Title: Employee Ownership and Share Buy Backs
IA No: BIS0390

Lead department or agency: BIS

Other departments or agencies:
None.

Impact Assessment (IA)

Date: 12/12/2012

Stage: Final

Source of intervention: Domestic

Type of measure: Secondary legislation

Contact for enquiries: Darren Walcott
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Summary: Intervention and Options

RPC Opinion: N/A – de-regulatory

Cost of Preferred (or more likely) Option				
Total Net Present Value	**Business Net Present Value**	**Net cost to business per year** (EANCB on 2009 prices)	**In scope of One-In, One-Out?**	**Measure qualifies as**
N/A	N/A	N/A	Yes	OUT

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

The independent Nuttall Review of employee ownership set out the economic and social benefits of employee ownership, which the Government has endorsed. Employee owned companies sometimes need to buy back their shares to distribute them to new employees in the company. Buy backs are voluntary arrangements between companies and a shareholder. The Nuttall Review found that the regulation of the process of buying back shares was overly burdensome for companies and recommended that Government reviews those regulations with a view to simplifying them.

What are the policy objectives and the intended effects?

The objective of the measures being proposed is to simplify and deregulate the process companies must comply with when buying back shares. The intended effect is to make it easier for employee owned companies to undertake share buy backs by removing unnecessary administrative burdens they experience. The measures are designed to make employee ownership more attractive and less burdensome to administer.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

Option 1 (preferred option) – Measures targeting the three key stages involved in share buy backs pursuant to employee share schemes, which would relax the conditions under which companies can (i) authorise buybacks, (ii) finance buybacks, and (iii) hold shares that are repurchased in treasury.
Option 2 – Do nothing.

Option 1 is preferred to the status quo given the Government's agenda to promote employee ownership, as per the agenda set out in the Nuttall Review, and the Government's broad agenda to reduce the regulatory burden on business.

Will the policy be reviewed? It will be reviewed 3 years after implementation.

Does implementation go beyond minimum EU requirements?			No		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	**Micro** Yes	**< 20** Yes	**Small** Yes	**Medium** Yes	**Large** Yes
What is the CO_2 equivalent change in greenhouse gas emissions? (Million tonnes CO_2 equivalent)			**Traded:**	**Non-traded:**	

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.

Signed by the responsible SELECT SIGNATORY: Jo Swinson Date: 4 March 2013

Summary: Analysis & Evidence

Policy Option 1

Description: Relax the conditions under which share buybacks that are pursuant to employee share schemes are carried out.

FULL ECONOMIC ASSESSMENT

Price Base Year N/A	PV Base Year N/A	Time Period Years N/A	Net Benefit (Present Value (PV)) (£m)		
			Low: N/A	High: N/A	Best Estimate: N/A

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	N/A		N/A	**N/A**
High	N/A		N/A	**N/A**
Best Estimate	N/A		N/A	**N/A**

Description and scale of key monetised costs by 'main affected groups'

The policy proposes to remove certain restrictions from existing legislation and is therefore deregulatory and is not expected to impose any new costs on business.

Other key non-monetised costs by 'main affected groups'

Small familiarisation costs may be incurred by companies that are currently employee owned that seek to become accustomed to the new framework in order to make use of the new options available. Familiarisation costs are not expected to apply to employee owned companies who have not used existing provisions before, since they would need to learn the provisions anew whether or not the policy is implemented.

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	N/A		N/A	**N/A**
High	N/A		N/A	**N/A**
Best Estimate	N/A		N/A	**N/A**

Description and scale of key monetised benefits by 'main affected groups'

Given the small size of the population of companies with a significant degree of employee ownership that fall within scope of the policy proposals, it is considered disproportionate to quantify the positive impact on business associated with the policy.

Other key non-monetised benefits by 'main affected groups'

The measures would reduce administrative burdens associated with existing regulation and increase the flexibility for companies who wish to arrange share buy backs. By making share repurchases easier the measures may also promote employee ownership more generally, which carries economic and social benefits for participating companies and individuals. This would grant companies greater freedom in adopting an ownership structure that best suits their needs.

Key assumptions/sensitivities/risks | **Discount rate (%)** |

The benefits of the proposed simplifications and deregulations are dependent on companies using the new flexibilities afforded them.

Wider risks could pertain to reducing shareholder control over the financing of share buy backs and to the risk to creditors of allowing companies more flexibility in financing buy backs.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: N/A	Benefits: N/A	Net: N/A	Yes	OUT

Evidence Base

Problem under consideration

1. Employee ownership is implemented through: (i) the use of an employee benefit trust in which shares in a company are held collectively on behalf of the company's employees ("indirect share ownership"); (ii) the use of a share plan which enables employees to become individual shareholders in the company ("direct share ownership"); or (iii) a combination of (i) and (ii).
2. There are benefits to both indirect and direct share ownership schemes and it is up to the company considering adopting an employee ownership structure to determine which option best suits their needs. The independent Nuttall Review of employee ownership found, for example, that some companies seek to embed employee ownership into their governance structures by using Employee Trusts to hold shares. Other companies prefer direct share ownership and allowing employees to benefit from, and to be incentivised by, shares they hold as individuals.
3. The Nuttall Review concluded that there are key Company Law challenges faced by companies seeking to utilise direct share ownership. These challenges pertain to both the regulatory burden and restrictions associated with buying back company shares and restrictions upon the ability of private companies to hold shares in treasury.
4. Thus, the Nuttall Review recommended that:

Recommendation V

The Department for Business, Innovation and Skills should consult upon improving the operation of internal share markets to support companies using direct share ownership, including holding private company shares in treasury and facilitating share buy backs.

5. There are three key provisions which regulate how buy backs may be administered. Broadly, these are designed to protect the interests of shareholders and creditors. However the Nuttall Review concluded that they were unduly burdensome for employee owned companies and may be holding back more employee ownership in the economy, which is a stated Government objective. The relevant provisions are below and the consultation sought to test whether they should be simplified whilst at the same time minimising the risk of removing the regulatory protection and benefits the original provisions are designed to ensure.

(i). Authorisation of a share buyback.

6. *The status quo* – private companies may only buy back shares off-market (i.e. not on a regulated investment exchange) if they have a buy back contract authorised by a *special resolution* of the shareholders (i.e. with 75% agreement) (ss.693-695 CA 06). Such a resolution is needed each and every time a buyback is sought. An ordinary resolution is needed for market purchases.
7. This provision provides protection to existing shareholders by preventing company directors from entering into share buy backs that are not in the company's or other shareholders' interests.

(ii). Financing share buybacks.

8. *The status quo* – a company when buying back shares must (i) pay for them in full and (ii) finance the purchase using distributable profits, or the proceeds of a fresh issue of shares made for the purpose of financing the share buyback. In addition, a private company may also use its share capital but to do so is subject to a number of further restrictions to protect the interests of shareholders and creditors of the company. The range of financing options for limited companies is therefore restricted.
9. Preventing payment by instalments protects the interests of creditors. If payment was allowed in instalments, the share capital available to creditors on the insolvency of a company would be diminished. This includes the interests of shareholders who if they sell their shares back to a

company and are being paid in instalments, thus becoming creditors, may be vulnerable should a company subsequently become insolvent.

(iii). After share buyback.

10. *The status quo* – when shares have been bought back, they are either cancelled or held in treasury. Shares held in treasury may be disposed of (sold for cash or transferred for an employee share scheme) by the company, but while holding them the company cannot exercise any associated ownership rights. Only shares that are listed or traded on a regulated market may be held as treasury shares, meaning that private companies do not have this option and must cancel shares following a buyback. Private companies have to go through the process of issuing new shares should the company wish to enable new or different employees to own shares in the company, which is a relatively more expensive and time-consuming process.
11. Allowing private companies to hold shares in treasury was considered during a previous consultation process on Company Law, but no interest in allowing this flexibility was identified at that time.

Rationale for intervention

12. The Nuttall Review set out the benefits of employee ownership. In light of these benefits, the Government is pursuing an agenda to remove barriers to further uptake of employee ownership in the private sector. The Nuttall Review identified a number of such regulatory barriers, including those relating to share buy backs (Recommendation V, cited above).

Benefits of employee ownership

13. There is widespread evidence that employee ownership has a positive impact on both business and employees. The Nuttall Review provides an analysis of the benefits of employee ownership (in Chapter 2 of the final report), linking it to the following outcomes:
    - improved business performance, in terms of profitability and productivity as well as employment growth;
    - increased economic resilience, with employee owned businesses outperforming traditional businesses during the recessionary period following 2008;
    - fostering employee commitment and engagement;
    - greater innovation, although the evidence in this regard is somewhat ambiguous and requires further investigation;
    - enhanced employee well-being by cultivating a sense of engagement with management;
    - reduced absenteeism.
14. It is important to note that although a wide body of literature generally tends to find that employee ownership is mutually beneficial to both the employees and the organisation, a strong theme which emerges is that share ownership should be combined with enhanced engagement practices in order to reap the full benefits of employee ownership.
15. In addition to the above research, stock market data indicates that employee owned businesses perform very well. Field Fisher Waterhouse compiles and maintains a stock index of employee owned businesses, which has outperformed the FTSE All Share by an average of 10% annually since the index's inception in 1992. There are also several success stories of employee owned businesses that have been compiled by the Employee Ownership Association.[1]

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[1] See the information available at the website of the Employee Ownership Association http://www.employeeownership.co.uk/employee-ownership/about-employee-ownership/case-studies/.

Policy objective

16. The policy objectives are to:

- reduce the administrative burden faced by companies when administering share buy backs, and to increase the flexibility available to companies in how they administer share buy backs, thereby allowing them to select the most suitable financing arrangement for their particular means;
- reduce the extent to which firms are disincentivised from adopting an employee owned structures because of unnecessary complicated processes; and
- ultimately, make employee ownership more attractive and thus more widespread in the economy, given its economic and social benefits.

17. A further objective is to ensure any simplification minimises the likelihood of unintended consequences and does not give rise to undue risks to either businesses or employees participating in employee share schemes.

Description of options considered (including do nothing)

18. Option 1 (preferred option) – To introduce a package of measures designed to reduce the regulatory burden on companies using direct share ownership seeking the buy back of their own shares, e.g. from departing employees. In terms of scope, policy proposal (i) relates to the authorisation of buy backs and will affect private companies; (ii) relates to the financing of share buybacks and will affect limited companies; and (iii) relates to the authorisation the holding of treasury shares and will affect private companies and public unlisted companies. The proposals are: -

(i) Authorisation of a share buyback.

19. *The status quo*: Private companies may only buy back shares off-market (i.e. not on a regulated investment exchange) if they have a buy back contract authorised by a *special resolution* of the shareholders (i.e. with 75% agreement) (ss.693-695 CA 06). Such a resolution is needed each and every time a buyback is sought. An ordinary resolution is needed for market purchases.

20. *Consultation*: We consulted on whether off-market share purchases should be made subject to an ordinary resolution. The respondents generally agreed that this would be a welcome deregulatory step. Although some suggested that the direct costs in holding a shareholder resolution were broadly similar. The real cost and time burden experienced by companies is having to seek a shareholder approval individually for each and every contract.

21. *Proposals*: (i) To allow off market purchases to be subject to an ordinary resolution rather than a special resolution; (ii) For buy backs connected an with employee share scheme, to allow companies to seek prior and general approval for multiple off-market share buy backs subject to shareholder approval by ordinary resolution.

(ii). Financing share buybacks.

22. *The status quo*: A company when buying back shares must (i) pay for them in full and (ii) finance the purchase using distributable profits, or the proceeds of a fresh issue of shares made for the purpose of financing the share buyback. In addition, a private company may also use its share capital but to do so is subject to a number of further restrictions to protect the interests of shareholders and creditors to the company.

23. *Consultation:* We consulted on whether and how provisions could be simplified to allow companies seeking to buy back shares more flexibility in paying for buybacks. There was general enthusiasm, particularly amongst businesses, for being able to purchase buy back shares by instalments and to remove restrictions on how the buy back could be funded. There was little appetite for a maximum time limit being imposed for the completion of the purchase. The general view being that it would be best to allow the two parties to agree the arrangements and that a statutory time limit could cause more problems in itself. It was pointed out to us that it is anomalous that an auditor's report is

required where a company wishes to use capital but is not required where a company reduces its share capital using a solvency statement. Therefore, the need for an auditor's report could be dispensed with. The main concern about removing the restrictions on the ways companies may fund the purchase of buy back shares, particularly in relation to allowing private companies to fund purchases out of capital without the need for shareholder approval by special resolution could be contrary to the interests of creditors and other shareholders.

24. *Proposals:* (i) to allow private companies to buy back own shares by instalments where the purchase is for the purposes of an employees share scheme; (ii) to allow private companies purchasing own shares for the purposes of an employees shares scheme to forgo the requirement to obtain an auditor's report (and a statutory declaration). The requirement for a solvency statement and shareholder approval by special resolution will remain; and (iii) to allow private companies where authorised by the Articles of Association to finance the buy back of shares for an amount not exceeding the lower of £15,000 or 5% of share capital in any financial year. This allows the financing of the purchase of small amounts of shares by number or value with little or no risk to creditors or remaining shareholders. Changes to the Articles of Association require shareholder approval by special resolution.

(iii). After share buyback

25. *The status quo*: when shares have been bought back they are either cancelled or held in treasury. Shares held in treasury may be disposed of (sold for cash or transferred for an employee share scheme) by the company but while holding them the company cannot exercise any associated ownership rights. Only shares that are listed or traded on a regulated market may be held as treasury shares, meaning that private companies do not have this option and must cancel shares following a buyback. Private companies have to go through the process of issuing new shares should the company wish to enable new or different employees to own shares in the company, which is a relatively more expensive and time-consuming process.

26. *Consultation:* we consulted on allowing private companies to hold shares in treasury after they have bought back shares pursuant to employee share schemes. There was a good deal of support for private companies being able to hold shares in treasury, and that unlisted public companies should also be able to do so. In effect, this would mean that all companies would be able to hold bought back shares in treasury.

27. *Proposals:* To allow for all companies to be able to hold shares in treasury based on existing regime that applies to listed public companies.

28. <u>Option 2</u> – Do nothing. Under this option there would be no change to the current regulatory structure surrounding share buybacks.

Costs and benefits

29. <u>Option 1</u>: The introduction of a package of measures designed to reduce the regulatory burden placed upon companies with an employee ownership structure that intend to buy back shares from employees.

30. Submissions received in response to the consultation issued by the Department for Business, Innovation and Skills indicate that the costs of operating an employee benefit trust could typically range between £2,000 and £10,000 annually. Easing restrictions on carrying out share buy backs has the potential to reduce these costs to business, although the precise impact is difficult to quantify. The extent to which relaxing current regulation would benefit businesses depends on various factors such as:

- the size of the company;
- the scale of the share scheme;
- the quantity of shares that are repurchased over a given period of time; and
- the distribution of shares amongst employees.

31. The current population of companies which could reasonably be expected to benefit materially from reduced administrative burdens resulting from the policy is small. Currently, there are approximately 100 privately owned UK companies in which employees own a substantial fraction (at least 20%) of the company's shares, representing just 0.005% of all UK private limited companies.[2] In light of this, and the dependence of cost savings on individual circumstances, it is considered disproportionate to attempt to further quantify the impact of the policy. Overall, we believe the costs of this policy option, as described in paragraphs 38-42 below, will be negligible.

Benefits

32. The overarching benefits are to reduce regulatory burden and increase flexibility, and to increase the attractiveness of employee ownership – which carries significant social and economic benefits as set out in the Nuttall Review. The population affected will be companies who utilise employee ownership via the direct share ownership structure described above. Therefore, the main impact of the policy is likely to be the encouragement of greater uptake of employee ownership programmes in a wider range of businesses rather than the reduction in the administrative burdens faced by currently employee owned businesses. The take up rate is also uncertain, as the decision about whether to adopt an employee owned business structure depends on a multitude of factors and not just the administrative cost of share repurchases.

(i). Benefits of simplifying the process to authorise share buybacks.

33. For companies that already operate direct share ownership schemes, lowering the threshold for shareholder approval for the authorisation of share buy backs from special to ordinary resolution may not amount to a significant cost savings. However, it should, in many cases, make it easier for such resolutions to succeed and may encourage more companies to exercise the option to buy back own shares. This benefit would apply to private companies and unlisted public companies, who do not have the option of on-market purchases, that are seeking to arrange the buy back of own shares.

34. Permitting the prior and general approval of multiple buy backs by ordinary resolution where the purposes of buy backs is connected with employee share scheme will allow employee owned companies greater flexibility to buy back their own shares without the costs of individual approval of each contract. This benefit would apply to private companies that are seeking to arrange share buy backs.

(ii). Benefits of easing financing restrictions on share buybacks.

35. Removal of the requirement to pay for shares in full at the time of repurchase is designed to give companies more flexibility in financing buy backs. This should in turn lower the costs to businesses by allowing them more scope to manage their payments and opt for the most suitable arrangement that the particular instance requires.

36. Reducing the requirements necessary to approve the finance the purchase of own shares out of capital will give some businesses a greater range of funding options is intended to increase the flexibility of businesses in how they can finance share buy backs, thereby allowing them to select the most suitable financing arrangement for their particular needs. This benefit would apply to private limited companies.

(iii). Benefits of holding shares in treasury.

37. It is proposed that private companies and unlisted public companies should be able to hold repurchased shares in treasury – as already exercised by listed public companies - in order to prevent the need for such companies to go through the burdensome procedure of cancelling and re-issuing fresh shares as the need to do so arises (for example, in order to provide shares to new starters in the company).

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[2] Data from Bureau van Dijk, FAME database. "Employees" here also includes managers and directors of the company.

Costs

38. The policy proposals are deregulatory, removing requirements which exist in current legislation. There may be small familiarisation costs incurred by employee owned companies who are already aware of and use the existing provisions, and who would need to learn the new provisions and changes made to them. We do not expect familiarisation costs to apply to employee owned companies who have not used these provisions before – they would need to learn the provisions anew whether or not these changes were made. Apart from potential familiarisation costs, we can determine no other direct costs associated with the proposals at this stage, although there are some potential wider risks to the proposals described below.

(i). Simplification of the process to authorise share buybacks.

39. The proposal may reduce regulatory protections aimed at allowing shareholders to control or veto a company from pursuing employee share schemes. However there are a number of other regulatory protections which already provide for this, for example: (i) director's duties; (ii) the ability of shareholders to (via special resolution) alter a company's Articles of Association to prevent, or set conditions on share buy backs; and (iii) the requirement for a company to gain shareholder approval by special resolution if the buy back payment is made out of capital.

(ii). Easing financing restrictions on share buybacks.

40. Allowing instalments may put creditors and remaining shareholders at a disadvantage if the company becomes insolvent before all instalments of payment have been made. Whereas for some companies having to pay upfront for share buy back purchases could put the business at risk. The ability to pay by instalments gives companies (particularly smaller companies) greater flexibility. The regulatory protections described in paragraph 39 acts to mitigate this risk.

41. Similarly, removing the need for private companies seeking to finance buy backs out of share capital to obtain an auditor's report could be seen as removing a protection for shareholders and creditors. However, this a simplification to bring the requirements for financing buy backs out of capital in line with those for capital reductions, and is limited to buy backs for employee share schemes. As above, there remain regulatory protections, as described in paragraph 39, which mitigate this risk.

42. It might also be the case that the relative imbalance of power and knowledge between the company and the selling shareholder may put the latter at risk of accepting proposals that may not be favourable. To some extent, this risk of asymmetry of information is inherent in all transactions between two parties and not just limited to payment by instalments. Crucially, share buy backs must be agreed by both parties.

Rationale and evidence that justify the level of analysis used in the IA (proportionality approach)

43. This IA draws on a significant body of research outlining the benefits of employee ownership for companies and individuals. The proposals are intended to enable employee ownership schemes to operate more effectively and are therefore designed to help unlock the general benefits of employee ownership established in the literature. The primary benefit of the policy proposal is therefore difficult to quantify; it is complex to accurately monetise the benefit of creating a more flexible environment in which employee share schemes are operated. Nevertheless, the policy does remove certain administrative cost burdens.

44. In recognition that the policy is deregulatory and the benefits of employee ownership are established by the independent Nuttall Review, it is felt that the level of analysis presented in this IA is sufficient for the purpose of characterising the policy's impact at this stage in the policy process. Although, the consultation responses did not provide sufficient information to allow for costs and benefits to be explicitly monetised, this IA describes the areas in which the policy is likely to result in a cost reduction to firms as well as where wider risks could potentially arise.

45. The responses did confirm general support for the proposals put forward. There were some suggestions as to how and where to go further such as the authorisation of share buy backs and permitting treasury shares which we are taking forward. We have also taken into account concerns, particularly in relation to the financing of share buy backs and have moderated our proposals accordingly, for instance retaining the need for a special resolution for financing buy backs out of capital. We are keen to avoid unintended consequences and this is one reason why some proposals are restricted to private companies and/or employee share schemes, with the option of considering further application at the Post Implementation Review.

Risks and assumptions

46. The policy package is intended to enable a more flexible approach to the implementation of employee share schemes. The benefits from the policy would only be realised to the extent that companies decide to take up the new flexibilities available to them subsequent to any de-regulation.

47. The policy proposals contained in this IA represent only one part of a wider set of recommendations set forth in the Nuttall Review. The policy objective – to facilitate more employee ownership in the private sector – will thus be met not only by this policy proposal but by several others set out in the Government's agenda to promote employee ownership and implement the Nuttall Review.

Direct costs and benefits to business calculations (following OIOO methodology)

48. Given the likely impact of the policy, it was considered disproportionate to explicitly quantify costs and benefits for the purposes of this impact assessment. Consequently, a direct net cost to business under OIOO methodology has not been provided. Nevertheless, the analysis provided in this IA indicates that the policy is a deregulatory "out" and is anticipated to result in a net reduction in the costs to business.

Wider impacts

49. We consulted with stakeholders on likely wider impacts and any possible unintended consequences of the policy proposals. Steps to mitigate the direct policy implications have been taken as outlined above. Concerns raised about other issues such as tax and insolvency (whether relevant to share buy backs or more general) have been passed to HMRC and the Insolvency Service to consider and provide any necessary guidance.

50. A waiver from the micros exemption will be sought so all company sizes can benefit from any deregulation.

Impact on Micros

51. Given that no major costs are anticipated from the deregulatory measures being proposed, and any familiarisation costs are likely to be small, we are proposing that the policy package would be applicable and indeed beneficial to micros.

Equalities Impact Assessment

52. In giving due regard to equality considerations, it is noted that this policy will not disproportionately affect people in protected groups and therefore an equalities impact assessment has not been provided.

Summary and preferred option with description of implementation plan

Summary

53. The policy measures being proposed follow recommendations made by the Nuttall Review of employee ownership. They target the key steps in the buyback procedure. The proposed changes would be deregulatory and remove restrictions on companies' ability to (i) obtain shareholder approval for share buybacks, (ii) finance buybacks and (iii) hold repurchased shares in treasury.

Implementation plan

54. The measures put forward in this IA are part of a much larger package of recommendation put forward in the Nuttall Review. In the Government response published in October 2012, the Government has accepted (in part or in full) almost all of the recommendations and is working with the relevant stakeholders to implement these recommendations over the next year. These include: a time-limited Minister-led implementation group to ensure progress across all Nuttall Review recommendations taken forward; an awareness raising campaign including Minister-led regional visit and events; the setting up a sector-led institute to improve awareness of employee ownership and increase access to professional advice and services; the production of 'off the shelf' templates and toolkits to improve information and advice to those setting-up employee-owned businesses.

Monitoring and post implementation review

55. We would expect the success of this policy to be reflected in higher levels of employee ownership, improved company performance and greater employee job satisfaction arising from holding a more meaningful stake in business.
56. The uptake of employee ownership in particular will be monitored through trade associations' reviews of employee ownership, internal databases and the views of relevant stakeholders.
57. We will undertake a post implementation review three years after implementation to assess the impact of the legislative changes made, and of any monetised and non-monetised benefits or costs.