

# COMPANIES ACT 2006

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## EXPLANATORY NOTES

### COMMENTARY

#### **Part 20: Private and Public Companies**

##### ***Chapter 2: Minimum Share Capital Requirement for Public Companies***

1064. Under the 1985 Act, a public company which is incorporated as such may not do business without first obtaining a trading certificate from the registrar. There is a minimum allotted share capital requirement, known as the “authorised minimum”, which is currently set at £50,000 and which must be denominated in sterling. The same minimum share capital requirement applies where a private company re-registers as a public company under Part 7 of the Act.
1065. If a public company reduces its share capital below the authorised minimum it will no longer meet the minimum share capital requirement for a public company and must re-register as a private company.
1066. The requirement for public companies to have a minimum share capital is derived from EU law. Article 6 of the Second Company Law Directive (77/91/EEC) provides that:
- ““The laws of member states shall require that in order that a company may be incorporated or obtain authorisation to commence business, a minimum share capital shall be subscribed the amount of which shall not be less than 25,000 euros.”
1067. The Department’s interpretation of this Directive is that it permits the authorised minimum to be denominated in euros, or the national currency of the Member State, but not in other currencies (so for example, the authorised minimum could not be satisfied in dollars).
1068. When this requirement was implemented in the Companies Act 1980 the amount of the authorised minimum was set at £50,000 (a figure considerably higher than the minimum required under the Directive). The CLR considered whether the authorised minimum should be maintained, increased or reduced. Their recommendation was to maintain it at £50,000.

##### ***Section 761: Public company: requirement as to minimum share capital***

1069. This section replaces section 117(2) of the 1985 Act and restates section 117(1), (4) and (6) of that Act. Like the provisions of the 1985 Act, it only applies to public companies that are formed as such on their original incorporation (as opposed to companies that re-register from private limited to public under the provisions of Part 7 of the Act).
1070. The current requirement for a statutory declaration to be filed with an application for a trading certificate, contained in section 117(2) of the 1985 Act, has not been carried forward. This is replaced by a requirement for a statement of compliance (see section 762 and the note on section 13).

1071. As now, the registrar will only issue a trading certificate if she is satisfied that certain conditions are met: in particular the company must satisfy the minimum share capital requirement for public companies – known as the “authorised minimum” (see *subsection (2)*).
1072. A trading certificate has effect from the date that it is issued and is conclusive evidence that the company is entitled to do business as a public company.

***Section 762: Procedure for obtaining certificate***

1073. This section replaces section 117(3) of the 1985 Act. It prescribes the contents of the application for a trading certificate (see *subsection (1)*), which, amongst other things, must include a statement that the nominal value of the company’s share capital is not less than the authorised minimum.
1074. The current requirement for a statutory declaration (or “electronic statement”) when an application is made for a trading certificate is replaced by a requirement to make a statement of compliance. This statement does not need to be witnessed and may be made in paper or electronic form. It will be for the registrar’s rules to specify who may make this statement (and the form of it).

***Section 763: The authorised minimum***

1075. This section replaces section 118(1) of the 1985 Act. Under section 118 the authorised minimum is £50,000. This implements Article 6 of the Second Company Law Directive which requires that in order that a public company may be incorporated or obtain authorisation to commence business, a minimum capital shall be subscribed (see above). As recommended by the CLR (Completing the Structure, paragraph 7.6), this section retains the authorised minimum at £50,000. In contrast to the 1985 Act provisions, the section also enables the minimum share capital requirement for public companies to be satisfied in sterling or the prescribed euro equivalent (see *subsection (1)*).
1076. Once a company has obtained a trading certificate under section 762 or section 117 of the 1985 Act (in the case of companies that obtain a trading certificate before these provisions of the Act come into force), there is no requirement for the authorised minimum to remain denominated in sterling or euro, and if it wishes a public company may subsequently redenominate all of its share capital (including the authorised minimum) under the provisions of Chapter 8 of Part 17 of the Act (which contains new provisions which permit companies easily to redenominate or convert their share capital from one currency to another).
1077. *Subsection (2)* of section 763 contains a new power which enables the Secretary of State, in regulations made under the Act, to prescribe the amount in euros that is for the time being to be treated as equivalent to the sterling amount of the authorised minimum. This is required in order to achieve parity between the prescribed sterling and euro amounts (which may become necessary due to exchange rate fluctuations). The amount prescribed will be determined by applying an appropriate spot rate of exchange to the prescribed sterling amount and rounding to the nearest 100 euros (see *subsection (4)*).
1078. The power to alter the authorised minimum, contained in section 118 of the 1985 Act, is carried forward in section 764.

***Section 764: Power to alter authorised minimum***

1079. This section replaces section 118(1) of the 1985 Act and restates section 118(2) and (3) of that Act. The power to alter the authorised minimum, contained in section 118, is carried forward but this has been updated to reflect the fact that in future companies will be able to satisfy the authorised minimum in sterling or the prescribed euro equivalent of the sterling amount (see section 763).

1080. **Section 764** also contains a new provision which enables the Secretary of State, in regulations made under the Act, to alter both the sterling amount of the authorised minimum and to make a corresponding alteration to the prescribed euro equivalent (which is to be determined by applying an appropriate spot rate of exchange to the sterling amount and rounding up to the nearest 100 euros – see *subsection (2)*).
1081. As now, the power in this section will enable the Secretary of State to alter the sterling amount of the authorised minimum, for example from £50,000 to £60,000, (and the prescribed euro equivalent) should it become necessary to do so (for example, because of changes to the prescribed minimum capital requirement for public companies at EU level) or desirable (for example, if it was considered appropriate for business reasons to raise or lower the minimum share capital requirement for public companies within the limits permitted by the Second Company Law Directive).

***Section 765: Authorised minimum: application of initial requirement***

1082. This section is a new provision which prescribes how the authorised minimum is to be met. Subsection (1) makes it clear that the authorised minimum may be satisfied by reference to allotted share capital denominated in sterling or euros (but not a combination of both).
1083. Where a company has allotted sterling and euro shares, the question of whether the authorised minimum has been satisfied will be determined firstly by reference to the total sterling amount of the company's allotted share capital and then by reference to the company's euros shares (see *subsection (2)*). To take an example, if a company has allotted sterling shares to the total value of £25,000 and euro shares to the equivalent of £60,000, the authorised minimum will have been satisfied in euros. If the same company had allotted sterling shares to the total value of £10,000 and euro shares to the equivalent of £40,000 it would not have satisfied the minimum share capital requirement for a public company as the authorised minimum may be satisfied in sterling or euro but not partly in sterling and partly in euro.

***Section 766: Authorised minimum: application where shares denominated in different currencies etc***

1084. This section is a new provision which enables the Secretary of State to prescribe, in regulations made under the Act, how references to the authorised minimum are to be applied where a public company has its share capital denominated in more than one currency, or where it redenominates (converts) its share capital from one currency to another (see section 622).
1085. There are various provisions in the Act (for example where a public company applies to court to reduce its share capital) which provide that a company must re-register as a private company where the nominal value of its allotted share capital falls below the authorised minimum. It is therefore necessary to make provision for how references to the authorised minimum in the Act are to be applied where a public company has its shares denominated in different currencies, or currencies other than those in which the authorised minimum may be satisfied, and to require that a company must re-register as a private company where the effect of a redenomination of its share capital is to bring the value of the company's share capital below the authorised minimum.
1086. To take an extreme example, the type of scenario that the power in this section is intended for is the situation where a public company incorporates with a share capital of £50,000 (expressed in sterling), allots additional dollar shares, subsequently redenominates part of its share capital into euros and then applies to the court to reduce its share capital. It will be necessary in such circumstances to determine what test should be applied to ascertain whether the company's allotted share capital has fallen below the authorised minimum (in other words what exchange rates must be applied, as at what date they should be applied and as between what currencies). Regulations made

pursuant to this section will need to deal with this type of issue. They will be subject to the negative resolution procedure due to their highly technical nature.

***Section 767: Consequences of doing business etc without a trading certificate***

- 1087. This section restates section 117 (7) and (8) of and Schedule 24 to the 1985 Act.
- 1088. As now, where a public company which is required to have a trading certificate enters into a transaction without first obtaining such a certificate, the directors are jointly and severally liable for any loss or damage caused to the other party to the transaction as a result of the company failing to meet its obligations. A director will only be jointly and severally liable with the company if he was a director at the time that the transaction was entered into and if the company has failed to meet its obligations under the transaction in question within 21 days of being called on to do so (see *subsection (3)*).
- 1089. Notwithstanding the fact that the company should not have entered into the transaction, the transaction itself is valid.
- 1090. Where a public company that is formed under this section, or under section 117 of the 1985 Act, has not obtained a trading certificate within a year of its incorporation, it may be wound up by the court (see section 122(1)(b) of the Insolvency Act 1986).