

Summary: Intervention & Options

Department /Agency:
**e Business, Enterprise and
Regulatory Reform**

Title:
**Impact Assessment of the Overseas Companies
(Execution of Documents and Registration of Charges)
Regulations 2009**

Stage: final

Version: 2

Date: 2 June 2009

Related Publications: The draft Overseas Companies Regulations 2008, published June 2008;
Implementation of Companies Act 2006 Consultative Document Feb 2007

Available to view or download at:

<http://www.berr.gov.uk/bbf/co-act-2006/> & www.berr.gov.uk/consultations/page37980.html

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

1. Companies, being persons created by operation of law, need statutory provision to ensure they can enter into contracts and execute documents. Action is required to ensure there continues to be provision after 30 September 2009.
2. Without Government intervention, those who deal with overseas companies in the UK via their establishment may be prevented from accessing accurate information about their credit-worthiness or from themselves filing charges related to them, and thus might have placed upon them an unacceptable admin burden. The current regime is sub-optimal.

What are the policy objectives and the intended effects?

1. The status quo for overseas companies as regards contracts and execution of documents.
2. The principal objective is that third parties, including potential lenders and creditors, can discover whether an overseas company's UK assets have been used to secure its borrowing. The secondary objective is that the registration requirements be clear to those taking security over such assets.

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

No alternative has been considered for contracts and execution of documents. For registration of charges, the options considered were:

- A. Abolition
- B. Introducing a single UK regime.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? 2010 (as part of the consideration of changes to regime for UK companies)

Ministerial Sign-off For final proposal/implementation stage 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:

Ian Lucas

..... Date: 14th July 2009

Summary: Analysis & Evidence

Policy Option: B	Description: Introducing a Single UK regime
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COSTS	ANNUAL COSTS	Description and scale of key monetised costs by 'main affected groups'		
	One-off (Transition) Yrs			
	£			
	Average Annual Cost (excluding one-off)			
	£	Total Cost (PV)		£
Other key non-monetised costs by 'main affected groups'				

BENEFITS	ANNUAL BENEFITS	Description and scale of key monetised benefits by 'main affected groups' Single UK regime would reduce duplicate checks undertaken by creditors, etc with savings of potentially £1 million per annum.		
	One-off Yrs			
	£	10		
	Average Annual Benefit (excluding one-off)			
	£ 1 million	Total Benefit (PV)		£ 8.32 million
Other key non-monetised benefits by 'main affected groups' Under the 2006 Act, overseas companies who no longer need to register charges where there is no UK registered establishment would benefit by around £11 million per annum. This benefit accrues to companies outside the UK.				

Key Assumptions/Sensitivities/Risks

Price Base	Time Period	Net Benefit Range (NPV)	NET BENEFIT (NPV Best estimate)
Year	Years	£	£

What is the geographic coverage of the policy/option?	UK
On what date will the policy be implemented?	1/10/09
Which organisation(s) will enforce the policy?	Companies House
What is the total annual cost of enforcement for these organisations?	£
Does enforcement comply with Hampton principles?	Yes
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?	£
Will the proposal have a significant impact on competition?	No
Annual cost (£-£) per organisation (excluding one-off)	Micro Small Medium 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 £	Decrease of £	Net Impact £

Key: Annual costs and benefits: Constant Prices (Net) Present Value

Evidence Base (for summary sheets)

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

The law relating to overseas companies' contracts

1. At present, the Foreign Companies (Execution of Documents) Regulations 1994 (SI 1994/950) and The Foreign Companies (Execution of Documents) Regulations (Northern Ireland) 2003 modify the provisions for UK companies for their application to overseas companies. There have been no problems with these provisions however these Regulations must be replaced from 1 October 2009. It is intended to retain the effect of the current Regulations.

The law relating to registration of companies' charges

BACKGROUND

2. Charges are the security that companies provide lenders. Under the Companies Act 1985 (the 1985 Act), companies incorporated in England & Wales are required to register almost all charges, regardless of the location of the secured assets. The main exceptions are for financial collateral arrangements and charges where the lender is a central Bank. Charges must be registered within 21 days of their creation. The main sanction for failure to register a registrable charge within the specified time period is that in the event of the company's insolvency the charge is invalid against a liquidator or administrator or any creditor (the "sanction of invalidity"). In addition, if a company acquires property subject to a charge, then it must register that charge. Criminal sanctions apply to a company that fails to meet the registration requirements. Similar provisions apply to companies incorporated in Scotland and Northern Ireland. These rules are retained in the Companies Act 2006 (the 2006 Act), which applies them to companies incorporated in the United Kingdom, including the UK subsidiaries of overseas companies.

3. The 1985 Act applies the rules for registration of charges created by companies incorporated in England & Wales to charges over property in England and Wales created by overseas companies with an establishment in England and Wales. They also apply to charges on property in England and Wales acquired by such a company. Overseas companies with establishments in Scotland and Northern Ireland are similarly regulated.

4. The current provisions will be replaced from 1 October 2009. For UK companies, there will not be any substantive change to the existing provisions; rather it is intended to make various changes in 2011 or later using powers in the Act. For overseas companies which have a registered UK "establishment" (a new concept which will include both current branches and places of business), the 2006 Act provides for Regulations setting out the regime for registration of charges largely by way of making similar provision as for UK companies.

Problems with the existing requirements for overseas companies

5. The principal problem with the existing regime is that the requirement to register charges applies to all overseas companies with an established place of business in England and Wales – whether or not that company is registered at Companies House. There is a problem with filing registrable charges created by overseas companies that have not registered at Companies House: there is no company record to which the charge information can be added. Instead the information is filed on a special register (the "Slavenburg" register). This makes compliance possible – and thus ensures that the sanctions for not filing do not apply. However the information is not easily accessible or useful to third parties.

6. In 2007/08 there were 33,216 entries on the Slavenburg register, ie registrations of charges over property in England and Wales by overseas companies without a registered

establishment in that jurisdiction. It is estimated that the figure is about 35,000 for the UK. There are about 8,000 overseas companies with a registered establishment in England & Wales; nearly 10,000 in the UK. There is no figure available for the number of charges registered by them. The registration fee is £13 but the total cost of registration is probably about £300 because of legal costs etc.

7. The 2006 Act deals with this problem by restricting the requirement to register charges to overseas companies that have a registered UK establishment. However “just-in-case” registrations would continue if it were possible that the registration has occurred but is not yet public knowledge. The sanction of invalidity is so effective that prudent lenders will continue to seek to register charges created by overseas companies without registered UK establishments.

8. At present, the separate regimes for companies incorporated in England & Wales, in Scotland and in Northern Ireland apply to overseas companies according to the jurisdiction of their established place of business in the UK. This probably does not increase costs but nor is there any benefit: it is an unnecessary complication particularly as the jurisdiction relevant to the charge may not be the same as that of the company’s established place of business.

9. There are also problems with the current regime because

- it is not clear where various intangible assets are located;
- the location of the assets covered by a floating charge may change;
- the rules do not deal with property located overseas when the charge is created but which is subsequently brought into the UK: and
- under the 11th Company Law Directive, the disclosure requirements relating to secured borrowing by EEA overseas companies is permitted only insofar as it relates to the validity of the borrowing.

OPTIONS

10. **Abolition:** it would be possible not to require overseas companies to register the particulars of any charges that they create over their UK assets. The benefit of this approach would be the cost-savings for these overseas companies associated with registration. Assuming 10 per cent of overseas companies with registered establishments in the UK create a charge in any year, this would yield savings of about £300,000. The primary consequence of abolition would be the loss of important information to potential lenders and creditors about the credit-worthiness of those overseas companies with a registered UK establishment. It would also facilitate fraud involving an overseas company securing borrowing on the basis of assets that it has already charged. This risk would reduce the ability of those overseas companies with a registered UK establishment to use their UK assets to secure borrowing: the extra costs of borrowing are certain to exceed the cost-saving from not being required to register the charge.

11. **“Just-in-case” registrations:** It is not essential that this problem be addressed. The Regulations address this problem by providing that the requirement to register applies only if the overseas company’s particulars are available for public inspection. This will bring annual cost savings of about £11 million to those companies no longer required to register their charges (assuming 35,000 such charges at a cost of £300 each). These benefits are expected to accrue solely to companies incorporated outside of the UK.

12. **Single UK regime.** It would be possible to continue to have separate regimes according to UK jurisdiction where the overseas company had registered its UK establishment. Alternatively, there could be a single UK regime. This would be simpler for those registering charges; noting that in any single year most registered overseas companies will not create a charge, the saving would be minimal totalling less than £30,000 a year. Having a single UK regime will make it much easier for third parties to discover the extent of the encumbrances over a registered overseas companies’ UK assets. Assuming that each check costs £50, that there are about 100,000 a year relating to overseas companies of which 20 percent are

multiple checks on a single overseas company, the single regime would bring savings of about £1 million a year. There would be no transitional costs.

13. **Other problems:** Further rationalisation of the current requirements for overseas companies would only be sensible if implemented at the same time as similar changes to the requirements for UK companies. Otherwise lenders would have to change their procedures twice and operate two regimes in the short interim. The costs and benefits have not therefore been assessed. The Government intend to consult in early 2010 over changes to the scheme for registration of charges created by UK companies.

14. There may be instances where it is not immediately clear where assets are located. The 1985 Act provides no guidance. This is a particularly significant issue where the overseas company is a bank. The City of London Law Society (CLLS) has commented that the legal uncertainty relating to the registration requirement for charges over intangible assets imposes a huge burden. It is not intended to address this issue directly in advance of the consideration of the complete regime for registration of company charges (see preceding paragraph). However, in the light of the CLLS comments, these Regulations do not retain the criminal sanction on an overseas company and its officers for failure to register a registrable charge created by the overseas company. Noting that the main sanction for failure to register is that, in the event of the company's insolvency, the charge is void against the liquidator or administrator and any creditor of the company, abolition of the criminal sanction will mean that the decision whether or not register the charge will be a commercial decision for the lender

Mandatory Specific Impact Tests

15. We have considered the three mandatory impact tests (gender, race, disability) and the recommended option is unlikely to have any discriminatory effects.

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>	<i>Results annexed?</i>
Competition Assessment	Yes/No	Yes/No
Small Firms Impact Test	Yes/No	Yes/No
Legal Aid	Yes/No	Yes/No
Sustainable Development	Yes/No	Yes/No
Carbon Assessment	Yes/No	Yes/No
Other Environment	Yes/No	Yes/No
Health Impact Assessment	Yes/No	Yes/No
Race Equality	Yes/No	Yes
Disability Equality	Yes/No	Yes
Gender Equality	Yes/No	Yes
Human Rights	Yes/No	Yes/No
Rural Proofing	Yes/No	Yes/No

