

EXPLANATORY MEMORANDUM TO
THE COMPANIES (REPORTING REQUIREMENTS IN MERGERS AND DIVISIONS)
REGULATIONS 2011

2011 No. 1606

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.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

2.1 These regulations amend Parts 17 and 27 of the Companies Act 2006 and the Cross-Border Mergers Regulations 2007 (S.I 2007/2974) to implement Directive 2009/109/EC which amends Council Directive 77/91/EEC (OJ L26, 31.1.1977, p.1) (“the Second Directive”) on the coordination of safeguards which for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, Council Directive 78/855/EEC (OJ L 295, 20.10.1978, p.36) (“The Third Directive”) concerning mergers of public limited liability companies, Council Directive 82/891/EEC (OJ L378, 31.12.1982, p.47) (“the Sixth Directive”) concerning the division of public limited liability companies and Directive 2005/56/EC of the European Parliament and of the Council (OJ L310, 25.11.2005, p.1) (“the Cross-Border Mergers Directive”) concerning cross-border mergers of limited liability companies as regards reporting and other requirements in the case of mergers and divisions carried out in accordance with the provisions of the Third, Sixth and Cross Border Mergers Directive.

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

3.1 These Regulations are substantial in length and make several amendments to the Companies Act 2006. Many of the amendments made are consequential on the primary amendments required by the Directive and are aimed at ensuring that the procedures accommodate the options on reporting which are now made available to companies. Nonetheless, the Department considers that it is appropriate for them to be subject to the negative resolution procedure. The Regulations implement the changes that have been made to the Second, Third and Sixth Directives as described in paragraph 4.1. The amendments to the Directives have been subject to the normal Parliamentary European scrutiny processes and consultation. In addition, the majority of the provisions in these Regulations amend the processes of the current regime for the procedure for mergers and divisions rather than introducing new regulatory obligations. As this instrument amends

primary legislation, the drafting of the amendments has been cleared by Parliamentary Counsel.

4. Legislative Context

4.1 Directive 2009/109/EC of the European Parliament and the Council amends Council Directive 77/91/EEC (OJ L26, 31.1.1977, p.1) (“the Second Directive”) on the coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, Council Directive 78/855/EEC (OJ L 295, 20.10.1978, p.36) (“the Third Directive”) concerning mergers of public limited liability companies, Council Directive 82/891/EEC (OJ L378, 31.12.1982, p.47) (“the Sixth Directive”) concerning the division of public limited liability companies and Directive 2005/56/EC of the European Parliament and of the Council (OJ L310, 25.11.2005, p.1) (“the Cross-Border Mergers Directive”) concerning cross-border mergers of limited liability companies as regards reporting and other requirements in the case of mergers and divisions carried out in accordance with the provisions of the Third, Sixth and Cross Border Mergers Directives.

4.2 The implementing provisions for the Second Directive are in Part 17 of the Act, Third and Sixth Directives are in Part 27 of the Act. The Cross-Border Mergers Directive was implemented by the Cross Border Mergers Regulations 2007 (S.I. 2007/2794).

4.3 Directives 78/855/EEC and 82/891/EEC were previously amended by Directive 2007/63/EC (OJ L 300, 17.11.2007 p.47). That Directive was implemented by the Companies (Mergers and Divisions of Public Companies) (Amendment) Regulations 2008 (S.I. 2008 No. 690) which amended Part 27 of the Act.

4.4 Scrutiny History: The Department for Business, Innovation and Skills submitted an Explanatory Memorandum to the House of Commons on 28th March 2007. The EM was cleared from scrutiny in April 2007.

4.5 A Transposition Note for the Directive 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 a reserved matter for Scotland and Wales.

6. European Convention on Human Rights

Edward Davey, MP, Minister for Employment Relations, Consumer and Postal Services has made the following statement regarding Human Rights:

In my view the provisions of the Companies (Reporting Requirements in Mergers and Divisions) Regulation 2011 are compatible with the Convention rights.

7. Policy background

7.1 EU Directive 2009/109/EC (“the amending directive”) is aimed at simplifying the processes involved in the Third Company Law Directive on public company mergers, and the Sixth Company Law Directive dealing with divisions of public companies. It also contains a small number of amendments to the Second Company Law Directive on formation and capital of public companies, and to the Cross Border Mergers Directive.

7.2 These changes fall into two broad categories:

- Enabling companies to take advantage of new technology
- Remove over regulation

7.3 The amendments being made expand the range of circumstances in which a company is able to dispense with certain requirements when undertaking a merger or division. In particular the requirements for: an experts’ report on the restructuring, a statement by directors justifying the restructuring, an update of the company’s accounts, approval by general meeting, and updates of any changes since the restructuring was proposed.

7.4 The regulations implement these changes and will not impose additional costs or burdens on business, and will simplify the process of a division or merger.

8. Consultation outcome

8.1 The draft regulations were consulted on from January to March 2011. There were three responses to the consultation who suggested minor amendments to the draft regulations, these views were taken on board in subsequent drafting.

9. Guidance

9.1 Companies House will produce forms associated with the amendments and guidance on how to complete the forms. This information will be available on their website, www.companieshouse.gov.uk

10. Impact

10.1 There will be no impact on business, charities or voluntary bodies, as the regulations are removing burdens and simplifying procedures.

10.2 There is no impact on the public sector.

10.3 An Impact Assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum on the OPSI website.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The EU Commission will review the legislation in five years time.

13. Contact

Maureen Beresford at the Department for Business, Innovation and Skills, Tel: 0207 215 2194 or email: maureen.beresford@bis.gsi.gov.uk, can answer any queries regarding the instrument.

Transposition Note: Directive 2009/109/EC of the European Parliament and Council

Transposition Note setting out how the Companies (Reporting Requirements in Mergers and Divisions) Regulations 2011 (“the Regulations”) implements Directive 2009/109/EC of 16th September 2009 amending Council Directives 77/91/EEC, 78/855/EEC, 82/891/EEC and Directive 2005/56/EC as regards reporting and documentation requirements in the case of mergers and divisions (“the amending Directive”)

The Directive

Directive 2009/109/EC amends four Directives:

- Council Directive 77/91/EEC of 13 December 1976 on the coordination of safeguards which for the protection of the interests of members and others are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (“Second Directive”)
- Council Directive 78/855/EEC concerning mergers of public limited liability companies (“Third Directive”);
- Council Directive 82/891/EEC concerning the division of public limited liability companies (“Sixth Directive”); and
- Directive 2005/56/EC of the European Parliament and of the Council concerning cross-border mergers of limited liability companies (“Cross-Border Mergers Directive”).

These Directives are concerned with the regulatory regime for mergers and divisions of public limited liability companies and for cross-border mergers of limited liability companies.

Introduction

These Regulations do not go beyond what is necessary to implement the Amending Directive including making consequential changes to domestic legislation to ensure its coherence in the area to which they apply.

Article	Objective of Article	Implementation
1.1	Amends Article 1.1 of the Second Directive The list of companies to which the 2 nd Directive applies is amended to reflect a change in the national law of Finland.	No action needed for the UK
1.2	Amends Article 10.5 of the Second Directive - a Member State option not to require an expert report on non cash consideration for shares on formation of a new company formed as a result of a merger or division where an expert report on the terms of the merger/division has been produced	Regulation 2 amending sections 593 and 595 of the Companies Act 2006. To be read in conjunction with Articles 2.7 and 3.8(a) below

	under 3 rd or 6 th Directive. The United Kingdom is exercising this option.	
1.3	Amends Article 27.3 of the Second Directive – a Member State option not to require a report in the case of non cash consideration for shares in the case of an increase in capital if the increase is to facilitate a merger or division – when an expert report on the terms of the merger/division has been produced under the 3 rd or 6 th directive	Regulation 2 amending section 595 of the Companies Act 2006. To be read in conjunction with Article 3.4 below
2.1	Amends Article 1.1 of the Third Directive The list of companies to which 3 rd Directive applies is amended to reflect a change in the national law in Finland.	No action needed for UK
2.2	Amends Article 6 of the Third Directive - draft terms of merger to be published on the company's website provided they are made available free of charge for a continuous period of one month before the general meeting to discuss the merger.	Regulation 6 inserts new section 906A and regulations 5, 15(2), 16(2), 17(2) make consequential amendments to sections 906, 916, 917 and 918. Regulation 31 inserts new section 940A.
2.3	Amends Article 8 of the Third Directive - consequential on amendments to Article 11	Regulation 17(3) amending section 918
2.4	Amends Article 9 of the Third Directive Directors to notify the general meeting of changes that have occurred between the time the report was drafted and the date of the meeting. Member State option that the report on the draft terms of the merger and the update need not be required if shareholders and holders of securities with voting rights agree to dispense with it.	Regulations 12 inserts new section 911B and regulation 18(3) makes consequential amendment to section 918A
2.5	Amends Article 11.1 of the Third Directive to: (a) exempt the need for an accounting statement if the company publishes a half yearly report and makes it available to shareholders, or if all shareholders have agreed it is not necessary (b) permits copies of documents to be provided by electronic mail with shareholder consent (c) companies not required to make documents available at the registered office if they are available on internet one month before the date fixed for the general meeting (d) relaxes requirement for the company to send documents by post or email if a printout can be obtained from the website for a continuous period of a month before the date of the meeting. In this case Member States may require that information is held for consultation by shareholders at the companies registered	Regulation 9, amends section 910 (accounting statement) with a consequential amendment to section 911 in regulation 10(2). Regulation 18(3) amends section 918A. Regulation 10(5) amends section 911. Regulation 11 inserts a new section 911A. Regulation 31 inserts a new section 940A. Regulation 11 inserts a new section 911A(5) and (6)

	office.	
2.6	Amends Article 13 of the Third Directive to require that Member States ensure that creditors are authorised to apply to the appropriate judicial authorities if they can demonstrate that due to the proposed merger their claim is at stake and no adequate safeguard has been obtained.	The Companies Act 2006 already allows for creditors to apply to the authorised judicial authorities. See S.938
2.7	Deletes Article 23.4 of the Third Directive - see (above) Art 1.2, amendment to Art 10 of the 2 nd Directive.	No action, but see Article 1.2
2.8	Amends Article 24 of the Third Directive as a consequence of Article 11 amendment	Regulation 16(3) amending section 917
2.9	Amends Article 25 of the Third Directive for merger by acquisition where one company owns 90% or more of the shares of the company being acquired as a result of amendments to Article 11	Regulation 16 amending section 917
2.10	Amends Article 27 of the Third Directive as a consequence of amendment to Article 11	Regulation 15(3) amends section 916
2.11	Amends Article 28 of the Third Directive to exempt from specified requirements in the case of a merger where one company owns 90% or more of the company being acquired and minority shareholders have the right to have their shares acquired by the acquiring company	Regulation 14 inserts a new section 915A
3.1	Amends Article 4 of the Sixth Directive - draft terms may be published on the company's website if they are made available free of charge for a continuous period of one month before the general meeting to discuss the division.	Regulations 20 inserts new section 921A and regulations 19, 27(2), 28(2) make consequential amendments to sections 921, 931 and 932. Regulation 31 inserts new section 940A. Also refer to Article 2.2
3.2	Amends Article 6 of the Sixth Directive as a consequence of amendments to Article 9	Regulation 28(3) amends section 932
3.3	Amends Article 7 of the Sixth Directive – textual amendment only	No action needed.
3.4	Amends Articles 8.3 of the Sixth Directive consequential on Article 1.3 above, as this is now reproduced by the amendment to Article 10 Second Directive.	No action, but see Article 1.3
3.5	Amends Article 9.1 of the Sixth Directive to: (a) exempt the need for an accounting statement in the case of non cash considerations if company publishes a half yearly report and makes it available to shareholders, or if all shareholders have agreed it is not necessary (b) permits copies to be provided by electronic mail with shareholder consent	Regulation 23 amends section 925 and regulation 24(2) makes a consequential amendment to section 926(3) Regulation 24 amends section 926. Regulation 25 inserts new section 926A.

	<p>(c) companies not required to make documents available at registered office if they are available on internet one month before the date fixed for the general meeting</p> <p>(d) the company need not send documents by electronic mail if shareholders can save copies of documents from internet</p>	<p>Regulation 31 inserts new section 940A.</p> <p>Regulation 25 inserts new section 926A.</p>
3.6	<p>Amends Article 12 of the Sixth Directive</p> <p>To require Member States to ensure that creditors are entitled to obtain adequate safeguards in the case of a merger where safeguards do not already exist.</p>	<p>The Companies Act 2006 already allows for creditors to apply to the authorised judicial authorities. See S.938</p>
3.7	<p>Amends Article 20 of the Sixth Directive as a consequence of amendment to Article 9</p>	<p>Regulation 27(3) amends section 931</p>
3.8(a)	<p><u>Amends Article 22.4 of the Sixth Directive</u> (Division by formation of new companies) consequence of amendment to Article 10 of 2nd directive (see Art 1.2 above)</p>	<p>No action but see Article 1.2</p>
3.8(b)	<p>Amends Article 22.5 of the Sixth Directive – specified requirements need not be met in cases where the division results in shares of each company being allocated to shareholders of the company being divided in proportion to their rights in the capital of that company.</p>	<p>Regulation 29 inserts new section 933A</p>
4.1	<p>Amends Article 6 of the Cross-Border Mergers Directive to provide an option for draft terms of merger to be published on the company's website or some other electronic platform designated by the member state for that purpose – if they are made available free of charge for a continuous period of one month before the general meeting to discuss the merger.</p>	<p>Regulations 36 and 37 inserting regulation 12A into the companies (Cross-Border Merger) Regulations 2007 and consequential amendment to regulation 12</p>
4.2	<p>Amends Article 15 of the Cross-Border Mergers Directive Article 15 amended so that the requirements in respect article 9 (draft terms of merger), article 10 (experts report) and 11 (availability of documentation to shareholders) in the case of a merger where one company owns 90% or more of the company being acquired shall be required only to the extent that the national law of the countries involved require them.</p>	<p>Regulations 34 & 35</p>
5	<p>5 years after the implementation date (30 June 2011) the commission shall review the functioning of these provisions in the 2nd, 3rd, 6th and Cross Border Merger Directives - in particular their effects on reducing administrative burdens.</p>	<p>No legislative action for UK</p>
6	<p>Member States shall bring in to force the laws,</p>	<p>No amendments to legislation required.</p>

	regulations and administrative provisions necessary to comply with this directive by 30 June 2011.	
7	The directive shall enter into force on the twentieth day following its publication in the official journal.	No amendments to legislation required

