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SUMMARY OF RESPONSES

Consultation on Registration of Charges created by companies and limited liability partnerships

OCTOBER 2010

Registration of charges created by companies and limited liability partnerships[1] – Summary of responses to consultation

Contents:

1. Introduction
    - Background
    - Devolved issues
    - Consultation process
        - Written consultation and meetings etc.
    - Statistical analysis of responses
        - Numbers of 'Yes'; 'No'; 'No View'
        - Numbers of responses with additional comments
        - Summary of respondent type:
          Typical groupings can be: Sub-postmasters; SMEs; micro business, small business, medium business, large business, Interest Groups; business representative organisation/trade body, Trade Union or employee organisation, consumer organisation, charity or social enterprise, individual, Local Government...
    - Analysis of themes

2. Summary of Responses
    Geographical Coverage
    Registrable Charges
    Time Limit for Registration
    Date of Creation
    Sanction of Invalidity
    Effect of Registration on Third Parties
    Delivery of Instrument
    Particulars to be filed
    Conclusive Certificate
    Procedures for Filing
    Late Registration and Changes to Particulars
    Memorandum of Satisfaction
    Public access to Information about Companies' Charges
    Unregistered Companies and Limited Liability Partnerships
    Overseas Companies
    Specialist Registers

Annex A: List of questions in the consultation document (optional)

Annex B: List of Respondents

The Government Response and Draft Impact Assessment will be published shortly.

[1] Consultation document published March 2010: URN 10/697

1. INTRODUCTION

Background

1. The law relating to registration of company charges is of real importance to capital markets as it helps to guard against fraud and to facilitate commercial borrowing. As noted by Professor Diamond in 1989, and quoted by the Law Commission in 2005:

> "… the general requirement for the registration of charges under the Companies Act commands almost universal support and there is no demand for its abolition. Apart from the objective of providing information for persons proposing to deal with the company so that they, or credit reference agencies on their behalf, can assess its creditworthiness, persons considering whether to provide secured credit can find out whether the proposed security is already the subject of a charge; by the same token, a registration system benefits the company itself if it is enabled to give some sort of assurance to a prospective secured creditor that the property it is offering as security is unencumbered. Registration can also ease the task of a receiver or liquidator in knowing whether to acknowledge the validity of an alleged mortgage or charge, and does away with the risk of fraud by inventing a security only when a receiver is appointed or the company goes into liquidation. One can also recognise that, in addition to the use of information by financial analysts and persons considering whether to invest in a company, there is today a general climate of opinion in favour of public disclosure of companies' financial activities."[2].

2. The current scheme for the registration of company charges is set out in Part 25 of the 2006 Act. It is the same as that provided by Part 12 of the 1985 Act. Although Part 12 was prospectively repealed and replaced by the 1989 Act[3], these amendments and repeals were never brought into force. The scheme is essentially the same as that first introduced by the Companies Act 1900. In the 10 months to January 2010, 124,373 charges created by GB companies were registered; a reduction of about 30 per cent on the same period a year earlier.

3. The main purpose of the current scheme for registration of company charges is to make public whether a company has used certain of its assets to secure borrowing. The express intention in the introduction of the scheme in 1900 was to penalise the concealment of secured credit. Under the current scheme, the register does not purport to provide an up-to-date accurate record of a company's complete indebtedness. What it does provide is an assurance to third parties that any registrable existing charge:

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[2] A.L. Diamond, *A Review of Security Interests in Property* (1989), HMSO, ISBN 011 514664 4, para 11.1.5 as quoted in the Law Commission's Report, para 1.3.

[3] Sections 92-104, 1989 Act.

- which is not on the Companies House record will be invalid against liquidators, administrators and creditors in the event of the company's insolvency (unless it was created very recently);

- which is on the Companies House record will not be invalid for want of registration against liquidators, administrators and creditors in the event of the company's insolvency.

4. Under this scheme, the requirement to register a charge arises *after* its creation, with sanctions for failure to register. It is a "transaction-filing" scheme. Transaction-filing is not the only model for a scheme for the registration of company charges. The principal alternative scheme is "notice-filing" under which what is filed is a notice that indicates that the chargee has taken or intends to take security over the specified assets. Notice-filing was adopted in 1952 by Article 9 of the Uniform Commercial Code for the United States and is now used throughout the United States, Canada, and New Zealand. Under notice-filing schemes, the relative priority of registered charges is determined by their dates of registration. The pressure to change to notice-filing has two main causes. First, the view that the existing scheme does not resolve priority issues; second, that it is inefficient.

5. Since 1952, there have been several reports recommending that the UK scheme be replaced by a notice-filing scheme[4], most recently those from the Company Law Review ("CLR")[5] and the Law Commission[6]. The CLR were concerned that the sanction of invalidity[7], as it exists at present, may constitute a disproportionate deprivation of a person's possessions in contravention of the European Convention on Human Rights[8] ("ECHR"). They noted that the sanction of invalidity underpins the present system but that it is not absolutely essential to notice-filing. They therefore recommended that the Law Commission and the Scottish Law Commission be requested to examine the system for registering company charges. The Law Commission view was that the sanction of invalidity is not incompatible with ECHR.

Devolved issues

6. The law relating to registration of company charges applies to all companies incorporated in the United Kingdom and limited liability partnerships (LLPs). Regulations under the Companies Act 2006 extend the requirements to register to charges over UK property created by overseas companies that have registered a UK establishment with Companies House.

7. The requirement to register a charge arises following the creation of a charge. The creation of a charge is an aspect of property law. Property law is devolved. Furthermore UK companies may create charges under the law of other jurisdictions.

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[4] 1971: The Report of the Committee on Consumer Credit (1971) Cmnd 4596, chaired by Lord Crowther;
1986: Report by Working Party on Security over Moveable Property chaired by Professor Halliday (Scottish Law Commission); 1989: *A Review of Security Interests in Property,* chaired by Professor Diamond for the DTI.

[5] The CLR Report, Chapter 12.

[6] The Law Commission's Report.

[7] 2006 Act, sections 874(1) and 889(1). This sanction is described in paragraphs 3O-32 and considered in in paragraphs 37-40 below.

[8] Article 1 of Protocol 1.

8. The Bankruptcy and Diligence etc (Scotland) Act 2007 provides for the creation of a floating charge under Scots law. When these provisions are brought into force, the establishment of a right under a floating charge under Scots law will take place on its registration in the Register of Floating Charges, to be established for this purpose. These provisions apply to all companies, not just those incorporated in Scotland or elsewhere in the United Kingdom. As a result, companies will have to register a floating charge created under Scots law under two separate pieces of legislation

Consultation process

9. In March 2010, the Government consulted over proposals to revise the current scheme for the registration of company charges under the Companies Act 2006. These proposals were based on the 2001 recommendations of the Company Law Review and the subsequent adv ice of the Law Commission. They involved possible changes to:

- which charges must be registered;
- how charges may be registered, including the introduction of electronic registration;
- the consequences of registering and of not registering a registrable charge.

Consultees' views were sought both on specific proposals and on related questions. The consultation document was placed on the departmental website and links to it were sent to 144 individuals and organisations (listed in Annex E of the consultation document); in addition, some 800 others who have been asked to be on the department's circulation list for matters relating to corporate law and governance were alerted to its publication. An internet discussion forum was set up with threads for each of the main policy areas.

10. The deadline for comments was 18 June 2010. Subsequently, all the consultees' further views were sought on issues arising from the consultation relating to:

- registration procedures;
- registrable charges;
- overseas companies;
- effect on third parties; and
- memorandum of satisfaction.

These further views will be taken into account un the Government's response.

Statistical analysis of responses

11. The Department received 33 responses:

4 from legal professional associations

6 from law firms

7 from individual lawyers, academic or practising

3 from accounting bodies

6 from bodies primarily representing those who use the information on the public record

1 each from the British Bankers Association, Lloyds and the Confederation of British Industry

as well as responses from Registers of Scotland, the Land Registry, the Financial Markets Law Committee and the Financial Services Authority.

2. SUMMARY OF RESPONSES

Geographical Coverage

Question: Do you consider that the same rules should apply to all UK companies?

Summary of Responses:

15 respondents: One law firm considered it more important to improve the system in each jurisdiction. While many of the others were concerned at the complexity arising from the differences between Scots and English law relating to property, all the others considered that, as far as practicable, the same rules should apply throughout the UK.

2. Registrable Charges

Proposal A: Any charge created by a UK company should be registrable unless specifically exempted.

Proposal B: The only exclusion from the requirement to register charges created by a UK company should be Lloyd's trust deeds other than a Lloyd's deposit trust deed or a Lloyd's security and trust deed.

Question: Under the proposal only to exclude charges over Lloyd's trust deeds, what charges that are not currently registrable would be made registrable?

Question: Do you consider that the requirement to register at Companies House should not apply to floating charges over financial collateral?

Question: Do you consider that there should be a requirement that the crystallisation of a floating charge be registered within 21 days of that event? If so, on whom should the requirement fall and what should be the sanction?

Proposal C: The requirement to register charges existing on property acquired should be abolished.

Summary of Responses:

15 commented. 13 preferred the proposed approach to the present position where registrable charges are listed in the primary legislation. ABFA particularly welcomed the extension to insurance policies. BP pointed out that it would make registrable charges over North Sea petroleum licences and Joint Operating agreements which are not currently regarded as registrable.

Hugh Beale and Louise Gullifer pointed out that this would make registrable fixed charges over debts other than book debts (insurance proceeds, film negative rights, etc). ICAEW argued that in any event charges granted over expected future income from major projects should be registrable. It was pointed out that, in practice, charges are generally registered unless there is a specific statutory disapplication of the registration requirement on which the chargee can confidently rely. Therefore law firms acting for lenders present for registration virtually all charges created by a chargor; even if a legal doubt exists as to whether such charges are in fact registrable (eg in the case of a charge over shares or over money in a bank account).

However several respondents had reservations: a Scottish law firm was concerned that if all charges were registrable then there would be an increase in uncertainty as to whether conditional transfers of ownership were registrable; it therefore suggested that there be a definition of charge. Another suggested that it be clear that the requirement did not apply to "quasi-security".

Members of one law firm, while considering the proposed approach would appear to be a desirable simplification, disagreed with the approach as they considered it would not be possible to identify all appropriate exceptions. Noting that there is not a definition of charge, they argued that making all registrable (apart from specified exceptions), would increase the risk for lenders from unexpected charges particularly from other financial arrangements being recharacterised as charges by the courts. They also proposed that only non-possessory charges on goods should be registrable.

One respondent drew attention to Smith (Administrator of Cosslett (Contractors) Ltd) v. Bridgend CBC[9] when Lord Scott had suggested that a conditional agreement to give security over unspecified assets in the future would be considered to be an agreement to give a floating charge and would fall within the requirements for registration of a floating charge. The time limit for registration would run from the date of the original agreement and not the subsequent date upon which the agreement to create the security became unconditional.

All supported the exclusion of Lloyd's trust deeds if there is a clear practical problem arising from the current requirement[10]. They questioned why some but not all Lloyds trust deeds should be excluded. One law firm suggested that a corporate member of Lloyd's should be required to make a general filing stating that it is a corporate member of Lloyd's and as such is required to enter into charges constituted by Lloyd's trust deeds but is not required to file particulars of these with the Registrar of Companies.

As for floating charges over financial collateral, there were differing views and widespread concern about the present uncertainty. This appears to arise from the range of control which may be exercised over financial collatteral whereas the Financial Collateral Regulations do not define the level of control that would make the charge exempt from registration under the Companies

[9] [2001] UKHL 58, [2002] AC 336, at [59]-[64]. His Lordship returned to this theme in National Westminster Bank PLC v. Spectrum Plus Ltd [2005] UKHL 41, [2005] 2 AC 680, at [107].

[10] The problem is described in paragraphs 5.78-5.85 of the Law Commission's Consultation Paper no.164, *Registration of Security Interests: Company Charges and Property other than Land.*

Act 2006. There is also difficulty in knowing whether security over financial collateral is by way of fixed or floating charge and, more specifically, because of the problems concerning floating charges in meeting the tests in the definition of "security interest" in those Regulations. Doubt means that charges are registered just in case. Some considered the Regulations should remove this uncertainty; others considered that the issue would be better dealt with in the context of the general reform of the laws applicable to financial collateral arrangements.

Other suggested exclusions were:

- rent security deposit deeds;
- shares and their proceeds, bonds, debt instruments negotiable on the capital markets and certain other named securities insofar as not excluded by Regulation 4 of The Financial Collateral Arrangements (No 2) Regulations 2003;
- title transfer financial collateral arrangements
- charges arising by operation of law;
- charging orders (confirms the decision of the Court of Appeal in *Re Overseas Aviation Engineering (GB) Limited* [1963];
- factoring arrangements;
- repurchase agreements;
- set-off rights;
- simple retention of title clauses;
- HP and conditional sale agreements;
- bank accounts;
- charges on goods and on insurance policies on goods where the goods are abroad or at sea, or are imported before they are delivered to a buyer or deposited in a warehouse, factory or store; and
- contractual liens over sub-freights (so as to reverse the decision in Re Welsh Irish Ferries[1985] 3 WLR 610)l
- a charge over an obligation supporting a principal obligation that has been registered;
- a fixed charge over the proceeds of collateral that was registered;
- all pledges and liens (whether contractual or arising by operation of law) except, possibly, if negotiable instruments or documents of title have been pledged, or goods are held by a third party bailee to the order of a pledge, and the collateral is released into the possession of the debtor for limited purposes such as sale;
- pledges of tangible movables,
- assignations in security of bank accounts,
- pledges of shares not falling within the Financial Collateral Regulations

As for charges created by a trustee company, most respondents who commented on the issue agreed that these should be registrable. It was noted that practice may differ between Scotland and the rest of the UK due to differences in trust law. Others noted that trust assets would not form part of the insolvency estate of the corporate trustee. The City of London Law Society therefore concluded that such a charge should not be registrable. Others argued that registration is needed to protect the position of a second chargee. One respondent proposed that the charge should be registered

against both the trustee which gives the security and the beneficial holder of the property, should that be a company. The reason given was that third parties may wish to deal with either the trustee or the beneficiary and they would not be able to gain an accurate picture of the true state of affairs unless the registration appears against the names of both the trustee and the beneficiary. Similarly, in terms of notice, the registration of the charge against both the trustee and the beneficiary would have the effect of conferring constructive notice on those who might wish to take security over either the legal or beneficial interest in the charged assets.

Of the 12 respondents who addressed the question whether the crystallisation of a floating charge should be registrable, only 2 favoured the event being registrable. Most respondents saw, on the one hand, practical problems with such a requirement and, on the other, considered it would serve little benefit given the requirement to file the notice of the appointment of a liquidator, administrator or administrative receiver.

Respondents were evenly divided over there should be a requirement to register charges existing on property acquired. On the one hand, some, eg the British Bankers Association and R3, considered that the obligation should continue in the interests of transparency; others were concerned that, as the requirement is not enforceable, it damages the reliability of the public record of the public record of charges. The City of London Law Society argued there not be such a requirement on the ground that only charges created by the company should be registrable.

In August 2010, further views were sought on:

- on making the requirement to register apply to "any charge or mortgage or pledge created or lien or security granted bv a company registered in the United Kingdom over any of its property (wherever situated) where the company concerned has a beneficial interest in the assets unless that charge, mortgage, pledge, lien or security is expressly excluded whether by Regulations under the Companies Act or other statute"; and
- on the various exclusions suggested by those who had responded to the consultation and

Two respondents considered the proposed approach was undesirable as, in the event of future amending Regulations to make a new exception, the sanction of invalidity would continue to apply to charges made until the amendment came into force.

As to the definition of what is registrable, several respondents gave strong reasons for not applying the requirement to register to anything other than charges or mortgages granted by a company. It was pointed out that the question of whether a particular transaction constitutes a charge and the question of whether a charge is a fixed or floating charge are matters which have traditionally been left to the courts to decide as a matter of common law.

As to exclusions, there was widespread agreement that both fixed and floating charges over financial collateral should be exempt under other legislation. There was general agreement that the exclusions should be only:

- corporate members of Lloyds trust deeds; and
- rent security deposits

As to charges made registrable as a result of a later court judgment, the current provisions on late registration were considered to be sufficient. Insofar as there is a problem, it is not soluble under company law.

3. Time Limit for Registration

Question: Do you consider that the 21-day time limit for registration should be abolished? Why?

Question: If the 21-day time limit for registration were abolished, do you consider there would need to be any safeguards?

Question: If electronic registration of charges were possible, should the time limit for registration be reduced to 14 days?

Summary of Responses:

5 respondents favoured abolition of the 21-day time limit and another 2 were sympathetic to that approach. It was argued that making

- unregistered charges ineffective against execution creditors and against charges that are registered, and
- registered charges ineffective against charges that had already been registered

would be an effective incentive to registration without the costly bureaucratic procedures associated with a time limit, although there was concern about the consequences for unsecured creditors. The ICAEW considered that the existing provisions in the Insolvency Act 1986 regarding preference, transactions at under value, transactions defrauding creditors and voidability of floating charges should provide sufficient protection against any connected person seeking to take advantage by registration of security immediately before insolvency.

10 respondents were strongly in favour of keeping the 21-day time limit, although several considered that improvements to the registration process are needed. It was argued that the time limit is a simple, well-understood and effective incentive for charges to be filed promptly and that it thus provides certainty that the public register shows all valid encumbrances. It was considered that the alternative would require a complex set of safeguards, particularly for the protection for of unsecured creditors.

Those in favour of keeping the time limit were mostly also in favour of it being kept at 21 days even if electronic registration were possible; while two of them favoured it being reduced to 14 days as did most of those who had opposed keeping the limit at all. One law firm suggested that the time limit be cast in terms of working days.

4. Date of Creation

Question: In practice, do third parties suffer from charges being valid because a conclusive certificate has been issued in circumstances when in fact the requirements for registration were not met within 21 days of the creation of the charge?

Proposal D: There should be a definition of date of creation for the purposes of the timelimit for registration of a charge.

For a charge created under the law of England, it should be:

- the date of the chargor's signature in the case of a charge created by an instrument in writing; and
- the date when the chargor entered into an enforceable agreement in any other case

For a charge created under the law of Scotland, it should be:

- the date of registration in the Scottish Register of Floating Charges in the case of a floating charge (or, if these provisions are not in force, the date the instrument is executed by the chargor); and
- in any other case, when the chargee acquires a real right.

Summary of Responses:

No respondent considered that, in practice, third parties ever suffer from a conclusive certificate being issued in circumstances when in fact the requirements for registration were not met within 21 days of the creation of the charge. Nevertheless several considered that it would be better if there were a statutory definition of the date of creation and/or the charge instrument were on the public record.

While most respondents who commented agreed that there should be a definition for the purpose of calculating the 21 day period with several considering the detail needed further consideration. However one law firm was concerned that the proposed definition would be an inducement to delay dating a charge (and so hide its existence) until it suited the chargee to register it. This would be highly undesirable as it could prejudice subsequent creditors. Another was concerned that creating a statutory definition would create the potential for a divergence between a charge and any other document that creates an obligation and should be avoided in principle. This law firm pointed out the date that appears on the face of a deed may not be the operative date of the obligation created by it if the deed is held in escrow or is undelivered, in each case pending the satisfaction of a specified condition or conditions. This respondent preferred the wording of section 103 of the Companies Act1989 because it refers to the fulfilment of conditions as well as dating even though this does not resolve the problem of the date of creation not being evident on the face of the charge. The AAT considered that a better definition for an electronic document would be the date of execution, i.e. the date when it first bears the certified electronic signatures of all parties involved (pursuant to sub-sections (3) (b) and (c) of section 91 of the Land Registration Act 2002).

5. Sanction of Invalidity

Proposal E: The sanction of invalidity should be modified so that an unregistered charge is ineffective against a liquidator or administrator on insolvency and against execution creditors (under Scots law, creditors who have executed diligence)

Question Is it necessary for the Act to provide for the situation where insolvency proceedings are begun 21 days or less after the creation of a charge?

Most respondents opposed modifying the sanction of invalidity so that the invalidity is not against all creditors. On law firm point out that under the proposal a second chargee which enforced its charge could be put in an invidious position where it had an obligation to account to a first chargee for the proceeds of sale of the charged asset notwithstanding that the first charge was not registered within the statutory period. In this situation, the second chargee might incur a liability to an execution creditor of the chargor of which it was aware for failing to account to it for the amount due to it up to the amount paid over to the first chargee. Similarly, if the chargor were in liquidation or administration, the second chargee might incur a liability to the liquidator/ administrator if the first chargee failed to account to the liquidator/administrator for the amount paid to it by the second chargee.

Only 3 respondents favoured providing for the situation where insolvency proceedings are begun 21 days or less after the creation of a charge. And one of these considered that the Insolvency Act 1986 might make it unnecessary.

6. Effect of Registration on Third Parties

Question: Should the buyer of property subject to an unregistered charge take free of the charge unless they know of it? Should there be any exceptions.

Proposal F (i) A person taking a charge over a company's property should be taken to have notice of any previous charge registered at the time the charge is created.

(ii) No other person should be taken to have notice of a registered charge

Summary of Responses:

There was widespread agreement that the buyer of property subject to an unregistered charge should take free of the charge unless they know of it. Several considered that the buyer should always take free of the charge if the chargee has failed to protect himself through registration. It was pointed out that this is the case under Scots law for assets subject to a floating charge. One legal firm recalled the Land Registry's previous concern that this would result in different treatment for the buyer of property to that for any other transferee and the chargor. Another proposed that there be an exception if the asset is subject to rules of a specialist register.

All who commented on the proposal agreed that a person taking a charge over a company's property should be taken to have notice of any previous charge registered at the time the charge is created. As to other persons, views differed. One law firm and ICSA considered that the proposal had the advantage of certainty. In addition, the British Bankers Association and ICAEW considered that registration should be deemed notice to all third parties. But most considered prefer the current common law rule that registration is constructive notice to those who should be reasonably expected to search the register.

7. Delivery of Instrument

Question: Does the requirement to deliver the charge document reduce the risk of malicious registration of a non-existent charge?

Question: Under the alternative to Proposal J, should it be possible to deliver an electronic pdf copy of the charging document instead of the original or a certified copy? Or would this bring a significant risk of fraud.

Summary of Responses:

Of the 13 respondents who gave their view, all but one considered that the requirement to deliver the charge document reduces the risk of malicious registration of a non-existent charge even though, as several noted, a determined malicious party can forge a non-existent charge.

Several respondents considered that delivering a PDF copy similarly reduces the risk. The British Bankers Association, for example, consider that there would be no greater danger of a falsified PDF copy than of a paper copy.

One law firm pointed out If the charge document were to be filed as an electronic pdf, there would need to be some clarification of the issues arising from the case of *R (on the application of Mercury Tax Group Ltd and another) v Her Majesty's Commissioners of Revenue and Customs and others* [2008] (EWHC 2721) regarding the submission of counterparts.

8. Particulars to be Filed

Proposal G: The required particulars should be:

(a) The registered name and registration number of the company that created the charge;

(b) the date of the creation of the charge and, in the case of a Scottish floating charge, the date of registration of any advance notice;

(c) whether there is an instrument creating or evidencing the charge. If not, how the charge was created (eg by registration in the Scottish Register of Floating Charges);

(d) the name and address of the person entitled to the charge or his agent with it being disclosed if:

(i) an agent for the chargee; or

(ii) a trustee for a group of lenders;

(e) the classes of property charged, say land; ships or aircrafts; other corporeal property; book debts; goodwill or any intellectual property;

(f) whether the property charged includes after-acquired property and, if so whether it is over all present and after-acquired property.

(g) in the case of a floating charge, whether there is:
(i) an automatic crystallisation clause;
(ii) a negative pledge.

Question: Do you consider that all the proposed particulars (ie Proposal G (a)-(g)) are essential information about a company that should be available from Companies House? Is there any other information you consider should be required?

Summary of Responses:

Virtually all respondents agreed that the required particulars should include:

- the registered name and registration number of the company that created the charge.
- The date of the creation of the charge. (A law firm queried whether this is consistent with the proposal to define the date of creation.)
- The name and address of the person entitled to the charge or his agent. (But Lloyds pointed out that it may be a class rather than a person.) However not all agreed that it should be a requirement to disclose if the named person is an agent for the chargee or a trustee for a group of lenders.

Several respondents welcomed the tick-box approach to declaring the classes of property charged. It was argued that this was preferable to the common practice of say “as listed in the instrument”. It was suggested that:

- for each class, there should be an option of fixed or floating;
- that there be sub-categories, eg proceeds of sub-hiring and proceeds of insurance claims under book debts;
- in the case of land, where situated and, in case of land in England and Wales, whether or not the title is registered;
- in the case of property for which there is a specialist register, whether registered and at which registry;
- the categories include stocks and shares, marketable instruments, and assignment of a life policy;
- the options include “all other assets”
- the list be simply land, moveable property, intangible

Others were strongly opposed to this approach, arguing that in practice secured transactions do not always fall within neat categories and that a property may change in character. One lawyer considered that the Register

should do no more than reveal the existence of a charge. Others considered that the person filing should continue to be provide a description of the charged property.

Nearly all considered it would be useful to require an indication whether the property charged includes after-acquired property and, if so whether it is over all present and after-acquired property. Those who disagreed suggested that there should be an option whether or not “all assets”.

Two respondents questioned whether, in the light of the rarity of oral charges, whether it be necessary to require a declaration whether there is an instrument creating or evidencing the charge. Registers of Scotland emphasised that the requirement need to be consistent with section 38 of the Bankruptcy and Diligence etc (Scotland) Act 2006.)

The majority were opposed to there being a requirement to reveal the existence of an automatic crystallisation clause.

A clear majority favoured a requirement to reveal a negative pledge. The British Bankers Association argued that this should apply only to negative pledges in the charging instrument itself, as opposed to those in facility letters. The City of London Law Society considered that this should be possible but not a requirement. They noted that if the public record includes the existence of the negative pledge it is then easier to establish that a person has constructive notice of it. A Scottish law firm suggested that the requirement should be to indicate whether or not a floating charge contains a negative pledge or ranking provisions contrary to a stated normal position (for Scotland the position under s.40 of the Bankruptcy and Diligence etc (Scotland) Act 2007).

Some respondents suggest that other information be required:

- the amount secured by the charge (but other respondents welcomed the exclusion of this. As one pointed out, the amount secured would fluctuate during the period of the loan, and the practice of inserting the words “all monies” results in no meaningful information being made available to assist the searcher);
- whether the charge constitutes a market charge for the purposes of section 173 Companies Act 1989;
- whether the charges were stated to be fixed or floating (on the face of the document);
- specific details of assets eg property addresses or asset numbers.
- in the case of overseas companies, the corporate name of the company if different from its UK name.

Several respondents pointed out that there needs to be a means of matching a charge instrument with the certificate of registration of the charge.

9. Conclusive Certificate

Proposal H: Registration of a charge should only prevent its invalidity for the classes of property included in both the brief particulars and the instrument creating the charge (if any).

Proposal I: Companies House should issue a certificate that is conclusive evidence of

- the identity of the chargor;
- the date of registration of the charge whose brief particulars are on the register;
- that the charge was registered within 21 days of its date of creation;
- the class(es) of charged property.

Question: Would the conclusive certificate still be needed for any purpose other than registration of land if the information on the public record were sufficient evidence for the courts of the facts in the conclusive certificate?

Question: What would be the impact on chargees of land and those dealing with them if registration of a legal charge at the Land Registry often incorporated a note that the charge may not have been properly registered under the Companies Act?

Question: Apart from the consequences for the Land Register, what would be the effects of the proposed changes relating to conclusive evidence?

Summary of Responses:

Views were varied on how the validity of a charge should be tied to the filed particulars. As noted by Professor Beale and Louise Gullifer, under current law the chargee and/or its legal advisors are shielded from responsibility for their mistakes, at the expense of third parties who rely on the incorrect information. On the other hand, as one law firm pointed out any need to take extra care when filing would result in additional costs. The British Bankers Association were concerned that tying validity to the filed particulars would give rise to litigation on fine points of interpretation as to whether particular assets were specified in the particulars. Some of those in favour of the proposal as well as those opposed saw serious practical problems with the underlying assumption that the brief particulars should include tick boxes for classes of property (rather than, in theory as at present, a brief description). Several considered that the best solution to this problem would be for the charge instrument to be placed on the public record.

Most respondents considered that the conclusive certificate is still needed. Virtually all favoured Companies House continuing to issue a certificate and that this should be conclusive evidence as to the identity of the chargor, and the dates of registration and creation. There was disagreement as to whether it should also be conclusive evidence as to the property charged (reflecting views on whether the validity of the charge should be tied to the filed particulars). One law firm considered that if there were not a conclusive certificate, then floating charges over unregistered land would require registration under the Land Charges Act 1972.

All those who commented considered that serious problems would ensue if it were commonplace for the Land Register to have notes that a charge might not have been properly registered under the Companies Act. Such notes

trigger the need for additional enquiries and investigations on the part of a potential purchaser (or other disponee) – for example on a transfer of the charge or a sale of the property under the chargee's power of sale – to ensure that the chargee has good title to enter into the proposed transaction. There was also concern that a note would cast doubt on the priority of the charge.

10. Procedures for Filing

Proposal J:

- **(a) Abolition of the requirement for the instrument (or a certified copy) to be delivered to the Registrar.**
- **(b) Abolition of the requirement for the instrument (or a certified copy) to be delivered to the Registrar.**
- **(c) If the charge is not registered within 21 days of its creation, it should be repayable on demand.**
- **(d) The civil liability for the accuracy of the particulars should lie with the chargor.**

Alternative to Proposal J:

- **(a) Either the instrument creating the charge or a certified copy should be required to be delivered to Companies House for registration of the charge - which is filed being the decision of the person filing.**
- **(b) Companies House should check the instrument (or certified copy) to ensure that the name of the chargor is the same as that in the particulars filed. The instrument should then be returned to the person who filed the particulars.**
- **(c) The civil liability for the accuracy of the filed particulars, including the date of creation and the class(es) of property charge, should lie with the chargee at the time of the creation of the charge.**
- **(d) The criminal sanction for failure to register a charge should be repealed.**

Summary of Responses:

Virtually all respondents preferred the alternative under which any person with an interest in the charge may, as now, register it. Views on whether the instrument should be part of the filing have been summarised separately (under Delivery of the Instrument) – almost all respondents considered it should be filed and several considered it should be placed on the public record.

Few respondents considered that Companies House should continue to check the filed particulars.

No respondent considered it necessary to retain the criminal sanction.

11 Late Registration and Changes to Particulars

Proposal K: There should be provision so that in the event of a late registration as directed by a court, the conclusive certificate is not issued until satisfaction of any timing condition provided by the court.

Proposal L: There should be provision for:

(i) the chargee voluntarily to file changes relating to the person entitled to the charge; and

(ii) the chargor to be required to file the addition of a negative pledge.

Summary of Responses:

Respondents did not have strong views on whether there should be provision so that the conclusive certificate is not issued until any timing condition provided by the court has been satisfied. One law firm considered it unnecessary; another considered that a procedure is needed as the creation of a new charge to secure monies already advanced risks being avoided as a fraudulent preference pursuant to section 239 Insolvency Act 1986. It was noted that electronic registration should reduce the need for late registration.

Most respondents considered it would be sensible – though not essential – to enable a chargee to notify the assignment of the charge.

Respondents were divided as to whether the chargor should be required to file the addition of a negative pledge. This was considered to be unusual. Professor Beale and Louise Gullifer considered the obligation should fall on the chargee.

12 Memorandum of Satisfaction

Proposal M: There should be provision for a memorandum of satisfaction in whole or in part to be filed by the chargee. On satisfaction of the terms of the charge, the chargor should have the right to demand that the chargee files a memorandum of satisfaction. The chargee would be required either to make the appropriate filing within 15 days of the chargor's demand or to commence court proceedings. In the event that neither the chargee has neither made the filing nor obtained a court order has been obtained by the end of 90 days (or such longer period as the court may direct), then the chargor can make the filing.

Summary of Responses:

Some respondents enthusiastically supported the proposal; others were strongly opposed. Most agreed that there should be provisions for a memorandum of satisfaction in whole or in part to be filed expeditiously. Most also agreed there needed to be a safeguard against a chargor filing it fraudulently. Views differed as to who should be able to file and the procedures: The following safeguards were proposed:

- the memorandum be accompanied by either the original or a pdf copy of the deed of discharge.
- a requirement that the chargee countersign the form to be filed;
- If a chargee were to refuse to issue such deed or countersign, then the chargor should be able to issue proceedings for an order to dispense with the discharge deed or chargee's countersignature

Several saw practical difficulties with the proposal. It was pointed out or argued that:

- in secured bond transactions, the security trustee acts on behalf of a syndicate of lenders all of whom would have to be consulted.
- the chargee might be wound up (for example if it were formed for the purpose of the transaction) or, if an individual, dead.

13. Public access to Information about Companies' Charges

Question: What use do you make of information about company charges held at Companies House?

Question: How often do you access information about company charges?

Proposal N: The requirement for Companies House to maintain a "Register of Charges" for each company should be revised so that the particulars entered are the filed particulars of each charge.

Question (i) How often do you inspect a company's own register of its charges?

(ii) If you represent a company, how often has someone sought to inspect your register of charges?

(iii) How would you be affected by abolition of the requirement for a company to keep a register of its charges?

Question (i) How often do you inspect the instruments creating charges of a company of which you are not a member or creditor?

(ii) If you represent a company, how often has someone who is not a member or creditor of the company sought to inspect an instrument creating a charge?

(iii) How would you be affected by abolition of the right for anyone other a member or creditor to inspect a company's instruments creating charges?

Proposal O: The requirement for a company to maintain a register of all the charges it has created should be abolished.

Proposal P: Only a company's creditors and members should have the right to inspect instruments creating a company's charges.

Summary of Responses

Most respondents reported heavy use of the information held at Companies House relating to company charges as it is useful to the company's customers, suppliers, lenders, bondholders and even auditors. Professional advisers use the information to advise clients on a wide range of transactions including (without limitation) lenders wishing to make facilities available to borrowers on a secured basis, purchasers wishing to purchase property and goods from the chargor, purchasers wishing to purchase the chargor itself and lenders wishing to conduct security reviews (both prior to and during insolvency proceedings). Insolvency practioners use it to find out who holds security over the assets of companies they are appointed to deal with or advise on, and the extent of that security.

The Asset Based Finance Association reported that many of its members access the information held by Companies House daily through one or more of the various means. CompaniesHouseDirect, the subscription service provided by Companies House, was the preferred means for other respondents.

There was widespread agreement that it would be sufficient if the "register of charges" that Companies House holds for each company were to comprise the filed particulars.

As for companies' own registers of charges, these are rarely inspected. It was noted that compliance with the requirement to keep these registers is poor. Only the Association of Accounting Technicians considered the requirement should be retained.

Most respondents considered there should continue to be a public right to inspect a company's instruments of charges. Insolvency practitioners and restructuring professionals always inspect the instruments of charges retained by companies; they are also sometimes inspected by potential creditors and their professional advisors. One law firm suggested that a company that enters into an oral charge should be required to prepare a memorandum of its terms and to make this available for inspection on the same basis as an instrument creating a charge.

14. Unregistered Companies and Limited Liability Partnerships

Proposal Q: The requirement to register charges should be the same for all UK companies, including unregistered companies.

Proposal R: LLPs should continue to be subject to the same rules relating to registration of charges as apply to UK companies. Any amendments made as a result of this consultation should, therefore, be applied to LLPs.

Summary of Responses:

Only one respondent disagreed with the proposal that unregistered companies be required to register charges. The exception was Lloyds, noting that it is exempt from the requirement to comply with specified provisions of the Companies Act 2006 by a direction made under a predecessor to section 1043.

No respondent disagreed with the proposal that limited liability partnerships be subject to the rules relating to registration of charges. A law firm and the association for insolvency practitioners both suggested that limited partnerships should also be subject to these rules as these are now commercially very significant.

15. Overseas Companies

Question: Do you agree that overseas companies that have registered a UK establishment should continue to be required to register at least some charges that they create?

Question: What charges created by overseas companies should be registrable at Companies House?

Question: Should the sanction of invalidity (see Proposal E) be modified in its application to charges created by overseas companies? If so, how?

Question: Should there be any other differences between the requirements for overseas companies and UK companies?

Summary of Responses:

Most respondents agreed that registered overseas companies should continue to be required to register at least some charges that they create. It was noted that otherwise creditors and potential creditors of an overseas company trading in the UK would no longer have an easy way of ascertaining what charges the company has created over its UK assets. Not everyone who uses the information at Companies House has the resources to instruct overseas counsel or search agents to obtain it from the country of registration. However the majority of the members of the City of London Law Society's argued that a company's home register is the only one that is relevant; the register at Companies House cannot provide a complete picture. .Several considered there needs to be further consultation on this issue.

Most respondents considered that if registered overseas companies are required to register charges, then this should not apply to charges over intangible property. Most respondents considered that charges over and in the UK, ships and aircraft registered in the relevant UK registers should be registrable. Several also considered that charges over one or more of the following types of assets should also be registered:

- UK land, whether or not registered
- registered intellectual property
- tangible property in the UK when the charge is created
- floating charges.

Scottish lawyers pointed out the decision whether or not floating charges should be registrable would need to take account of the Bankruptcy and Diligence etc (Scotland) Act provisions on floating charges.

Most respondents considered that the sanction of invalidity should not be modified for overseas companies. However one law firm suggested an unregistered charge be void against insolvency practitioners in the UK only. The British Bankers Association suggested it should also be void against a creditor in the UK. It was also suggested that the sanction should not apply to overseas companies but one respondent pointed out that, under Article 1(d) of the 11th Company Law Directive, a member state may only require

> "an indication of the securities on the company's property situated in that Member State, provided such disclosure relates to the validity of those securities."

Assuming electronic registration is established, no respondent suggested any other difference.

16. Specialist registers

Question: How important do you consider it to be that those inspecting a company's record at Companies House be able to discover whether it has granted any registrable charges?

Question: What would be the consequences for you if the record at Companies House did not include charges over certain assets for which there is a specialist register.

Question: Do you consider that the time limit for registration of a legal charge over land in England and Wales should be the priority period of an official search made before the creation of the charge?

Question: Do you agree that charges over land in England and Wales should continue to be registered at Companies House?

Question: What do you consider would be the advantages and disadvantages of treating a standard security over land in Scotland created by companies as if they were registered at Companies House if the Keeper were to provide particulars to Companies House?

Question: Would it be sufficient if the information on the company's record at Companies House for a floating charge created under Scots law were

(a) The name and registration number of the company that created the charge;

(b) the date of the creation of the charge; and

an indication that the charge was created by registration at the Scottish Register of Floating Charges;

Summary of Responses:

Every respondent (except the Land Registry) considered it essential that those inspecting a company's record at Companies House be able to discover whether it has granted any registrable charges. Several emphasised that otherwise those needing the information would have to conduct separate searches of the different asset registers and this might not be straightforward as these registers are not arranged by company. Several respondents looked forward to the registers sharing information. However, unless and until it is possible for information filed at an asset registry to be readily available for searching at Companies House, all considered that that the importance of cheap and easy searching outweighs the (relatively minor) disadvantage of a chargee sometimes having to register a charge in an asset registry as well as at Companies House.

No respondent considered that the time limit for registration of a legal charge over land in England and Wales should be the priority period of an official search made before the creation of the charge. It was argued that the

purposes of registration at the Land Registry and at Companies House and the consequences of non-registration are too different for their time periods to be linked.

A key consequence of the difference between the treatment of land in Scotland and in England & Wales is that a “standard security” is only over land in Scotland while it is usual for a charge over land in England & Wales to also be over other assets. The Land Registry was the only respondent to consider that charges over land in England and Wales should not also be registered at Companies House. However respondents however considered that there would be savings of time and money if a standard security over land in Scotland created by companies was treated as if registered at Companies House provided that the particulars available from Companies House were the same as if it had been registered there.

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