

EXPLANATORY MEMORANDUM TO
THE COMPANIES (MERGERS AND DIVISIONS OF PUBLIC COMPANIES)
(AMENDMENT) REGULATIONS 2008

2008 No. 690

1. This explanatory memorandum has been prepared by the Department for Business, Enterprise and Regulatory Reform and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 These regulations implement Directive 2007/63 as regards the requirement of an independent expert's report on a merger of a public limited liability company. They relax the requirement for an independent expert's report in the case of a company merger if all shareholders agree one is not necessary.

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

3.1 None.

4. Legislative Background

4.1 These changes implement Directive 2007/63/EC of the European Parliament and of the Council of 13 November 2007 amending Council Directives 78/855/EEC and 82/891/EEC as regards the requirement of an independent expert's report on the occasion of merger or division of public limited liability companies.

4.2 To implement the proposed Directive it is necessary to amend the provisions in section 918 of in the Companies Act 2006 relating to mergers to allow for the report to be dispensed with when all shareholders so agree. No amendment is necessary in relation to divisions as section 933 of the Companies Act 2006 already permits exemption in the case of a company division. A Transposition Note for Directive 2007/63/EC is attached at Annex A.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom. Company Law is a transferred matter for Northern Ireland and reserved for Scotland and Wales.

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 required.

7. Policy background

Policy

7.1 The Government agrees that the requirements of the existing Directives should be simplified. The expert's report is an information obligation that imposes a material cost on the companies involved. The report is for the benefit of shareholders, and it seems reasonable to relieve companies of this burden where shareholders agree. Protection of shareholders, including minority shareholders, is achieved by requiring the agreement of all shareholders to dispensing with the report. Although UK companies will only be minimally affected by the lifting of this burden companies of other Member States will benefit, with a consequent contribution to EU deregulation and competitiveness.

7.2 Relaxation of the requirement for an independent experts report has been identified by the European Commission as part of its programme to reduce administrative burdens and as suitable for fast track procedure. The Government supports this proposal as the first measure under the EU administrative burdens programme and agreed that the existing directives should be simplified.

Consultation

7.3 Consultation has been carried out by the European Commission in the context of its Action Programme of 24 January 2007 of reducing administrative burdens. The Commission has also consulted Member States informally together with its Advisory Group on Corporate Governance and Company Law (which consists of market experts, members of the professions, business and academic communities). The Government has undertaken informal consultation with the UK business, investment and professional communities on the simplification programme for company law. A formal consultation on implementing directive 2007/63 was undertaken from December 2007 to February 2008 there were very few responses.

8. Impact

8.1 An Impact Assessment on the changes made by the Companies (Mergers and Divisions of Public Companies) (Amendment) Regulations 2008 which implement Directive 2007/63/EC accompanies this memorandum. This particular aspect of company law is not much used in UK and any impact would be minimal.

8.2 These Regulations have no impact on the public sector.

9. Contact

Julie Ford at the Department for Business, Enterprise & Regulatory Reform, and Telephone: 020 7215 2162 or e-mail: Julie.Ford@berr.gsi.gov.uk can answer any queries regarding the instrument.

Department BERR		Impact Assessment: The Companies (Mergers and Divisions of Public Companies) (Amendment) Regulations 2008
Stage Final	Version 1 05/03/2008	Related Publications Directive 2007/63/EC

Available to view or download at: http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/l_300/l_30020071117en00470048.pdf

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

To implement Directive 2007/63/EC of the European Parliament and of the Council relaxing the requirement for an independent expert's report on the occasion of a merger or division of public limited liability companies.

What are the policy objectives and the intended effects?

Relaxation of the requirement for an independent experts report has been identified by the European Commission as part of its programme to reduce administrative burdens by 25% and suitable for fast track procedure. Although UK companies will only be minimally affected by the lifting of this burden the government agrees that the requirements of the existing directives should be simplified.

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

- 1. Do nothing.**
- 2. Transpose the provisions in the Directive into UK law. This preferred option provides the option to dispense with an independent experts report in the case of a merger or division of a public limited liability company if all shareholders agree to do so - reducing administrative burdens and costs and aligning the provisions for domestic mergers and divisions in relation to the experts report with the Cross-Border merger provisions**

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

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

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

Signed by the responsible Minister: Gareth Thomas

Date: 7th March 2008

Policy Option	Description
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<p>ANNUAL COSTS</p> <p>One off (Transition) -£ 0.00 £s <input type="text"/></p> <p>Average Annual Cost (excluding one-off)</p> <p>£-£</p>	<p>Description and scale of key monetised costs by ‘main affected groups’</p> <p>The draft regulations apply to all limited liability companies - they provide the option not to have an independent experts report in the case of a merger or division of a company. There should not be any cost to companies even if the option were to be exercised.</p> <p style="text-align: right;">Total Cost (PV) 0.00</p>
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Other **key non-monetised costs** by ‘main affected groups’

<p>ANNUAL BENEFITS</p> <p>One off £-£ £s <input type="text"/></p> <p>Average Annual Benefit (excluding one-off)</p> <p>)</p>	<p>Description and scale of key monetised benefits by ‘main affected groups’</p> <p>The provisions in the 3rd and 6th directives are currently transposed in company law under section 427A of the Companies Act 1985. During 2005/2006 Companies House received 3 notifications from the courts in respect of mergers or divisions under section 427A of the Companies Act. At an estimated cost of £2,500 per report this would lead to saving in the region of £7,500 per annum.</p> <p style="text-align: right;">0</p>
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Other **key non-monetised benefits** by ‘main affected groups’

Exercising the option provided by the regulations will reduce administrative burdens as well as costs.

Key Assumption/Sensitivities/Risks Although UK companies will only be minimally affected by the lifting of this burden on companies, other Member States will benefit, with a consequent contribution to EU deregulation and competitiveness.

Price Base Year	Time Period Years	Net Benefit Range (NPV) £-£	NET BENEFIT (NPV Best estimate)
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What is the geographic coverage of the policy/option?	
On what date will the policy be implemented?	
Which organisation(s) will enforce the policy?	
What is the total annual cost of enforcement for these organisations?	£-£
Does enforcement comply with Hampton principles?	Yes/No
Will implementation go beyond minimum EU requirements?	Yes/No
What is the value of the proposed offsetting measure per year?	£-£
What is the value of changes in greenhouse gas emissions?	Negligible/£-£
Will the proposal have a significant impact on competition?	Yes/No

Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Med	Large
Are any of these organisations exempt?	Yes/No	Yes/No	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)			£ (Increase - Decrease)
Increase of	£ <input type="text"/>	decrease of	£ <input type="text"/> Net Impact

Key:

Annual Cost: Constant Prices	(Net) Present Value
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Evidence Base for Summary Sheets

Companies (Mergers and Divisions of Public Companies) (Amendment) Regulations 2008

Proposal

1. The regulations provide for the simplification of administrative procedures for public limited liability companies by implementing Directive 2007/63/EC which provides companies with the option to dispense with the requirement for an independent experts report if all shareholders agree that one is unnecessary.

Objective

2. Directive 2007/63/EC aims to simplify the administrative procedure to be followed by public limited liability companies in the case of mergers and divisions by making certain information obligations voluntary instead of mandatory.

3. In doing so, it will contribute to the target to reduce Administrative Burdens by 25% by 2012 and to enhance the competitiveness of the EU's economies by facilitating the regulatory environment and more specifically freeing up and redirecting resource to more business specific and productive activities.

4. The regulations transpose the provisions in the Directive into UK law and so enables UK companies to exercise the option to dispense with an independent experts report if shareholders so wish

Background

5. As part of its "Administrative Burdens Reduction Programme"¹, the European Commission has identified changes to two company law directives which would remove information obligation burdens. Directive 78/855/EEC (the 3rd Directive) sets out the rules and procedures for mergers of public limited companies and Directive 82/891/EEC (the 6th Directive) which sets out the rules and procedures for the division of public companies.

6. Both Directives stipulate a requirement for an independent expert's report to be compiled on the terms of the merger or division by public limited liability companies during mergers and divisions. In the case of 6th Directive a member state option allows disapplication of the requirement for an independent experts report if all shareholders agree, however in the case of the 3rd Directive there is no such exemption.

7. The amending Directive 2007/63/EC provides the option for companies not to have an experts report in the case of a merger if all shareholders agree that one is not necessary.

8. The Government agrees that the requirements of the existing Directives should be simplified. The expert's report is an information obligation that imposes a material cost on the companies involved. The report is for the benefit of shareholders, and it seems reasonable to relieve companies of this burden where shareholders agree. Protection of shareholders, including minority shareholders, is achieved by requiring the agreement of all shareholders to dispense with the report.

9. Although UK companies will only be minimally affected by the lifting of this burden, companies of other Member States will benefit, with a consequent contribution to EU deregulation and competitiveness

Options

¹ Available from the following link: http://eur-lex.europa.eu/LexUriServ/site/en/com/2007/com2007_0023en01.pdf

Option 1 - Do nothing

10. Doing nothing would leave the UK in breach of its legal obligations and open to legal challenge from the European Commission or from companies wishing to take advantage of the Directive. To do nothing would disadvantage those few companies that do use 3rd and 6th directives for company restructuring as they would not be able to take advantage of reduction in administrative burdens and the cost benefits.

Option 2 - Transpose the provisions in the Directive into UK law.

11. The provisions in the regulations do not dispense with the requirement for an independent experts report; rather it provides an option to do so should all shareholders agree. By implementing the provisions in the directive the regulations provide choice – those that still wish to have a report can do so.

12. The expert's report is an information obligation that imposes a estimated material cost of £2,500 on the companies involved. By transposing the provisions in the Directive into UK law the regulations provide companies with the option to avoid such costs and associated administrative burdens with the agreement of all shareholders.

13. The option not to have report may be particularly attractive for small companies where the small number of shareholders mean it may be easier to obtain decision and so to avoid the cost of independent expert report in cases where they are close to the business and the report adds very little to existing knowledge.

14. Transposing the provisions in the Directive into UK law is the preferred option provides the option to dispense with an independent experts report in the case of a merger or division of a public limited liability company if all shareholders agree to do so reducing administrative burdens and costs and aligning the provisions for domestic mergers and divisions in relation to the experts report with the Cross-Border merger provisions.

COSTS AND BENEFITS

15. No costs will be imposed and the provisions in the regulations provide companies with an option to eliminate a regulatory burden.

16. Benefits will arise in theory; the European Commission Impact Assessment notes that Denmark has estimated the administrative costs of the expert's report for each merger or division at some EUR 3,500 (£2,500). However, the Commission's Impact Assessment also correctly notes that there are very few of these transactions in the UK each year ("less than a handful"). Indeed, in the past, UK companies have used the processes of takeover or of reconstructions or amalgamation under section 427 of the Companies Act 1985, rather than mergers and divisions under Section 427A. In the financial year 2005/2006, Companies House received three notifications from the court relating to section 427, but none relating to Section 427A. On this basis cost savings in the UK would be minimal because of the small number of companies that would use the merger or division procedures set out in the EU Directives.

17. By implementing the provisions in the Directive, the regulations will also align the provisions in the 3rd and 6th Directives with the provisions in Directive 2005/56/EC and UK law covering Cross-Border Mergers in respect of the requirements for an independent experts report resulting further simplification of the law.

WHO WILL BE AFFECTED?

18. The provisions in the regulations will apply to all public limited liability companies.

ISSUES OF EQUITY AND FAIRNESS

19. The provisions in the regulations cover public limited liability companies, they are optional and apply to all companies equally. The Government considers that the measures

introduced by the regulations will not bring disproportionate benefits or have disproportionate effects on particular groups.

SMALL FIRMS IMPACT TEST

20. The regulations apply to all public limited liability companies regardless of size; they will not impose additional costs or burdens on such companies. The relaxation of the requirement for an independent experts report may be of particular benefit to small companies as smaller number of shareholders more likely to be close to the business eliminating the need for a report and also easier to obtain agreement.

ENFORCEMENT AND SANCTIONS

21. The requirement for all shareholders to agree with the need for or to dispense with an independent experts report is a key element of the enforcement process.

CONSULTATION

22. Consultation has been carried out by the European Commission in the context of its Action Programme of 24 January 2007 of reducing administrative burdens. The Commission has also consulted Member States informally together with its Advisory Group on Corporate Governance and Company Law (which consists of market experts, members of the professions, business and academic communities). The Government has undertaken informal consultation with the UK business, investment and professional communities on the simplification programme for company law. More formal consultation is currently underway in respect of a Communication covering simplification proposals all EU company law including the possible repeal of the 3rd and 6th Directives.

COMPETITION ASSESSMENT

23. The regulations will have no significant adverse impact on markets. Application of the regulations will affect public limited liability companies. The application of the regulations will not impose new costs on such companies nor are the benefits sufficiently large to affect competition. However it is anticipated that

COMMENCEMENT

24. The provisions in the Directive should be implemented by 31st December 2008. We aim to bring the regulations implementing the Directive into force on 6 April 2008, together with provisions to ensure that the UK correctly implements the prohibition on companies holding their own shares in the case of mergers and divisions.

Specific Impact Tests - Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

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

TRANSPOSITION NOTE

DIRECTIVE 2007/63/EC AMENDING COUNCIL DIRECTIVES 78/855/EEC AND 82/891/EEC AS REGARDS THE REQUIREMENT OF AN INDEPENDENT EXPERT'S REPORT ON THE OCCASION OF MERGER OR DIVISION OF PUBLIC LIMITED LIABILITY COMPANIES.

The Companies (Mergers and Divisions of Public Companies) (Amendment) Regulations 2008

1. The Companies (Mergers and Divisions of Public Companies) (Amendment) Regulations 2008 implement in the UK Directive 2007/63/EC amending Council Directives 78/855/EEC and 82/891/EEC as regards the requirement of an independent expert's report on the occasion of merger or division of public limited liability companies (OJ L 300, 17.11.2007, p. 47).
2. The Directive must be implemented by 31 December 2008, but the Regulations come into force on 6 April 2008, the same date on which Part 27 of the Companies Act (mergers and divisions) comes into force. In this respect only, the Regulation do more than is necessary to implement the requirements of the Directive.
3. The Directive provides an exception to the requirement for producing an independent expert's report for a merger or division of a public company if all the shareholders and the holders of other securities giving the right to vote of each of the companies involved in the merger have agreed to dispense with the report.
4. The main provisions of the Directive are implemented as follows:

Article in Directive	Purpose	Implementation
2	Exception in relation to mergers	Regulation 2 (inserting section 918A into Companies Act 2006)
3	Exception in relation to divisions	Already implemented in section 933 of Companies Act 2006

5. The Regulations also amend the implementation in Part 27 of the Companies Act 2006 of Directive 78/855/EEC and Directive 82/891/EEC. (No transposition note was produced for either Directive at the time of their original implementation, which Part 27 of the 2006 Act merely restates.) The amendments in regulations 3 and 4 ensure that the UK correctly implements the prohibition on companies holding their own shares in Article 19(2) of Directive 78/855/EEC and Article 17(2) of Directive 82/891/EEC. The need for these amendments only came to light recently because the same issue arose in relation to the Companies (Cross-Border Mergers) Regulations 2007 (SI 2007/2974), which implement the same prohibition in Directive 2005/56/EC on cross-border mergers of limited liability companies.
6. Responsibility for the measures described in this transposition note taken to implement the Directives lies with the Secretary of State for Business, Enterprise and Regulatory Reform.

Department for Business, Enterprise and Regulatory Reform
[date]