

*Why directors may be loath to join smaller companies Financial Times
(London, England) February 6, 2006 Monday*

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Financial Times (London, England)

February 6, 2006 Monday
London Edition 1

SECTION: LETTERS TO THE EDITOR; Pg. 16

LENGTH: 488 words

HEADLINE: Why **directors may be loath to join smaller companies**

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BODY:

From Mr Tom Mackay.

Sir, Lord Sainsbury, minister for science and innovation (Letters, February 2), indicates that the government will listen carefully and respond positively to any suggested technical improvements to the company law reform bill.

There is general acceptance that the government has won the argument that there ought to be a code of directors' duties. The present argument is over how you fine-tune the wording to make the suggested code better. For instance, section 156 (3) states that the director must have regard to several factors, including the company's operations on the community and the environment. Larger companies have resources to review such factors but smaller companies do not.

The impact will fall unduly on the smaller sector. Also the likely consequence of 156 (3) is that there will be an increase in the length of minutes and to a large extent those minutes will develop a standard format. The effect will be a waste of resources, including cost for no real benefit to UK plc. Even if the government does not accept it is wrong for company law to be used to regulate the environment - that should be left to environmental legislation - it ought to accept that the wording of the code needs to make it clear that the factors in 156 (3) are subservient to the prime duty of a director to promote the success (or interests) of the company.

Also in section 158 it is stated that a director must not only exercise reasonable care, skill and diligence but must do so with "the general knowledge, skill and experience that the director has". It seems to be generally accepted that this will be part of the new code.

This will have unintended consequences that will be bad for UK plc. Able directors (perhaps directors of FTSE 100 companies) will be reluctant to become directors of smaller quoted companies given the liabilities that might arise because of section 158. Historically, a director has long had to exercise reasonable care, skill and diligence.

Then through insolvency legislation there was introduced the idea that once a

company had reached a certain financial condition there was an increased duty on a director obliging him to act with the general knowledge, skill and experience he had.

Hoffman LJ in the case of *Re D'Jan of London Ltd* extended the wording in the statute (which regulated wrongful trading) to directors' duties generally (although Hoffman does not seem to cite any case law to support his extension of the common law).

The code now sets Hoffman's view in stone. However, it is not welcomed by many in the business community as it increases the liabilities of able directors. Does the bill make it more or less likely that the finance director of Shell will be willing to accept an appointment as a director of an Aim company? I urge your readers to read the draft code and make their views known.

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