

EXPLANATORY MEMORANDUM TO

THE OVERSEAS COMPANIES (EXECUTION OF DOCUMENTS AND REGISTRATION OF CHARGES) REGULATIONS 2009

2009 No. 1917

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

2. Purpose of the instrument

2.1 The instrument has two purposes:

- (a) to provide for the formalities of doing business under UK law by companies incorporated outside the United Kingdom; and
- (b) to ensure that the public record for every overseas company that is registered with Companies House includes essential information about the company's use of its property in the United Kingdom as security for borrowing.

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

3.1 None

4. Legislative Context

4.1 The Companies Act 2006 ("the 2006 Act") has substantially rewritten company law. It replaces almost all of the provisions of the Companies Act 1985 ("the 1985 Act") and also introduces new provisions. Part 34 of the 2006 Act (sections 1044 to 1059) deals with various matters relating to overseas companies that are carrying out business in the UK. Other sections of the 2006 Act also apply to overseas companies. These Regulations relate to the exercise of the powers in section 1045 (company contracts and execution of documents) and 1052 (company charges).

4.2 At present, the Foreign Companies (Execution of Documents) Regulations 1994 (SI 1994/950) apply to overseas companies, with modifications, the provisions for companies incorporated in the United Kingdom ("UK companies") in sections 36 – 42 of the Companies Act 1985 (the "1985 Act"). The Foreign Companies (Execution of Documents) Regulations (Northern Ireland) 2003 (SR 2003 No.5) make similar provision under the law of Northern Ireland. From 1 October 2009, the formalities of doing business for UK companies will be subject to sections 43 – 52 of the 2006 Act. Section 1045 provides power for these sections to be applied, with exceptions, adaptations or modifications, to overseas companies.

4.3 Article 2(2)(d) of the Eleventh Company Law Directive allows the UK to require disclosure of an indication of the securities on an overseas company's property situated in the UK, provided such disclosure relates to the validity of those securities. At present, the provisions of the 1985 Act relating to charges on property in England and Wales that apply to companies incorporated in England and Wales (ie sections 395 – 408) apply to charges over property in England and Wales of any overseas company with a place of business in that jurisdiction. Part 13 of the Companies (Northern Ireland) Order 1986 has similar provisions. The provisions relating to companies incorporated in Scotland (sections 410 - 423) apply to charges over property in Scotland of an overseas company with a place of business there. From 1 October 2009, the provisions relating to registration of charges created by UK companies will be sections 860-892 of the 2006 Act. The Companies (Company Records) Regulations 2008 (SI 2008/3006) provide the rules for inspection of a UK company's register of charges and copies of its instruments of charges, as required by sections 877 and 892. Section 1052 provides power to apply the

provisions for UK companies, with or without modifications, to an overseas company that has registered with the Registrar of Companies particulars of an establishment in the United Kingdom. The regime for registration of particulars is set out in the Overseas Companies Regulations 2009 (SI 2009/1801) which will come into force on 1 October 2009.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

5.2 This instrument applies to all overseas companies (whether or not they have registered an establishment in the UK) entering into contracts and documents under the law of England and Wales and Northern Ireland and, separately, under the law of Scotland. It also applies to overseas companies that have registered an establishment in the United Kingdom with Companies House in the event of their creating charges over their assets in the UK.

6. European Convention on Human Rights

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

7. Policy background

• *Terminology*

7.1 The 1985 Act refers to ‘oversea companies’. The 2006 Act changes this terminology from ‘oversea’ to ‘overseas’. For ease of reference, this Explanatory Memorandum consistently uses the term ‘overseas’ even when referring historically to ‘oversea’ companies.

• *What is being done and why*

Company contracts, etc

7.2 Part 2 of this Instrument relates to the formalities of doing business in the UK. It replicates the current provisions which are being repealed by the 2006 Act; it therefore revokes the Foreign Companies (Execution of Documents) Regulations 1994 and the Foreign Companies (Execution of Documents) Regulations (Northern Ireland) 2003. These are matters of substantive law and are not dependent on the registration by the company of an establishment in the United Kingdom.

Registration of Charges

7.3 Part 3 of this Instrument (Regulations 8-27) sets out a regime for the registration of charges over property in the UK created by those overseas companies that have registered particulars of an establishment in the UK with the UK registrar of companies. There are currently nearly 10,000 such companies. This instrument modifies the provisions that, from 1 October 2009, will apply to UK companies (including UK subsidiaries of overseas companies).

7.4 If a company uses its assets as security for its borrowing, it creates a charge over them. Company law requires most charges to be registered with the Registrar of Companies within 21 days of their creation. It also requires the company to keep a register of all its charges and provides that this register and copies of all instruments creating charges must be kept available for inspection by the company’s members and creditors. There are two sanctions for a UK company’s failure to register a charge. First, there is a criminal sanction on the company and its officers in default. Second, the charge will not be valid in the event of the company’s insolvency; this is commonly known as “the sanction of invalidity”. The sanction of invalidity is very powerful: it ensures a very high level of compliance with the requirement to register charges and

means that the registration is almost always carried out by the lender (or its agent). A prudent lender will seek to register a charge if there is any doubt as to its registrability and if, in the event of the company's insolvency, the lender's claim to the asset is likely to be determined by a UK court.

7.5 For UK companies, the purpose of these requirements is to ensure that third parties, including potential creditors, can discover the extent to which the company's assets would be available to discharge its debts in the event of its insolvency. It also prevents the fraudulent use of encumbered assets to secure further borrowing from a lender ignorant of the prior charge. In the case of overseas companies, the only purpose is the prevention of fraudulent use of their UK assets as security for borrowing. This difference in purpose underlies the modifications made by this instrument.

7.6 Regulation 8 defines the companies subject to the requirement to register their charges. This is to ensure that, at the time the charge is created, a lender can be certain whether or not the requirement to register applies to charges created by that overseas company. It thus removes the need for "just-in-case" registrations. As only the sanction of invalidity will apply, the decision to register will be a purely commercial decision for the lender.

7.7 The instrument provides a single UK-wide scheme, regardless of the location within the UK of either the charged assets or the company's place of registration. This mirrors the revised approach to registration of particulars set out in SI 2009/1801 which introduces a UK-wide scheme. While this slightly simplifies the process for the person registering the charge, the real benefit is for those searching the register who will no longer need to make multiple searches of the different registries.

7.8 If a UK company acquires property subject to a registrable charge, then it must register the charge. This requirement has a criminal sanction only. In view of the Eleventh Company Law Directive, this instrument does not apply this requirement to overseas companies.

7.9 This instrument modifies the requirement for the company to keep a register of charges and to make both this register and copies of instruments available for inspection. For overseas companies, the requirement will apply only to registrable charges. It applies the rules relating to the exercise of inspection rights that are applicable to UK private companies.

8. Consultation outcome

8.1 The consultative document, "Implementation of the Companies Act 2006", published in February 2007, sought views on the modifications to the regime for UK companies for its application to overseas companies. A first draft of the Overseas Companies Regulations, including provisions for the execution of documents and registration of charges, was published in December 2007. In the light of comments received, a revised draft was published in June 2008. In February 2009, in view of further questions relating to registration of charges, it was decided that these provisions should not be part of the main Overseas Companies Regulations. It was decided that the provisions relating to execution of documents should be coupled with those for registration of charges. Revised draft provisions relating to registration of charges were published in April 2008.

Company contracts, etc

8.2 One respondent to the December 2007 draft Regulations suggested there be a requirement to register the names of those authorised to sign. The Government has decided not to amend the provision on the basis that the requirement to file the authorised names and alterations to those names would impose an unnecessary burden on business which extends beyond our current interpretation of the Eleventh Company Law Directive. All other comments were technical.

Registration of Charges

8.3 The Regulations have been drafted in close consultation with key stakeholders, particularly the City of London Law Society. There have been two issues of particular concern: first, to ensure that prudent lenders do not seek to register charges that are not registrable; and second, whether there needs to be a definition of “assets located in the UK”.

8.4 Under the 1985 Act, the requirement to register applies to all overseas companies that have a place of business in the UK whether or not the company has registered with the Registrar of Companies. If the company has not registered, then the details of its registered charges are placed on a special register, known as “the Slavenburg Register”. While there were fewer than 9,000 live overseas companies registered at Companies House in 2007/08, there were 33,216 charges entered onto the Slavenburg Register. The sole purpose of this register is to ensure that the charge is not invalid; there is no benefit to either the company or third parties. The 2006 Act removes the need for the Slavenburg Register by restricting the requirement to register to registered overseas companies. The Law Society and the City of London Law Society expressed concern that, if the requirement to register were to apply to all charges over UK property created by registered overseas companies, then prudent lenders would still seek to register charges created by all overseas companies, whether or not registered, so as to avoid any risk of the company having only just registered without the fact of its registration being visible to the public. To avoid this outcome, the instrument applies the requirement to register only to charges created by overseas companies whose particulars are available for public inspection.

8.5 Under the 1985 Act, the requirement to register applies to charges created over assets located in the UK. The legal concept of location is clear for fixed assets but not for either moveable or intangible assets. On the basis of responses to the February 2007 consultation document, the December 2007 draft regulations proposed two criteria: registration on a UK specialist register for classes of assets for which there is such a register; and in the case of other intangible property, whether it is governed by the law of any part of the United Kingdom. Following discussion with stakeholders in Spring 2009, it was agreed that the governing law test was inappropriate but there was no consensus on how best to resolve this problem. However the importance of the issue is greatly reduced by the removal of the criminal sanction. This means that the decision to register a charge over intangible assets can be a wholly commercial decision for the lender. The Instrument therefore retains the current requirements to register charges over assets in the UK. The Government intends to revisit this issue in 2010 when there will be consultation over use of the general power to amend the provisions relating to registration of charges.

9. Guidance

9.1 Companies House publish guidance on their website <http://www.companieshouse.gov.uk/>. The guidance for overseas companies, which covers registration of charges, will be revised in line with this Instrument.

10. Impact

10.1 The impact on business, charities or voluntary bodies is restricted to those that are, or have dealings with, overseas companies, in particular those that provide secured loans to such companies.

10.2 The impact on the public sector is the need for Companies House to adapt its systems. In particular, Companies House will no longer need to maintain a register for the registration of charges created by overseas companies that do not have a UK registered establishment.

10.3 An Impact Assessment is attached to this memorandum.

11. Regulating small business

11.1 The legislation applies to small businesses that are overseas companies and their creditors.

11.2 To minimise the impact of the requirements on firms employing up to 20 people, the approach taken is to minimise the changes.

11.3 The basis for the final decision on what action to take to assist small business is that the general regime for execution of documents and registration of charges minimises the impact of the requirements on small business.

12. Monitoring & review

Company contracts, etc

12.1 The overseas companies regime will be reviewed and amended as necessary in light of subsequent changes to UK or EU company law.

Registration of Charges

12.2 There will be consultation in early 2010 over proposals to change the general regime for registration of charges. Views will be sought on these Regulations as well as on how the regime for UK companies should be modified for overseas companies.

13. Contact

Anne Scrope at the Department for Business, Innovation and Skills, Tel: 0207 215 2194 or email: anne.scrope@bis.gsi.gov.uk, can answer any queries regarding the instrument.

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

Contact for enquiries: anne.scrope@berr.gsi.gov.uk

Telephone: 0207 215 2194

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 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?	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

[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

Annexes

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