

LIST OF RESPONSES TO *COMPANY FORMATION AND CAPITAL MAINTENANCE* IN THE ORDER IN WHICH THEY WERE RECEIVED

No	Name	Date of response	Key Subjects/other points
1	Brian G Strand FCA	3.11.99	
2	Federation of Small Businesses	12.11.99	
3	Buddenbrook Consultancy	15.11.99	
4	J Brady	14.12.99	
5	HM Land Registry	21.12.99	
6	Better Regulation Task Force	22.12.99	
7	Pannell Kerr Forster	23.12.99	
8	Babcock International Group Plc	23.12.99	
9	F A G Kay	28.12.99	
10	HW Higginson	3.1.00	
11	KSV Thorogood	4.1.00	
12	Stephen Griffin, Reader in law University of Wolverhampton	5.1.00	
13	Lee Roach, Research Student in Corporate Governance, University of Bristol	5.1.00	
14	Birmingham Law Society	5.1.00	
15	Institute of Chartered Accountants	5.1.00	
15a		3.3.00	
16	Institute of Chartered Secretaries and Administrators	6.1.00	

17	Association of Chartered Certified Accountants	6.1.00	
18	Association of Accounting Technicians	7.1.00	
19	The Royal Institution of Chartered Surveyors	7.1.00	
20	Dundas & Wilson & Garretts	7.1.00	
21	Confederation of British Industry	10.1.00	
21a	Confederation of British Industry	9.2.00	
22	British Venture Capital Association Legal & Technical Committee	10.1.00	
23	The Institute of Chartered Accountants of Scotland	10.1.00	
24	Association of British Insurers	10.1.00	
25	Dr Elaine Sternberg. University of Leeds	10.1.00	
26	KPMG	10.1.00	
27	Action with Communities in Rural England	10.1.00	
28	York Place Company Services Ltd	10.1.00	
29	The Law Society	10.1.00	
29a	The Law Society	29.3.00	
30	The General Council of the Bar	11.1.00	
31	Kenneth Lavanchy, FCIS FIMgt, Chartered Secretary	11.1.00	
32	Foreign & Colonial Management Ltd	11.1.00	
33	British American Tobacco	11.1.00	
34	Halifax plc - Company Secretary's Department	11.1.00	
35	London Society of Chartered Accountants	12.1.00	
36	Freshfields, Solicitors & Foreign Lawyers	12.1.00	

37	PricewaterhouseCoopers	13.1.00	
38	The Abbey National Group	13.1.00	
39	Campbell Hooper, Solicitors	14.1.00	
40	The Association of Investment Trust Companies	14.1.00	
41	Deloitte & Touche	14.1.00	
42	The Law Society of Scotland	17.1.00	
43	Fork Truck Association	19.1.00	
44	D A Buskell, Chartered Secretary, Company Secretary & Director	21.1.00	
45	British Bankers' Association	24.1.00	
46	Ernst & Young	24.1.00	
47	Institute of Directors	25.1.00	
48	London Stock Exchange	25.1.00	
49	Lovells	31.1.00	
50	City of London Law Society	1.2.00	
51	Jordans	1.2.00	
52	Clifford Chance	2.2.00	
53	The British Chambers of Commerce	10.2.00	
54	The Faculty of Advocates	14.03.00	
55	Mechanical-Copyright Protection Society Limited & The Performing Right Society Limited	23.03.00	

RESPONSES ON COMPANY FORMATION

1 Do you agree with the proposal in paragraph 2.4 for defining who are the founder members of the company?

<p>Brian G Strand (1) Yes</p>
<p>Federation of Small Businesses (2) Agreed</p>
<p>Buddenbrook Consultancy (3) Yes</p>
<p>J Brady (4) Yes</p>
<p>F A G Kay (9) I disagree with this proposal because:- There are still a number of companies with Founder shares in their share capital The proposed use of the word “founder” instead of “subscriber” in relation to the first member(s) of a company happens to carry with it an aura of extraordinary commercial acumen and achievement. Although the practice seems to have fallen out of use there are still companies on the register which have a special class of shares known as Founder shares. These often give over-riding rights and are in some ways similar to the “golden share” retained by the Government when they privatise and sell off part of a nationalised industry. Therefore if this proposal is implemented there will be companies that have a class of shares designated as Founder shares but also, because of the change of law regarding the new name for subscribers shares, they will have Founder share(s) which in fact are Ordinary shares. It is a matter of pride and status to be able to claim you founded, say, The Virgin Group of companies, the Heron group, Waterstones (the booksellers) W H Foyle, Mentorn Films, Regency of London, Laker Airways or similar organisations. I suggest that Richard Branson of Virgin, Tom Gutteridge of Mentorn, Bill Gates of Microsoft, the children of Jack Cohen of Tesco and the others whose vision, drive and enterprise has resulted in the creation of a well known successful company will probably not be happy with the proposal that, by law, it is not they who are the founder member of their company but the person(s) who happened to be the subscribers to the memorandum for company formation purposes. Some years ago I was involved in incorporating a new company named Narcotics Anonymous – a guarantee company as I recall. The likelihood is that I was one of the subscribers and if this is the case then, when the law is changed, I shall be able to claim to be a Founder Member of Narcotics Anonymous – a bit much for someone who smokes a pipe, has only taken drugs prescribed by his doctor, and hardly touches alcohol. Still, such a claim to fame is probably enough to get an appearance on Frost on Sunday. The consultation document is silent as to whether or not the person(s) signing the proposed Registration Document will be required to state they are desirous of being formed into a limited company. It is logical that they should make such a statement or that such a statement should be implied from the wording of the document itself. After all, if you want to be issued with a passport you have say so and sign to that</p>

effect.

So in effect we are still going to have subscriber(s) – it is therefore extremely unfortunate that the word “founder” has been chosen to describe the first member(s) of any company.

When you consider that the vast majority of company incorporations are “shelf companies” incorporated purely for re-sale by company registration agents such as Jordan & Sons, London Law Agency, Chettleburghs etc and by firms of accountants and solicitors, there can be little doubt that the particular individual(s) who will sign the Registration form are “founding” nothing more than a commercial “shell” that the subsequent owners can use to start, develop and expand a new business. They are not founding a business that in later years could become an international conglomerate and it seems rather inappropriate for them to be described as Founder Members with all that implies.

My understanding of the word “subscribe” is to write (your name) below and presumably this will still happen – if not I would ask “why not?” because there is in every incorporation a contract between the individual(s) making application to be incorporated and the Registrar of Companies. And contracts need to be signed.

I see no reason why the term “subscriber” should not continue to be used and the proposal to call subscribers “founders” smacks to me of change for the sake of change. But if there is insistence on change for the sake of it, then I would strongly advocate the use of “promoter(s)” instead of “founder”. Promoters is not a description new to the Companies Act and denotes that category of businessmen who instigate and get set up a new company. Much the same as the promoters of boxing matches – Frank Warren, Barry Hearn, or whoever, promotes the boxing match but does not get into the ring and fight.

H W Higginson (10)

Yes

K S V Thorogood (11)

Yes

Association of Chartered Certified Accountants (17)

Yes

The Royal Institute of Chartered Surveyors (19)

Yes

Dundas Wilson & Garretts (20)

Yes - we agree with the proposal in paragraph 2.4

Confederation of British Industry (21)

Yes

The Institute of Chartered Accountants of Scotland (23)

Yes. The importance of founder members appears to have been overstated. They are no more than the company’s first shareholders.

Association of British Insurers (24)

Yes

Dr Elaine Sternberg (25)

Yes

KPMG (26)

We agree that the persons who have signed the *registration form* should be the founder members of the company.

York Place Company Services Ltd (28) Yes
The Law Society (29) We agree with this proposal
The General Council of the Bar (30) The committee agrees that the term Founder Members for those who sign the registration form should replace the term subscribers to the Memorandum and Articles of Association. This follows from the proposal, with which the committee agrees, that these documents should be replaced by a single constitution. Founder Members should be entered in the register of members. Thereafter, as at present, those persons who agree to become members will be entered in the register of members. Under this Question, in paragraph 2.5 and on page 90, reference is made to a consultation paper, issued by the Treasury in July 1999, suggesting that, in relation to uncertified securities, records maintained by the operator rather than the register of members should confer title to membership of a company. The Steering Group will consider this proposal at a later stage when it considers the requirements of registers. The purpose in the case of such securities is to eliminate the gap between settlement of a transaction and the transfer of legal title. Subject to further consideration when the Steering Group reaches this stage, the committee wishes to sound a note of caution. There are or may be occasions when it is important that a company should know who are its members. Entry on the register as the test of membership, and the rule that a company is not bound to take account of equitable interests are sound principles. This problem already arises where nominee companies hold shares for a large number of persons. This will be considered further under the response upon meetings. It is there proposed, and the committee agrees with this, that a nominee company should be entitled to appoint more than one representative or proxy to attend a meeting and that a proxy, like a representative, should have full rights to speak and vote. The purpose of this is to enable individual beneficial owners to express their views. This raises problems of communication, which are also considered under the responses on meetings. It is impractical that nominee companies should have to circulate company documents to all for whom they hold shares in a company. The solution may be to require all listed companies and, perhaps, all public companies to maintain web sites and to put circulars on them.
Kenneth Lavanchy (31) Yes
British American Tobacco (33) Yes
London Society of Chartered Accountants (35) Yes
The Abbey National Group (38) Yes
Deloitte & Touche (41) Yes
The Law Society of Scotland (42) Yes
Fork Truck Association (43) Yes
D A Buskell (44)

Yes
Institute of Directors (47) Yes
Clifford Chance (52) Yes
The Faculty of Advocates (54) The Faculty agrees that the persons who have signed the new Registration Form should be deemed to have agreed to be the founder members of the company. We further consider that the names of the founder members should be entered as members of the company on the company's register of members. It is noted that the Treasury has proposed in a consultation paper of July 1999 that in relation to uncertificated securities it should be the records maintained by the Operator rather than the company register maintained by the company or its registrar which confer legal title and company membership. We do not support this proposal. We consider that it should always be the company Register maintained by the Company or its Registrar, which confers the legal title and company membership.
The Mechanical Copyright Protection Society Ltd & The Performing Right Society Ltd (55) Yes

2 Do you think that the relationship between the company and its members, and between the members themselves, is adequately defined by the present section 14(1)? Specifically, does it help to characterise these relationships as contractual? And should the relationships created by the constitution extend to the directors and officers of the company?

Brian G Strand (1) Yes
Federation of Small Businesses (2) Section 14(1) appears to be adequate in its present form for micro companies
Buddenbrook Consultancy (3) It would help many directors and company secretaries of LTD companies to understand their role if the Memorandum and Articles amalgamated, renamed and became a full Contract.
J Brady (4) Should perhaps specify that it is 'contractual'. It should NOT extend to directors and officers
F A G Kay (9) I think that s.14(1) describes the relationship not only adequately but also succinctly. I have always looked upon these relationships as contractual because it is usual for an application form to acquire shares to contain a proviso "subject to the provisions of the memorandum and articles of association" or words to that effect. But if the legal position will be strengthened or clarified by making these relationships contractual then let's go for it. Most definitely the relationship created by the constitution should extend to the directors and officers.

H W Higginson (10)

The relationship is not adequately defined in section 14(10). If the rights of members are to be dealt with separately, this section could be repealed. If not, it helps to characterise the relationships as contractual. The rights and duties of officers, so far as they are not defined in the Act, should be explained in the constitution.

K S V Thorogood (11)

No - since the case of 'single member' companies is specifically excluded and gives rise to a potential conflict in law.

Lee Roach (13)

In *Wood v Odessa Waterworks Co*, Stirling J held that:

The articles of association constitute a contract not merely between the shareholders and the company, but between each individual shareholder and every other.

S14 Companies Act 1985 gives statutory effect to this statement. This provision is indicative of a conceptualisation of the company commonly referred to as the 'nexus of contracts' model. This model jettisons the idea that the firm is a legal entity and redefines the company as "the nexus of a set of contracting relationships among individuals" or "a marketplace where various constituencies contract for their own protection." The corporation exists in order to facilitate contracting between the various parties within the corporation. Therefore, the relationships between the directors and the various parties are described as 'contractual'.

The rationale for making these relationships contractual is that only through open contract can efficient outcomes be achieved. "If the contract...is "knowingly" and "freely" made by the parties...its performance makes each of the parties better off and creates a large pie for society." Any contract that is not mutually beneficial will be unstable in that the party that believes itself to be in the weaker position will try to avoid fulfilling the contract fully - what theorists term 'shirking.'

However, in the context of a public company, this is not the case. As Eisenberg noted: "A corporation is a profit-seeking enterprise of persons and assets organised by rules. Most of these rules are determined by the *unilateral actions of corporate organs or officials*. Some of these rules are determined by market forces. Some are determined by contract or other forms of agreement. Some are determined by law."

In the case of a public company, most of the rules are determined unilaterally by management. It is clear that "scattered stockholders cannot and do not, negotiate" with management regarding the provisions in the articles. Accordingly, a shareholder's role is limited to whether to invest or not and if a shareholder does decide to invest, then they purchase a package of non-negotiable rights.

Therefore, whilst in technical and procedural sense, the S14 contract is contractual, in a philosophical sense and taking into account the underlying rationale behind contractual relationships, the S14 contract is not contractual. The lack of free and open bargaining between directors and managers ensures that the S14 contract is unilateral and imposed upon those with no power to negotiate its contents.

The Royal Institute of Chartered Surveyors (19)

Section 14(1) does help characterise the relationship as contractual and should, in our opinion, be extended to Directors and Officers.

Dundas Wilson & Garretts (20)

Yes (to all three parts)

Confederation of British Industry (21)

We are content with the present situation, although the New Zealand wording has its merits. Specifically, a company's Memorandum and Articles of Association are, in our view, a multi-party contract relating to share rights, and no less contractual for that. The relationships thereby created should not extend beyond dealing with the rights of members as members.

The Institute of Chartered Accountants of Scotland (23)

Yes (to all three parts)

Association of British Insurers (24)

We believe there are difficulties in characterising the Memorandum and Articles of Association as a contract between the Company and its Members since the ownership interest in the company subsists in those Members. It is easier to see these documents as providing a form of contract between the Members of the Company. This is notably apparent where the share capital is divided into different classes, for example, where there are preference shares in issue.

Dr Elaine Sternberg (25)

No. The relationships between the company and its members and between the members themselves is not adequately defined by Section 14(1).

Yes, it helps to characterise these relationships as contractual.

No, the relationships created by the constitution should not extend to the directors and officers of the company.

KPMG (26)

We leave this to the legal profession.

York Place Company Services Ltd (28)

Yes and its effectiveness must bear a relationship to the completeness and comprehensiveness of the constitution. On the second point, does this mean in terms of clarifying the role of the Director or binding the Director to the constitution contractually? Yes if it means both.

The Law Society (29)

(a) There is a substantial body of reported case law on section 14 which it is not possible to rationalise, and which seems to depart from the express terms of the section. It is essential that the present unclear and confused position be clarified. There are two distinct questions:

(i) Who are the parties to the constitution?

(ii) What rights are conferred on the parties to the constitution?

As to (i), we consider that the parties to the constitution should be the members and the company and the members inter se. Thus no right would be conferred on a third party, e.g. the company's auditor or solicitor. We therefore consider that section 6(2) of the Contract (Rights of Third Parties) Act 1999 should be retained. As to (ii), presently we consider that the totality of the company's constitution should be enforceable by a member against the company and between the members inter se. Thus if the constitution of a development company provides that the X firm of architects should be appointed architects for the development, this should be enforceable by a member but not by the firm of architects directly. However, this is a matter which will also need to be dealt with elsewhere in the Review, for example, in connection with Minority Protection and Shareholder Remedies.

(b) It does not help to characterise the relationship constituted by section 14(1) as contractual. It is a unique form of contract to which many of the normal rules of contract do not apply. For example, the court will not imply into the articles any provision in order to give them business efficacy, nor will the court order rectification of the contract, or rescind it for misrepresentation (Bratton Seymour Service Co. Ltd. v. Oxborough [1992] BCLC 693; Scott v. Frank Scott (London) Ltd. [1940] Ch 794). The one advantage of treating the relationships set out in section 14 as contractual is that it has introduced great and desirable flexibility into the structuring of the corporate constitution. We consider that the retention of such flexibility is essential with respect to the structuring of a company's constitution.

(c) We found the third element of the question difficult to reply to in a comprehensive way. The reason for this is that it is not made clear what rights in the company's constitution a member will be entitled to enforce. We appreciate that this question is being dealt with in the context of shareholder rights and remedies but until an answer is provided it is difficult to determine whether similar rights should be extended to directors and other officers of the company. Also, we assume that the principle will be maintained that the board must act collegiately and it is unclear how this principle would be affected by extending a right of enforcement to the directors. We do not consider it possible at this stage to express an opinion on whether a right to enforce the constitution of the company should be extended to directors or other officers. A company's constitution already creates legal relationships between directors and a company (e.g. Regulations 82, 85 and 87 of Table A) and we assume that there is a proposal to alter this feature of a company's constitution.

The General Council of the Bar (30)

The committee considers that the relationship between a company and its members and between the members inter se is adequately defined in Section 14 of the Companies Act 1985. It has full contractual force as a document under seal. In a proper case, it can be specifically enforced. In a complex web of contractual rights and fiduciary duties, the operation of the Section is well understood. Attempted clarification might well raise more problems than it solved.

The relationship should not be extended to directors and officers. That would be contrary to the salutary principle that directors owe a duty to the company as a whole and not to individual shareholders, that it is for the company to enforce any rights, and that the members' control is through the power to prescribe or limit the power of directors in the constitution or by special resolution, or to remove the directors. Any other control by individuals should, as at present, be by representative action or by petition to wind up, or under Section 459 of the Companies Act 1985.

Also under Table A and under most Articles of Association powers of management are delegated to the directors, so that shareholders can only interfere by special resolution. This principle is necessary for effective administration of a company. So it is for the directors to control officers and officials.

So, any attempt to extend Section 14 to directors and officers would only cause confusion, and impede efficient administration of a company.

Kenneth Lavanchy (31)

Yes: persons become members for the purpose of investment. Consequently, the memorandum and articles of association give rights to members qua members. Directors and other officers act in completely different capacities under separate contractual arrangements.

British American Tobacco (33)

Yes We are content with the present situation, although the New Zealand wording has its merits. Specifically, a company's Memorandum and Articles of Association are, in our view, a multi-party contract relating to share rights, and no less contractual for that. The relationships thereby created should *not* extend beyond dealing with the rights of members *qua* members.

Halifax plc – Company Secretary's Department (34)

We are of the opinion that it is useful to make contractual arrangements clear between parties although we do have a concern which we have raised below in our comments on deemed notice.

London Society of Chartered Accountants (35)

No - to definition between the company and its members, and between the members themselves under section 14 (1).

Yes - to the relationships created by the constitution should be extended to the directors and officers of the company.

Freshfields (36)

Although some directors and officers might want to be able to enforce an indemnity in their favour in the articles, which they cannot do currently, we think the disadvantages of extending the relationships created by the constitution to the directors and officers of the company might outweigh any such advantage. If such a proposal is to be made, we think it would be important to make clear exactly what rights members would have against directors and officers. We favour making the members the only persons with rights under the constitutional documents, and clarifying the basis of that relationship.

The Abbey National Group (38)

We think a reform of the law should clarify the contractual nature of rights within the company. We do not think that contractual relationships created by the constitution should extend to directors and officers of the company, as their respective rights are best covered in separate contracts.

Campbell Hooper (39)

Section 14(1) generally thought to be inadequate. The extension of implied contract principles was perceived by some as dangerous. However, it is thought to be beneficial for directors to be bound by the company's Constitution. Campbell Hooper agrees.

Deloitte & Touche (41)

Yes, however, the constitution should address the relationship between members in their role as members. Relationships in other roles (e.g. directors and officers) should come from employment contracts, agreements for services, etc.

The Law Society of Scotland (42)

The Committee is of the opinion that Section 14 is long overdue for reconsideration. There are numerous rights and obligations arising from the "constitution" of a company which are not adequately encompassed within the concept of a contract.

Moreover, although the definition and effect of a contract are similar in Scots law and English law, they are not identical. For example, Scots law recognises that in certain circumstances the parties to a contract may confer enforceable rights on a third party, and to that extent the statement in 2.7 of the Consultation Document does not correctly reflect Scots law.

The reference to sealing in Section 14(1) and to "speciality debt" in s.14(2) have no meaning in Scots law.

The Committee would prefer a “constitutional” approach under which the Memorandum and Articles of Association and any resolutions of the Company or of the Directors pursuant thereto constitute a (non-exclusive) corpus of rights and obligations enforceable by and against the Company itself, its members and its officers according to their terms. Reference to such rights and obligations as “contractual” should be avoided so that the peculiarities of Scots law or English law in relation to contractual rights and obligations are not (necessarily) imported into the enforcement of rights and obligations under the constitution of an incorporated company. It follows that the Committee would agree with extending the relationships created by the Memorandum and Articles of Association (and other relevant resolutions) to the Directors and other officers of the Company.

Fork Truck Association (43)

No. Yes. Yes, in the absence of any other document

D A Buskell (44)

Section 14(1) does not adequately define the various relationships, and does not characterise them as contractual. Relationships created by the constitution should extend to the directors and officers.

Institute of Directors (47)

Yes

Clifford Chance (52)

The relationship between the company and its members, and between the members, is adequately defined by s14(1).

We do not think it helps to characterise the relationships as contractual, as there is no true contract. Many of the normal rules of contract do not apply to a company’s constitution. For example, the Memorandum and Articles cannot be rectified or enforced in the same way as a contract. Further, unlike a contract which cannot be varied without the consent of the parties, the Articles can be changed without the consent of an individual member. The relationship is more analogous to the relationship between a club and its members: on joining the club, the member agrees to abide by the rules.

The relationships created by the constitution should not extend to the directors and officers of the company. Those relationships are governed by employment contracts.

The Faculty of Advocates (54)

We are of the view that the relationship between the company and its members, and between the members themselves, is adequately defined by the present Section 14(1). In the context of Section 14(1) it is appropriate that the members may only enforce rights given to them in their capacity as members. We do not consider there to be any advantage in the Memorandum and Articles, or the founding documents which are to replace them, being extended in their terms to include relationships with directors and other officers of the company. We consider that such matters may be dealt with appropriately by contract between the company and the directors and other officers. We are of the view that the provisions available to members under Section 459, Companies Act 1985, provide substantial protection to members.

The Mechanical Copyright Protection Society Ltd & The Performing Right Society Ltd (55)

This is an extremely difficult question to which we have not reached a conclusion. We

would not wish to create a complex web of relationships, where the interrelationship would be unclear and might lead to litigation.

In addition to the constitution, the Performing Rights Society has a Membership Agreement which extends the relationship between the members and the company, but this is because of the peculiar nature of the Society. Given the current state of the law as prescribed in section 14(1) of the Companies Act 1985, the Performing Right Society also has to have Rules and Regulations to make it work. Amending the legislation is not likely to provide a better way of dealing with this issue.

3 Do you agree that a debt owed by a member to the company should no longer be a speciality debt?

Brian G Strand (1) Yes
Federation of Small Businesses (2) Agreed
Buddenbrook Consultancy (3) Yes
J Brady (4) Yes
F A G Kay (9) I agree
H W Higginson (10) Yes
K S V Thorogood (11) Yes
Association of Chartered Certified Accountants (17) Yes
The Royal Institute of Chartered Surveyors (19) Yes
Dundas Wilson & Garretts (20) Yes agree that a debt owed by a member to the company should no longer be a speciality debt.
Confederation of British Industry (21) Yes
The Institute of Chartered Accountants of Scotland (23) Yes
Association of British Insurers (24) We have no firm view
KPMG (26) We express no view on this
York Place Company Services Ltd (28) Yes
The Law Society (29) The limitation period for a speciality debt is twelve years. We can see no good reason for retaining this. Accordingly, we agree that a debt owed by a member to the company under the articles or memorandum should no longer be a speciality debt.

The General Council of the Bar (30) The committee agrees.
Kenneth Lavanchy (31) No: the debt should remain a speciality debt. If dividends can be so claimed, there is no reason why a reverse debt should be any different.
British American Tobacco (33) Yes
London Society of Chartered Accountants (35) Yes
The Abbey National Group (38) Yes
Deloitte & Touche (41) Yes
The Law Society of Scotland (42) The committee has no comment to make in relation to this question as the issue does not arise in Scots law.
Fork Truck Association (43) Yes
D A Buskell (44) Agree
Institute of Directors (47) Yes
Clifford Chance (52) Yes
The Faculty of Advocates (54) We make no comment on this proposal which affects England and Wales.
The Mechanical Copyright Protection Society Ltd & The Performing Right Society Ltd (55) No comment.

4 Do you agree that the three existing types of company should be retained (without prejudice to the possibility of creating additional types)?

Brian G Strand (1) No - Private and Plc only
Federation of Small Businesses (2) Agreed but with specific rules for micro companies. Small, medium and large companies should then have additional obligations and responsibilities added.
Buddenbrook Consultancy (3) There should be a new nomenclature and initials for the unlisted PLC. I give seminars to around 1000 directors and company secretaries each year - mainly of small companies but some of larger and many totally misunderstand the limited liability concept. One must wonder if it is not time to abandon this word altogether Further many people are totally misled when dealing with a PLC into thinking that it is a fully listed company. This misconception is exploited widely. The range of company nomenclature could be:

<p>'Bloggs Single Member Company' or 'Bloggs SMC' 'Bloggs Private Company' or 'Bloggs PC' 'Bloggs Guarantee Company' or 'Bloggs GC' 'Bloggs Unlisted Company' or 'Bloggs UC' 'Bloggs Public Listed Company' or 'Bloggs PLC' The concept of limited liability is also widely misunderstood</p>
<p>J Brady (4) Yes</p>
<p>HM Land Registry (5) Yes, it is important to maintain as much of the fundamental structure of company law as possible within the framework of change. People are familiar with these types of companies and how the existing system works</p>
<p>F A G Kay (9) Yes, I do</p>
<p>H W Higginson (10) Yes</p>
<p>K S V Thorogood (11) Yes</p>
<p>Association of Accounting Technicians (18) We are doubtful about the purpose and practical benefits of an unlimited company category and would prefer to see the existence of just two types of company - Limited and Guaranteed</p>
<p>The Royal Institute of Chartered Surveyors (19) Yes</p>
<p>Dundas Wilson & Garretts (20) We would support the retention of the three existing types of company since in our view they all have particular advantages in different circumstances. For example, guarantee companies provide an appropriate vehicle for a charity while unlimited companies provide advantages both in the context of groups and on a standalone basis where they provide the advantages of incorporation but without the requirement to file accounts.</p>
<p>Confederation of British Industry (21) Yes</p>
<p>The Institute of Chartered Accountants of Scotland (23) Yes</p>
<p>Association of British Insurers (24) Yes</p>
<p>Dr Elaine Sternberg (25) Yes</p>
<p>KPMG (26) Yes</p>
<p>York Place Company Services Ltd (28) Yes</p>
<p>The Law Society (29) We agree with this proposal</p>
<p>The General Council of the Bar (30) The committee agrees. The present three categories of a company provided for in Section 1(2) of the Companies Act 1985 should be retained, private companies, public</p>

companies and companies limited by guarantee. The provisions of Section 15 of the Companies Act 1985 should be retained to prevent a company in effect limited by shares being registered under the guise of a company limited by guarantee.
Kenneth Lavanchy (31) Yes
British American Tobacco (33) Yes
London Society of Chartered Accountants (35) Yes
The Abbey National Group (38) Yes
Deloitte & Touche (41) Yes
The Law Society of Scotland (42) Yes
Fork Truck Association (43) Yes
D A Buskell (44) Agree
Institute of Directors (47) Yes
Clifford Chance (52) Yes. All three types of companies have their uses.
The Faculty of Advocates (54) We agree that the three existing types of company should be retained.
The Mechanical Copyright Protection Society Ltd & The Performing Right Society Ltd (55) Yes

5 Do you agree that a public and a private company should be defined as suggested in paragraph 2.10

Brian G Strand (1) Yes
Buddenbrook Consultancy (3) See 4 above
J Brady (4) Yes
HM Land Registry (5) Yes, this definition has the advantage of simplicity and is referable to description on the register which is solely a question of fact.
F A G Kay (9) Yes
H W Higginson (10) Yes
K S V Thorogood (11) Yes - except that the status and legality of 'phoenix' companies should be ring-fenced

by proper provisions to protect against abuse.
Association of Accounting Technicians (18) In our view, the most appropriate way of distinguishing a public company from a private company would be to look at the number of shareholders who are not involved in the management of the company.
The Royal Institute of Chartered Surveyors (19) Yes
Dundas Wilson & Garretts (20) Yes - we agree that a public and a private company should be defined as suggested in paragraph 2.10.
Confederation of British Industry (21) Yes
The Institute of Chartered Accountants of Scotland (23) Yes
Association of British Insurers (24) Yes
Dr Elaine Sternberg (25) Yes
KPMG (26) Yes
York Place Company Services Ltd (28) Yes
The Law Society (29) We agree with this proposal
The General Council of the Bar (30) The committee agrees that the distinction between public and private companies must be maintained. The committee agrees that a public company should be one registered as such. All other companies should be private companies.
Kenneth Lavanchy (31) Yes
British American Tobacco (33) Yes. However, there is a common public misconception that public companies are also companies with a listing of shares on a recognised securities exchange. It may be helpful to introduce a clear form of public listed company - i.e. where the shares of that company are publicly traded - as opposed to a public company.
London Society of Chartered Accountants (35) Yes but it would be useful for the Companies Act to specify what constitutes a public company.
The Abbey National Group (38) Yes
Deloitte & Touche (41) Yes, however, there will be a need to set specific requirements to register or re-register as a public company as both definitions turn on whether or not the company is so registered.
The Law Society of Scotland (42) Yes
Fork Truck Association (43) Yes

D A Buskell (44) Agree
Institute of Directors (47) Yes. The principal misconception by the general public is that a public company is necessarily a listed company.
Clifford Chance (52) Yes
The Faculty of Advocates (54) We agree with this proposal.
The Mechanical Copyright Protection Society Ltd & The Performing Right Society Ltd (55) Yes, but perhaps clarify that private companies include a company limited by guarantee. It would be easier to comment on a precise definition of a private and public company.

6 Do you agree that it should be possible to form any type of company as a single member company

Brian G Strand (1) No - Private company only
Federation of Small Businesses (2) Yes - but with specific exceptions for plcs.
Buddenbrook Consultancy (3) See 4 above
J Brady (4) No
HM Land Registry (5) We see no reason why the formation as distinct from the running of the company should require more than one person to set it up.
F A G Kay (9) No. If a meaningful distinction is to be maintained between a public and a private company then some clear difference has to be seen. A public company needing at least two directors is one distinction and I believe the other should be the minimum number of members should be more than one. Having recently gone through Consultation Document 2 on General Meetings etc. I am more and more convinced that the distinction between public and private companies should be between those listed on the London Stock Exchange (public companies) and those not so listed (private companies). The unlisted public company is a bit of a sham being no more than a private company with pretensions above its station. I consider the minimum number of members for a plc should be increased to, say, ten.
H W Higginson (10) Yes
K S V Thorogood (11) Yes, except for the proviso expressed in the answer to Question 5.
The Royal Institute of Chartered Surveyors (19)

No. The current system provides a mechanism for limiting rogue behaviour.
Dundas Wilson & Garretts (20) We agree that any type of company should be capable of being formed as a single member company.
Confederation of British Industry (21) Yes
The Institute of Chartered Accountants of Scotland (23) Yes
Association of British Insurers (24) We are not entirely convinced of the necessity of providing for the formation of a company by a single natural shareholder only as opposed to a single corporate shareholder.
Dr Elaine Sternberg (25) Yes
KPMG (26) Yes. Whilst having a single member might appear to be contrary to the notion of a 'public' company, it may be that a single member would wish to raise public debt and this can, at present, be done only by a public company. Furthermore, any requirement for a company to have more than a single member could, in practice, be neutralised by the use of nominee shareholders.
Action with Communities in Rural England (27) No. In the case of charitable companies we would find this measure unacceptable.
York Place Company Services Ltd (28) Yes
The Law Society (29) We agree. Should such a reform not be introduced, we consider that section 24, a section rightly described as an "obsolete rule" (<i>Nisbet v. Sheppard</i> [1994] 1 BCLC 300 at 305, per Hoffmann LJ), should be repealed. The procedure for incorporating a single member company should be made as simple as possible.
The General Council of the Bar (30) The committee agrees.
Kenneth Lavanchy (31) Yes
British American Tobacco (33) Yes. This is simply a catch-up provision for public companies in particular, which is to be welcomed. However, see comments in Q5 above.
London Society of Chartered Accountants (35) Private companies - yes; public companies - no. It has not been adequately explained why formation of a public company should be made easier.
The Abbey National Group (38) Yes
Deloitte & Touche (41) Yes
The Law Society of Scotland (42) Yes
Fork Truck Association (43) Yes
D A Buskell (44)

No, only a private company
Institute of Directors (47) The institute sees no reason to change the existing requirement that a public company should be formed of two or more persons whereas a private company can be formed by a single person.
Jordans (51) We support this proposal. The current requirement for public companies and unlimited companies to be formed by two members is unnecessary.
Clifford Chance (52) Yes
The British Chambers of Commerce (53) We support the Group's proposals to allow single persons, natural or legal, to form public limited companies. Additional to this, however, we believe that there is a need for a new kind of legal entity, which provides sole traders with some of the benefits of limited liability but without the burdens of full incorporation.
The Faculty of Advocates (54) We agree that it should be possible to form any type of company as a single member company.
The Mechanical Copyright Protection Society Ltd & The Performing Right Society Ltd (55) No comment

7 Do you agree that the requirement that a company be formed for lawful purpose should be retained

Brian G Strand (1) Yes
Federation of Small Businesses (2) Yes
Buddenbrook Consultancy (3) Yes
J Brady (4) Yes
HM Land Registry (5) This seems a useful requirement to retain and which can be used in appropriate cases to wind up a company.

F A G Kay (9)

I do. In the theory of banking a loan should not be made to a customer unless it is in the customer's interests, the bank's interest and the national interest, which means no loan, should be made for an illegal purpose such as smuggling.

Some years ago there was a case where Inland Revenue refused to extend to a limited company the usual tax benefits because the company had been incorporated by a prostitute in furtherance of her profession. Having been opposed to s.3A from the time it was first proposed by the learned professor, I cannot refrain from pointing out that had S.3A not existed it is possible the lady prostitute would not have found it possible to form her limited company. I realise that prostitution is not in itself illegal but I am sure the Registrar would have been able to decline registration on the grounds that it was against the public interests.

There is an old saying that "you cannot contract out of the law" so possibly the position is already covered by common law – but it bears repeating that a company cannot be formed for an illegal purpose so let's have the belt, and braces as well.

H W Higginson (10)

Yes

K S V Thorogood (11)

Yes - but further strengthened where the track record of 'phoenix' companies suggests that abuse/default is a likelihood, e.g. tax evasion, creditor failure, etc.

The Royal Institute of Chartered Surveyors (19)

Yes

Dundas Wilson & Garretts (20)

We are not persuaded that the Consultation Document has demonstrated a strong need for the retention of the "lawful purpose" requirement.

Confederation of British Industry (21)

No, because it is too uncertain of meaning and incapable of being policed. However, the carrying on of unlawful activities should be a specific ground for winding-up at the instance of the DTI.

The Institute of Chartered Accountants of Scotland (23)

Yes. The provision has little practical value but to remove it may give an inappropriate message.

Association of British Insurers (24)

Yes

Dr Elaine Sternberg (25)

Yes

KPMG (26)

Yes

York Place Company Services Ltd (28)

Yes absolutely

The Law Society (29)

With the proposed abolition of objects clauses there seems little sense in retaining the requirement that a company be formed for a lawful purpose. However, where a company carries out unlawful activities we consider that section 124A of the Insolvency Act 1986 should be amended so that the company can be wound up by the Secretary of State on public policy grounds.

The General Council of the Bar (30)

The committee agrees that the requirement that a company must be formed for legal purpose should be retained. Although this cannot be checked on registration when the need to state the objects of a company is abolished, the need to certify this fact on the registration form will have a deterrent effect. The provision may prove useful in criminal or civil proceedings.

Kenneth Lavanchy (31)

Yes

British American Tobacco (33)

No, because it is too uncertain of meaning, and incapable of being policed. However, the carrying on of unlawful activities should be a specific ground for winding-up at the insistence of the DTI.

Agreed. The concept of the lawful purpose is far too vague and only likely to be defined ultimately by precedent. Either we should attempt to add a definition - this in itself would be difficult to achieve successfully - or we leave it out completely which would be our preferred option.

London Society of Chartered Accountants (35)

Yes

The Abbey National Group (38)

Yes

Deloitte & Touche (41)

Yes

The Law Society of Scotland (42)

Yes

Fork Truck Association (43)

Yes

D A Buskell (44)

Agree

Institute of Directors (47)

Yes. We know of no reason for there to be any change to the existing statute in this area.

Jordans (51)

We agree that the requirement for a company to be formed for a lawful purpose should be retained.

Clifford Chance (52)

Yes

The Faculty of Advocates (54)

We agree that this requirement should be retained

The Mechanical Copyright Protection Society Ltd & The Performing Right Society Ltd (55)

Yes

8 Do you agree that, for newly formed companies, the Memorandum and Articles of Association should be replaced by a constitution in a single document, accompanied by a standard Registration Form?

Brian G Strand (1)

Yes

Buddenbrook Consultancy (3)

Yes - the present arrangement is well out of date. (see also answer to Q2)

J Brady (4)

Yes

HM Land Registry (5)

Yes. In practice both the memorandum and articles of association are produced when the constitution is requested. In many situations both are required because the basis of the company's delegation of authority is at issue, details of which are contained in the articles not the memorandum of association.

F A G Kay (9)

I am suspicious of the motivation behind this proposed change.

It looks very much to me like change for the sake of change because it seems that basically the same information is going to be contained in the "constitution" and standard Registration Form as is prescribed in the present Memorandum and Articles of Association and the Form 10. On the other hand, it could be that our masters in Brussels have ordained that further needless changes have to be made.

At the moment for incorporation we have:

the Memorandum & Articles – a single document.

Form 10 – Statement of intended Registered Office, Directors & Secretary

Form 12 – Statutory Declaration (hopefully soon to be obsolete).

Under the new proposals we will have:

the constitution – one document

a standard Registration Form (containing the same details as Form 10) plus a statement of compliance in place of the Statutory Declaration at (3) above.

The only reason Forms 10 and 12 are separate documents at the moment is because Companies House adopted the practice of numbering prescribed forms to correspond with the section of the Companies Act from which they derived.

With the replacement of the Form 12 with a simple certificate of compliance there is no reason on earth why the Form 12 requirements (as to be modified) could not be incorporated into the Form 10.

The difference between the existing procedure and the proposed procedure therefore boils down to whether you call a document the Memorandum and Articles of Association or a company's Constitution. Other countries have changed the name of the Memorandum and Articles of Association; in Antigua the Memorandum became the Articles and the Articles became the Bye-laws (I suspect following the practice in the USA).

So the proposal is to have two documents wrapped up in one under the title of "Constitution". My understanding there will be no insistence on an objects clause – but at the same time objects clauses will not be prohibited. I suggest the Steering Group take note of how s.3A of the Companies Act was received by those who actually set up business through the medium of a limited company – basically it was incorporated as the main object and all the detailed objects which section 3A was designed to replace were still added as subsidiary clauses. To me, this suggests that there is not going to be much reduction in the size of the "constitution".

Objects clauses can impose restraints and – from the point of view of the members and, indeed, sometimes directors too – are very worthwhile. I vote to retain them, in all their detail, for the reasons specified in my answer to Question 12.

Para 2.14 of the consultation document states "it is proposed to replace the Memorandum & Articles of Association and the various other documents with a single

“constitution” document and a standard Registration Form.” Unless you have actually prepared and submitted documents for the formation of a new company under the existing system you could be forgiven for believing from this wording that there was to be a major pruning of paper work ending up with just two documents.

As I have shown above, there is little evidence to support such a contention.

The “standard Registration Form” referred to will need to be at least as big as the present Form 10 – which is a minimum of four pages – and will probably have to extend to a minimum of six pages. And unless objects clauses are prohibited the “constitution” is going to be no less than the present Memorandum and Articles.

Reference is also made to the Memorandum and Articles as if they were two documents. Normal practice is that both documents are bound under the same cover and so become one document just as you have different chapters in a novel but when bound under one cover becomes a book.

There is, in my view, clearly a bias in the consultation document towards the proposed changes by telling the truth but not the whole truth – and I wonder why.

I cannot detect any significant advantage over the existing procedure (apart from the abolition of the statutory declaration and its replacement by a certificate) of the proposals contained in the consultative document so I do NOT agree with the proposal put in Question 8 above.

H W Higginson (10)

Yes

K S V Thorogood (11)

Yes, providing that ‘phoenix’ companies are specifically included

Association of Chartered Certified Accountants (17)

Given the blurring of the distinction between the memorandum and the articles, and given that individual provisions of each may be changed by a similar procedure, there seems no obvious reason why there need to be two separate constitutional documents. We therefore support the proposal to introduce, with respect to new companies, a single, integrated constitutional document.

The Royal Institute of Chartered Surveyors (19)

Yes

Dundas Wilson & Garretts (20)

Yes

Confederation of British Industry (21)

Yes, enthusiastically

The Institute of Chartered Accountants of Scotland (23)

Yes

Association of British Insurers (24)

We do not see any objection to the proposal for a single document to replace the existing Memorandum and Articles of Association, though equally, we are not aware that the current requirements represent an onerous obligation which could be mitigated. The existing Memorandum of Association is in reality of residual significance and we suggest that if a combined constitution is adopted this be designated the Articles of Association.

Dr Elaine Sternberg (25)

No. Information that is now contained in the Articles can have a profound bearing on corporate governance, and can therefore affect the extent to which the company may be attractive or indeed acceptable investment for potential investors.

KPMG (26) Yes
York Place Company Services Ltd (28) Yes
The Law Society (29) We agree with this proposal. It is a matter for consideration as to what name the new constitutional document should be identified as but we consider that the nomenclature should not use either “articles” or “memorandum” as this would only confuse.
The General Council of the Bar (30) The committee agrees that for newly formed companies the Memorandum and Articles of Association should be replaced by a constitution in a single document accompanied by a standard registration form.
Kenneth Lavanchy (31) No: as stated in paragraph 2.13, the memorandum and the articles perform very separate functions. Any change to the articles, however minor, would require the delivery of a new complete Constitution.
British American Tobacco (33) Yes, enthusiastically. Again, the extent to which this may also apply to public companies is limited by EU law which requires that a public company has to state its objects. There is however no reason why the former “Memorandum & Articles” document could not be renamed the company’s constitution.
London Society of Chartered Accountants (35) Yes
The Abbey National Group (38) Yes
Campbell Hooper (39) Generally in favour
Deloitte & Touche (41) Yes
The Law Society of Scotland (42) Yes, provided that the safeguards presently attached to amendments to the Memorandum (including the possibility of creating unalterable share rights) are preserved, to the extent that these continue to be relied upon.
Fork Truck Association (43) Yes
D A Buskell (44) Agree
Institute of Directors (47) Yes. The IoD believes that the distinction between a company’s Memorandum and articles of Association serves little purpose. In a recent survey of our members (December 1998) almost three quarters (73%) agreed with the ending of the distinction. The registration form when duly registered could be regarded as the “instrument of incorporation” for the purpose of EU directives.
Clifford Chance (52) Yes
The British Chambers of Commerce (53) We strongly support this suggestion, which along with the proposed new standard

registration form would simplify current arrangements. We believe that this should be signed by the directors to acknowledge their duties.

The Faculty of Advocates (54)

We consider that the separation of the constitution of a company into two documents no longer serves any useful purpose, in the light of members' ability to alter by means of a special resolution both the memorandum and articles (except in respect of the country in which the company carries on business). However, we are in favour of retaining provisions in the company's constitution which are entrenched, or which can be altered only by a majority greater than that required for a special resolution.

The Mechanical Copyright Protection Society Ltd & The Performing Right Society Ltd (55)

The distinction between Memorandum and Articles of Association is not generally understood and it would make more sense if they were on one document, or at least clearly labelled as to what they contain.

9 Do you agree that existing companies should not be required to reregister, but that transitional arrangements on the above lines should be worked out?

Brian G Strand (1)

No - all to reregister

Federation of Small Businesses (2)

Yes

Buddenbrook Consultancy (3)

I believe companies should be required to re-register over a (say) 5 year period. If the Registrar were able to produce the simple registration form for all companies this would speed re-registration.

J Brady (4)

No - lets get a common footing as soon as possible

HM Land Registry (5)

Yes. If reregistration were necessary, then there would be companies who fail to observe the procedures creating uncertainty. It would also significantly increase the costs of the company. It should be possible to devise transitional provisions which adequately address the issue whilst allowing voluntary reregistration in appropriate cases.

F A G Kay (9)

In a word, "NO".

What is being suggested is the equivalent of a rule that existing teams in the English Football League continue to play to the present offside rule but any new teams that join the League must play to a new offside rule.

Such a decision will create one set of rules for the existing one million companies and another set for those incorporated after the introduction of the new rules.

I consider that existing companies should be reregistered. But that does not necessarily mean one million companies need to submit a "constitution" document and a standard Registration Form.

The new Act can say that:

existing companies are automatically reregistered. (No certificate to be issued)

<p>The memorandum and Articles of association of existing companies shall be deemed to be combined into one document and be known as the company's "constitution". the registered office, directors, secretary and members on record at Companies House on the date of reregistration shall constitute the Registration Form. Should the right to apply to the court to cancel an alteration to the Memorandum be retained? No – provided such alteration still has to be by Special Resolution.</p>
<p>H W Higginson (10) Yes</p>
<p>K S V Thorogood (11) Yes, provided that 'phoenix' companies are specifically excluded.</p>
<p>Association of Chartered Certified Accountants (17) Yes</p>
<p>Association of Accounting Technicians (18) If brought in, it would seem sensible to apply the proposed new arrangements to all companies, which would mean requiring existing companies to reregister. Appropriate transitional arrangements would, of course, need to be applied.</p>
<p>The Royal Institute of Chartered Surveyors (19) Yes</p>
<p>Dundas Wilson & Garretts (20) Yes</p>
<p>Confederation of British Industry (21) Yes</p>
<p>The Institute of Chartered Accountants of Scotland (23) Yes</p>
<p>Association of British Insurers (24) We agree that existing companies should not be required to reregister. It is to be hoped that complex transitional arrangements will not be a consequence of the change.</p>
<p>Dr Elaine Sternberg (25) Existing companies should not be required to reregister, however, transitional arrangements on the above lines are not acceptable.</p>
<p>KPMG (26) Yes</p>
<p>York Place Company Services Ltd (28) Yes</p>
<p>The Law Society (29) We agree that existing companies should not be required to re-register but that they should be given the option to do so.</p>
<p>The General Council of the Bar (30) The committee agrees that existing companies should not be required to re-register, but that transitional provisions will be necessary on the lines suggested in paragraph 2.15 to ensure that the two kinds of constitution should develop on converging lines, as to the power to alter the Memorandum of Association and the power to entrench provisions.</p>
<p>Kenneth Lavanchy (31) Yes</p>
<p>British American Tobacco (33)</p>

Yes. The transitional arrangements should be implemented to ensure that after a period of time all companies have in place a single constitutional document - this could be achieved when for example a company decides to adopt new Articles.
London Society of Chartered Accountants (35) Yes
The Abbey National Group (38) The transitional arrangements should be clear. There should be clarification for formation and support, but with checks for creditors of existing companies.
Deloitte & Touche (41) Yes
The Law Society of Scotland (42) Yes
Fork Truck Association (43) Yes
D A Buskell (44) Yes, but a time-scale must be for a reasonable period, say two years.
British Bankers' Association (45) It is vital that the transitional arrangements are clear - one clear set of processes. What is required is streamlining for formulation and support, but safeguards must be built in for creditors of existing companies. The Ultra Vires issue is addressed for new companies, but it must work across the board.
Institute of Directors (47) Yes
Clifford Chance (52) Yes
The Faculty of Advocates (54) If it is not proposed to require existing companies to re-register at any point in the future, we see no reason for transitional arrangements regarding these companies. Machinery already exists to enable the memorandum and articles to be altered: see sections 4, 5, 6 & 17 of the Companies Act 1985. It is a quite separate question whether a company already registered but which wishes to alter its memorandum and articles should be required to re-register its constitution as a single document. <u>A fortiori</u> , a company already registered which does not wish to alter its memorandum and articles should not in our view be put to the trouble and expense of registering its constitution as a single document unless there is a good reason. No such reason is advanced in the Consultation Document.
The Mechanical Copyright Protection Society Ltd & The Performing Right Society Ltd (55) Yes

10 Should the right to apply to court to cancel an alteration to the memorandum be retained?

Brian G Strand (1) No
Federation of Small Businesses (2) Yes
Buddenbrook Consultancy (3)

The law should 'overarch' individual Memorandums so that no application to Court would be necessary.

J Brady (4)

Yes

F A G Kay (9)

Basically "Yes" – because there seems to be no difference to the information required at present.

But you cannot put in the Registration Form the name(s) of the Founder Member(s) for the simple reason that at the stage of submitting the Registration Form there is no company in existence to be a Founder Member of – which is but another reason why "subscriber" or "promoter" are so much more appropriate words to use.

I can imagine some thinking, "this is being pedantic" – but it is sometime necessary.

Those at the DTI may not recall this, but Companies House used to post Certificates of Incorporation dated the following day so that they arrived on the desk of the presenter on the date of incorporation. Until a lady officer signed a batch of post dated certificates which were duly posted and then very inconveniently she died the same day she signed the certificates. So Certificates of Incorporation were in issue signed by an officer who was dead on the date of incorporation given on the Certificate of Incorporation. I understand this practice ceased.

But it is equally possible for a person who is designated to be the first member of accompany to die between the date of signing the Registration Form and the date of incorporation. And when you are dead you cannot be a Member – of anything.

Legislation should be drafted to cover all known possibilities – and with precedents going back over 137 years we should be approaching the stage where perfection is in sight.

H W Higginson (10)

The right to apply to the court to cancel an alteration to the memorandum should not be retained.

K S V Thorogood (11)

Yes

The Royal Institute of Chartered Surveyors (19)

Yes

Dundas Wilson & Garretts (20)

Yes

Confederation of British Industry (21)

No. Nobody can recall such an application being made, and it becomes ludicrous once the requirement for an objects clause is removed.

The Institute of Chartered Accountants of Scotland (23)

Yes

Association of British Insurers (24)

We have no firm view.

Dr Elaine Sternberg (25)

Yes

KPMG (26)

We express no view on this

York Place Company Services Ltd (28)

Yes

The Law Society (29)

<p>We do not consider that the right to apply to the court to cancel an alteration to the memorandum should be maintained. Such a right would maintain the distinction between memorandum and articles, a distinction the introduction of a single constitutional document is designed to abrogate.</p>
<p>The General Council of the Bar (30) The right to apply to the court to cancel an alteration in the Memorandum of Association should not be retained.</p>
<p>Kenneth Lavanchy (31) No</p>
<p>No. Nobody can recall such an application being made, and it becomes ludicrous once the requirement for an objects clause is removed.</p>
<p>British American Tobacco (33) Agreed. This should be done as a once and for all clean up attempt without leaving any potential for redress by this means.</p>
<p>Halifax plc – Company Secretary’s Department (34) As to the right to apply to court to cancel an alteration to the Memorandum, we feel that the requirements of the special resolution needed to alter the Memorandum are protection enough for the small minority although are not aware of applications to the court causing any difficulties in practice. The possibility of application to the court after the meeting does in theory at least create an element of uncertainty</p>
<p>London Society of Chartered Accountants (35) Yes</p>
<p>The Abbey National Group (38) See answer to question 9</p>
<p>Deloitte & Touche (41) Yes</p>
<p>The Law Society of Scotland (42) Yes. Although little used in practice, and to some extent superseded by s.459, the Committee believes it is important to safeguard the rights of an individual member, who objects to a fundamental change to the constitution of the company. At present, he or she would be entitled to court protection, and that member should continue to be able to apply to the court for assistance; in the Committee’s view, a reformed Section 459 would not be sufficient.</p>
<p>Fork Truck Association (43) Yes</p>
<p>D A Buskell (44) Agree</p>
<p>British Bankers’ Association (45) See answer to Q9</p>
<p>Institute of Directors (47) We know of no reason to change this existing right.</p>
<p>Clifford Chance (52) No. We consider that, in the absence of oppression as provided by section 459, it is undemocratic to permit a minority to undo the decision of the majority.</p>
<p>The Faculty of Advocates (54) We consider that in relation to companies already registered, the provisions of Section 5 of the Companies Act 1985, which deal with the alteration of the company’s objects should be retained. We also consider that such a procedure should be retained for</p>

companies whose constitution is contained within a single document.
The Mechanical Copyright Protection Society Ltd & The Performing Right Society Ltd (55)
No, companies should be allowed to make changes as if they were new companies.

11 Do you agree with the proposals in paragraph 2.16-18 for the content of the new Registration form?

Brian G Strand (1) Yes - but file electronically
Federation of Small Businesses (2) Yes - this is a major simplification
Buddenbrook Consultancy (3) This seems a much simpler process although do we really need nominal value of shares?
J Brady (4) Yes
HM Land Registry (5) Yes, it would be useful to distinguish between the basic information about the company and the ephemeral information which may be updated by information in the annual return.
F A G Kay (9) I do not agree, but as long as it is not made mandatory NOT to have objects the proposal can be introduced as far as I am concerned because I believe it will get the same welcome as that enjoyed by s.3A – most private companies will still want to have objects. Why will private companies still want to have objects if they do not have to? Because objects provide a safeguard for Members – and sometimes for directors too. Members may not wish the directors to have powers to give guarantees on behalf of the company – or to make contributions to or grant pensions to former directors and employees – or to grant loans to anyone – or to exercise company borrowing powers. Different companies will have different needs.
H W Higginson (10) Yes
K S V Thorogood (11) Yes, providing that a prerequisite is embodied such that an historical record of ‘phoenix’ registrations is a mandatory requirement.
Association of Accounting Technicians (18) We agree that the proposals for the content of the new Registration Form are appropriate and we welcome this simplification.
The Royal Institute of Chartered Surveyors (19) Yes
Dundas Wilson & Garretts (20) Yes
Confederation of British Industry (21) Yes
The Institute of Chartered Accountants of Scotland (23) Yes

Association of British Insurers (24) Yes
Dr Elaine Sternberg (25) Emphatically not. To the extent that there is any company law at all, it should provide for the existence of and publication of clear company objects. Without company objects, corporate governance makes no sense. The definitions used by The Strategic Framework (“the internal management and control of companies”, 5.2.19) and the Cadbury (paragraph 2.5) and Hampel (para 1.15) Reports (“the system by which companies are directed and controlled”) are seriously defective. They potentially include all sorts of considerations (e.g. internal power politics, external regulation) that are not part of corporate governance. Conversely, they provide no intrinsic criterion of what constitutes good corporate governance. A better definition of ‘corporate governance’ is provided by CGAIM (p20), in which it refers to “ways of ensuring that corporate actions, assets and agents are directed at achieving the corporate objectives established by the corporation’s shareholders”, makes clear the centrality of corporate objectives.
KPMG (26) Yes
York Place Company Services Ltd (28) Yes
The Law Society (29) We agree with the proposed contents of the new Registration Form.
The General Council of the Bar (30) The committee agrees with the proposals in paragraph 2.16-18 upon the contents of the registration form.
Kenneth Lavanchy (31) No: the requirement for objects to be defined should be retained, even if only ‘a general commercial company’
British American Tobacco (33) Yes
Halifax plc – Company Secretary’s Department (34) We considered the proposals in relation to the Registration Form to be acceptable but we are concerned about the recent practice of registering companies with names similar to those of existing companies with a view to selling the name on those companies. We believe the Registrar should be under a duty to help prevent this practice, perhaps by checking applications against the register for companies with similar names and issuing warning notices to those companies who could then object.
London Society of Chartered Accountants (35) Yes
The Abbey National Group (38) Yes, we also emphasise the point that Form should be in plain English, straightforward and clear.
Deloitte & Touche (41) Yes

<p>The Law Society of Scotland (42) The Committee believes it would be useful to include in the Registration Form the trade classification(s) on the same coded basis as is required for the Annual Return. This would of course be subject to alteration (as required) in subsequent Annual Returns. Subject to that suggestion the Committee agrees with the proposed content of the new Registration Forms.</p>
<p>Fork Truck Association (43) Yes</p>
<p>D A Buskell (44) Agree</p>
<p>Institute of Directors (47) Yes with the exception of the objects clause. See response to Question 12.</p>
<p>Clifford Chance (52) Yes</p>
<p>The British Chambers of Commerce (53) We agree that this would be eminently sensible and support the format proposed in the Group's paper, which suggests splitting the information into basic information which cannot be changed by law without the intervention of the registrar and more detailed information that can be changed and thus may be superseded. The new registration form being proposed should be capable of being electronically filed.</p>
<p>The Faculty of Advocates (54) We consider that the general requirement on companies to state their objects in their constitution should remain. However, subject to that consideration, we agree with the proposals set out in the document as regards the content of the new Registration Form.</p>
<p>The Mechanical Copyright Protection Society Ltd & The Performing Right Society Ltd (55) Yes</p>

12 Do you agree that for private companies the requirement to have objects should be dropped?

<p>Brian G Strand (1) Yes and for both types: i.e. anything lawful less any stated exception in application</p>
<p>Buddenbrook Consultancy (3) I see no reason for companies (of all descriptions) to have objects clauses.</p>
<p>J Brady (4) No</p>
<p>HM Land Registry (5) Yes, they serve no useful purpose in practice</p>
<p>F A G Kay (9) Yes</p>
<p>H W Higginson (10) Yes</p>
<p>K S V Thorogood (11)</p>

No
Association of Accounting Technicians (18) We agree that the requirement for private companies to have objects should be dropped.
The Royal Institute of Chartered Surveyors (19) Yes
Dundas Wilson & Garretts (20) Yes
Confederation of British Industry (21) Yes. We agree that objects clauses have become lengthy and broad and have lost much of their value. Companies can choose whether or not to have limitations but these should not bind third parties. Any limitation should be an internal matter between the management and shareholders.
The Institute of Chartered Accountants of Scotland (23) Yes. We believe that the Second Directive should be amended and that the requirement to have objects should also be dropped for public companies.
Association of British Insurers (24) Yes
Dr Elaine Sternberg (25) Emphatically not: see question 11 immediately above.
KPMG (26) The <i>requirement</i> should be dropped but companies should have the <i>option</i> of having an objects clause, although this should be an internal rule (i.e. as between members and the directors but should not affect the rights of outside parties or the validity of 'ultra-vires' transactions unless the outside party was aware of the position).
Action with Communities in Rural England (27) No. In the case of charitable companies we would find this measure unacceptable.
York Place Company Services Ltd (28) Yes but with a statement perhaps reinforcing the carrying out of lawful business.
The Law Society (29) We agree that the requirement for a private company to have objects should be abolished. However the option should remain for a private company to insert objects in its constitution. Where a company does possess objects the legislation should make it clear exactly what their effects are.
The General Council of the Bar (30) The committee agrees that the requirement for a private company to have objects to be dropped. But it should be optional for it to do so. A statement of objects may be a useful protection for minorities.
Kenneth Lavanchy (31) No: funding to a private company by some financial body or otherwise, may be specified to be used for specific purposes. Even if there is no statutory obligation to state objects, it should be permissible for these to be stated, if required.
British American Tobacco (33) Yes. Ideally, I would prefer to see the requirement dropped for public companies but appreciate that we are operating within the restrictions of the EU Company Law requirements. What action are we taking to raise this at the EC level? Additional comments on this matter at Q28 below are noted.

London Society of Chartered Accountants (35) Yes
The Abbey National Group (38) Yes
Campbell Hooper (39) Generally in favour.
Deloitte & Touche (41) Yes
The Law Society of Scotland (42) Yes, subject to the comments made in relation to question 11.
Fork Truck Association (43) Yes
D A Buskell (44) No, this is a useful guide on what the company might have been formed to do.
British Bankers' Association (45) Yes
Institute of Directors (47) No. The EC Second Directive requires public companies to have objects in its constitution. The Institute believes that public and private companies should be treated similarly in this area. We believe that members of companies in certain situations may benefit from having objects in their constitution. In a recent survey of our members (December 1998) most respondents did not feel the objects placed any undue restrictions on their business activities.
Jordans (51) Whilst commercial companies will benefit from the enhanced commercial flexibility of not having to state an 'object', the needs of non-commercial companies must not be entirely forgotten. For example, some companies are formed for the specific purpose of holding title to a specific property and maintenance of the common parts. The members of such a company may obtain comfort from the statement of a specific object. Sports clubs and companies established for specific (but not strictly charitable) causes may also have similar need. The suggesting in paragraph 2.35 should allow for this.
Clifford Chance (52) Yes
The Faculty of Advocates (54) We believe that the requirement for companies to state their objects in their constitution should be retained. We believe that it is useful to force the founders of companies, whether public or private, to give some thought to what is the purpose of the company they are establishing and whether they want any restrictions to protect their interests. If they do not believe specific objects are needed it is very easy at present for companies to opt out of having a specific objects clause. We do not support this proposal. We consider that there is, if anything, a greater necessity to require private companies to state their objects as less publicity is accorded to such companies and members who acquire shares in such companies are entitled to know the main lines of business which the company intends to pursue. Further, we do not consider that private companies should be treated differently to public companies in this regard.
The Mechanical Copyright Protection Society Ltd & The Performing Right

Society Ltd (55)

Yes, the requirement for objects to be mandatory should be adopted. However, companies should still be able to have objects, e.g. if they are charities or have been formed for carrying out specific purposes. Such objects need not include those necessary for a general commercial company.

13 Do you agree that the option of registering the objects of a “general commercial company” should be withdrawn, with appropriate savings for companies already formed with such objects?

Brian G Strand (1)

Yes also see comments on 12

Buddenbrook Consultancy (3)

The ‘general commercial company’ idea (which has been virtually ignored) should be dropped.

J Brady (4)

No

HM Land Registry (5)

Yes

F A G Kay (9)

This question is not very clear.

Does the signing of the form refer to the signing in the form of authentication or the signing as individuals giving consent to accept office as director/secretary?

If the question refers to individuals signing giving consent to accept office then the first director(s) and secretary (designate) should sign in accordance with the spirit of s.288(2) of the Act which requires that consent to hold office as director/secretary be in writing.

If the signatures referred to are in the manner of authentication of the form and its contents they should not sign – the form should be signed by the subscriber(s)/founder member designate/promoter(s).

The person(s) who form the company and on incorporation become its first member(s) are the ones to say how they want the company set up – which includes who the first director(s) and secretary is to be. Just as first director(s)/secretary have to give their consent in writing so the people who initiate incorporation should give their signature in confirmation that is how they want the company established.

I THINK IT IS COMPLETELY WRONG TO ALLOW AN AGENT TO SIGN SUCH A DOCUMENT – unless of course he has a Power of Attorney.

H W Higginson (10)

Yes

K S V Thorogood (11)

Yes, always providing that a historical record of ‘phoenix’ companies is evident.

Lee Roach (13)

According to S3A Companies Act 1985 a ‘general commercial company’ means:
 ‘(a) the object of the company is to carry on any trade or business whatsoever, and
 (b) the company has power to do all such things as are incidental to the carrying on of any trade or business by it.’

Some have assumed that the intention of Parliament in introducing this provision was

to encourage companies to curtail from drafting long detailed objects clauses. In fact, in line with the reforms contained in the 1989 Act, the adoption of S3A “will mean that the company will effectively have opted out of the ultra vires rule for internal purposes”. However, for reasons that will be examined, poor drafting has led to a situation where the new provision is little used, or where it is used, it is used in conjunction with other more detailed objects.

S110 Companies Act 1989 was introduced relatively late in the Act’s passage through Parliament. Accordingly, it escaped thorough scrutiny. This explains why the Act contains several phrases and words that are highly ambiguous.

Firstly, there is uncertainty as to what is meant by the words ‘trade’ and ‘business.’ If a literal approach is adopted, then acts of corporate philanthropy will not appear to be covered. The objects clause will permit all kinds of profit-making activity, but not activity that departs from the profit goal. This is upheld by the use of the phrase ‘general *commercial* company.’ If this is the case, then companies that have at their heart charitable activities, for example charitable or holding companies, may be precluded from using the new objects clause. Conversely, a more liberal approach may be adopted in which the words ‘trade’ or ‘business’ may also include activities that are not reciprocal of profit led.

Secondly regardless of the meaning of the words ‘trade’ or ‘business’, the company can engage in *any* activity within its field of trade. What this means is that there is no longer a need for ‘subjective’ objects clauses along the lines of those found in the *Bell houses* line of authority.

Finally, S3A applies where a company’s memorandum states that ‘*the* object of the company is to carry on business as a general commercial company’. The use of the italicised word implies that the S3A objects clause should be the only stated object. However, this has not been the case.

I would therefore recommend an alternatives. We should abolish the objects clause altogether. Parliament in the Companies Act 1989 severely emasculated the doctrine of *ultra vires*. The question is why not finish the process of reform and abolish it completely. However, directors should not be free to act however they wish and so I propose that we adopt a statutory statement of what the company may and may not do, along the lines of S4 of the American Model Business Corporation Act:

4. Each corporation shall have power:

- (a) To have perpetual succession by its corporate name unless a limited period of duration is stated in its articles of incorporation.
- (b) To sue and be sued, complain and defend, in its corporate name.
- (c) To have a corporate seal which may be altered at pleasure, and to use the same by causing it, or a facsimile thereof, to be impressed or affixed or in any other manner reproduced.
- (d) To purchase, take, receive, lease or otherwise acquire, own, hold, improve, use and otherwise deal in and with, real or personal property, or any interest therein, wherever situated.
- (e) To sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of all or any part of its property and assets.
- (f) To lend money and use its credit to assist employees.
- (g) To purchase, take, receive, subscribe for, or otherwise acquire, own, hold, vote, use, employ, sell, mortgage, lend, pledge, or otherwise dispose of, and otherwise use and deal in and with, shares or other interests in, or obligations of, other domestic or foreign corporations, association, partnerships or individuals, or direct or indirect

obligations of the United States or of any other government, state, territory, governmental district or municipality or of any instrumentally thereof.

(h) To make contracts and guarantees and incur liabilities, borrow money at such rates of interest as the corporation may determine, issue its notes, bonds and other obligations, and secure any of its obligations by mortgage or pledge of all or any of its property, franchises and income.

(I) To lend money for its corporate purposes, invest and reinvest its funds, and take and hold real and personal property as security for the payment of funds so loaned or invested.

(j) To conduct its business, carry on its operations and have offices and exercise the powers granted by this Act, within or without this State.

(k) To elect or appoint officers and agents of the corporation, and define their duties and fix their compensation.

(l) To make and alter by-laws, not inconsistent with its articles of incorporation or with the laws of this State, for the administration and regulation of the affairs of the corporation.

(m) To make donations for the public welfare or for charitable, scientific or educational purposes.

(n) To transact any lawful business which the board of directors shall find will be in aid of government policy.

(o) To pay pensions and establish pension plans, pension trusts, profit sharing plans, stock bonus plans, stock option plans and other incentive plans for any of all of its directors officers and employees.

(p) To be a promoter, partner, member, associate or manager of any partnership, joint venture, trust or other enterprise.

(q) To have and exercise all powers necessary or convenient to effect its purposes.

In America, many States have adopted this provision as part of their State company law. However, it may be the case that this statement of powers is too general for the classifications of company that exist, and therefore, it may be the case that certain types of company may be permitted to opt out of certain provisions. In any case, the above provision is not so much limiting as enabling e.g. in the UK there is no statutory authority for a corporation's right to engage in philanthropy. Provisions such as that above help to clarify areas of the law such as this. Further, a list format such as this can be added to as the legislators believe upon recommendations from judges or other bodies e.g. the Law Commission or the DTI.

The Royal Institute of Chartered Surveyors (19)

Yes

Dundas Wilson & Garretts (20)

Yes

Confederation of British Industry (21)

Yes - it has never worked.

The Institute of Chartered Accountants of Scotland (23)

Yes

Association of British Insurers (24)

We have no firm view

Dr Elaine Sternberg (25)

Only if they are required to submit more specific objects, e.g., to be a business, and have as object the maximising long-term owner value by selling goods or services of type X.

<p>KPMG (26) Yes - such an object is too vague and, we suspect, is used to get around the mandatory requirement for an objects clause.</p>
<p>York Place Company Services Ltd (28) Yes</p>
<p>The Law Society (29) We agree that the option of registering the objects of a general commercial company should be abolished. Savings should be made for a company already formed with such objects.</p>
<p>The General Council of the Bar (30) The option to register a company as a “general commercial company” should be withdrawn. The committee does not consider that any transitional provisions are required for companies already so registered.</p>
<p>Kenneth Lavanchy (31) No</p>
<p>British American Tobacco (33) Yes - Section 3A of the Companies Act 1985 (as inserted by the Companies Act 1989) has never worked. It would, however, be important to ensure that the legislation is very specific in this matter. S3A never worked as legal advice resulted in most companies being incorporated with not only the “general commercial company” object but also a whole host of other objects in a belt and braces attempt to ensure that the company would not operate ultra vires. Would the removal of the requirement to have an objects clause be sufficiently explicit to ensure that legal opinion would not then recommend some further form of objects clause for ultra vires protection.</p>
<p>London Society of Chartered Accountants (35) Yes provided that the removal of S3A does not make it difficult for a public company to have a general objects clause.</p>
<p>The Abbey National Group (38) Yes</p>
<p>Deloitte & Touche (41) Yes, however, it is not clear whether the removal of s3A precludes the use of general clauses or merely removes a statutory interpretation of what is meant by general commercial company.</p>
<p>The Law Society of Scotland (42) Yes. The Committee does not, however, understand the need for “safeguards” for companies already formed with the objects of a “general commercial company”. The Committee is of the view that the majority of these companies believe (wrongly upon a strict interpretation of the law) that they have unlimited contractual capacity. The Committee would therefore propose that any company which is formed as a “general commercial company” should have the extended powers proposed in question 23 and should not be limited to activity which constitutes a “trade or business”. The reference in s.3A(a) to “trade or business” is confusing, it being uncertain in what respect precisely this limits the power of the company to undertake a particular activity.</p>
<p>Fork Truck Association (43) No</p>
<p>D A Buskell (44)</p>

No
Institute of Directors (47) We see no reason for withdrawing this option.
Clifford Chance (52) Yes
The Faculty of Advocates (54) We do not disagree with the proposal that the option of registering the objects of a “general commercial company” should be withdrawn, provided there are appropriate savings for companies already formed with such objects.
The Mechanical Copyright Protection Society Ltd & The Performing Right Society Ltd (55) Yes

14 Do you agree that the new Registration Form should be signed by the first director(s) and secretary, whose particulars would be included?

Brian G Strand (1) Yes
Federation of Small Businesses (2) The majority of companies are formed by agents. The particulars of the first director and secretary should state if his is the case in order to avoid confusion when the real owners acquire the shares and file their particulars.
Buddenbrook Consultancy (3) Yes although it might be helpful with off the shelf companies for there to be a ‘second registration form’ for the first non-nominee (i.e. operational) directors and secretary to sign.
J Brady (4) Yes
F A G Kay (9) If a statement of such duties is included in the Companies Act – Yes. What confirmation is to be given? It must be in writing otherwise it is valueless.
H W Higginson (10) Yes
K S V Thorogood (11) Yes - but a record of past and present directorships - with Company’s House registration(s) - to be given. Director to be disqualified if it is apparent that ‘phoenix’ companies are a speciality.
The Royal Institute of Chartered Surveyors (19) Yes
Dundas Wilson & Garretts (20) Yes
Confederation of British Industry (21) Yes
The Institute of Chartered Accountants of Scotland (23) Yes
Association of British Insurers (24)

Yes
Dr Elaine Sternberg (25) Yes
KPMG (26) Yes
York Place Company Services Ltd (28) Yes, but there is no reference to a licensed incorporater signing on the founder members behalf.
The Law Society (29) We agree with this proposal subject to one qualification. We do not consider that the home address of a signatory should have to be disclosed.
The General Council of the Bar (30) The committee agrees that the new registration form should be signed by the directors and the secretary named therein.
Kenneth Lavanchy (31) Yes - there is no change in principle to the existing Companies Form 10.
British American Tobacco (33) Yes. There is an issue here concerning the implementation of the Electronic Communications Bill and the authority of electronically-filed documents. It is important to ensure that the signature of the new Registration Form by the first officers of the company can be done electronically as well as physically to allow for the advent of new technology which would permit electronic incorporation.
London Society of Chartered Accountants (35) If the purpose of signing the Registration form is merely to confirm that due process has been followed in forming the company it would not concern us that such directors and secretaries are "corporate" as is the case with "shelf companies". However, if signing the Registration Form is to have greater significance, as suggested by paragraph 2.19, in that it is an acknowledgement that the directors have informed themselves of their duties and responsibilities, it would seem necessary that in the case of "shelf companies" the Registration form should be countersigned by the first natural persons appointed as directors and secretary when the company commences trading.
The Abbey National Group (38) Yes
Campbell Hooper (39) Yes
Deloitte & Touche (41) The proposal needs to address the situation where there is a corporate director or secretary. Also there is an assumption that returns to Companies House will be paper based. Legislation should facilitate the use of modern technologies such as electronic returns.
The Law Society of Scotland (42) The Committee cannot see the necessity for the registration form to be witnessed. It should be noted that the effect of witnessing a document is different in Scots law and English law, and there is nothing in Scots law to suggest that (apart from the provisions of the Companies Act) the constitutional documents of a company require this formality.

Subject to this comment, the Committee agrees that the first Directors and Secretary should sign the form (without the requirement of witnessing).

Fork Truck Association (43)

Yes

D A Buskell (44)

Agree

Institute of Directors (47)

Yes

Clifford Chance (52)

Yes

The Faculty of Advocates (54)

We agree with this proposal.

The Mechanical Copyright Protection Society Ltd & The Performing Right Society Ltd (55)

Yes

15 Do you agree that the director(s) should confirm that they have read a statement of their duties as directors?

Brian G Strand (1)

Yes

Buddenbrook Consultancy (3)

All directors should be required to sign a statement of duties on appointment (and ideally every 5 years which would give an opportunity for new matters on a prescribed form to be included as required).

J Brady (4)

Yes

F A G Kay (9)

No. I am against subsidiary legislation in this form because I know that the DTI's treatment to one section of the 1980 Act was the equivalent of Moses coming down from the mountain and announcing that in the seventh commandment the words "Thou shalt" and "commit adultery" come into force from 1st January. The Act gave the S of S authority to introduce sections – but not selected bits and pieces.

Also it is not made clear what is meant by "delivery by an agent". It could just mean the agent is the courier but I rather suspect the meaning intended is that the agent shall be able to sign the Registration Form instead of the subscriber(s)/founder member(s) designate/promoter(s) – a practice with which I strongly disagree.

H W Higginson (10)

I question the value of such a statement.

K S V Thorogood (11)

Yes

Association of Chartered Certified Accountants (17)

We fully support the proposal to require, on the registration form, confirmation from directors that they have read an authoritative statement of their duties and responsibilities as directors. We feel that such a statement could usefully be included as a standard feature in the annual directors' report of private companies.

Association of Accounting Technicians (18)

Whilst agreeing with the suggestion that the director(s) should confirm that they have

read a statement of their duties as directors, we feel that directors should also sign the statement of duties to confirm that they have read and understood them. By citing this declaration on the actual Registration Form, it is more likely that those signing will take note of their responsibilities.

The Royal Institute of Chartered Surveyors (19)

Yes. We believe that more emphasis should be placed on directors' duties.

Dundas Wilson & Garretts (20)

Yes. We believe that a requirement for directors to confirm that they have read a statement of their duties as directors would be particularly pertinent in the context of smaller private companies.

Confederation of British Industry (21)

Yes

The Institute of Chartered Accountants of Scotland (23)

Yes. We particularly support this proposal, which should ensure that directors are better aware of their responsibilities. However, we believe that the directors' confirmation should be formalised and should extend to the fact that they understand and accept the duties and responsibilities of company directors - not just that they have read a statement of their duties as directors. More importantly this should be extended to all new directors and not be limited just to directors of new companies.

Association of British Insurers (24)

Yes

Dr Elaine Sternberg (25)

Yes. This should not, however, be interpreted as requiring that they have or acquire specific directorial 'credentials'.

KPMG (26)

Yes

York Place Company Services Ltd (28)

Yes and perhaps the Institute of Directors would be able to provide a sensible draft.

The Law Society (29)

We agree that directors should confirm that they have read a statement of their duties as directed.

The General Council of the Bar (30)

The committee agrees that every director on assuming office should on the return of his appointment or election confirm that he has read a statement of his duties. These duties and fiduciary duties are too complex to be satisfactorily stated in the Companies Act. The committee agrees with the proposal stated elsewhere that a short code of guidelines would be useful to help directors to deal with particular problems which may arise.

Kenneth Lavanchy (31)

No - this would become as meaningless as a practical entity as the repetitive reiteration of the statement of directors' obligation attaching to statutory accounts. In any case, the terms of such a statement would change from time to time, in compliance with politically correct Best Practice. Such statements are frequently written from a myopic viewpoint (of the 'Guides' issued by Companies House) and do not represent anything like the responsibilities at large, of directors.

British American Tobacco (33)

Yes. I am not sure what value there is in a proposed director confirming that they

have informed themselves about their duties as directors following the suggestions from the Law Commission and The Scottish Law Commission, in their report “Company Directors: Regulating Conflicts of Interest and formulating a Statement of Duties”. The proposed non-statutory statement of a director’s duties is - we understand - non-binding and would therefore at best be a point of best practice. To what extent could a director be held liable (other than under current legislation) for a “breach” of a non-statutory statement? If there is any doubt about this then it is not clear of this sign off by a director is of any real value either to the shareholders or to creditors and other stakeholders.

Halifax plc – Company Secretary’s Department (34)

In considering the Registration Process and Form, we recognise the merits of the proposals, especially the requirement for the directors to sign a statement of their duties. We considered this sufficient notification to Companies House. We hoped that all future directors would also be required to sign a statement of duties and not merely the founder members

London Society of Chartered Accountants (35)

Yes. However there would have to be provision for natural persons to make such a confirmation on behalf of corporate directors.

The Abbey National Group (38)

Yes. As a way of making directors aware of their main duties they should confirm that they have read a statement of duties.

Campbell Hooper (39)

Yes, provided this is a statutory statement. Campbell Hooper agrees.

Deloitte & Touche (41)

Yes, but also see answer to Question 14

The Law Society of Scotland (42)

The Committee agrees with the concept that first (and all subsequent) Directors should not only consent to their appointment but should also acknowledge that they have some understanding of their responsibilities. What that should be must depend upon the outcome of the consultation process relating to Part X of the Act. In its response to that, the Committee strongly supported a statutory general statement of the duties of Directors, and rejected the concept of a non-statutory statement of duties. Accordingly, for the reasons given there, the Committee would not be in favour of any reference to a non-statutory statement being included in the registration form (or in relation to any subsequent appointments).

Fork Truck Association (43)

Yes

D A Buskell (44)

Yes, most definitely

British Bankers’ Association (45)

Yes. As a means of ensuring that Directors are aware of their duties they should confirm that they have read a statement of their duties. However, it is noted that there is no reference to the levels of directors competency (i.e. duty of care measured against level of competence) for which we think “self-certification” is an insufficient guide from the lender’s perspective. (It is believed that the government is working elsewhere on this matter in the context of directors’ personal liability, BBA responded to the Law Commission study, full co-ordination would be appropriate).

Institute of Directors (47)

In a survey of our members (December 1998) it did appear that many respondents perceived difficulties with the present law on directors duties. Most respondents believed that a clarification of the law and a non binding statement of director duties would be an improvement to the current situation. We recommend the development of a government publication that identifies the duties of directors in a simple, universal and comprehensive manner. The development of the publication would require consultation with the leading representative organisations and should be distributed to all newly appointed directors. We recommend that directors should sign a non-statutory statement of directors' duties when appointed as a director to confirm that they have read the document.

Clifford Chance (52)

Yes

The Faculty of Advocates (54)

We agree with this proposal.

The Mechanical Copyright Protection Society Ltd & The Performing Right Society Ltd (55)

Yes, since it goes a small way to ensuring that directors are aware of their duties.

16 Do you agree that a power as described in paragraph 2.20 should be provided?

Brian G Strand (1)

Yes

Federation of Small Businesses (2)

Agreed

Buddenbrook Consultancy (3)

Yes

J Brady (4)

Yes

HM Land Registry (5)

Yes it would be useful to retain the power by regulation to prescribe different types of Registration Form for each type of company so that any changing needs can be addressed more quickly than in primary legislation.

F A G Kay (9)

If the Memorandum and articles have to go, then I agree – particularly with the bit about signing by the founder shareholder(s)/founder member(s) designate.

H W Higginson (10)

Yes

K S V Thorogood (11)

Yes, but extend to include 'phoenix' companies and their record of payment of Inland Revenue tax liabilities together with VAT payment register.

The Royal Institute of Chartered Surveyors (19)

Yes

Dundas Wilson & Garretts (20)

We think it appropriate that a power as described in paragraph 2.20 should be provided.

Confederation of British Industry (21)

Yes
The Institute of Chartered Accountants of Scotland (23) Yes
Association of British Insurers (24) We have no firm view
Dr Elaine Sternberg (25) No. There should only be a suggestion.
KPMG (26) We agree that there should be such a power but that, as a matter of practice, there should be prior consultation with interested parties.
York Place Company Services Ltd (28) Yes
The General Council of the Bar (30) The committee agrees that the secretary of state should have power, subject to negative resolution, to alter the registration form. This initial form under supervision by the Registrar of Companies need not be stated in the Companies Act.
Kenneth Lavanchy (31) Yes
British American Tobacco (33) Yes
London Society of Chartered Accountants (35) Yes
The Abbey National Group (38) Yes
Deloitte & Touche (41) Yes
The Law Society of Scotland (42) Yes, provided that the content remains prescribed by statute as outlined in 2.16 to 2.18.
Fork Truck Association (43) Yes
D A Buskell (44) Agree
Institute of Directors (47) Yes
Clifford Chance (52) Yes
The Faculty of Advocates (54) We agree that there should be a power, subject to negative resolution, to prescribe the new registration forms for each type of company.
The Mechanical Copyright Protection Society Ltd & The Performing Right Society Ltd (55) Yes

17 Do you agree with the proposals in paragraph 2.21 on the content and signature of the company's constitution?

<p>Brian G Strand (1) Yes</p>
<p>Federation of Small Businesses (2) Agreed</p>
<p>Buddenbrook Consultancy (3) Yes - although does witnessing have any validity?</p>
<p>J Brady (4) Yes</p>
<p>HM Land Registry (5) We agree that the form of constitution should resemble the present details in Table A minus the details of authorised capital in relation to private companies.</p>
<p>F A G Kay (9) Generally speaking, I agree. But I question paragraph 2.23 (a) - Register no constitution and Table A would apply. I seem to recall that this applied before we “went into Europe” but some 25 years ago an E E C directive was issued stating that the Articles of Association of a company had to be in writing – which meant if a company operated under Table A by default it had to adopt and file written Articles which read something like “The regulations contained in Table A to the Companies Act 1948 shall be the articles of association of the company”.</p>
<p>H W Higginson (10) Yes, but the concept of authorised share capital should not be abolished for public companies. If private companies are to have no par value share, it should be possible for the constitution to limit the number of shares the company may issue.</p>
<p>K S V Thorogood (11) Yes</p>
<p>Association of Accounting Technicians (18) The matters dealt with in table A are related purely to a company’s internal arrangements and we see no need for these to become public issues. For a private company we do not feel that these details need to be filed with the registrar. However, for public companies, particularly where shareholders are more remote, this information should be filed with the registrar as a matter of public record.</p>
<p>The Royal Institute of Chartered Surveyors (19) We agree with the proposals to an extent. However, we would not support the abolition of par value shares for public companies, even if the second Directive allows for this.</p>
<p>Dundas Wilson & Garretts (20) Yes, we agree with the proposals in paragraph 2.21 on the content and signature of the company’s constitution although we suggest that consideration be given to making provision for electronic signatures to be acceptable in order to facilitate the on-line registration of new companies.</p>
<p>Confederation of British Industry (21) Yes</p>
<p>The Institute of Chartered Accountants of Scotland (23) Yes</p>

Association of British Insurers (24) Yes
Dr Elaine Sternberg (25) No. To the extent that there are any requirements, they should include the requirement of clear company objects.
KPMG (26) Yes
York Place Company Services Ltd (28) Yes
The Law Society (29) We agree with the proposals as to the contents of a company's constitution and on balance agree that the signature of the founder should be witnessed as this in principle at least makes it harder to forge somebody's signature.
The General Council of the Bar (30) The committee agrees that the constitution should, like the present Articles, regulate the company's internal affairs. It has reservations about whether the concept of authorised share capital and of shares with a par value should be abolished. Each company should be free to decide these matters for itself. This matter is dealt with fully in the Response of the Law Society Company Law Committee to the consultation on Maintenance of Capital. Members of this committee have played a full part in the preparation of that Response, which has been approved by this committee. The committee agrees that the constitution should be signed and witnessed by the Founder Members before it is delivered.
Kenneth Lavanchy (31) Yes
British American Tobacco (33) Yes
London Society of Chartered Accountants (35) Yes
The Abbey National Group (38) Yes
Deloitte & Touche (41) Yes
The Law Society of Scotland (42) Yes, subject to doubts as to the necessity for witnessing as indicated in the Committee's response to question 14.
Fork Truck Association (43) Yes
D A Buskell (44) Agree
British Bankers' Association (45) Yes
Institute of Directors (47) Yes
Clifford Chance (52) Yes
The Faculty of Advocates (54) We agree that the constitution should prescribe the regulations for the company and

agree that the constitution document should be signed by the founder members and witnessed before delivery to the registrar.

The Mechanical Copyright Protection Society Ltd & The Performing Right Society Ltd (55)

Yes

18 Do you agree with these proposals to retain the substance of the present statutory provision for Table A and other model constitutions for companies of various types, but to drop the specific power to prescribe a model constitution for partnership company?

Brian G Strand (1)

Yes

Federation of Small Businesses (2)

Agreed - subject to any conflict with the proposed Limited Liability Partnership Bill

Buddenbrook Consultancy (3)

Yes - although I would hope that Table A content itself be subject to consultation and is modernised.

J Brady (4)

Yes

HM Land Registry (5)

Yes, it is useful to retain the concept of Table A with which many people are familiar.

F A G Kay (9)

I believe it should be possible to amend the constitution by special resolution – so I agree with the first part of the question.

If this were the rule then it would be equally possible for members by special resolution to entrench provisions so that unanimity was required to further change.

But to require unanimity does not always make good sense because of the possibility of companies losing touch with long standing members with minute shareholdings.

Instead of unanimity I would go for 90% or 95%.

H W Higginson (10)

Yes

K S V Thorogood (11)

Yes

The Royal Institute of Chartered Surveyors (19)

Yes

Dundas Wilson & Garretts (20)

We agree with these proposals.

Association of British Insurers (24)

We have no firm view

Dr Elaine Sternberg (25)

So long as companies can continue to opt out of Table A.

KPMG (26)

Yes
York Place Company Services Ltd (28) Yes
The Law Society (29) We agree with these proposals. We also consider that Tables C and E should be made default regulations in so far as in their present form they relate to Articles.
The General Council of the Bar (30) The committee agrees that model constitutions on the lines of Table A should be retained subject to modification or replacement by express provisions by a company in its constitution. The prescription of model constitutions for partnership companies should be dropped.
Kenneth Lavanchy (31) Yes: but with the proviso that in the case of the registration of a self-contained constitution, where such constitution was silent on any matters otherwise contained in Table A, such matters <u>mutatis mutandis</u> should be deemed to be included in that constitution.
British American Tobacco (33) Yes - the latter was always unnecessary
London Society of Chartered Accountants (35) Yes
The Abbey National Group (38) Yes. At the moment difficulties occur when Articles are “silent” in required areas as silence is deemed to mean a lack of power/capacity. Subject to express exclusions made by companies, all versions of Articles should include the necessary powers to transact business with banks.
Deloitte & Touche (41) Yes
The Law Society of Scotland (42) Para 2.23 does not contain an exhaustive list of the possibilities. In addition, a company may register articles which fail to make it clear whether and to what extent provisions in Table A are excluded or amended. If this gives rise to a practical issue, the interpretation of the constitution of the company has to be resolved by the courts. The Committee believe there is no simple alternative (apart from exhorting the draftsman of articles to be more meticulous). There is of course no means whereby the Registrar can check whether particular articles may fall within this category, and the Committee assumes that it is not intended to “outlaw” in any sense articles of this form, however unsatisfactory. Subject to the above comment the Committee agrees with this proposal.
Fork Truck Association (43) Yes
D A Buskell (44) Agree
British Bankers’ Association (45) Yes. Problems are currently encountered where Articles are “silent” in required areas - “silence” is taken to mean an absence of power/capacity. One way of addressing this might be a set of standard powers from which specific powers may be excluded as required by members.

<p>Institute of Directors (47) We support the proposal to retain the substance of the present statutory provision for Table A and other model constitutions for companies of various types.</p>
<p>Jordans (51) We agree with this proposal. The ability of a company to choose between utilising a prescribed constitutional document, having tailor-made constitution or a mixture of the two depending on circumstances enables maximum flexibility.</p>
<p>Clifford Chance (52) Yes</p>
<p>The Faculty of Advocates (54) We agree with these proposals.</p>
<p>The Mechanical Copyright Protection Society Ltd & The Performing Right Society Ltd (55) The substance of the statutory provision for Table A and other model constitutions for companies of various types should be kept. Also, there should be a requirement that the whole constitution is kept as one document, rather than “As Table[A] except for the following articles....”. This should avoid confusion particularly as over the years the Tables may be amended by statute. No comment on the partnership company.</p>

19 Do you agree that the general rule should be that the constitution of a company should be amendable by special resolution, but that it should be open to the members to entrench provisions so that unanimity would be needed to change or remove them?

<p>Brian G Strand (1) Yes</p>
<p>Federation of Small Businesses (2) No. Unanimity is not necessary; 75% in value would be sufficient.</p>
<p>Buddenbrook Consultancy (3) Yes</p>
<p>J Brady (4) Yes</p>
<p>HM Land Registry (5) Yes, it should be possible for members of a company to restrict the ability to amend important terms on which they agree to join the company.</p>
<p>F A G Kay (9) Para 2.28 is in accordance with existing practice and I see no reason for change. Also the first part of Para 2.29 requiring not only a copy of the special resolution changing the constitution but also an updated print of the constitution to be filed with the Registrar is in accordance with existing practice and I see no reason for change. But the second para of 2.29 does not make sense where the constitution states that the regulations contained in Table A shall be part of the constitution of the company because Table A will be constant even if it is amended by statute or statutory instrument. Then you will have other companies which adopt Table A in part where the constitution will say “the regulations contained in Table A with the exception of regulations 8, 9, 10, 11 to 15, which shall be deemed to be excluded, shall form part of</p>

the constitution of the company". Again there will be no need for amendment to the constitution because it will refer to Table A which will still be Table A however much it is amended by the government.

The second part of 2.29 will only apply where all the provisions of Table A are repeated as part of the constitution.

Otherwise I do not see a need to quote a statute or statutory instrument as authority for an enforced amendment to the constitution brought about by a change to Table A.

If you are looking at a constitution part of which is Table A then it is necessary to refer to Table A to find out what its relevant provisions have to say. And if you are stupid enough to do that without checking your copy of Table A is up to date you deserve all you get.

H W Higginson (10)

I agree that the constitution should be amendable by special resolution but not that members should, by unanimity, be able to entrench provisions removable only by unanimity. I am concerned that such a provision might prejudice new members.

K S V Thorogood (11)

Yes, providing that any modification or amendment is reviewed and approved the Registrar at Companies House.

Association of Chartered Certified Accountants (17)

We agree that there should be a general rule to the effect that a company's constitution should be capable of amendment by special resolution. It should, additionally, be open to a company to entrench individual provisions in its constitution so as to require unanimity to amend or remove them.

The Royal Institute of Chartered Surveyors (19)

Yes

Dundas Wilson & Garretts (20)

We agree that the general rule should be that the constitution of a company should be amendable by special resolution. However, we would suggest providing greater flexibility than simply allowing members to entrench provisions so that unanimity would be needed to change or remove them. We would therefore suggest allowing percentages between 75% and 100% to be prescribed by the constitution for such changes.

Confederation of British Industry (21)

Yes

The Institute of Chartered Accountants of Scotland (23)

Yes, this would be sensible.

Association of British Insurers (24)

We agree that a company's constitution should be amendable by special resolution. For avoidance of doubt we should emphasise that a company's constitution should not be capable of amendment by ordinary resolution. Although entrenching provisions so as to require a higher majority to change than the 75% of those voting as specified for a special resolution, should be permitted, requiring unanimity can create insuperable barriers to achieving at a future date what an overwhelming majority of shareholders decide at that time to be in the company's best interests. We believe that the concept of qualified majority is the correct basis on which to permit changes to the company's constitution, Memorandum or Articles.

Dr Elaine Sternberg (25)

Yes

KPMG (26)

In principle, entrenchment might be seen as offending against the principle of majority rule (subject to rights for unfairly prejudiced minorities) and, particularly in the case of founder entrenchment in public companies, there must be some doubt as to whether the investors would be aware of the entrenchment. Perhaps it should be made a condition that public companies should list any existing entrenchments when offering their shares for subscription (or for sale, if treasury stock is allowed)? That is not to say that entrenchment should be disallowed. Some provisions may be perfectly acceptable; an example would be where the constitution of an owner-occupied flats management company (usually a private company) restricted membership to the current lessees.

York Place Company Services Ltd (28)

Yes

The Law Society (29)

We agree that the constitution of a company should be amendable by special resolution and that the restraints of Russell v Northern Bank Development Corporation Ltd [1992] BCLC 1016 should be removed. We consider that s 17(2) of the Companies Act 1985 provides a satisfactory mechanism for entrenching rights in the company's constitution (of course suitable adjustments will have to be made to reflect the fact that there is one single constitutional document). In dealing with the entrenching of provisions in the company's constitution it will be necessary to deal with the following situations:

- a) the mechanism for entrenching rights on the initial incorporation of a company and the alteration of such rights;
- b) the mechanism for entrenching rights subsequent to incorporation and the alteration of such rights.

We consider that it should be left to the incorporators, if they so desire, to provide for the necessary majority needed to both entrench and to alter class rights. If the company's articles are silent on this, then it would be appropriate to provide for unanimity.

The General Council of the Bar (30)

Generally a company should have power to amend its constitution by special resolution. But the committee agrees that it should be open to a company to prescribe that amendment should require the consent of all members or of all members voting at the meeting to consider the amendment, or be subject to such other requirements as the company may think fit.

Kenneth Lavanchy (31)

Yes: but it should not be possible for provisions to be entrenched with amendment/removal only by unanimous vote. Investment Agreements exist for purposes such as this.

British American Tobacco (33)

Yes. However, the proposed entrenchment provision if it were applied to a public company could be taken by institutional investors as being a protectionist measure to ward off potential aggressors. It is unlikely that this would be acceptable to the investment community - it is almost akin to the poison pill tactic.

When I worked for Forte plc, I came across an unusual provision for a special class of Founder Shares that had fabulous voting rights in favour of the Forte foundation. The investment community and The Stock Exchange was highly critical of the provision and it was investigated by The Takeover Panel during the takeover by Granada Group

plc. Is this therefore only likely to be acceptable to private companies?
London Society of Chartered Accountants (35) Yes
Freshfields (36) We wonder if there are circumstances in which it should be possible to entrench provisions so that they cannot be changed even by unanimity.
The Abbey National Group (38) Yes
Campbell Hooper (39) Mixed views. Some in favour. Others believe a time limit (e.g. maximum 5 years) should apply to entrenchment of provisions. Campbell Hooper agrees.
Deloitte & Touche (41) Yes
The Law Society of Scotland (42) In principle, yes. The Government should, however, be cautious about extending the ability to “entrench” provisions in the constitution of a company beyond those matters for which entrenchment is currently considered appropriate, principally individual share rights.
Fork Truck Association (43) Yes
D A Buskell (44) Agree
British Bankers’ Association (45) Yes
Institute of Directors (47) Yes
Clifford Chance (52) Yes, absent entrenchment, the constitution of a company should be amendable by special resolution. We think that a company should be able to entrench provisions however it wishes.
The Faculty of Advocates (54) We agree with such a general rule, but consider that founder members should continue to be able to provide for entrenched provisions in the constitution, and that these should continue to be recognised. We also agree that the provisions in Section 459 of the Act in relation to non-entrenched provisions where the minority felt oppressed.
The Mechanical Copyright Protection Society Ltd & The Performing Right Society Ltd (55) Yes, since it provides protection on companies formed for specific reasons.

20 Do you agree with the proposals in paragraphs 2.28 and 2.29 on the publicity to be given to a company’s constitution?

Brian G Strand (1) Yes but available on company website to members and public
Federation of Small Businesses (2) Agreed

<p>Buddenbrook Consultancy (3) Yes</p>
<p>J Brady (4) Yes</p>
<p>HM Land Registry (5) Yes, it is important that a copy of the constitution should be readily available on request and that alterations to the constitution are properly recorded.</p>
<p>F A G Kay (9) There seems no change from existing practice so what is there to object to? I agree.</p>
<p>H W Higginson (10) Yes</p>
<p>K S V Thorogood (11) Yes but see the answer to Question 19 as a qualification.</p>
<p>The Institute of Chartered Accountants in England and Wales (15) We are concerned that the costs that companies would incur in altering their constitutions would outweigh any benefits. We believe that the Steering Group should examine whether compliance with the obligation under the First Directive can be achieved in a more cost-effective manner.</p>
<p>The Royal Institute of Chartered Surveyors (19) We agree, but additionally we believe that a certificate confirming that the company has notified all members should be issued.</p>
<p>Dundas Wilson & Garretts (20) Yes</p>
<p>Confederation of British Industry (21) In principle yes, but it should be noted, as a matter of technical drafting, that where a Special Resolution overrides the Articles, or indeed is passed in pursuance of a provision contained therein, but that does not actually alter their wording, there should be no requirement to re-file the Articles. An example of such a case is where, say, an Article provides that there shall be a maximum limit of ten directors unless otherwise resolves by [Special] Resolution; if such a [Special] Resolution is passed, the Article as such is not altered.</p>
<p>The Institute of Chartered Accountants of Scotland (23) Yes</p>
<p>Association of British Insurers (24) Yes</p>
<p>Dr Elaine Sternberg (25) Yes</p>
<p>KPMG (26) We agree with the proposals in paragraph 2.28. Those in paragraph 2.29 would not be satisfactory unless companies are notified individually of the change made by statute or statutory instrument. Failing such notification would be consistent with the proposal in question 27 to provide that a person is <u>not</u> to be assumed to have notice of a matter merely because of its being disclosed in a document kept by the registrar of companies or made available by the company for inspection. As a matter of practice directors of private companies in particular do not have the time or the resource to monitor changes to the law which are not widely publicised or are publicised whilst they are on</p>

holiday. It is also for consideration whether the State should bear the cost of amending company constitutions where it has imposed change.

York Place Company Services Ltd (28)

Yes

The Law Society (29)

We agree with these proposals

The General Council of the Bar (30)

The committee agrees that a company must send a copy of its constitution with amendments up to date to every member on request. Some limit on this, for example, for intervals between each request, may be necessary to prevent pressure groups using this device to bring pressure on a company. The committee agrees that when an amendment is filed, a copy of the constitution as amended should be filed. It is suggested in the committee's response on Company Meetings that public companies might well be required to establish websites for giving information to shareholders and others. If so, or, if a company has a website, the constitution might well be required to be placed on the website. This would justify an interval between any demands for a copy. This would be a protection against misuse by a pressure group of the right to obtain copies.

Kenneth Lavanchy (31)

Yes

British American Tobacco (33)

In principle yes, but it should be noted, as a matter of technical drafting, that where a Special Resolution overrides the Articles, or indeed is passed in pursuance of a provision contained therein, but does not actually alter their wording, there should be no requirement to re-file the Articles. An example of such a case is where, say, an Article provides that there shall be a maximum limit of ten directors unless otherwise resolved by [Special] Resolution; if such a [Special] Resolution is passed, the Article as such is not altered.

In addition, it is increasingly likely that copies of the constitution will become available in other formats to shareholders via the internet. This would either be through the Companies House own website or through that of the Company concerned. If an individual shareholder requested a copy of the constitution then this could be done in this format as well as through the usual means

London Society of Chartered Accountants (35)

We agree that where a company's constitution has been amended by an Act of Parliament that it should not be necessary to send a copy of the Act with a copy to the constitution to the member that has requested it. However, the constitution should be annotated with the title of the Act that has amended it.

An issue that needs to be addressed is whether the suggestion in paragraph 2.29 is the most cost-effective mechanism of meeting the requirement under the First Directive. It seems an expensive proposition that companies should have to amend their constitutions for alterations imposed by statute and sent them to the Registrar together with a note identifying the amending statute.

The Abbey National Group (38)

Yes

Deloitte & Touche (41)

Consideration should be given to whether there is a more cost-effective means of meeting the public disclosure requirement of the First Directive. For example limits on

the frequency with which a member can request copies of the constitution and alternative procedures where companies have to amend their constitutions for alterations imposed by statute and sent them to the Registrar together with a note identifying the amending statute. For example, in the latter case, where the frequency and volume of change is outside of a company's control, would notification be needed on an individual basis or would a cumulative basis (say 12 months) be sufficient? This may be of particular importance given the proposed requirement at q34 for private companies to make shares no par value.

The Law Society of Scotland (42)

Yes

Fork Truck Association (43)

Yes

D A Buskell (44)

Agree

British Bankers' Association (45)

Yes

Institute of Directors (47)

No. This may be onerous for listed companies. A company should be entitled to charge a reasonable fee for the provision of a constitution requested by a member.

Jordans (51)

We would suggest that Members would be entitled to a copy of the company's constitution, on request, when initially joining the company. As proposed changes to a constitution are circulated to Members for consideration, we would argue that if a Member wished to obtain a copy of the constitution incorporating all changes it would be appropriate for the Member to be charged a reasonable fee. Otherwise the company will bear the cost of supplying information to a Member twice.

The privilege of incorporation has always been balanced by the requirement of public disclosure of specific documents. We would argue that the governing constitution of a company is a relevant document.

Clifford Chance (52)

Yes

The Faculty of Advocates (54)

We consider that the provisions in section 19 of the Act should continue to apply. However, we are also in favour of retaining the requirement to send to members, on request, a copy of any act of Parliament which effects a change to the constitution. We consider that a company should be entitled to fix a reasonable charge for supply the constitution. At five pence, the present maximum charge appears plainly inadequate. We agree with the proposal made at paragraph 2.29.

The Mechanical Copyright Protection Society Ltd & The Performing Right Society Ltd (55)

Yes

21 Do you agree with the proposals in paragraphs 2.31 and 2.32 on the formation and registration of a company?

Brian G Strand (1)

Yes again electronically to speed things up
Federation of Small Businesses (2) Agreed. The abolition of the statutory declaration is welcomed.
Buddenbrook Consultancy (3) Yes
J Brady (4) Yes
HM Land Registry (5) Yes, it is important that the acceptability of the name of the company be checked at the time of registration but no other checks into the accuracy of the declaration of compliance be undertaken at that stage.
F A G Kay (9) Yes
H W Higginson (10) Yes
K S V Thorogood (11) Yes
The Royal Institute of Chartered Surveyors (19) Yes
Dundas Wilson & Garretts (20) Yes
Confederation of British Industry (21) Yes
The Institute of Chartered Accountants of Scotland (23) Yes
Association of British Insurers (24) Yes
Dr Elaine Sternberg (25) Yes
KPMG (26) Yes
York Place Company Services Ltd (28) Yes except that the declaration of compliance must reinforce the seriousness of forming a company and the ongoing obligation of any officers. The removal of the statutory declaration takes away the double check before reaching the Registrar that all documents are in order and complete. Some form of recognised licensed incorporater system should be considered.
The Law Society (29) We agree with these proposals
The General Council of the Bar (30) Yes
Kenneth Lavanchy (31) Yes
British American Tobacco (33) Yes. In principle the proposals are sensible although there would be some value in amalgamating the Registration form with the formal declaration of compliance as a single form for the sake of simplicity. The same comments made in response to question 14 regarding electronic signing and filing of these forms should also be

considered within this context.
<p>London Society of Chartered Accountants (35) Yes. As this is merely a confirmation of due process, we do not have the same concerns as in our answer to question 14 above that such a declaration of compliance would be signed by corporate directors in respect of “shelf companies”. However, a company’s first significant action is the commencement of trading. It is at this stage that a declaration of compliance would have most significance, as it would bind in the actual members that control the company at commencement of its trading life.</p>
<p>The Abbey National Group (38) Yes</p>
<p>Deloitte & Touche (41) Yes</p>
<p>The Law Society of Scotland (42) The Committee regrets the proposal to abolish the statutory declaration of compliance. While it is recognised that this may appear in the eyes of the founder members and officers to be a redundant document, it is the only assurance that a third party with appropriate public duties has or ought to have satisfied himself or herself that the company has been formed for a lawful purpose and that the signatures on the registration documents are genuine. Given the concern that the ease of incorporating companies in Great Britain may result in abuse by those intent upon fraud or other crimes, the Committee believes that it is unfortunate that the opportunity is not being taken to enhance the significance of this declaration of compliance. The Committee does not believe that the existence of criminal sanctions is a sufficient deterrent, certainly not to any person proposing to form a company for an improper purpose. Subject to these comments the Committee would agree with the proposals.</p>
<p>Fork Truck Association (43) Yes</p>
<p>D A Buskell (44) Agree but consider it should be a statutory declaration, unless the penalties for false or reckless are sufficiently severe.</p>
<p>British Bankers’ Association (45) Yes</p>
<p>Institute of Directors (47) Yes</p>
<p>Clifford Chance (52) Yes</p>
<p>The British Chambers of Commerce (53) We support the suggestion that the registration of a company should no longer have to be under oath, but instead with a non-statutory declaration of compliance, with appropriate penalties where it is falsely or recklessly made.</p>
<p>The Faculty of Advocates (54) We agree with these proposals.</p>
<p>The Mechanical Copyright Protection Society Ltd & The Performing Right Society Ltd (55) Yes</p>

22 Do you agree with the proposals in paragraphs 2.33 and 2.34 on the effect of registration, including specifically the proposal to retain the conclusive effect of the incorporation certificate?

Brian G Strand (1) Yes
Federation of Small Businesses (2) Agreed
Buddenbrook Consultancy (3) Yes
J Brady (4) Yes
HM Land Registry (5) Yes. It is important that reliance can be placed on the incorporation certificate without any further investigations being undertaken.
F A G Kay (9) Dealing with the second part of the question first, it is extremely difficult for a member to institute proceedings in such circumstances. Apart from the cost element, it is usually a case of closing the stable door after the horse has bolted because it does not come out into the open until long after the event that something contrary to the constitution has been done – and if you have a good spin doctor it never comes out. Because it can provide protection – albeit not absolute – to Members I think a company’s capacity should be limited to that which is stated in its constitution, including its objects. No one would suggest, for example, that the United States of America should have unlimited capacity regardless of what is in its constitution – why should limited companies be any different. Both are supposed to be democratic institutions.
H W Higginson (10) Yes
K S V Thorogood (11) Yes
The Royal Institute of Chartered Surveyors (19) Yes
Dundas Wilson & Garretts (20) Yes
Confederation of British Industry (21) Yes
The Institute of Chartered Accountants of Scotland (23) Yes
Association of British Insurers (24) Yes
Dr Elaine Sternberg (25) Yes
KPMG (26) Yes
York Place Company Services Ltd (28) Yes

<p>The Law Society (29) We agree with these proposals and consider it essential that the conclusive effect of the certificate of registration should be retained in order to avoid any challenge to the validity of the incorporation of a company.</p>
<p>The General Council of the Bar (30) The committee agrees that the certificate of incorporation should be conclusive as at present. But the declaration of compliance should still require a statutory declaration. As the certificate is to be conclusive, its truth should be supported with some formality.</p>
<p>Kenneth Lavanchy (31) Yes</p>
<p>British American Tobacco (33) Yes</p>
<p>London Society of Chartered Accountants (35) Yes. We presume that the reference to person in the last sentence of paragraph 2.33 includes both legal and natural persons.</p>
<p>The Abbey National Group (38) Yes</p>
<p>Campbell Hooper (39) A director should be treated as validly appointed (for S35 purposes, etc.) if: (a) there is a valid Board resolution appointing him/her, <u>and</u> (b) a signed Form G288 is filed.</p>
<p>Deloitte & Touche (41) Yes</p>
<p>The Law Society of Scotland (42) Yes</p>
<p>Fork Truck Association (43) Yes</p>
<p>D A Buskell (44) Agree</p>
<p>British Bankers' Association (45) Yes</p>
<p>Institute of Directors (47) Yes</p>
<p>Clifford Chance (52) Yes</p>
<p>The Faculty of Advocates (54) We agree with these proposals.</p>
<p>The Mechanical Copyright Protection Society Ltd & The Performing Right Society Ltd (55) Yes</p>

23 Do you agree that a company should henceforth have unlimited capacity, regardless of anything in its constitution, including its objects, but that a member should continue to be able to take proceedings to restrain the doing of an act contrary to the constitution?

Brian G Strand (1)

Yes
Federation of Small Businesses (2) Agreed
Buddenbrook Consultancy (3) Yes - although I wonder if the ability to take action should be restricted to members holding 10% of the shares (similar to the requirement to hold an EGM)
J Brady (4) Yes but subject to “objects” retention
HM Land Registry (5) There should be default provision so that the situation is clear even if no mention of the status of the company is specified. The right to take proceedings should be retained.
F A G Kay (9) Yes. It is not possible to contract out of the law, be it charitable law or otherwise.
H W Higginson (10) Yes
K S V Thorogood (11) No. A company to be subject to constitution restraints.
Association of Chartered Certified Accountants (17) We believe it to be a logical progression from s35 of the Companies Act 1985 for companies to be given unlimited capacity to act and to be free of any compulsion to list their objects in their constitution. Where any restrictions or limitations are set down in the constitution of a particular company, members should have the right to restrain any violation of them.
The Royal Institute of Chartered Surveyors (19) Yes
Dundas Wilson & Garretts (20) We are slightly nervous at the prospect of creating the potential for conflict between members and companies as a result of possible differences between the company’s capacity under statute and purported limitations of its capacity in its constitution. However, on balance we would support the proposal.
Confederation of British Industry (21) Yes, enthusiastically.
The Institute of Chartered Accountants of Scotland (23) Yes
Association of British Insurers (24) We believe that this is probably the basis which should apply in law
Dr Elaine Sternberg (25) No. This effectively makes nonsense of corporate governance. It would be far better, if a practical way to implement it could be found, to restore full ultra vires. This could, perhaps, be achieved, at least broadly, if at least certain types of acts, e.g., contributions to charities, political parties, were recognised to be ultra vires for businesses or even commercial companies, as defined by their objects. In addition, an extraordinary resolution should be required to change the objects of the company, or they will often have little binding effect even on the directors’ vis a vis the members. It should not be forgotten, as these provisions seem to do, that while the directors are representatives of the company to third parties, they do so only as the representatives or stewards of the members. It is the members, not the board of

directors, who in aggregate are the owners of the company, entitled to end its life by winding it up if they so choose.

KPMG (26)

Yes

York Place Company Services Ltd (28)

Yes and this should be extended to Directors being able to take proceedings where it feels co-directors are acting contrary to the constitution.

The Law Society (29)

We agree with this proposal. We assume that the shareholder's right to take proceedings could not be invoked to restrain an act in fulfilment of an earlier obligation entered into by a company. Where a company has full capacity as a matter of principle it is unnecessary to have a provision enabling shareholders to ratify a transaction which is outside the company's objects. However, entering into such a transaction would also constitute a breach of director's duties and because of this doubts about the validity of a transaction may arise. Accordingly, shareholders should have a power by simple majority to ratify a transaction which is outside the company's objects. Such a resolution should not effect any liability incurred by the directors or any other person (see section 35(3)).

The General Council of the Bar (30)

The committee agrees that a company should have unlimited powers to deal with third parties, regardless of any restriction in its constitution, including any statement of its objects. Any such restriction would operate internally. So any member would be able to restrain an act by the directors contrary to the constitution or, if too late to do that, to recover compensation for the company. But an act by a director, or person associated with him ought to be voidable at the instance of the company, subject to the rights of third parties.

Kenneth Lavanchy (31)

Yes, see response to Question 12

British American Tobacco (33)

Yes, enthusiastically. See also my response to question 13 concerning the objects clauses of limited companies

London Society of Chartered Accountants (35)

Yes. It should also be possible for members to be able to choose to restrict the company's capacity. For example, for charitable purposes or to make ethical investments only.

The Abbey National Group (38)

Yes

Campbell Hooper (39)

Yes

Deloitte & Touche (41)

Yes

The Law Society of Scotland (42)

Yes. See also the Committee's comments in relation to the "general commercial company"

Fork Truck Association (43)

Yes

D A Buskell (44)

Agree

British Bankers' Association (45)

Yes. We would wish to see Companies Act 1985 s711(A) implemented.

Institute of Directors (47)

No. The Institute believes that a company should be able to limit its capacity through provision on its registration form or constitution. Members of the company should have the right to take proceedings to restrain the doing of anything contrary to these provisions without prejudice to the rights of third parties.

City of London Law Society (50)

We welcome the proposals that: (a) a company should have unlimited corporate capacity, regardless of anything in its constitution; (b) whilst a member of the company would retain the right to take proceedings to restrain the doing of an act contrary to its constitution, this would be without prejudice to the rights of third parties (section 35(2)); (c) it should be possible for the members of the company to ratify by a resolution an act done by the directors contrary to the constitution.

We consider that a company should have all the powers of a natural person (except those incapable of exercise by an incorporeal being) and also the powers required to fulfil its functions as a company, such as the power to issue shares and declare dividends.

It would also be helpful if protection could be extended (when the opportunity arises) to other types of entity currently outside the protection of sections 35 and 35A, such as local authorities, building societies and statutory corporations, so that the ultra vires doctrine is removed insofar as it affects third parties dealing with those entities.

We express no view at this stage on whether the members of a company should be able to ratify by ordinary or special resolution. We recognise that a special resolution would be required to alter the company's memorandum and articles of association. It is arguable that ratification of an act which would have been permitted only if the memorandum and articles had been changed in advance should also require a 75% majority rather than a simple majority.

Clifford Chance (52)

Yes

The Faculty of Advocates (54)

In light of the provisions of sections 35(1), 35A(1) and 35B, it is not clear from the Consultation Document to what extent the proposed reform would go beyond the present position. We note that at present certain transactions which are entered into by directors and in which they exceed their power under the constitution, may be voidable under Section 322A. We are not sure from the Consultation Document whether it is intended to repeal this section. We consider that the members of the company should continue to be able to take proceedings to restrain the doing of acts contrary to provisions of the constitution without prejudice to third party rights. We see no justification for the proposal to reduce the requirement for ratification of directors' acts which are contrary to such provisions from a special resolution to an ordinary resolution.

The Mechanical Copyright Protection Society Ltd & The Performing Right Society Ltd (55)

No if, for example, a company is formed for specific reasons. If directors act contrary to the provisions it should be possible for members to ratify those actions, but that should be done by special resolution, or by the amount that is required to change the objects of the company (ie unanimously in some cases).

24 Do you agree that in the case of charitable companies this should continue to be subject to the special provisions of charities law?

<p>Brian G Strand (1) Yes i.e. company law and charity add ons</p>
<p>Federation of Small Businesses (2) Agreed</p>
<p>Buddenbrook Consultancy (3) Obviously charities need to be subject to Charity law. This is not an area where I have much experience but many of those running charity companies are very unclear where their priorities lie. Is it not possible to clarify this either under Charity or Company law?</p>
<p>J Brady (4) Yes but secondary to company law</p>
<p>HM Land Registry (5) Yes</p>
<p>F A G Kay (9) Yes – but with a reservation regarding paragraph 2.40 Although a party to a transaction should not generally be bound to enquire whether it is permitted by a company’s constitution or is beyond the powers of the directors nevertheless such a party should not be able to hide behind this protective clause where it is blatantly obvious the transaction is ultra vires. e.g. a quasi loan.</p>
<p>H W Higginson (10) Yes</p>
<p>K S V Thorogood (11) Yes</p>
<p>Association of Chartered Certified Accountants (17) We agree that companies that are charities should be subject to charity law with respect to their activities.</p>
<p>Association of Accounting Technicians (18) We would like to see increased alignment between company law and charity law. This is necessary to address the current situation on grounds of simplification and where conflicts in compliance exist.</p>
<p>The Royal Institute of Chartered Surveyors (19) Yes</p>
<p>Dundas Wilson & Garretts (20) Yes</p>
<p>Confederation of British Industry (21) Yes</p>
<p>The Institute of Chartered Accountants of Scotland (23) In principle, we agree that the rules for charitable companies should be consistent with those for unincorporated charities. This is not the case in other subject areas, such as accounts and audit, and we understand that a review of the laws applicable to all charities is taking place.</p>
<p>Association of British Insurers (24) We have no firm view</p>

Dr Elaine Sternberg (25)
See Q23 immediately above. If the proposed changes would make the owners of a non-charitable company less well protected than the beneficiaries of a charitable company, the discrepancy should be rectified by improving the state of the members of the non-charitable company.

KPMG (26)
Yes

York Place Company Services Ltd (28)
Yes

The Law Society (29)
We agree with this proposal and consider that charitable companies would be better regulated by separate legislation.

The General Council of the Bar (30)
The committee agrees that transactions by charitable companies should be subject to charity law.

Kenneth Lavanchy (31)
Yes

British American Tobacco (33)
Yes

London Society of Chartered Accountants (35)
Yes

The Abbey National Group (38)
Yes

Deloitte & Touche (41)
Yes

The Law Society of Scotland (42)
“Charities law” (in general) is not the same in Scots law and English law. It is assumed, however, that what is meant are the statutory provisions referred to in s.35(4), that applicable in Scotland being s.112 of the 1989 Act.
In the Committee’s view Section 112(3) does not sufficiently protect persons dealing with a charity in good faith. In particular, there are two cases where the Committee believes such a person ought to be protected but is not (a) where he or she reasonably believes the consideration to have been “full” and (b) where he or she reasonably believed that the Act was intra vires.
With regard to (a), the Committee believes that the requirement for “full consideration” should be replaced by a requirement that the person dealing with the charity should be acting in good faith and that he or she reasonably believed that the consideration was adequate in all the circumstances.
With regard to (b), the Committee does not understand why a person who receives a charitable donation should be put to the burden and expense of examining the objects of the charity in order to determine whether on a proper construction thereof the purpose of that donation is intra vires. He would not be required to undertake such an enquiry if the donor was a trading company without charitable status. Here the Committee would suggest that the protection afforded by Sections 35 and 35A (as amended) should extend to any person receiving money or other benefit from a company unless he or she knows that it is a charity and, acting in bad faith, obtains a benefit which he knows to be ultra vires.

Fork Truck Association (43) Yes, most definitely.
D A Buskell (44) Agree
Institute of Directors (47) Yes
Clifford Chance (52) Yes
The Faculty of Advocates (54) We agree that the special provisions in respect of charities law should continue to apply.
The Mechanical Copyright Protection Society Ltd & The Performing Right Society Ltd (55) Yes

25 Do you agree with the proposals in paragraphs 2.37-40 relating to the powers of directors to bind the company, including specifically the proposal that special provisions should continue to apply to charitable companies?

Brian G Strand (1) Yes
Federation of Small Businesses (2) Agreed
Buddenbrook Consultancy (3) Agree proposal - should right of member be restricted to 10% as above?
J Brady (4) Yes
HM Land Registry (5) Yes, it is important that someone dealing with a company should not have to enquire if the transaction is permitted by the constitution or if the powers of the directors are limited.
Pannell Kerr Forster (7) This question touches on the issue of charitable companies. We believe that the whole issue of whether a charity is incorporated or unincorporated should make minimal differences to the way it operates. At present, the serious mismatch between incorporated and unincorporated charities in their accounting, reporting and whistleblowing duties causes unnecessary complications. Where there are differences, we believe that charity law should take priority over company law. To achieve this, company law should be amended so as to leave any issues peculiar to charities to charity law. Charity law would also need to be changed to remove the exclusions for incorporated charities in, for example, s41 of the Charities Act 1993. There are many complexities in this whole area, and we believe they ought to be tackled as part of the overall company law reform and not left to the Charity Commission to develop their own corporate vehicle, as some commentators are suggesting.
H W Higginson (10)

Yes
K S V Thorogood (11) Yes
The Royal Institute of Chartered Surveyors (19) Yes
Dundas Wilson & Garretts (20) Yes
Confederation of British Industry (21) Yes
The Institute of Chartered Accountants of Scotland (23) We agree with the proposals in paragraphs 2.37 and 2.38. Please refer to our comments on question 24, in relation to charities and paragraph 2.39.
Association of British Insurers (24) We have no firm view
Dr Elaine Sternberg (25) See Q23 and Q24 immediately above.
KPMG (26) Yes
York Place Company Services Ltd (28) No, I think the Directors must respect the limitations of the constitution. It is not practical to expect the member less involved with the day to day running of the company to know within short time spans where a Director has breached the constitution and therefore wishes to bring proceedings.
The Law Society (29) We agree with these proposals but consider that the present s35(A) of the Companies Act 1985 is defective in a number of technical respects.
The General Council of the Bar (30) The answers to Questions 23 and 24, which deal with the powers of the company, apply equally to the powers of directors.
Kenneth Lavanchy (31) Yes
British American Tobacco (33) Yes
London Society of Chartered Accountants (35) Yes
The Abbey National Group (38) Yes. As a bank we would prefer to see clarity here. Limits in other companies' constitutions should not jeopardise agreements we enter into in good faith. If limits are still to exist there must be a clear filing system in place.
Deloitte & Touche (41) Yes

The Law Society of Scotland (42)

See the Committee's comments in relation to charitable companies in response to question 23.

The Committee proposes that Section 35A(1) should extend not only to a person dealing with the Board of Directors (collectively) but also to a person dealing with a single Director unless he or she is dealing in bad faith i.e. knowing that a majority of the Board of Directors had refused to authorise the Act in question.

Section 35A(1) in its present form strictly speaking requires any person dealing with a company, in whatever manner, to obtain sight of a resolution passed by a validly constituted Board of Directors approving the Act in question. Again strictly speaking this would require that person to investigate the number of Directors and the Articles in order to establish that what appeared to be a validly constituted Board and resolution thereof did authorise the transaction. In practice, this is only sought in material transactions where legal advice is obtained and where, arguably, the possibility of abuse by a single Director is negligible as a result of other checks and safeguards in the process. The practical assumption is made that the Directors have delegated authority to the particular Director with whom the third party is dealing, and it would be dangerous to make further enquiries which might remove the protection afforded by s.35A and the assumption that valid delegation had taken place as a matter of internal management.

The Committee would, however, retain the safeguard that a person other than a Director should be required to establish that authority has been delegated to him or her by a resolution of the Board.

Fork Truck Association (43)

Yes

D A Buskell (44)

Agree

British Bankers' Association (45)

Yes. Absolute clarity is required by lenders. It is important that any agreement entered into by a lender and a company in good faith, should in no way be jeopardised by limits of Directors' powers in that company's constitution - clarity regarding this would be welcomed. In addition, if such limits exist it is important that a system is in place for a lender to be able to immediately establish this. The proposals suggested in paras 2.39 and 2.40 are acceptable.

Institute of Directors (47)

We agree with the proposal to retain this provision.

City of London Law Society (50)

We support the proposals that: (a) the power of the board of directors to bind the company, or authorise others to do so, is deemed, in favour of a person dealing with the company in good faith, to be free of any limitation under the company's constitution (*section 35A(1), as interpreted by section 35A(2) and (3)*); (b) the right of a member to bring proceedings to restrain the directors from acting beyond their powers is retained, except that this would not apply to restrain an act in fulfilment of an existing obligation of the company (*section 35A(4)*); (c) the abolition of ultra vires in relation to the company should not affect any liability which might be incurred by the directors, or any other person, by reason of the directors exceeding their powers (*section 35A(5)*); (d) a party to a transaction with a company should continue to have

no duty to inquire whether it is permitted by the company's constitution or beyond the powers of the board of directors to bind the company or authorise others to do so (*section 35B*), but see also our answer to question 27.

Clifford Chance (52)

Yes

The Faculty of Advocates (54)

We agree with these two proposals, subject to our observations in response to question 23 above.

The Mechanical Copyright Protection Society Ltd & The Performing Right Society Ltd (55)

We are not aware in the experience of our company any difficulties with these provisions and therefore have no amendments to offer.

26 Do you agree that the law relating to the powers of the directors to bind the company should be modified on the lines of the present section 322A where the other party is a director or a person connected to a director? Or should such persons simply be excluded from the protection given to third parties by the present section 35A

Brian G Strand (1)

Yes

Federation of Small Businesses (2)

Agreed

Buddenbrook Consultancy (3)

Would prefer to see exclusion

J Brady (4)

Simply be excluded from S35A protection

HM Land Registry (5)

We favour the simpler approach of excluding such persons from the protection provisions

F A G Kay (9)

I cannot get very excited about legislation such as sections 35A and 322A because first I cannot recall an instance where these sections were applicable and secondly I am of the firm belief that however the law is worded there is always out there somewhere a solicitor or someone else who is clever enough to get round it.

My suggestion is to leave these two sections basically as they are.

H W Higginson (10)

A director and person connected with a director should simply be excluded from the protection given to third parties by section 35A.

K S V Thorogood (11)

Exclude from protection by the present Section 35A.

Stephen Griffin (12)

I noted with some concern the company law steering group's interpretation of the law governing current S35 CA 1985. I would wish to make the following observations. The report considered that in relation to dealings with third parties, the present law (s35 CA 1985) should be clarified to ensure that a private or public company had unlimited capacity. The basis for this latter proposal was a fear that the problem of

ultra vires transactions still existed. However, with respect, it is submitted that such a fear is unwarranted in the context of corporate capacity. In truth, the inability of a third party to enforce a transaction with a company will not be a matter of lack of capacity but rather a question of whether the officer of the company involved in the transaction had the requisite authority to bind the company. Yet, it is to be noted that the report considered that the purpose of S35A was to protect third parties when dealing with a director who was absent of any authority to enter into the transaction in question. With the utmost respect, it is submitted that the interpretation afforded to S35A(1) is flawed. Section 35A(1) provides that, "In favour of a person dealing with the company in good faith, the power of the board of directors to bind the company, or authorise others to do so, shall be free of any limitation under the company's constitution. Section 35B then provides that, "A party to a transaction with the company is not bound to enquire whether it is permitted in the company's memorandum or as to any limitation on the powers of the board of directors to bind the company or authorise others to do so." In effect, the board may authorise an individual director to enter into any transaction which is outside the terms of the company's constitution. The crucial point is that an individual director in entering into a transaction must first have been authorised to do so by the board. As such, agency rules are still relevant to determine whether an individual director had the requisite authority (whether he had been authorised) to enter into a particular transaction.

The Royal Institute of Chartered Surveyors (19)

We believe such persons should be excluded from the protection given to third parties by the present section 35A.

Dundas Wilson & Garretts (20)

Yes

Confederation of British Industry (21)

Without prejudice to any modifications to section 322A which might be thought desirable, we think it much preferable to retain the concept of such a section rather than adopt the route of a simple exclusion from section 35A.

The Institute of Chartered Accountants of Scotland (23)

We prefer the second alternative - that such persons should simply be excluded from the protection given to third parties by the present section 35A. Such connected parties would need to take their own advice at the time of the transaction.

Association of British Insurers (24)

We fully concur with the principle underlying the law as currently framed but have no firm opinion on what modification to the existing legal provisions might be appropriate.

Dr Elaine Sternberg (25)

See Q23 and Q24 immediately above.

KPMG (26)

We favour the second option: directors and their connected persons should be excluded from the protection given to third parties under section 35A.

York Place Company Services Ltd (28)

Exclude from protection under S35A.

The Law Society (29)

A section along the lines of section 322A is needed to protect innocent third parties who are involved in a transaction with directors where the directors are acting in

excess of their authority. Thus it is essential to have a provision similar to section 322A(5)(c) and 322A(7). It may be possible to simplify section 322A but we cannot see any need to do so. Also, as a matter of general principle, we consider it desirable that where a statutory prohibition is created the consequences of breach of that provision are clearly spelt out in the legislation as in the case with section 332A.

The General Council of the Bar (30)

The committee prefers the alternative that directors and persons connected with them dealing with a company should be excluded from the protection conferred by Section 35A of the Companies Act 1985 rather than a provision on the lines of Section 322A.

Kenneth Lavanchy (31)

Exclude from the scope of section 35A

British American Tobacco (33)

Without prejudice to any modifications to Section 322A which might be thought desirable, we think it much [more] preferable to retain the concept of such a section rather than adopt the route of a simple exclusion from Section 35A.

London Society of Chartered Accountants (35)

Yes

The Abbey National Group (38)

The law should be improved if directors and connected persons were specifically excluded from the protection in Section 35A. The impact of this exclusion should be outlined by merging provisions in Section 322A in a new Section 35A.

Campbell Hooper (39)

Yes

Deloitte & Touche (41)

Yes

The Law Society of Scotland (42)

Refer to the Committee's response to Question 25 in relation to dealings with a single Director.

In principle, the Committee would prefer to retain Section 322A as a clear statement of a limitation on the powers of the Directors to enter into transactions with themselves or their close associates. While as a matter of legal interpretation, simply denying such persons the protection afforded by s.35A may amount to the same thing, the "message" is not so clearly expressed and in that respect the change would go against the general trend of the review of Part X.

Fork Truck Association (43)

Yes

D A Buskell (44)

It would be best to extend section 35A

British Bankers' Association (45)

It is assumed that the definition of "connected persons" is that used in the Companies Act s346, confirmation of this would be welcome. It is considered that the law would be improved if directors and connected persons were specifically excluded from the protection in section 35A. The effect of such exclusion also needs to be spelt out by consolidating the provisions in section 322A in a revised section 35A.

Institute of Directors (47)

Section 35A currently provides an important exception from the principles of the law

of agency according to which an officer of the company cannot be bound in respect of a transaction for which the officer has neither actual nor ostensible authority. Section 322A limits the exception as regards transactions between the company and its directors or their connected persons. We consider that an exclusion of directors and connected persons from the protection given to third parties by section 35A be introduced to replace section 322A.

City of London Law Society (50)

As pointed out in our previous response of June 1999, section 35A does not save a transaction if it has not been authorised by the directors at all, or the purported authorisation by the directors is ineffective because of a procedural defect in the company's internal authorising process. We suggest that the above provisions be amended to protect third parties in such cases. Clearly, a sensible balance must be struck between protecting a company against the risk of an unauthorised or even fraudulent person purporting to act on its behalf and protecting a third party who deals with a person held out as having authority to bind the company. We suggest that thought is given, for instance, to the creation of a statutory presumption in favour of third parties that a transaction is presumed to be validly authorised by the directors where: (a) the third party obtains a copy, certified as true by the company secretary, of a resolution of the directors of the company; (b) the resolution, on its face, authorises the transaction; (c) the names of the directors on the resolution are those whose names are recorded with the Registrar of Companies as directors of the company.

Another possibility is that a third party could be entitled to treat as conclusive a certificate to him signed by a director and the secretary (whose names are so recorded) certifying that a document had been validly authorised and executed on the company's behalf.

We also suggest that third parties should be protected more fully against the risk that the directors of a company might be acting in breach of their fiduciary duty, for the reasons set out in paragraph 2.4 of our previous Response. As observed in the Steering Group's Strategic Consultation Document of February 1999 (paragraph 1.11), company law is not currently well suited to groups of companies.

We agree that serious thought should be given to simplifying section 322A, so that it only excluded directors and connected persons from protection of section 35A. Even though section 322A(7) allows the court a wide and unfettered discretion to make an offer affirming, severing or setting aside a transaction which is voidable under section 322A but valid under section 35A in favour of a party to the transaction who is not a director or connected person (see *Re Torvale Group Limited* [1999]2 BCLC 605), there is still a potential risk for an innocent third party. To give one example, where a facility is granted by a bank to one company in a group on the security of a guarantee from another, the guarantor may well be a connected person. If, in this situation, the guarantee is outside the scope of the objects clause contained in the guarantor's memorandum of association, the effect of section 322A is, arguably, to render the guarantee voidable. In this situation, there may well be a single "transaction" (as defined by section 322A(8)) to which the borrower, the guarantor and the bank are all parties. If the borrower is connected with a director of the guarantor, the bank would not be protected by section 322(A)(5)(c) because it would be a party to the transaction. The transaction would be voidable unless ratified by the guarantor in general meeting. However, the bank would not know that the transaction required ratification, unless it had examined the guarantor's memorandum and articles of association. A number of banks have ceased, in reliance on section 35A, to obtain and

inspect their corporate customers' memorandum and articles. If section 322A is to be retained, the above trap for the unwary lender should be removed.

Clifford Chance (52)

With a view to simplifying the drafting, we prefer the second suggestion.

The Faculty of Advocates (54)

We are not aware of any deficiencies in Section 322A of the Companies Act 1985. Consequently we see no necessity to replace that section with a provision which merely excludes directors and connected persons from the protection given by Section 35A. Section 322A(2) clearly provides that such transactions are voidable at the instance of the company. We see no need to replace it by a provision which merely excludes directors and other persons from the protection of Section 35A.

The Mechanical Copyright Protection Society Ltd & The Performing Right Society Ltd (55)

Yes

27 Do you agree that deemed notice should be abolished, with the possible exception relating to the Register of company Charges; and that the qualification that a person may be affected if he fails to make reasonable inquiries should be dropped?

Brian G Strand (1)

No make all public on company website

Federation of Small Businesses (2)

Agreed

Buddenbrook Consultancy (3)

Yes

J Brady (4)

Yes

HM Land Registry (5)

It is important that it is possible to ascertain by objective means if someone is or is not bound by a charge. The deemed notice provisions is one way of ensuring that the position is clear and allows the person dealing with the company to speedily and cheaply check the details of the matters which will affect the transaction. It is therefore a fair method to adopt.

Babcock International Group plc (8)

We disagree with this proposal. Deemed notice provides certainty and simplicity, and the information in question is very accessible. We are not aware of any particularly strong reasons supporting the proposal.

F A G Kay (9)

It seems illogical that deemed notice should be abolished where, for example, a person does not receive a notice but is made fully aware of the notice by reading the copy of the same notice received by a friend or colleague.

A person who does not receive his notice of an AGM but still attends the meeting is deemed to have received due notice – which seems fair enough.

If deemed notice is abolished it is rather going to knock on the head the suggestion in Consultation Document 2 relating to general meetings that notices might be given on a bulletin board on the internet. (This is another example of the “domino effect” which

affects the Companies Act – what is done in one part of the Act has consequences for other parts of the Act.)

As regards the abolition of deemed notice not applying to the Register of Company Charges it is important to spell out whether the register referred to is the one maintained by the company or the one maintained at Companies House. Basically the register kept by the company includes all charges, equitable and legal, whereas the one kept at Companies House relates mainly only to legal charges.

From experience, I would estimate that over 90% of companies do not properly maintain the Register of Company Charges they are required to keep under s.411 CA 1985. The register maintained by the Registrar under s.397 can be considered to be up to date (as regards new charges but not charges which have been discharged or released) because transactions involving the creation of a charge are normally handled by solicitors who also attend to registration at Companies House.

The company charges register at Companies House is just like the Land Registry or Land Charges Registry. Everyone knows or should know of their existence and purpose and if anyone fails to carry out a relevant search then on their own heads be it. Deemed notice should therefore be retained as regard the company register of charges kept at Companies House.

The qualification that a person may be affected if he fails to make reasonable enquiries should NOT be dropped.

H W Higginson (10)

Yes

K S V Thorogood (11)

Yes

Association of Accounting Technicians (18)

We see the information held at Companies House as being important as a matter of public record. We therefore think it is appropriate that the deemed notice requirements should be retained. The existing arrangements seem to have clear benefits and no obvious drawbacks, so we are not in support of a change.

The Royal Institute of Chartered Surveyors (19)

We are strongly in favour of this proposal.

Dundas Wilson & Garretts (20)

Yes

Confederation of British Industry (21)

Yes, not least because the present law is muddled and confused.

The Institute of Chartered Accountants of Scotland (23)

We agree that the deemed notice should be abolished, except in relation to the Register of Company Charges.

Association of British Insurers (24)

Yes

Dr Elaine Sternberg (25)

No. See Q23 and Q24 immediately above.

KPMG (26)

We agree with the proposals

York Place Company Services Ltd (28)

Possibly except what provisions will be in place to ensure the person is made aware of relevant information in this respect.

The Law Society (29)

We consider that as a general principle deemed notice should have no role to play in a commercial context. We agree that an exception may need to be made with respect to the register of charges.

The General Council of the Bar (30)

The committee agrees that the rule of deemed notice of registered documents should be abolished, with the exception of registers of charges.

Kenneth Lavanchy (31)

The doctrine of deemed notice should not be abolished. If a person fails to protect his/her interests by not carrying out due diligence, then the consequences should be for that person's account. The whole ethos of expanding provision of company data through Companies House, is to simplify the search process.

British American Tobacco (33)

Yes, not least because the present law is muddled and confused. There is the obvious point here that technological change means that it will become increasingly easy for companies to disseminate information publicly by electronic means and that, as a result, the concept of deemed notice would be easier for companies to defend. On-line access to a company's website, including the use of an alerter service when a new event occurs, all will help in this regard.

Halifax plc – Company Secretary's Department (34)

We had one significant concern on the proposals relating to the abolition of deemed notice. We were unsure how this would interact with the contractual nature of the relationship between the company and its members - we would be concerned if the result was that the members could claim that they are not bound by the Articles of Association if they have never been given a copy of them. This could, for example result in very difficult, if not impossible, AGMs if no one is bound by the Articles. We presume that this was not the intention of the proposal and would ask you to consider carefully the risks inherent in this proposal.

London Society of Chartered Accountants (35)

Yes

The Abbey National Group (38)

Yes to both parts of the question

Deloitte & Touche (41)

Yes

The Law Society of Scotland (42)

Yes

Fork Truck Association (43)

Yes

D A Buskell (44)

Agree

British Bankers' Association (45)

It is agreed that deemed notice should be abolished, with the exception of the Register of Company Charges. It is understood that this latter issue is being considered elsewhere, and co-ordination would be welcome. It may be appropriate to consider the position again after the further work has been completed.

Institute of Directors (47)

Yes

City of London Law Society (50)

We support the proposals that: (a) section 711A(1) should be brought into force, so

that a person is not taken to have notice of a matter merely because it is disclosed in any document kept by the company for inspection; (b) in contrast, section 711A(2) should not be brought into force, so that the exclusion of deemed notice is not affected by the uncertainty which would otherwise be caused by leaving open the question whether a person would be affected by notice of any matter by reason of a failure to make such inquiries as ought reasonably to be made; (c) an exception relating to the registration of the essential features of a company charges should be retained (section 711(4)), although third parties should not necessarily be treated as having constructive notice of negative pledges and other restrictions simply because they are included on the relevant Form M395.

If section 711A(1) is brought into force, this would also be helpful in enabling an outsider to place greater reliance on the “indoor management” rule (derived from *Royal British Bank -v- Turquand (1856)*) where he would previously have been treated as having constructive notice that an internal authorisation procedure had not been correctly followed. At present, if an outsider is aware of an irregularity (other than a breach of a constitutional limitation on directors’ powers) in the authorisation of a transaction, then the outsider will not be protected. An example is where the board minutes show that two directors attended the board meeting to approve a transaction, but the outsider is on notice that the quorum for a board meeting expressly stated in the company’s articles is three directors. Another example is where a board resolution is invalid for want of disclosure of an interest on the part of a director (of which the third party is aware).

If section 711A(1) is brought into force, an outsider would still be unprotected where he had been put on actual notice. Company searches will still be necessary, in order to check certain facts as explained in paragraph 3.4 of our previous Response. Where a microfiche of a company’s public file has been supplied to an outsider, it is arguable that he has notice of the contents (including the company’s memorandum and articles of association), whether or not he actually reads the whole microfiche. We suggest that an outsider should not be treated as being on notice (actual or constructive) of a company’s public documents for the purpose of the “indoor management” rule. An outsider should be able to rely on that rule to the fullest possible extent.

Clifford Chance (52)

Yes

The British Chambers of Commerce (53)

We do not agree that the concept of deemed notice should be abolished. The practice of checking the information at Companies House is we believe a valuable discipline for those parties dealing with a company.

The Faculty of Advocates (54)

We support the proposal that a person is not to be assumed to have notice of a matter merely because it is disclosed in the company’s register or made available for inspection by the company. We further support the proposal that the qualification that a person may be affected if he fails to make reasonable inquiries should also be dropped. However, we agree that an exception may be required in relation to the register of company charges.

The Mechanical Copyright Protection Society Ltd & The Performing Right Society Ltd (55)

Abolishing deemed notice would seem to go too far.

28 Do you agree with the additional requirements set out in paragraph 2.44 for the constitution of a public company?

<p>Brian G Strand (1) No objects - lawful and any exceptions detailed i.e. only show exceptions</p>
<p>Federation of Small Businesses (2) Agreed</p>
<p>Buddenbrook Consultancy (3) The whole problem with unlisted plcs is the almost deliberate misconception they create in the minds of the unaware - i.e. that they are listed on the Stock Exchange and thus of greater 'worth' or 'value' than a LTD. If deemed notice is abolished this misconception becomes even more an issue.</p>
<p>J Brady (4) Yes</p>
<p>HM Land Registry (5) In view of the second directive, there seems to be no real option but to proceed as suggested.</p>
<p>F A G Kay (9) I agree entirely they should be retained. Furthermore, I do not see any advantage in making the requirements for a private company any different to those for a public company as regards share capital and par value shares. With the proposed differences between public and private companies, when we come to the re-registration of a private company as a public company it will be the equivalent of souping up an old banger to a quality limousine.</p>
<p>H W Higginson (10) Yes</p>
<p>The Royal Institute of Chartered Surveyors (19) We do not believe it necessary for public companies to maintain separate objects.</p>
<p>Dundas Wilson & Garretts (20) Yes</p>
<p>Confederation of British Industry (21) Reluctantly, yes. We agree that these requirements are necessary under the Second Directive, but would prefer to see the Second Directive amended so as to remove these requirements.</p>
<p>The Institute of Chartered Accountants of Scotland (23) No. We would support changes to the Second Directive to allow public companies not to have objects and to drop the par values of public company shares. As a point of concern, we question how private companies, if they are not allowed to have par value shares, may convert to public companies (which have par values and a minimum issued share capital).</p>
<p>Association of British Insurers (24) Yes</p>
<p>Dr Elaine Sternberg (25) Yes. Subject to the answers to Q1 and Q2 of Volume 2: In principle, I consider it inappropriate and counterproductive for any regulatory prescriptions to be set for the structure or conduct of corporations of any sort:</p>

“Because the purpose of corporate governance is to ensure that corporations respect their owners’ wishes, it should always be for the shareholders to determine the degree of protection that they want, and the methods and structures that they deem best suited to achieve it. Regulation that limits shareholders’ options, and reduces their freedom to control their own company as they choose, is necessarily counterproductive.” (CGAIM p116)

See also CGAIM pp 108-116: ‘Regulation, Legislation: Substantial Costs without Corresponding Benefits’, and Chapter 7, ‘Market Improvements’.

If the law is going to prescribe anything at all, it should be sufficient for it to require that certain outcomes be achieved, without specifying the means for achieving them. Insofar as specific procedures are mentioned, they should constitute a default only, from which an individual company can deviate by taking positive action so long as that action is approved by its shareholders.

The most important outcome to be protected is one for the members of corporations that have been constituted under current Company Law, and that have attracted shareholders on the basis of notional protections afforded by existing Company Law. In that case, the members should have a single opportunity protected by the law to reformulate their corporation’s Constitution, thus setting the procedures that should afford their protection in future. Once the new constitution has been established, it should be for the shareholders to monitor and protect their own rights.

KPMG (26)

Yes

York Place Company Services Ltd (28)

Yes

The Law Society (29)

We agree that the Second Directive requires the additional requirements for the public company although our preferred solution would be to amend the Second Directive so that these requirements are optional rather than being mandatory (see also the Committee’s reply to question 45 on Capital Maintenance).

The General Council of the Bar (30)

The committee agrees that, so long as the Second Directive remains in force in its present form, a public company will be obliged to state its objects and to have a minimum authorised share capital in shares of par value.

Kenneth Lavanchy (31)

Yes

British American Tobacco (33)

Reluctantly, yes. We note with enthusiasm the hope (paragraph 2.43) to secure agreement on the removal of the requirements of the Second EU Company Law Directive that a public company must have objects, and that its shares must have a par value or accountable par.

London Society of Chartered Accountants (35)

Yes

Freshfields (36)

We note the requirement for public companies to state their objects, but wonder whether this requirement could be met, for example, by the public company stating that its objects included doing anything a natural person could do, with a statutory

provision to say that where this was the case the company would have unlimited capacity.
The Abbey National Group (38) No comment
Deloitte & Touche (41) Yes
The Law Society of Scotland (42) Yes
Fork Truck Association (43) Yes
D A Buskell (44) Agree
Institute of Directors (47) The amount of issued share capital and the division of initial shared capital into shares of a fixed amount should be identified in the constitution of a public company.
Clifford Chance (52) Yes
The Faculty of Advocates (54) We agree with the additional requirements. In particular we remain of the view that it is appropriate to require the constitution of a public company to state the objects of the company and to provide details of authorised share capital.

29 Do you agree with the proposals in paragraph 2.45 for the additional information on the Registration Form of a public company?

Brian G Strand (1) Yes
Federation of Small Businesses (2) Agreed
J Brady (4) Yes
HM Land Registry (5) In view of the content of the Second Directive, there seems to be no real option but to proceed as suggested.
F A G Kay (9) No – because they make the procedure impractical. According to paragraph 2.46 of the Consultation Document the idea is to reduce a two-stage process into a single stage – brilliant. But it disregards the practicalities of life. Let us follow through the single stage procedure envisaged by para 2.46 We need to form a public limited company which means a minimum of two directors, a secretary, two members, an authorised share capital not less than £50,000 and a paid up share capital of not less than £12,500. Are the two subscribers between them expected to pay up front a minimum of £12,501.50 and in addition assume a contingent liability for £37,500 for which the subscribers could still be liable even after they have transferred the share to others?

A formidable obligation to assume.
 And what are they going to do with the £12,501.50 cash they receive? Put it in a tin box under the bed – they cannot open a bank account because the company, not yet incorporated, does not exist?
 Then when the company is incorporated the two subscribers will need to transfer their 50,000 partly paid shares (on which Stamp Duty will be payable by the transferees) to those who wish to take up shares in the company and the directors will then have to make a call on the shares (for which 14 days notice must be given) to get them fully paid up.
 Now let us look at the existing two-stage procedure.
 The subscribers get a public limited company incorporated. Their liability is simply to pay up £2 for the two subscriber shares. But the new company cannot trade until it gets a Certificate to Commence Business, which necessitates an issued share capital of £50,000 on which a minimum of 25% is paid up.
 The directors (who are usually the two subscribers) arrange for the allotment of 49,998 shares of £1 each for cash at par. A company bank account is opened and the subscription money for the shares paid in.
 The statutory declaration can then be filed to be followed by the issue of the Certificate to Commence Business.
 Allowing for the 14 day notice for a call on shares to make them fully paid up it looks very much as if the two stage procedure is quicker than the single stage route.
 Bearing in mind the practical difficulties which would arise from the single stage procedure I not only do not agree with but also would actively oppose the proposal set out in paragraph 2.45.

H W Higginson (10)
 Section 117 does not require the statutory declaration when a company registers as a public company. It precludes a company registered as a public company from doing business or exercising borrowing powers unless the registrar has issued a certificate after a statutory declaration has been delivered to him in accordance with subsection (3). It is not possible for a company to have an allotted capital not less than the authorised minimum when it applies for registration. It follows that the registration of a public company cannot be a single stage process.

The Royal Institute of Chartered Surveyors (19)
 Yes

Dundas Wilson & Garretts (20)
 Yes

Confederation of British Industry (21)
 Yes

The Institute of Chartered Accountants of Scotland (23)
 No. We do not see the need for the disclosures in the third and fourth bullet point in paragraph 2.45 - relating to preliminary expenses and benefits to the promoter of the company.

Association of British Insurers (24)
 Yes

Dr Elaine Sternberg (25)
 Yes, subject to answers to Q1 and Q2 of volume 2 (see Q28 above)

KPMG (26)
 Yes

York Place Company Services Ltd (28) Yes
The Law Society (29) I would delete the requirement to file the information in the last two bullet points but it is required by the Second Directive. Should we recommend that an alteration to the Second Directive is pursued? We consider that the requirements in the last two bullet points should, if possible, be deleted as they are of no practical use and are an unnecessary administrative burden.
The General Council of the Bar (30) The committee agrees that the additional information mentioned in paragraph 2.45 should be included in the expanded registration form for public companies.
Kenneth Lavanchy (31) Yes
British American Tobacco (33) Yes
London Society of Chartered Accountants (35) Yes
The Abbey National Group (38) Yes
Deloitte & Touche (41) Yes
The Law Society of Scotland (42) Yes, subject to the comments made by the Committee above in relation to the declaration of compliance (Question 21).
Fork Truck Association (43) Yes
D A Buskell (44) Agree
Institute of Directors (47) Yes
Jordans (51) The document appears to suggest that a Form 117 can be presented to Companies House at the same time as the incorporation documents of a public company. We would argue that this is not possible. The statutory declaration requires an officer of the company to state that the aggregate allotted share capital of the company is not less than £50,000. As a company does not exist until the certificate of incorporation is issued, we cannot see how this statement can be made prior to the issue of the certificate. This suggestion is likely to impede commerce and be unhelpful. Often at the moment of incorporation of a plc the required details will be unknown. They may be unknown until the final moment of completion of a deal in which the plc may be a participant. The current 2-stage process is much more flexible. Is it necessary to retain the requirements to detail preliminary expenses and benefits? The current requirements often cause confusion.
Clifford Chance (52) Yes
The Faculty of Advocates (54) We agree with this proposal.

30 Do you agree that the registration of a newly formed company as public company should henceforth be a single stage process?

Brian G Strand (1) Yes
Federation of Small Businesses (2) Agreed
J Brady (4) Yes
HM Land Registry (5) Yes, this is a desirable improvement to the system.
F A G Kay (9) No. The idea is impractical.
H W Higginson (10) No
The Royal Institute of Chartered Surveyors (19) Yes
Dundas Wilson & Garretts (20) Yes
Confederation of British Industry (21) Yes
The Institute of Chartered Accountants of Scotland (23) Yes
Association of British Insurers (24) Yes
Dr Elaine Sternberg (25) Yes
KPMG (26) Yes
York Place Company Services Ltd (28) Yes except it may be that for name protection purposed the formation of the company is required and/or the receipt of money in payment of the initial shares is delayed.
The Law Society (29) We do not agree that the registration of a company should necessarily be a single stage process, it should be optional. In some circumstances, companies have been floated on, for example, the Alternative Investment Market as start-up companies where the purpose of the flotation was inter alia to raise the required minimum capital. This procedure could not be followed if there was one single incorporation document. Also, there are certain types of capital restructuring where the two stage procedure is necessary, for example, a private company with more than 50 shareholders wishes to effect a reconstruction so as to put a new holding company on top of itself. In this situation the new holding company would be making a public offering and the two-stage procedure would facilitate this. Also, the single stage process would make it impossible to form a public company as a shelf company. We also consider that s 117 should make it clear that the entering into conditional arrangements and contracts by a

public company does not constitute the carrying on of business by that company until the conditions have been satisfied.
The General Council of the Bar (30) The committee agrees that the registration of a newly formed company as a public company should be a single stage operation.
Kenneth Lavanchy (31) Yes
British American Tobacco (33) Yes
London Society of Chartered Accountants (35) Yes
The Abbey National Group (38) Yes
Deloitte & Touche (41) Yes
The Law Society of Scotland (42) Yes
Fork Truck Association (43) Yes
D A Buskell (44) Not agree, but I understand the need to rationalise the requirements. The Trading Certificate provides an extra safeguard to creditors and is therefore useful.
Institute of Directors (47) Yes
Jordans (51) No, see answer to Question 29. 51
Clifford Chance (52) No. Currently, it is possible to create a public company as a shelf company and not pay up the share capital until the company begins trading (in accordance with section 117). If registration of a new public company were a single stage process, the share capital would have to be paid upon incorporation.
The Faculty of Advocates (54) We do not envisage any difficulty arising from this proposal.

31 Do you agree that the incorporation certificate of a public company should have conclusive effect?

Brian G Strand (1) Yes
Federation of Small Businesses (2) Agreed
Buddenbrook Consultancy (3) Yes
J Brady (4) Yes
HM Land Registry (5) Yes, it is important that reliance can be placed on the incorporation certificate without any further investigations being undertaken.

<p>F A G Kay (9) What is meant by “shall have conclusive effect?” The certificate of incorporation of a public company should have effect in accordance with section 13(6) and (7)(b) CA 1985 – but a separate Certificate to Commence Business will still be necessary (unless the requirement to have the minimum share capital before commencing business is removed).</p>
<p>H W Higginson (10) The incorporation certificate of a public company has, under section 13, the effect referred to.</p>
<p>The Royal Institute of Chartered Surveyors (19) Yes</p>
<p>Dundas Wilson & Garretts (20) Yes</p>
<p>Confederation of British Industry (21) Yes</p>
<p>The Institute of Chartered Accountants of Scotland (23) Yes</p>
<p>Association of British Insurers (24) Yes</p>
<p>Dr Elaine Sternberg (25) Yes</p>
<p>KPMG (26) Yes</p>
<p>York Place Company Services Ltd (28) Yes</p>
<p>The Law Society (29) We agree with this proposal and consider it essential to attach conclusive effect to the certificate of incorporation in order to avoid any argument that a company has been defectively registered. The jurisdiction of the court exercised in <u>R v Registrar of Companies</u> [1991] BCLC 476 also needs to be put on a clearer statutory footing.</p>
<p>The General Council of the Bar (30) The committee agrees that the certificate of incorporation of a public company should be conclusive as to the fact of registration and as to its contents.</p>
<p>Kenneth Lavanchy (31) Yes</p>
<p>British American Tobacco (33) Yes</p>
<p>London Society of Chartered Accountants (35) Yes</p>
<p>The Abbey National Group (38) Yes</p>
<p>Deloitte & Touche (41) Yes</p>
<p>The Law Society of Scotland (42) Yes</p>
<p>Fork Truck Association (43) Yes</p>
<p>D A Buskell (44)</p>

Agree
British Bankers' Association (45) Yes
Institute of Directors (47) Yes
Clifford Chance (52) Yes
The Faculty of Advocates (54) We agree with this proposal.