your details below (please print). YES NO

If **Yes**, do you wish to have the mailing stopped or redirected? If so, please give details below (please print). YES NO

2. Presentation of information

2a Was the document clear and easily understood? YES NO

2b Was the document
too long too short about right

2c Was the background information sufficient? YES NO

2d Were the key issues correctly identified? YES NO

If **No** to any of these questions, please comment below.

2e Were the policy options offered clearly set out? YES NO
If **No**, please comment below.

2f Was the layout helpful confusing neither

2g Could this consultation document have been made clearer? YES NO

If **Yes** to either of these questions, please comment below.

3. Responses from consultees

Was the period of time allowed for the return of responses to the document

too long too short about right

4. Responsiveness of Company Law and Investigations Directorate

4a Have you telephoned Company Law and Investigations Directorate about this consultation? YES NO

If **Yes**, was the person who responded knowledgeable? YES NO

If **Yes**, was the person who responded helpful? YES NO

4b Following the analysis of replies, it is proposed to let those consultees who responded know the outcome and the next steps. Would this be helpful? YES NO

Thank you for taking the time to complete this form. Any additional comments or suggestions on the consultation procedure would be welcomed.