

COMPANIES ACT 2006

EXPLANATORY NOTES

COMMENTARY

Part 20: Private and Public Companies

1044. The provisions of this Part set out the two major differences between public and private companies.
1045. **Chapter 1** replaces sections 58(3), 81 and 742A of the 1985 Act which provide that private companies are not allowed to offer their shares to the public.
1046. **Chapter 2** replaces sections 117 and 118 of the 1985 Act which deal with the minimum share capital requirement for public companies (known as the “authorised minimum”). It contains new provisions that enable this requirement to be satisfied in euros as well as sterling. To facilitate this change it has been necessary to seek two new powers:-
- a) a power to prescribe the amount in euros that is to be treated as equivalent to the sterling amount of the authorised minimum (see section 763); and
 - b) a power to prescribe how references to the authorised minimum in the Act are to be applied where a public company has shares denominated in more than one currency or redenominates its share capital (that is, converts its share capital from one currency to another) and to require that a company must re-register as a private company where the effect of redenomination is to bring the value of the company’s share capital below the authorised minimum (see section 766).
1047. The authorised minimum is relevant to all public companies, not just those that are incorporated as such, see for example, section 91.

Chapter 1: Prohibition of Public Offers by Private Companies

1048. The CLR considered the prohibition on private companies offering their shares to the public in paragraph 4.160 of Developing the Framework and then examined the dividing line between public and private companies in Chapter 2 of Completing the Structure. The CLR presented their conclusions in paragraphs 4.54 to 4.62 of the Final Report.

Section 755: Prohibition of public offers by private company

1049. *Subsection (1)* of this section continues the prohibition in section 81(1) of the 1985 Act on private companies offering their shares or debentures to the public, though the consequences of breaching the prohibition are changed. The prohibition applies only to private companies limited by shares or limited by guarantee and having a share capital. The prohibition does not apply to unlimited companies or to companies limited by guarantee and not having a share capital.
1050. Private companies are also prohibited from allotting their shares or debentures with the intention that they are offered to the public by someone else. *Subsection (2)* creates a presumption as to when shares or debentures have been allotted in this way. Similar provision was made in section 58(3) of the 1985 Act which this subsection replaces.

1051. A private company will no longer commit an offence if it offers its securities to the public. Instead, if a private company does breach the prohibition it will be compelled to re-register as a public company, unless it appears to the court that the company does not meet the requirements for re-registration and that it is impractical or undesirable to require it to take steps to do so, in which case the court may make a remedial order and/or an order for the compulsory winding up of the company.
1052. *Subsection (3)* contains an exemption to the prohibition on public offers. Where a private company intends to become a public company it will be able to make an offer before it has completed the formalities of re-registration as a public company. Acts done in good faith before allotment in anticipation of re-registration will not be treated as breaching the prohibition on offers to the public, even if the re-registration arrangements do not ultimately succeed. The exemption also applies if, as part of the terms of the offer, the company undertakes to re-register as a public company and then complies with that undertaking not later than 6 months after the day on which the offer is first made to the public.

Section 756: Meaning of “offer to the public”

1053. This section explains what is meant by “offer to the public” for the purposes of the prohibition on public offers contained in section 755. This section also sets out certain circumstances where an offer is not to be regarded as an offer to the public. It replaces section 742A of the 1985 Act.
1054. An offer will not be an offer to the public if it is not calculated to result in shares or debentures of the company becoming available to anyone other than those receiving the offer. An example would be where shares are offered to a particular person, with the intention that no one other than that particular person may take up the offer or acquire the shares as a result. Nor will an offer be an offer to the public if the offer is otherwise a private concern of the person receiving it and the person making it.
1055. *Subsection (4)* creates two further exemptions for offers to persons already connected with the company (as defined in *subsection (5)*) and for offers in respect of securities to be held under an employees’ share scheme (as defined in section 1166). Such offers are presumed to be the private concern of those involved and so not an offer to the public if the conditions set out in subsection (4) are met.
1056. The range of persons already connected with the company for the purposes of subsection (4) has been expanded slightly from the current provision in section 742A of the 1985 Act. *Subsection (5)* now includes a trustee of a trust where the principal beneficiary is an existing debenture holder of the company or the widow or widower, or surviving civil partner of a person who was a member or employee of the company.
1057. *Subsection (6)* explains what is meant by a member of a person’s family for the purposes of subsection (5).

Section 757: Enforcement of prohibition: order restraining proposed contravention

1058. This section enables members, creditors or the Secretary of State to apply to the court for an order restraining a private company from carrying out any proposed contravention of the prohibition on offering shares or debentures to the public. This is a new procedure which will enable the member, the creditor or the Secretary of State to prevent by civil action any further activity by the company towards making an offer in contravention of the public offer prohibition. The court must also make such an order if, in proceedings brought by a member under section 994 or by the Secretary of State under section 995, it appears to the court that the company is proposing to breach the public offer prohibition.

Section 758: Enforcement of prohibition: orders available to the court after contravention

1059. This section applies where a private company breaches the prohibition on offering securities to the public. It introduces a new enforcement procedure for breaches; it replaces the criminal offence currently imposed in section 81 of the 1985 Act with a civil enforcement procedure.
1060. If a company breaches the prohibition, certain members, certain creditors or the Secretary of State may apply to the court. In order to have standing to bring the application, the member or creditor must have been a member or a creditor at the time the offer was made in contravention of the public offer prohibition; in addition anyone who became a member as a result of the offer to the public may bring an application.
1061. On such an application, if the court decides the company has acted in contravention of the public offer prohibition then it must order the re-registration of the company as a public company, unless it appears to the court that the company does not meet the requirements for re-registration as a public company (see Part 7 of the Act), and it is impracticable or undesirable to require it to take steps to do so. If the court is unable to order re-registration for these reasons, it may instead make a remedial order or an order for the compulsory winding up of the company (see Chapter 6 of Part 4 of the Insolvency Act 1986). The court has discretion as to whether or not to make these orders. This might be appropriate for example where the company has breached the prohibition but has not allotted shares, and has withdrawn the offer and undertaken not to do it again.

Section 759: Enforcement of prohibition: remedial order

1062. A remedial order is an order for the purpose of putting anyone affected by the breach of the public offer prohibition back in the position they would have been in if the breach had not occurred. It may require any person knowingly concerned in the contravention, whether or not an officer of the company, to offer to purchase the shares or debentures that were the subject of the offer on such terms as the court thinks fit. The remedial order will override the terms of the company's constitution, but no one holding the securities will be obliged to accept the offer made to purchase them. It may be made whether or not the holder of the securities subject to the order is the person to whom the company allotted or agreed to allot them.

Section 760: Validity of allotment etc not affected

1063. This section makes clear that any allotment or sale of securities or any agreement to allot or sell securities is not made void simply because there has been a breach of the prohibition on offers to the public. Equivalent provision was made in section 81(3) of the 1985 Act.

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).