

EXPLANATORY MEMORANDUM TO

THE FINANCIAL SERVICES AND MARKETS ACT 2000 (CONTROLLERS) (EXEMPTION) ORDER 2009

2009 No. 774

1. This explanatory memorandum has been prepared by HM Treasury and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The Order provides exemptions from the statutory obligation to notify the Financial Services Authority when acquiring, increasing, reducing or ceasing to have a significant holding of shares or voting power in a UK authorised person (a financial services firm). A general exemption applies in respect of certain firms not regulated under EC law so that the obligation to notify only arises at the threshold of a 20% holding. (Non-exempt firms are subject to thresholds at 10%, 20%, 30% and 50%.) Specific exemptions apply in respect of building societies (at the threshold of 20% of capital) and for friendly societies.

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

3.1 None

4. Legislative Context

4.1 The Order is made under a power in Part 12 of the Financial Services and Markets Act 2000 ("FSMA"), as amended by the Financial Services and Markets Act 2000 (Controllers) Regulations 2009 (S.I. 2009/534). Part 12 of FSMA imposes obligations to notify the Financial Services Authority in respect of significant changes of holdings in UK authorised persons. This implements requirements in various financial services directives. Part 12 also applies to UK authorised persons not authorised under a relevant directive. The exemptions relate to the latter category of UK authorised persons.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

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

7. Policy background

- *What is being done and why*

7.1 The Order reduces the regulatory burden on persons deciding to acquire a holding in a UK authorised person which is not authorised under a relevant EC directive by creating exemptions from the obligation to notify the Financial Services Authority.

- *Consolidation*

7.2 The Order consolidates, with modifications, provisions from previous Orders.

8. Consultation outcome

8.1 The Treasury published a consultation document in September 2008 (Implementation of the Acquisitions Directive). This referred to a consultation of March 2006 “Reducing reporting requirements: A consultation on reform of the ‘controllers’ regime in Part XII of the Financial Services and Markets Act 2000” and consulted further on Government plans to take forward the proposals relating to businesses not covered by the relevant EC directives.

8.3 All respondents to the consultation who commented on the proposed changes to the exemptions (8 out of 10) were in favour of them.

9. Guidance

9.1 The FSA is publishing guidance on the controllers regime.

10. Impact

10.1 The impact on business, charities or voluntary bodies is likely to be minor as the provisions are deregulatory.

10.2 The impact on the public sector is a likely reduction in the burden on the Financial Services Authority to assess notifications.

10.3 An Impact Assessment which accompanied the 2008 consultation is attached to this memorandum.

11. Regulating small business

11.1 The legislation applies to small business.

11.2 Where notification is still required, despite the exemptions, the Financial Services Authority may impose different requirements for different cases and vary or waive requirements. This may help to minimise the impact of the requirements on small firms employing up to 20 people.

11.3 The basis for the final decision on what action to take to assist small business was developed following public consultation.

12. Monitoring & review

12.1 The European Commission is expected to undertake a review of the implementation and impact of the Acquisitions Directive by 21st March 2011 and to report to the European Parliament and Council. If appropriate, this may lead to review of the exemptions.

13. Contact

Michael Jampel at HM Treasury Tel: 0207 270 5173 or e-mail: Michael.Jampel@hm-treasury.x.gsi.gov.uk can answer any queries regarding the instrument.

Summary: Intervention & Options

Department /Agency: HM Treasury (HMT) and Financial Services Authority (FSA)	Title: Impact Assessment of the implementation of the Acquisitions Directive	
Stage:	Version: 1	Date: 28 July 2008
Related Publications:		

Available to view or download at:

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

Contact for enquiries: Michael Jampel

Telephone: 020 7270 5173

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

Certain attempted acquisitions in other Member States were blocked on doubtful grounds. The EU Acquisitions Directive (AD) aims to prevent this. We must implement the AD despite there being no market or regulatory failure **in the UK**. Also it should benefit UK firms. Transposition requires changes to the Financial Services and Markets Act (FSMA) by HMT, and consequently to FSA rules and responsibilities. We have included in this Consultation Document/Impact Assessment some deregulatory proposals previously consulted on by HMT which are linked to, but not required by, the AD, which should reduce costs for non directive firms.

What are the policy objectives and the intended effects?

The proposed changes discussed in this Consultation Document are intended to reduce the cost and improve the efficiency of the existing "change in control" regime, while ensuring the level of regulatory protection against unsuitable acquirers is not reduced. There are also proposals contained in this consultation document to reduce notification and reporting requirements for non-directive firms, which are deregulatory and remove super-equivalent rules (and move to reliance on the FSA's Principles for Business).

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

"Do nothing" would lead to infraction proceedings, and damage the UK's position and reputation as the leading financial centre in the EU.

We propose a "copy out" approach to the AD, which leads to the majority of the changes proposed in this Consultation Document. Modifying FSMA, rather than just changing FSA rules, is required so that the changes apply to all potential acquiring firms. (There will also be consequential changes to FSA rules and supervisory responsibilities.)

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

The Commission and member states will review the application of the Acquisitions Directive two years after implementation and will present a report to the European Parliament.

Ministerial Sign-off For SELECT 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:

Kitty UsherDate: 22 September 2008

Summary: Analysis & Evidence

Policy Option:	Description:
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COSTS	ANNUAL COSTS	Description and scale of key monetised costs by 'main affected groups' The implementation of the AD is unlikely to impose significant additional costs on firms as it is primarily intended to enhance the regulatory approvals process and provide greater legal certainty, clarity and transparency. One-off implementation cost to Financial Services Authority estimated at £150 000.
	One-off (Transition) Yrs	
	£ 150 000	
	Average Annual Cost (excluding one-off)	
	£ 0	Total Cost (PV) £ 150 000
Other key non-monetised costs by 'main affected groups' The AD is unlikely to impose significant additional costs on firms. However, firms may incur one-off system costs with the proposed move from the 33% threshold to the 30% threshold. (We are consulting on this change.)		

BENEFITS	ANNUAL BENEFITS	Description and scale of key monetised benefits by 'main affected groups' The proposals to reduce our notification and reporting requirements for non-directive firms down to a single notification are deregulatory and will remove super-equivalent rules. It is estimated that each notification costs a firm around £2000 and that perhaps about 5% of the current 2000 notifications will no longer be needed.
	One-off Yrs	
	£	
	Average Annual Benefit (excluding one-off)	
	£ 200 000	Total Benefit (PV) £
Other key non-monetised benefits by 'main affected groups' The implementation of the AD should enhance competition within the Single Market for financial services. This will benefit both firms and consumers. Non Directive firms will benefit from moving from a four threshold regime to a single threshold regime of 20 per cent. Firms exempt from notification will also benefit.		

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?	EU
On what date will the policy be implemented?	21 March 2009
Which organisation(s) will enforce the policy?	FSA
What is the total annual cost of enforcement for these organisations?	£ 150000 (one off)
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?	Yes/No
Annual cost (£-£) per organisation (excluding one-off)	Micro Small Medium Large
Are any of these organisations exempt?	No 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.]

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The existing banking, insurance and securities EU directives require all persons proposing to gain significant influence over authorised firms to apply for pre-approval from the target firm's home state regulator. They also require authorised firms to notify their home state regulator of changes in their controllers when they occur and also in an annual report. The Financial Services and Markets Act (FSMA) "change in control" regime extends similar requirements to most authorised firms.

The pre-approval requirement is an important tool to help maintain the reputation of EU financial markets and protect consumers. However, the requirement places considerable power in the hands of individual home state regulators. The Acquisitions Directive goes some way towards addressing industry concerns that the existing regime is open to abuse by regulators, by requiring 'maximum harmonisation' of the time period for assessment, assessment criteria and requirements for consultation between member states.

The existing assessment period will be reduced by 5 working days to 60 working days and the Directive also permits a single interruption of up to 20 working days if further information is required. This consultation document also contains proposals to extend the maximum interruption period to 30 working days for 3rd country acquirers or persons not authorised under the EU single market directives. The directive also includes additional transparency and collaboration requirements. FSMA already imposes similar domestic requirements (e.g. the publication of reasons for a negative decision), therefore the FSA does not envisage any significant impact on its current processes. The directive also confirms that the FSA can oppose an acquisition when the information from a proposed acquirer is incomplete. Therefore, from a UK perspective we expect the impact of the process changes to be minimal.

The Directive more tightly defines the assessment criteria and will require a departure from the FSA's current approach. Notably, the Directive will no longer permit the FSA to take consumer protection concerns into account when assessing a potential acquisition. Also, powers of opposition regarding incoming passporting firms are limited.

The Directive allows Member States to keep a threshold at 33 per cent rather than 30 per cent. However, in the interest of simplicity for firms, we do not intend to take up this option. This is so that firms which operate internationally will ideally be faced with equivalent regimes in each Member State. The UK will therefore have four thresholds of 10, 20, 30 (current threshold being 33 per cent) and 50 per cent. Firms may incur a one off system change to accommodate the move from 33 per cent to 30 per cent – we are consulting on this proposal, to gauge stakeholder views.

The Directive also introduces a number of new exemptions from the pre-approval requirements which will help reduce the notification burden placed on the industry where appropriate. These exemptions, which mainly derive from a cross reference to the Transparency Directive, apply to voting rights or shares held in an underwriting capacity. This is provided that the shares are not used to intervene in the management of the issuer. Voting rights held by a firm acting in a custodial capacity, or acquired for the sole purpose of clearing and settling, are also exempt (provided custodians can only exercise voting rights under instructions given in writing or by electronic means).

The implementation of the Directive should create greater legal certainty, clarity and transparency for competent authorities as well as market participants. This in turn should tackle regulatory barriers to cross-border consolidation identified by the EU Commission and therefore enhance competition within the Single Market for financial services. This should benefit both firms and consumers: firms will have increased opportunities to access markets in other Member States as well as carrying out business effectively on a cross-border basis, while consumers will have access to a wider range of more competitively priced financial services products. It is very difficult to quantify the specific improvement in competition from this regulation-related measure, as business factors will also be very important; but this proposal reduces one hurdle.

HMT has already consulted industry on a proposed departure from the existing approach and the approach in the Directive in relation to the notification thresholds for non-directive firms (i.e. categories of firm not covered by the Acquisitions Directive). For non-directive firms, the Government proposes a move from the existing four thresholds (10, 20, 33 and 50 per cent) to a single 20 per cent threshold. There will be a consequential change to FSA's rules to remove the requirement for regulated firms to notify any changes in their controllers crossing the 10, 33 or 50 per cent thresholds. There would be some cost savings for firms in reducing the complexity for non-directive firms that fall outside the scope of the Directive by moving from the current notification requirements to a single requirement. From a study conducted for the FSA in 2006, it was estimated that each notification costs a firm around £2000. A rough estimate is that around 5 per cent of notifications will no longer be needed; there were just under 2000 notifications last year, so if these estimates are approximately correct, there should be annual savings of £200,000.

A “copy-out” approach minimises the possibility of over-implementing the requirements of the Directive. This Directive is “maximum harmonisation”, which means that Member States are not allowed to impose stricter rules than those in the Directive; therefore a copy-out approach demonstrates precise compliance as well as avoiding super-equivalence (“gold-plating”).

Re the specific questions on page 2 of the assessment (above):

- The FSA has been assessed as complying well with Hampton principles
- The implementation does not add to the minimum EU requirements. However, its subject matter is slightly wider than EU requirements because we propose to **de**regulate and simplify the existing regime for firms not covered by the directive.
- The implementation should increase competition. So in that sense it has a positive, not negative, impact.

Re the other specific impact tests in the checklist on the next page:

- Small firms impact test: the Directive aims to improve legal certainty, clarity and transparency of a supervisory process, in order to tackle regulatory barriers to cross-border consolidation. This should benefit firms of all sizes wishing to move into other Member States' markets.

The following have also been considered in this assessment:

- Legal aid
- Sustainable development
- Carbon assessment and other environment
- Health
- Race, disability, gender equality

- Human rights
- Rural proofing.

There is no impact on the above issues.

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
Small Firms Impact Test	No	No
Legal Aid	No	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	No	No
Disability Equality	No	No
Gender Equality	No	No
Human Rights	No	No
Rural Proofing	No	No