



# COMPANY LAW MEMO 2008

Newsletter Issue 6

November 2008

► **Contents**

► **News**

► **Cases**

► **CA 2006**

► **All newsletters**

► **Online updates**

► **Contact us**



PDF printer  
friendly version

Welcome to the *Company Law Memo 2008* newsletter, highlighting important recent developments in company and insolvency law. You can also access comprehensive updates to specific paragraphs via our online updating service. We always welcome suggestions from readers, so please contact us if you have any comments.

## In this issue...

### Dividends and distributions:

- » Directors' duties in share sale transactions

### Directors:

- » New guidance on directors' accounting duties
- » Directors' actual and ostensible authority

### Company management and decision making:

- » BERR consultation on shareholder rights

### Company accounts:

- » APB guidance on new auditors' reports
- » Proposal to grant equivalence to GAAPs of certain third countries

### Company secretary:

- » New guidance on company secretary's role

### Buying and selling a company:

- » OFT publishes summary of responses to merger control consultation

### Corporate restructuring and development:

- » European Commission proposal on mergers and divisions

### Litigation and investigations:

- » ICSA guidance on corporate manslaughter

### Insolvency:

- » Just and equitable ground for winding up
- » Nominees' and supervisors' qualification requirements

### Companies Act 2006:

- » Final version of Eighth Commencement Order
- » New regulations: statutory and third country auditors, annual returns, charges
- » Draft secondary legislation: LLPs, trading and address disclosures, accounts
- » Proposal to merge the Northern Ireland Registry with Companies House

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## NEWS ROUND-UP

### APB guidance on new auditors' reports

See CLM ¶¶667, ¶¶1158, ¶¶1177, ¶¶1409, ¶¶1625, ¶¶1634, ¶¶4340

The Auditing Practices Board (APB) has issued a Bulletin entitled "Miscellaneous Reports by Auditors Required by the United Kingdom Companies Act 2006". As its title suggests, the purpose of the Bulletin is to provide guidance and examples on the reports and statements required to be made by auditors under the **new Companies Act**. Reports and statements covered by the Bulletin include:

- » report on distribution by reference to relevant accounts;
- » report on the use of initial accounts in distributions;
- » statement by an auditor on ceasing to hold office;
- » statement with respect to net assets when a private company re-registers as a public company;
- » report when a private company wishes to redeem or purchase its own shares out of capital;
- » valuation report when a public company wishes to allot shares for non-cash consideration; and
- » report when non-cash assets are transferred to a public company by certain shareholders.

A copy of the Bulletin can be found on the Financial Reporting Council's website:  
<http://www.frc.org.uk/apb/publications/pub1758.html>.

### BERR consultation on shareholder rights

See CLM ¶¶3626, ¶¶3730+, ¶¶3743, ¶¶3749, ¶¶3840, ¶¶3846

BERR has published a consultation document in relation to the implementation of the EU Shareholder Rights Directive (EC Directive 2007/36). Although primarily aimed at listed companies, the consultation document also proposes changes to bring the new Companies Act into line with the Directive, which will apply to both listed and non-listed companies. The proposals affecting all companies include:

- » adding a new provision which will enable general meetings to be **held via "electronic means"**, which would include telephone, video and web-conferencing;
- » making amendments to enable **corporate representatives** appointed by the same corporate shareholder to vote in different ways from one another in respect of different blocks of shares, to mirror the corporate shareholder's own right to do so;
- » reducing the default threshold of shareholders able to require directors to call **general meetings** from 10% to 5%;
- » adding a new section which will allow votes taken on a **poll** to be cast in advance; and
- » making amendments to the rules regarding **proxies**, including clarifying how a proxy appointed by more than one shareholder can follow different voting instructions on a show of hands and adding a new section which will oblige proxies to act in accordance with the instructions of their appointing shareholders (this duty is currently derived from case law).

In relation to **proxy voting**, the draft regulations propose to give a proxy appointed by more than one shareholder who all instruct him to vote in the same way one vote on a show of hands for or against the resolution, as applicable. However, if he is instructed to vote in different ways, he will have one vote for and one against. It is arguable that the proposed amendments, as they currently stand, have not sufficiently clarified the voting rules and that it may still be necessary to demand a poll to properly reflect the spread of votes (e.g. if one proxy is appointed by four shareholders, and three instruct him to vote for the resolution and one wants him to vote against, he can only cast two votes (one for and one against), giving the "against" vote undue weight).

▶ Contents

▶ News

▶ Cases

▶ CA 2006

▶ All newsletters

▶ Online updates

▶ Contact us



PDF printer  
friendly version

News



## NEWS ROUND-UP cont...

The Government proposes to implement the Directive (including the above proposals) by means of the draft Companies (Shareholders' Rights) Regulations 2008/9, and is inviting comments on the above proposals by 30 January 2009, when the consultation period ends. The Directive must be implemented by 3 August 2009.

The consultation document is available on BERR's website:  
<http://www.berr.gov.uk/files/file48662.pdf>.

▶ Contents

▶ News

▶ Cases

▶ CA 2006

### New guidance on company secretary's role

See CLM ¶4142+

The Institute of Chartered Secretaries and Administrators (ICSA) has published a new guidance note which summarises the company secretary's main **corporate governance responsibilities**. These responsibilities include:

- » duties derived from the Combined Code on Corporate Governance, including those relating to board composition and procedures, directors' remuneration, auditing, relationships with shareholders and corporate disclosures;
- » obligations in relation to statutory and regulatory compliance; and
- » the need to ensure that the board is aware of current guidelines issued by institutional investors (such as the Guidelines on Responsible Investment Disclosure issued by the Association of British Insurers).

Although some of the guidance is targeted at company secretaries of listed companies (such as those responsibilities derived from the Combined Code), it still provides useful clarifications to company secretaries with regards to their role in promoting good corporate governance, irrespective of whether their company is publicly traded or not.

The guidance note is available on ICSA's website:  
<http://www.icsa.org.uk/knowledge/guidance/081020>.

▶ All newsletters

▶ Online updates

▶ Contact us



PDF printer friendly version

### New guidance on directors' accounting duties

See CLM ¶4185+

The Institute of Chartered Accountants in England and Wales (ICAEW) has issued new guidance on the financial and accounting duties and responsibilities of directors (TR 06/08). The guidance sets out what is considered to be **good practice**, rather than what may be acceptable as the legal minimum. It is concerned with companies in the UK subject to the provisions of the new Companies Act and has been prepared on the basis of the complete implementation of it (with the exception of the model articles). The guidance is divided into 3 parts:

- » Part 1 deals with directors in general, for instance, who is a director and the powers and duties associated with directorship;
- » Part 2 deals with the financial reporting and accounting responsibilities of directors, including for example, the requirement to prepare true and fair accounts and retain records, and the laying/delivery of accounts; and
- » Part 3 deals with other financial responsibilities of directors, such as the requirement to file annual returns, compliance with the City Code on Takeovers and Mergers (where the company is involved in a takeover/merger), and responsibilities in relation to fraudulent trading.

Note that the accounts provisions of the new Act came into force on 6 April this year, applying to financial years starting on or after that date. Most of the new Act is now in force, but some provisions will not be implemented until 1 October 2009 (see *Company Law Memo* for details).

# News



## NEWS ROUND-UP cont...

### Proposal to grant equivalence to GAAPs of certain third countries

See CLM ¶¶4212, 4226, 4229

The EU has long had the objective of achieving a single market in financial services and unifying the regulation of financial markets throughout the Community. Part of this objective includes the **global convergence in accounting standards** to reflect international practice and promote the efficiency of capital markets (see *CLM 2008 Newsletter Issue 1*). Since 1 January 2005 all EU listed companies have been required to prepare their consolidated accounts in conformity with the International Financial Reporting Standards (IFRS) of the EU. Non-EU financial entities are able to use their own Generally Accepted Accounting Principles (GAAPs) until 2011, provided that its country's standards are moving towards the IFRS ones.

EC Regulation 1569/2007 sets out the basis on which non-EU GAAPs will be considered equivalent to IFRS. This affects **listed companies** and their obligations under the Transparency Directive and the Disclosure Directive (see *CLM 2008 Newsletter Issue 1*). Under this regulation the European Securities Commission has proposed to determine that the GAAPs of US, Japan, China, Canada, South Korea and India are found to be equivalent to IFRS. These will be reviewed for China, Canada, South Korea and India by 2011 (at the latest).

In the UK, **non-listed companies** are able to choose whether to adopt international accounting standards or continue to prepare their accounts in accordance with UK GAAP.

▶ Contents

▶ News

▶ Cases

▶ CA 2006

▶ All newsletters

▶ Online updates

▶ Contact us



PDF printer friendly version

### OFT publishes summary of responses to merger control consultation

See CLM ¶¶5510+

In March this year the Office of Fair Trading (OFT) revised and updated its guidance on merger control (see *CLM 2008 Newsletter Issue 3* for further details). The **revised guidance** covers various issues, such as the issue of when an acquiring company is considered to have the ability to materially influence the target, and the use of the statutory pre-notification merger notice procedure. The OFT has now published a summary of responses to the consultation on the draft guidance.

In summary, the majority of respondents welcomed the OFT's guidance, although they also raised a number of issues on the revised draft, including:

- » the need for clearer guidelines on the circumstances in which the acquiring company would have **material influence** over the target (and therefore would be subject to the OFT's merger control procedures);
- » the need for clarification on when it would be appropriate to use the voluntary pre-notification **merger notice procedure** (which is intended to be a fast-track procedure for transactions that do not raise any anti-competitive concerns); and
- » concern that the threshold at which the OFT would seek **initial undertakings** from potential acquiring companies where the merger is likely to raise competition concerns is too low.

The OFT is currently finalising its guidance in the light of these issues. For instance, it intends to clearly explain the key principles as to when "material influence" is likely to be found. The OFT aims to publish the finalised guidance by the end of 2008.

A copy of the OFT's summary of responses can be found on the following website:  
[http://www.offt.gov.uk/shared\\_offt/business\\_leaflets/enterprise\\_act/oft1021.pdf](http://www.offt.gov.uk/shared_offt/business_leaflets/enterprise_act/oft1021.pdf).



## NEWS ROUND-UP cont...

### European Commission proposal on mergers and divisions

See *CLM* ¶15520+, ¶16536+

The European Commission has put forward a proposal for a directive aimed at **reducing the administrative burdens** on European public limited companies in relation to mergers and divisions. The proposal is an initiative of the Commission's **simplification** programme, and allows companies to publish draft terms of the merger/division on their own **website** (rather than having to publish them in the national gazette or register (Companies House in the UK) and enables them to send information to shareholders electronically when the shareholders agree. The purpose of this is to provide easier and cheaper access to information.

In addition, the proposal removes the requirement for companies to table an independent expert's report at the general meeting to consider the merger or division, and also eliminates the need to hold a shareholders' meeting where the merger/division in question is between a parent company and its subsidiaries (both of these elements are already in place in the UK under the new Companies Act).

The proposal will be implemented by amending various current EC Directives. Details of the proposal can be found at:

[http://ec.europa.eu/internal\\_market/company/docs/simplification/20080925commprop\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/simplification/20080925commprop_en.pdf).

In addition, the Commission has also launched a public consultation on how well the EC Merger Regulation works in relation to the jurisdictional provisions and referral mechanisms in particular (EC Regulation 139/2004). The consultation closes on 1 December 2008.

▶ Contents

▶ News

▶ Cases

▶ CA 2006

▶ All newsletters

▶ Online updates

▶ Contact us



PDF printer friendly version

### ICSA guidance on corporate manslaughter

See *CLM* ¶17181+

ICSA has published guidance on the Corporate Manslaughter and Homicide Act 2007, which came into force on 6 April 2008 (see *CLM 2007 Newsletter Issue 1* and *Issue 6* for further coverage of the Act).

The guidance explains the new offence of corporate manslaughter and sets out a number of suggested steps which organisations can take to **minimise the risk of prosecution** for corporate manslaughter, which include:

- » complying with the Health and Safety at Work etc Act 1974;
- » ensuring that compulsory health and safety guidelines are in place and that employees understand and adhere to them;
- » offering health and safety training; and
- » engaging health and safety experts to ensure a safe work environment.

The guidance is available on ICSA's website:

<http://www.icsa.org.uk/assets/files/pdfs/guidance/081003.pdf>.



## NEWS ROUND-UP cont...

### Nominees' and supervisors' qualification requirements

CLM ¶7423

The Insolvency Service has issued proposals to enable **non-insolvency practitioners** to act as nominees and supervisors of CVAs and IVAs ("Authorised persons – section 389A Insolvency Act 1986", September 2008). The legislation currently enables persons other than insolvency practitioners to take on these roles by setting out an exception to the criminal offence for acting without being qualified to do so, as long as the person (s 389A IA 1986):

- » is a member of a body recognised by the secretary of state for the purposes of authorising nominees and supervisors to act;
- » has the correct security in place; and
- » is not disqualified from acting (because he is an undischarged bankrupt, he is subject to a disqualification order or he lacks the mental capacity to act).

However, at the moment, the secretary of state has not yet recognised any professional bodies for this purpose, meaning that only qualified insolvency practitioners can act as nominees and supervisors.

The Insolvency Service proposes to **amend the legislation** to make it clear that a person can be authorised to deal with just CVAs and/or IVAs (without having to be qualified to deal with other types of insolvency procedure as well). It also proposes to put a scheme in place for the authorisation of nominees and supervisors through membership of recognised professional bodies, in much the same way as insolvency practitioners are authorised to act now. There are no plans to act on the power in the legislation for the secretary of state to authorise individuals to act directly. **Regulations** will deal with nominees' and supervisors' security (or bond), mirroring the provisions for insolvency practitioners' bonds (see CLM ¶7425). The regulations will also set out the record-keeping obligations of authorised persons.

The consultation is open until 12 December 2008; it can be found on the Insolvency Service's website: <http://www.insolvency.gov.uk/>. The **timetable** for implementation of these changes is currently unclear, as the Insolvency Service has recently announced that it proposes to introduce the legislative amendments into a suitable Bill going through parliament when one becomes available. As there is no such Bill at present, the consultation is likely to be reissued because the current consultation document will be out of date by the time the changes can be considered by parliament.

▶ Contents

▶ News

▶ Cases

▶ CA 2006

▶ All newsletters

▶ Online updates

▶ Contact us



PDF printer  
friendly version



## RECENT CASES

### Directors' duties in share sale transactions

See CLM ¶1742

*Progress Property Co Ltd v Cornus Moore & Another* [2008] EWHC 2577 (Ch)

Where a company sells its shareholding in another company to a third party, the seller company's directors will firstly need to approve the sale and the sale price. Directors may be subject to claims for breach of their fiduciary duties or the duty to exercise care, skill and diligence on the ground that the share sale constitutes a **transaction at an undervalue** and that the directors acted beyond their powers by approving it. To determine whether a claim for breach of duty can be established in these situations, the court will have regard to the intention of the directors and also the attitude of the company's shareholders to the share sale.

In this case, TUK Ltd agreed to sell its majority shareholding in one of its group companies to a third party. A claim was brought against a director of TUK Ltd on the ground that the sale was at an undervalue. The court, dismissing the claim, held that the director in question had not intended to sell the shares at an undervalue, so it was not an unlawful distribution. In any event, the shareholders of the seller company had approved the transaction, so they could not claim for breach of duty.

### Directors' actual and ostensible authority

See CLM ¶2350+

*Magical Marking Ltd and another v Holly and others* [2008] EWHC 2428 (Ch)

For the purposes of considering whether a director was acting within his ostensible authority, it is possible for the **representation about the scope of his authority** to be made by the director in question.

In this case, a director (who had fallen out with his fellow director and was leaving the company) instructed an IT consultant to accompany him to the company's premises and copy the entire contents of the company's business records and databases. The third party argued that he should not be liable to the company for infringing its copyright and database rights or the director's subsequent misuse of the confidential information because he was following the director's instructions, which he considered had been given with the director's actual and ostensible authority. The court rejected this argument stating that:

- » the use of powers for improper purposes could never be within a director's actual authority;
- » the director's implied actual authority had been expressly terminated when his operational responsibilities came to an end and staff were informed that he had been asked not to attend the premises; and
- » although it was possible for a representation as to a director's ostensible authority to come from the director himself, in this case, nobody had made an unequivocal representation that the director had the authority of the company to engage the consultant, and the company had never held the director out as having the authority to commit the company to contracts or to make representations about the scope of his authority.

The court also found that the abnormal circumstances of the case should have aroused the third party's suspicions as to whether the transaction with him would bind the company.

▶ Contents

▶ News

▶ Cases

▶ CA 2006

▶ All newsletters

▶ Online updates

▶ Contact us



PDF printer friendly version



## RECENT CASES cont...

### Just and equitable ground for winding up

See CLM ¶17602+

*Re Abacrombie & Co Limited* [2008] EWHC 2520 (Ch)

When considering a petition to wind a company up on the just and equitable ground, the court may investigate the company's **business arrangements** and assess their **commercial benefits** and effects on creditors.

A&Co Ltd provided bankruptcy advice to debtors and assisted them in becoming bankrupt. A significant part of its business involved the determination of a debtor's beneficial interest in his residential property, and arranging for it to be purchased by the debtor's spouse or partner at a reduced price. Around 70-90% of the proceeds of sale would then be paid to A&Co Ltd as fees. The effect of this arrangement, according to the court, was to deprive the debtor's estate of funds, reducing the distributions that could be made to his creditors. The court held that this arrangement lacked any commercial benefit to the debtors. In addition, it was detrimental to the debtors' creditors and undermined the bankruptcy process. Therefore, in the circumstances it was just and equitable to wind A&Co Ltd up.

---

▶ Contents

▶ News

▶ Cases

▶ CA 2006

▶ All newsletters

▶ Online updates

▶ Contact us



PDF printer  
friendly version

# Case law



## COMPANIES ACT 2006: IMPLEMENTATION

The text of the Companies Act 2006, explanatory notes and tables of destinations and origins are freely available to download at: <http://www.opsi.gov.uk/acts/acts2006a.htm>.

To see when specific sections of the Act will or have come into force, check the implementation timetable on the FL Memo Ltd newsletter homepage (follow the link to "Companies Act 2006 implementation timetable"). The implementation timetable is now up to date to the final version of the Eighth Commencement Order.

► Contents

► News

► Cases

► CA 2006

► All newsletters

► Online updates

► Contact us



PDF printer friendly version

### Final version of Eighth Commencement Order

See CLM ¶765, ¶1385, ¶1400+, ¶1472, ¶7535

BERR has published the final version of the Eighth Commencement Order (SI 2008/2860), which will bring into force the remaining provisions of the new Companies Act on 1 October 2009, with a few minor exceptions which will not be implemented (see footnote below). The final version of the Order generally follows the approach taken in the draft (details of which can be found in *CLM 2008 Newsletter Issue 4*), bringing into force provisions regarding company formation, shares and share capital, some company registers and dissolution and restoration, amongst other things.

The following matters are treated differently to the draft version:

- » the time limit on **applications to restore** a company to the register. Currently, this depends upon the application being made: 2 years from dissolution, in the case of an application to **declare a dissolution void** (this limit can be waived if the application is being made to enable a person to make a personal injury claim against the company); or 20 years, in the case of an application for restoration. From 1 October 2009, these two procedures will be replaced by an expedited procedure for restoring a company that was struck off mistakenly, and a normal procedure for restoration in other cases. A 6-year time limit will apply to both new procedures. In respect of companies dissolved on or after 1 October 2007 (but before 1 October 2009), the final Order extends the current 2-year limit to 6 years (in line with the new procedures), retaining the exception for personal injury cases; and
- » the availability of new powers to existing companies regarding their **share capital**. The new Companies Act gives companies incorporated on or after 1 October 2009 certain **default powers** to change their capital: to reduce their share capital, to purchase their own shares, to issue redeemable shares (for private companies only), and to purchase their own shares out of capital (for private companies only). The final Order states that existing companies will also have these default powers (a change from the draft version which required existing companies to pass a resolution to apply the relevant power(s)), unless specifically prevented by their articles.

The provisions that will not be implemented are sections 327(2)(c), 330(6)(c), 1175 (as it applies to Northern Ireland) and Part 2 of Schedule 9.

### New regulations

In addition to the final versions of the regulations discussed below, BERR has announced that final versions of the following regulations will be published shortly:

- » the Companies (Company Records) Regulations 2008;
- » the Companies (Fees for Inspection of Company Records) Regulations 2008; and
- » the Companies (Registration) Regulations 2008.

# CA 2006



## COMPANIES ACT 2006: IMPLEMENTATION cont...

### Statutory auditors and third country auditors

See CLM ¶4290, ¶4345

The Statutory Auditors and Third Country Auditors (Amendment) (No. 2) Regulations 2008 (SI 2008/2639) came into force on 31 October 2008. They amend the Statutory Auditors and Third Country Auditors Regulations 2007 (SI 2007/3494) and are aimed at regulating certain third country auditors and audit entities. Details of the new regulations are discussed in *CLM 2008 Newsletter Issue 5*.

### Annual returns

See CLM ¶3896, ¶3899, ¶3907, ¶4062+

The Companies Act 2006 (Annual Return and Service Addresses) Regulations 2008 (SI 2008/3000) set out the disclosure requirements in annual returns (including, amongst other things, particulars of directors and secretaries and certain information about shareholders). The requirements in the regulations are the same in substance as those in the April 2008 draft (see *CLM 2008 Newsletter Issue 3*), although with regards to the particulars of directors and secretaries required to be disclosed in annual returns, the Government has changed its approach and decided to amend the new Companies Act and include the required particulars in the Act (instead of setting them out in the regulations, as in the April 2008 draft).

### Charges

See CLM ¶4642 ¶4645

The Companies (Particulars of Company Charges) Regulations 2008 (SI 2008/2996) set out the details of the charges that will have to be registered at Companies House. They include the same requirements as the draft regulations issued in April 2008 (see *CLM 2008 Newsletter Issue 3*).

## Draft secondary legislation

### Application of CA 2006 to LLPs

See CLM ¶77

BERR has published the draft of the Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009 (see *CLM 2007 Newsletter Issue 9* and *CLM 2008 Newsletter Issue 3* for background to the regulations and details of the consultation process on this topic). The purpose of the regulations is to apply the **remaining provisions** of the new Companies Act (i.e. provisions other than those in relation to accounts which came into force on 1 October 2008, see *CLM 2008 Newsletter Issue 4*) to LLPs.

The regulations cover a range of **subject matters** in relation to LLPs, including:

- » LLP names and trading disclosures;
- » membership (including register of members and disclosure of members' residential addresses);
- » annual returns;
- » debentures and charges;
- » arrangements, reconstructions and cross-border mergers;
- » fraudulent trading;
- » protection of members against unfair prejudice;
- » dissolution and restoration to the register;
- » overseas LLPs; and
- » the register of companies.

► Contents

► News

► Cases

► CA 2006

► All newsletters

► Online updates

► Contact us



PDF printer friendly version

# CA 2006



## COMPANIES ACT 2006: IMPLEMENTATION cont...

BERR is currently inviting comments on the draft regulations until 28 January 2009. The finalised regulations will apply to LLPs from 1 October 2009.

### ▶ Contents

### ▶ News

### ▶ Cases

### ▶ CA 2006

### ▶ All newsletters

### ▶ Online updates

### ▶ Contact us



PDF printer friendly version

### Trading and address disclosures and register of companies

See *CLM* ¶259+, ¶585, ¶3896, ¶3907

The draft Companies (Trading Disclosures) (Amendment) Regulations 2008 have been laid before Parliament. They will amend the Companies (Trading Disclosures) Regulations 2008 (SI 2008/495). The Government has also laid before Parliament the draft Companies (Disclosure of Addresses) Regulations 2008 and the draft Companies (Registrar of Companies and Applications for Striking Off) Regulations 2008. No substantial changes have been made to these regulations since the previous drafts, see [CLM 2008 Newsletter Issue 3](#) for further details.

### Amendments to accounts, reports and audit legislation

See *CLM* ¶2897, ¶3199

BERR has published the draft Companies Act 2006 (Accounts, Reports and Audit) Regulations 2009. The main purpose of the regulations is to correct provisions and update cross-references in Part 15 of the new Companies Act (which deals with accounts) and regulations made under it. For instance, the regulations amend the disclosure requirements in the new Act regarding advances, credits and guarantees given by banks for the benefit of their directors, so that banks will only be required to disclose aggregate figures (the Act, as it currently stands, requires information for each director and therefore does not allow banks to provide such information in aggregate).

In addition, the regulations also set out filing and auditing requirements for corporate governance statements, which publicly traded companies have to prepare (either as part of their annual directors' report or as a separate report).

Comments on the draft regulations are invited by 9 January 2009.

### Proposal to merge the Northern Ireland Registry with Companies House

See *CLM* ¶4042

BERR has published a **consultation** document on proposals to integrate the Northern Ireland Registry with Companies House, creating a UK-wide Register of Companies.

The proposal forms part of the implementation of the new Companies Act to create a single company law regime across the UK (i.e. applicable to Northern Ireland as well as Great Britain). The new Companies Act defines the term "Registrar of Companies" to include not only the Registrar for England and Wales and the Registrar for Scotland, but also the Registrar for Northern Ireland (s 1060 CA 2006). It is hoped that the integration of the two registries will provide a number of benefits, for instance, access to a broader range of products and a single point of contact for customers.

The consultation closed on 18 November 2008, and the Government is intending to provide a response to it early in 2009. The Government intends to bring this change into effect on 1 October 2009.

The consultation document is available on BERR's website:  
<http://www.berr.gov.uk/files/file47537.pdf>.