

The Companies Act 2006

Key Practical Pointers for Private Companies



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The Companies Act 2006 (“**2006 Act**”) is a complex and technically difficult statute to understand and although one of the core ideas behind this legislation was to make Company Law easier, particularly for private companies, to date this has not proved to be the case.

This document outlines some of the key administrative points relating to private companies in the 2006 Act and the actions owners and directors should take to fulfil their obligations under the Act.

Articles of association

- Articles of association are now the statutory constitutional document containing restrictions on a company's objects (if any) under the 2006 Act. Shareholders' rights may also be set out here (and if relevant supplemented by a shareholders' agreement). The memorandum of association is no longer of ongoing relevance after formation of a company (see below). There are standard sets of “model” articles which will often be appropriate for the great majority of private companies.
- Standard model articles are less complicated than previously.
- A company must register its articles with Companies House unless it has model articles.
- The version of the model articles in force at the time a company was originally registered (for example, Companies Act 1985 - Table A) continues to apply to that company, unless the company decides to adopt the relevant model articles under the 2006 Act (with or without modifications) in place of its existing articles.
- Any information, for example “objects”, “name” or “share capital” contained in the memorandum of an existing company of a type which is set out in the articles under the 2006 Act, is treated as forming part of the company's articles.

Auditors

- Auditors may limit their liability by agreement with the company provided the agreement is fair and reasonable.
- An auditor in office is deemed to be reappointed in the case of private companies at the end of the year, although members have a right to prevent automatic reappointment.

Authorised share capital

- The 2006 Act abolished the requirement for a company to have an authorised share capital. Shareholders wishing to restrict the number of shares issued by a company will need to amend its articles of association by special resolution to include such a restriction.

- On formation of a company with a share capital, a form called a “statement of capital” of initial shareholdings must be submitted to the Registrar.
- A statement of capital must be filed with the Registrar on each occasion where there is a change to the company's share capital.
- A public company is still required to have an allotted share capital of a nominal value that is not less than £50,000 (or the prescribed euro equivalent) in order to obtain a trading certificate and to maintain this as its minimum share capital. The 2006 Act does not provide expressly that the authorised minimum must continue to be denominated in sterling or euros once the initial minimum capital requirements have been satisfied.

Company formation

- Any type of company (not just a private company) can be formed by a single person.
- There are provisions for ensuring increased facilities for on-line registration at Companies House.
- The objects clause of the memorandum for all new companies has been abolished under the 2006 Act (see above) and no existing memorandum can be updated or amended.
- A private company is no longer required to have a secretary, although it may still decide to have one.
- If the company is to have a share capital, a statement of its share capital and initial shareholdings must be delivered to Companies House on formation.
- All directors may have their home address kept on a separate record to which public access is restricted. In order to benefit from this option, a director has to provide a service address for the public record.
- A statement of compliance that all requirements of the 2006 Act have been complied with has replaced the witnessed statutory declaration and must be delivered to the Registrar on formation.
- The form (IN0 1) required to incorporate a company is more complicated than was previously the case.

Declaration of directors' interests

- The 2006 Act has divided the duty of directors to declare their interests in transactions and arrangements into two provisions:
 - section 177 relates specifically to directors declaring their interests in transactions or arrangements which are proposed but not yet been entered into by the company; and
 - section 182 deals with declarations of interests in relation to existing transactions or arrangements that the company has already entered into.
- The declaration must contain both the nature and extent of the director's direct or indirect interest.
- As disclosure of a director's interest must be made to the other directors, no disclosure is required where a private company has only one director.
- There is no need to disclose anything the other directors who already know or ought reasonably to have known about the nature of a director's interests in any transaction.

Directors' duties

- The 2006 Act introduced a statutory statement of directors' duties that replaced many common law and equitable rules. This comprises of seven general duties:
 - to act in accordance with the company's constitution
 - to exercise powers only for the purposes for which they are conferred
 - to promote the success of the company
 - to exercise independent judgment
 - to exercise reasonable care, skill and diligence
 - to avoid conflicts of interests, and
 - not to accept benefits from their parties.
- The 2006 Act does not contain all the necessary detail on directors' duties as regard must still be had to existing rules in interpreting and applying the statutory duties.
- There is a statutory requirement for directors to have regard, amongst others, to a list of factors (such as relationships with customers and suppliers or effect on the community) in exercising their duty to promote the success of the company (the so-called principle of "enlightened shareholder value"). The list of factors that directors are required "to have regard to" is not exhaustive.
- One useful set of general guidance (although not in any way to be seen as a statutory list) for directors can be found at www.bis.gov.uk. It is in a release dated June 2007 and set out in a long set of Ministerial Statements about directors' duties - the list is on page 2. It is also included at the end of this document.
- One other key point (as set out in the guidance noted above) is to ensure accurate records of all decisions are kept.

Electronic communications

- A shareholder is allowed to communicate with the company by electronic means, for example, if the company has given an electronic address in a notice calling a meeting.
- the 2006 Act allows companies to send documents to shareholders:
 - in electronic form, subject to shareholder approval; and
 - by a website, subject to shareholder approval, or deemed approval where no reply is received from a shareholder within 28 days of the company's request.

Execution of documents

- The requirement for private companies to appoint a company secretary has been abolished, although private companies may choose to retain a secretary if they wish. Any secretary retained by a private company continues to have power to execute documents on behalf of the company.
- A company may execute a document either by fixing its common seal or, if the document is signed on behalf of the company, by the signature of two authorised signatories or by a single director in the presence of a witness. Authorised signatories are the company's directors and, in the case of a private company with a secretary or a public company, the secretary.

Financial assistance

- The prohibition on the giving of financial assistance by a private company for the purchase of its shares and the private company so called "whitewash" procedure, have both been abolished. The prohibition on the giving of financial assistance remains for public companies.
- The prohibition on the giving of financial assistance by a public company subsidiary for the purpose of an acquisition of shares in its private holding company is retained.

Filing accounts and penalties

- The time for private companies to file their accounts has been reduced from 10 to nine months and for public companies from seven to six months from their year end.
- Penalties for filing accounts late have been increased substantially.

Loans to directors

- The general prohibition on loans to directors was abolished and replaced with a requirement for shareholder approval for all companies.

Name

- The company name may be changed by whatever means are provided in the company's articles, in addition to the statutory procedure. This means that the company is able to decide the manner of changing its own name, for example by directors' resolution.

Notice of shareholder meetings

- The phrases "extraordinary general meeting" and "EGM" are no longer used under the 2006 Act. The 2006 Act simply refers to "general meetings" or "annual general meetings" (or "AGMs").
- Shorter notice may be agreed by a majority in number of the members having the right to attend and vote at the meeting who together hold the "requisite percentage" in nominal value of the voting shares. The "requisite percentage" is 90 percent in the case of a private company or such higher percentage (not exceeding 95 percent) as may be specified in the company's articles.

Ordinary resolutions

- No substantive changes were made to the nature of ordinary resolutions under the 2006 Act.
- If any provision of the 2006 Act requires a resolution of a company or its members and it does not specify what kind of resolution, an ordinary resolution is required unless the company's articles require a higher majority, or unanimity.
- If a provision of the 2006 Act specifies that an ordinary resolution is required, the articles will not be able to specify a higher majority.
- A written ordinary resolution is passed by a simple majority if it is passed by members representing more than 50 percent of the total voting rights of eligible members.

Pre-emption rights – share allotment

- Members of a private company with only one class of shares may authorise the directors by special resolution or by power in their articles to allot shares without complying with the statutory pre-emption provisions (rights of first refusal).

Quorum requirements

- The quorum is calculated by reference to the numbers of "qualifying persons" who are present at the meeting. These include an individual who is a member of the company, a person authorised to act as the representative of a corporation, and a person appointed as proxy of a member.
- Other than for single member companies (where one qualifying person present at a meeting is a quorum), and subject to the provisions of the company's articles, in almost all cases two qualifying persons present at a meeting constitute a quorum.

Records

- A time limit was introduced on the requirement to keep records of at least 10 years from the date of the relevant resolution, decision or meeting (for both shareholders' and directors' meetings). This 10 year period replaced the 1985 Act requirement to keep such records indefinitely.
- A company must keep available for inspection the records of shareholders' meetings and resolutions for a period of 10 years, either at its registered office or at a single alternative location in the same part of the UK as the company's registered office.

Share buybacks

- A specific authorisation in a company's articles for it to purchase its own shares is no longer required under the 2006 Act.
- The procedure for the purchase of own shares out of capital is still only available to private companies under the 2006 Act, and has been retained despite the introduction of a simpler procedure for the reduction of capital by private companies using a solvency statement.

Share capital: maintenance of capital

- A number of deregulatory measures were introduced under the 2006 Act with the intention of removing many of the so called capital maintenance rules for private companies, including:
 - the abolition of the prohibition on the giving of financial assistance by a private company for the purchase of its shares
 - the removal of the requirement for a specific authorisation in a company's articles in order for a company to be able to reduce its share capital, buy back its shares, consolidate or sub-divide its shares, or allot redeemable shares, and
 - the introduction of a new solvency statement procedure for private limited companies to reduce their share capital, as an alternative to the court approved procedure.

Short notice

- The majority of shareholders from whom consent to short notice needs to be obtained by most private companies was reduced under the 2006 Act to 90 percent of the voting rights, unless a higher percentage (not exceeding 95 percent) is specified in the company's articles.

Special resolutions

- A written special resolution is passed by a majority of at least 75 percent if it is passed by members representing at least 75 percent of the total voting rights of eligible members.
- A resolution of a private company which is passed as a written resolution will not be a special resolution unless it states that it was proposed as such.

- Where any provision of the 2006 Act requires a resolution of the company or its members and does not specify what kind of resolution, an ordinary resolution will be required unless the company's articles require a higher majority or unanimity. When a provision specifies that an ordinary resolution is required, the articles will not be able to specify a higher majority.
- The concept of extraordinary resolutions was not carried forward in the 2006 Act, although any reference to an extraordinary resolution in a company's memorandum or articles, or in a provision of a contract, continues to have effect after 1 October 2007.

Statement of capital

- This is a form which needs to be filed at Companies House each time the share capital of the Company is altered.

True and fair view

- The 2006 Act reinforced the true and fair view requirement by imposing a specific obligation on the directors of a company to satisfy themselves that the accounts give a true and fair view of the assets, liabilities, financial position and profit or loss before they approve the company's accounts.

Written resolutions

- It is still the case that under the 2006 Act only private companies can pass written resolutions. This means public companies that are wholly-owned subsidiaries cannot take advantage of the written resolution procedure under the 2006 Act for making decisions and will need to hold a meeting.
- Private companies have been given the ability to pass written ordinary resolutions by a simple majority of those eligible to vote and written special resolutions by a 75 percent majority of those eligible to vote, rather than requiring unanimity for all types of written resolution as was the case under the 1985 Act.
- Procedural details covering the circulation of, and timing for the passing of, written resolutions are included in the 2006 Act in much greater detail than was the case in the 1985 Act. For example, the copy of the written resolution must be accompanied by a statement informing the members how to signify agreement to the resolution and as to the date by which the resolution must be passed if it is not to lapse.

Some useful guidance for Directors – as noted under ‘Directors’ duties’ above

1. Act in the company’s best interests taking everything you think relevant into account.
2. Obey the company’s constitution and decisions taken under it.
3. Be honest and remember that the company’s property belongs to it and not to you or to its shareholders.
4. Be diligent, careful and well informed about the company’s affairs. If you have any special skills or experience use them.
5. Make sure the company keeps records of your decisions.
6. Remember that you remain responsible for the work you give to others.
7. Avoid situations where your interests conflict with those of the company. When in doubt disclose potential conflicts quickly.
8. Seek external advice where necessary, particularly if the company is in financial difficulty.



Nick Gould
Partner

Nick regularly lectures on areas of corporate law and is the firm’s main commentator on the Companies Act, which finally came into effect in October 2009. He has held a number of seminars to audiences ranging from clients to law schools, both within the UK and abroad, on Directors Duties and the implementation of the Companies Act and its many implications. He has also been advising a UK business federation on related issues.

Nick’s practice includes mainstream corporate work as well as a wide range of commercial advice which arises from dealing with a diverse and international client base. Over the years, he has advised on buying/selling a range of companies, from those in the TV/media, telecom and software markets to those involved in energy and transportation. His clients range from international shipping groups to entrepreneurs and family run companies.

Email: nick.gould@incelaw.com

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Dubai	Hamburg	Hong Kong	Le Havre	London	Paris	Piraeus	Shanghai	Singapore
T:+971 4 3598982	T:+49 40 38 0860	T:+852 2877 3221	T:+33 2 35 22 18 88	T:+44 20 7481 0010	T:+33 1 53 76 91 00	T:+30 210 4292543	T:+86 21 6157 1212	T:+65 6538 6660
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E: firstname.lastname@incelaw.com

24 Hour International Emergency Response T +44 20 7283 6999

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