

**EXPLANATORY MEMORANDUM TO
THE TAKEOVER CODE (CONCERT PARTIES) REGULATIONS 2008
2008 No. 3073**

1. This explanatory memorandum has been prepared by Her Majesty's Treasury ("the Treasury") and is laid before Parliament by Command of Her Majesty. This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Description

2.1 The Takeover Code (Concert Parties) Regulations 2008 ("the Regulations") modify the application of Rule 9 of the City Code on Takeovers and Mergers ("the Takeover Code").

2.2 Rule 9 of the Takeover Code requires a person to make a mandatory offer for the shares of a company where that person acquires 30% or more of the voting rights in a public company either alone or when taken together with the shares in which a person acting in concert with that person is interested (Rule 9(1)(a)).

2.3 Rule 9 also requires a mandatory offer to be made where a person, taken together with any shares held by a person acting in concert with that person, has an interest in 30-50% of the voting rights of a company and increases the percentage of shares carrying voting rights in which that person has an interest (Rule 9(1)(b)).

2.4 Regulation 2(1) specifies that certain persons are not to be considered to be "persons acting in concert" under Rule 9 of the Takeover Code simply by virtue of the Treasury's shareholdings, either directly or by way of a company wholly owned by the Treasury, as a result of (a) the exercise of powers under the Banking (Special Provisions) Act 2008, or (b) participation in the Government's recapitalisation scheme.¹

2.5 Regulation 2(2) specifies that the Treasury, the Secretary of State and UK Financial Investments Ltd (UKFI) are not to be regarded as acting in concert with one another by virtue of their relationship to, or functions in connection with, certain persons.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 It was not possible in the case of these Regulations to comply with the 21-day rule according to which relevant instruments are laid before Parliament for at least 21 days prior to coming into force. The Regulations were made on 28 November 2008 and came into force at noon on 28 November 2008.

3.2 The Treasury are the sole shareholder in Northern Rock plc and Bradford & Bingley plc and are likely to acquire a significant shareholding in the Royal Bank of Scotland Group Plc on 1 December 2008 and subsequently Lloyds TSB plc.² The Treasury have

¹ See §7.2 for a summary of the recapitalisation scheme.

² *ibid.*

announced that its investments in these banks will be managed by UKFI, a company wholly owned by the Treasury via a nominee. These companies may fall within the definition of “persons acting in concert” within Rule 9 as a result of the Treasury’s shareholdings. In addition, the Takeover Panel has indicated that it considers that the Shareholder Executive, an executive agency of the Department for Business, Enterprise and Regulatory Reform, may be a concert party of the Treasury for these purposes.

3.3 It became apparent that it was necessary to take immediate action to provide certainty to the markets as to how Rule 9 of the Takeover Code will apply to companies recapitalised through the scheme or whose securities are taken into temporary public ownership. Such measures will also provide certainty to the persons specified in Regulation 2(1) as to the effects of any dealings in each other’s shares, which will ensure that their freedom to make commercial decisions as to whether to deal in such shares is not inhibited by virtue of the Treasury’s shareholdings. It was necessary to legislate even before the Treasury acquired shares in the Royal Bank of Scotland Group Plc or Lloyds TSB plc because the Takeover Panel has indicated that, in line with usual practice, it was minded imminently to request the banks not to deal in each others shares so as to avoid a transaction taking place to which Rule 9 would apply.

4. Legislative Background

4.1 The Regulations are made under section 2(2) of the European Communities Act 1972, which provides that any designated Minister or department may by regulations make provision for, amongst other things, the purpose of implementing any Community obligations.

4.2 In this case, the relevant Community Directive is Directive 2004/25/EC (the Takeovers Directive). The Treasury are a government department designated for the purposes of section 2(2) of the European Communities Act 1972 in relation to credit and financial institutions and the taking of deposits or other repayable funds from the public.

5. Territorial Extent and Application

5.1 This instrument extends to all of the United Kingdom.

6. European Convention on Human Rights

6.1 As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is necessary.

7. Policy background

7.1 In February 2008, the Banking (Special Provisions) Act 2008 was enacted on an expedited basis when it became apparent that it would be impossible to achieve a private sector sale of Northern Rock plc which would adequately protect tax payers’ and consumers’ interests. The Act confers on the Treasury securities and property transfer

powers to facilitate the resolution of a distressed UK deposit-taker. The securities transfer powers were exercised to take Northern Rock plc into temporary public ownership and were used to effect a transfer of securities in Bradford and Bingley plc into temporary public ownership and to effect a subsequent property transfer of the deposit book to Banco Santander S.A.. The securities in Northern Rock plc and Bradford & Bingley plc are held by the Treasury Solicitor, as a nominee of the Treasury.

7.2 The Chancellor of the Exchequer announced on 8 October 2008 a package of measures to address the current exceptional instability in the financial markets. These measures include a recapitalisation scheme for the UK banking sector. As part of the recapitalisation scheme, the Treasury is underwriting a placing and open offer by, and may as a result acquire a significant shareholding in, The Royal Bank of Scotland Group plc. The Treasury will also underwrite, subject to the completion of the announced merger of Halifax Bank of Scotland plc and Lloyds TSB plc, equity capital raising by the merged entity. The shares will be held by the Treasury Solicitor as nominee of the Treasury. The shareholdings in companies participating in the recapitalisation scheme will be managed on a commercial basis and at arm's length by UKFI, a company wholly owned by the government.

7.3 The purpose of the Regulations is to ensure that certain persons are not considered to be "persons acting in concert" under Rule 9 of the Takeover Code simply by virtue of the Treasury's shareholdings as a result of (a) the exercise of powers under the Special Provisions Act, or (b) participation in the recapitalisations scheme. It is desirable to modify the application of Rule 9 in this manner in order to ensure that the commercial freedoms of such persons are not inhibited so they may deal in one another's shares in the normal course of business without triggering a mandatory share offer (unless, of course, such parties are considered to be concert parties for any other reason).

8. Impact

8.1 A Regulatory Impact Assessment is attached to this memorandum.

9. Contact

9.1 The Treasury Switchboard at HM Treasury, 1 Horse Guards Road, London SW1A 2HQ. Tel: 020 7270 4558 or e-mail: public.enquiries@hm-treasury.gsi.gov.uk. The Switchboard can answer any queries regarding the instrument.

Summary: Intervention & Options

Department /Agency: HMT	Title: Impact Assessment of the modification of the application of Rule 9 of the City Code on Takeovers and Mergers (the Takeover Code)	
Stage: Implementation	Version: 1	Date: 28 November 2008
Related Publications:		

Available to view or download at:

<http://www.hm-treasury.gov.uk>

Contact for enquiries: HM Treasury Switchboard **Telephone: 020 7270 4558**

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

The application of Rule 9 of the Takeover Code to certain persons simply by virtue of the Treasury's shareholdings in them as a result of (a) the exercise of powers under the Banking (Special Provisions Act) 2008 or (b) participation in the Government's recapitalisation scheme could limit significantly the commercial freedoms of such person to deal in one another's shares. Such an effect would be an undesirable and unintended consequence of the Treasury's shareholdings and would be inconsistent with the Government's policy to manage its investment in these companies on a commercial basis at arm's length.

What are the policy objectives and the intended effects?

To protect the commercial freedoms of persons in which the Treasury has shareholdings as a result of either an exercise of powers under the Banking (Special Provisions) Act 2008 or as a result of participation in the recapitalisation scheme. It is also intended that the Regulations will provide certainty to the markets as to the application of Rule 9 of the Takeover Code to such persons.

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

The purpose of the Regulations is to modify the application of Rule 9 of the Takeover Code in order that certain persons are not to be treated as "persons acting in concert" simply because of the Treasury's shareholdings in such persons. The Government has considered a number of options and weighed up the various competing considerations and considers this to be the best solution for protecting the commercial freedoms of certain persons and to provide certainty to the market in general as to the application of Rule 9 to certain persons. In reaching this view, the Government has weighed up the various competing considerations.

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

The Government will review the costs and benefits of this action in due course.

Ministerial Sign-off For Impact Assessments:

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) the benefits justify the costs.

Signed by the responsible Minister:

A handwritten signature in black ink, appearing to read "Paul Jones", with a long horizontal flourish extending to the right.