

**EXPLANATORY MEMORANDUM TO  
THE COMPANIES (SHARES AND SHARE CAPITAL) ORDER 2009**

**2009 No. 388**

1. This explanatory memorandum has been prepared by The Department for Business Enterprise and Regulatory Reform (BERR) and is laid before Parliament by Command of Her Majesty.
2. **Purpose of the instrument**
  - 2.1 This Order makes provision in relation to shares and share capital for the purposes of various provisions of the Companies Act 2006.
  - 2.2 In various circumstances the Act requires companies to deliver to the registrar of companies a statement of capital containing, for each class of the company's shares, prescribed particulars of the rights attached to the shares. It also requires a company to send a current statement of capital to any member of the company on request, containing such prescribed particulars. The Order prescribes these particulars; it does not deal with the contents of a statement of capital in a company's annual return.
  - 2.3 Where an unlimited company allots a new class of shares, section 556 of the Act requires it to deliver to the registrar of companies a return of the allotment containing prescribed particulars of the rights attached to the shares. This Order prescribes the particulars.
  - 2.4 The Order prescribes the information that must be included in a return of an allotment delivered to the registrar of companies under section 555 of the Act (return of an allotment of shares by a limited company).
  - 2.5 The Order provides that, where shares are allotted or paid up using the settlement system operated by Euroclear UK & Ireland Limited (see [www.euroclear.com](http://www.euroclear.com)), and where treasury shares are transferred using that system, the obligation which arises on the part of a settlement bank to make payment is to be regarded as a means of payment falling within the definition of "cash consideration" in section 583 of the Act. That definition applies to determine whether, for the purposes of companies' legislation, shares in a company are deemed to be paid up in, or allotted for, cash. It also applies for the purposes of section 727 of the Act, which permits a company to sell treasury shares at any time for a cash consideration. The Euroclear system (also known as CREST) is regulated by the Uncertificated Securities Regulations 2001 (S.I. 2001/3755, as amended).
  - 2.6 Finally the Order prescribes the form of, and information to be contained in, a directors' statement made under section 714 of the Act where a private company makes a payment out of capital for the redemption or purchase of its own shares.

**3. Matters of special interest to the Joint Committee on Statutory Instruments.**

3.1 None

**4. Legislative Context**

4.1 The Order relates to provisions of the Companies Act 2006.

**5. Territorial Extent and Application**

5.1 The instrument applies to all of the United Kingdom

**6. European Convention on Human Rights**

The instrument is subject to the negative resolution procedure and does not amend primary legislation. Consequently no statement about compatibility with the Convention rights is required.

**7 Policy background**

7.1 The Companies (Shares, Share Capital and Authorised Minimum) Regulations were published in draft on the Department's website in May 2007.

7.2 The Government subsequently announced in November 2007 that it would be necessary to delay final implementation of the Companies Act 2006 until October 2009. That announcement did not affect commencement in April 2008 of Chapter 2 of Part 20 of the Act (which deals with the authorised minimum share capital requirement for public companies); and there was a subsequent decision that the provisions of the Act enabling private companies to reduce their share capital by special resolution supported by solvency statement, and the provisions about the treatment of reserves arising from capital reductions, should be commenced in October 2008. As a result, the Companies (Authorised Minimum) Regulations 2008 were made in March 2008 to deal with the authorised minimum share capital requirement, and the Companies (Reduction of Share Capital) Order 2008 was made, coming into force in October 2008, to deal with capital reductions supported by solvency statement and with the treatment of reserves arising from capital reductions. The latter Order covered matters which were previously intended to be addressed in the Companies (Shares and Share Capital) Order and which no longer need to be; the Companies (Shares and Share Capital) Order 2009 therefore omits those matters.

7.3 Provisions dealing with the authorised minimum capital requirement for public companies in the context of provisions of the 2006 Act which are coming into force on 1 October 2009 have also not been included in the Companies (Shares and Share Capital) Order 2009 as originally proposed. The Department will be making separate Regulations at a later date to deal with those matters, to come into force on 1 October 2009.

- 7.4 Provisions prescribing particulars of rights attached to shares underpin provisions in the 2006 Act requiring a “statement of capital” to be delivered to the registrar of companies and provided to a company’s members. Those provisions are new and are associated with the abolition of the concept of authorised share capital.
- 7.5 The information prescribed for returns of allotment broadly corresponds with that required by section 88(2) of the 1985 Act, although there are differences.
- 7.6 As for the information to be contained in a directors’ statement under section 714 (article 5), it broadly corresponds to that currently required by Companies House Form 173.
- 7.7 Following the publication in May 2007 of draft Regulations stakeholders requested that specific provision be made to provide for settlement under the settlement system operated by Euroclear UK & Ireland Limited(also known as CREST) to be regarded as cash consideration for the purposes of particular provisions of the Act. We are content that this approach should be adopted.

## **8. Consultation outcome**

8.1 A consultation exercise was conducted between February and May 2007 on secondary legislation to be made under the Companies Act 2006. Draft Regulations were published on the department’s website in May 2007 for comment. Although the Companies (Shares and Share Capital) Order 2009 is not identical to the draft Regulations published in May 2007, the substance of the Order is essentially the same as the substance of the equivalent provisions in those draft Regulations and is a consequence of that consultation exercise and subsequent contributions from stakeholders. A revised draft of the Share Capital Regulations was placed on the website in 2008.

## **9. Guidance**

9.1 Guidance on this Order can be obtained from Richard Grafen whose contact details can be found at paragraph 13.

## **10. Impact**

10.1 The impact on business, charities or voluntary bodies is set out in the attached impact assessment.

10.2 We are not aware of any significant impact on the public sector.

10.3 An Impact Assessment is attached to this memorandum. The Order contains requirements for documents to contain particular information; there are no obvious significant costs or burdens on companies.

## **11. Regulating small business**

11.1 The legislation applies to small businesses that incorporate as companies.

11.2 There is no identifiable need to adopt an approach specifically aimed at minimising the impact of the Order on firms employing up to 20 people; the Order applies consistently across all businesses.

11.3 No specific course of action is required for small businesses.

## **12. Monitoring & review**

12.1 This Order is being made consequent upon the Companies Act 2006. Therefore the monitoring and review of the Order will take place within the context of the wider monitoring and review of the implementation of the Companies Act. It is anticipated that the Companies Act legislation will be reviewed at a point three to five years after having come into force; this Order comes into force on 1 October 2009.

## **13. Contact**

Richard Grafen at the Department for Business, Enterprise and Regulatory Reform 0207 215 5323 or e-mail: [Richard.Grafen@berr.gsi.gov.uk](mailto:Richard.Grafen@berr.gsi.gov.uk) can answer any queries regarding the instrument.

## Summary: Intervention & Options

<b>Department /Agency:</b> <b>BERR</b>	<b>Title:</b> <b>Impact Assessment of The Companies (Shares and Share Capital) Order 2009</b>	
<b>Stage:</b>	<b>Version:</b> Second draft	<b>Date:</b> 25 February 2009
<b>Related Publications:</b>		

**Available to view or download at:**

<http://www.>

**Contact for enquiries:** Phillip Nicholls

**Telephone:** 020 7215 3091

What is the problem under consideration? Why is government intervention necessary?

The need to prescribe contents and, in one case, the form of certain documents which companies must produce under the Companies Act 2006.

The need to make clear that a company's shares are deemed paid up in cash or allotted for cash if the Euroclear (also known as CREST) system is used; and to make clear that treasury shares can be sold using that system.

Proper implementation of the Companies Act 2006 in respect of prescribed matters requires government intervention.

What are the policy objectives and the intended effects?

Proper implementation of the Companies Act 2006 with clarity and certainty for companies & directors and to provide certainty for companies wishing to use the Euroclear settlement system for the allotment and payment up of shares and the sale of treasury shares.

What policy options have been considered? Please justify any preferred option.

Regulations relating to returns of allotment, statements of capital, and directors' statements underpin 2006 Act provisions consequently the only option was non-implementation, which would have rendered Companies Act 2006 provisions incomplete.

Following consultation stakeholders favoured that payment for securities via the Euroclear settlement system be recognised as equivalent to cash-consideration. We are satisfied that this is an appropriate policy to adopt - the alternative being not to do so; it gives certainty to those using the settlement system.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? Three to five years from implementation. The Order will be reviewed in the wider context of Companies Act 2006.

**Ministerial Sign-off** For SELECT STAGE Impact Assessments:

***I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.***

Signed by the responsible Minister:

Ian Pearson

..... Date: 26th February  
2009

## Summary: Analysis & Evidence

<b>Policy Option:</b>	<b>Description:</b>
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<b>COSTS</b>	<b>ANNUAL COSTS</b>	Description and scale of <b>key monetised costs</b> by 'main affected groups' No data on cost of meeting prescribed requirements but likely to attract no, or minimal, cost. New policy - CREST related regulation - is permissive and attracts no, or minimal, new costs or benefits.				
	<table border="1" style="width: 100%;"> <tr> <td style="width: 60%;"><b>One-off</b> (Transition)</td> <td style="width: 40%;"><b>Yrs</b></td> </tr> <tr> <td style="text-align: center;">£ 0</td> <td></td> </tr> </table>		<b>One-off</b> (Transition)	<b>Yrs</b>	£ 0	
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	£ 0					
<table border="1" style="width: 100%;"> <tr> <td style="width: 60%;"><b>Average Annual Cost</b> (excluding one-off)</td> <td style="width: 40%;"></td> </tr> <tr> <td style="text-align: center;">£ 0</td> <td></td> </tr> </table>	<b>Average Annual Cost</b> (excluding one-off)		£ 0			
<b>Average Annual Cost</b> (excluding one-off)						
£ 0						
<b>Total Cost (PV)</b>		£ 0				
Other <b>key non-monetised costs</b> by 'main affected groups' 0						

<b>BENEFITS</b>	<b>ANNUAL BENEFITS</b>	Description and scale of <b>key monetised benefits</b> by 'main affected groups' None				
	<table border="1" style="width: 100%;"> <tr> <td style="width: 60%;"><b>One-off</b></td> <td style="width: 40%;"><b>Yrs</b></td> </tr> <tr> <td style="text-align: center;">£ 0</td> <td></td> </tr> </table>		<b>One-off</b>	<b>Yrs</b>	£ 0	
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<b>Average Annual Benefit</b>						
£ 0						
<b>Total Benefit (PV)</b>		£ 0				
Other <b>key non-monetised benefits</b> by 'main affected groups' 0						

Key Assumptions/Sensitivities/Risks	none
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Price Base Year	Time Period Years	<b>Net Benefit Range (NPV)</b> £ 0	<b>NET BENEFIT (NPV Best estimate)</b> £ 0
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What is the geographic coverage of the policy/option?	UK
On what date will the policy be implemented?	1 October 2009
Which organisation(s) will enforce the policy?	not required
What is the total annual cost of enforcement for these	£ n/a
Does enforcement comply with Hampton principles?	Yes/No
Will implementation go beyond minimum EU requirements?	No
What is the value of the proposed offsetting measure per year?	£ n/a
What is the value of changes in greenhouse gas emissions?	£ n/a
Will the proposal have a significant impact on competition?	No

Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large
Are any of these organisations exempt?	No	No	N/A	N/A
<b>Impact on Admin Burdens Baseline</b> (2005 Prices)				(Increase - Decrease)
Increase	£ 0	Decrease	£ 0	<b>Net</b> £ n/a

Key:

Annual costs and benefits: Constant Prices

(Net) Present Value



[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

### Background

1. A consultation exercise was conducted between February and May 2007 on secondary legislation to be made under the Companies Act 2006. The Companies (Shares, Share Capital and Authorised Minimum) Regulations were published in draft on the Department's website in May 2007.
2. The Government subsequently announced in November 2007 that it would be necessary to delay final implementation of the Companies Act 2006 until October 2009. That announcement did not affect commencement in April 2008 of Chapter 2 of Part 20 of the Act (which deals with the authorised minimum share capital requirement for public companies); and there was a subsequent decision that the provisions of the Act enabling private companies to reduce their share capital by special resolution supported by solvency statement, and the provisions about the treatment of reserves arising from capital reductions, should be commenced in October 2008. As a result, the Companies (Authorised Minimum) Regulations 2008 were made in March 2008 to deal with the authorised minimum share capital requirement, and the Companies (Reduction of Share Capital) Order 2008 was made, coming into force in October 2008, to deal with capital reductions supported by solvency statement and with the treatment of reserves arising from capital reductions. The latter Order covered matters which were previously intended to be addressed in the Companies (Shares and Share Capital) Order and which no longer need to be; The Companies (Shares and Share Capital) Order 2009 therefore omits those matters.
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### Purpose

1. This Order makes provision in relation to shares and share capital for the purposes of various provisions of the Companies Act 2006.
2. In various circumstances the Act requires companies to deliver to the registrar of companies a statement of capital containing, for each class of the company's shares, prescribed particulars of the rights attached to the shares. The Act also requires a

company to send a current statement of capital to any member of the company on request. The Order prescribes these particulars; it does not deal with the contents of a statement of capital in a company's annual return.

3. Where an unlimited company allots a new class of shares, section 556 of the Act requires it to deliver to the registrar of companies a return of the allotment containing prescribed particulars of the rights attached to the shares. This Order prescribes the particulars.
4. The Order prescribes the information that must be included in a return of an allotment delivered to the registrar of companies under section 555 of the Act (return of an allotment of shares by a limited company).
5. The Order provides that, where shares are allotted or paid up using the settlement system operated by Euroclear UK & Ireland Limited, also known as the CREST system (see [www.euroclear.com](http://www.euroclear.com)), and where treasury shares are transferred using that system, the obligation which arises on the part of a settlement bank to make payment is to be regarded as a means of payment falling within the definition of "cash consideration" in section 583 of the Act. That definition applies to determine whether, for the purposes of companies' legislation, shares in a company are deemed to be paid up in, or allotted for, cash. It also applies for the purposes of section 727 of the Act, which permits a company to sell treasury shares at any time for a cash consideration. The Euroclear system is regulated by the Uncertificated Securities Regulations 2001 (S.I. 2001/3755, as amended).
6. Finally the Order prescribes the form of, and information to be contained in, a directors' statement made under section 714 of the Act where a private company makes a payment out of capital for the redemption or purchase of its own shares.

## Content

1. The Act requires companies, in various circumstances, to deliver a statement of capital to the registrar of companies and requires a current statement of capital to be sent to any of the company's members on request. A statement of capital must (amongst other things) state, for each class of the company's shares, such particulars of the rights attached to shares as are prescribed by order or regulations. Article 2 prescribes these particulars. It does not apply to the statement of capital in a company's annual return, the contents of which are regulated by section 856(2) of the Act as amended by the Companies Act 2006 (Annual Return and Service Addresses) Regulations 2008 (S.I. 2008/3000).
2. Where an unlimited company allots shares of a class with rights that are not in all respects uniform with shares previously allotted, section 556 of the Act requires the company to deliver a return of the allotment to the registrar of companies for registration. The return must contain such particulars of the rights attached to the shares as are prescribed by order or regulations. Article 2 prescribes these particulars. Article 3 prescribes the information that must be included in a return of an allotment of shares delivered to the registrar of companies under section 555 of the Act by a limited company.
3. Section 713 of the Act provides that a payment out of capital by a private company for the redemption or purchase of its own shares is not lawful unless, among other things, the company's directors make a statement in accordance with section 714. The statement must be in the form prescribed by order or regulations and must contain (among other

things) such information with respect to the nature of the company's business as may be so prescribed. Article 5 prescribes both the form of a directors' statement under section 714 and the information as to the nature of the company's business which such a statement must contain.

4. Section 583 of the Act provides that a share in a company is deemed paid up (as to its nominal value or any premium on it) in cash, or allotted for cash, if the consideration received for the allotment or payment up is a cash consideration. "Cash consideration" is defined in subsection (3), which lists a number of methods of payment and provides also that "cash consideration" is constituted by payment by any other means giving rise to a present or future entitlement (of the company or a person acting on the company's behalf) to a payment, or credit equivalent to payment, in cash. The definition may be supplemented by order providing that particular means of payment are to be regarded as falling into the latter category. Article 4 provides that "cash consideration" includes a settlement bank's obligation to make a payment in respect of the allotment or payment up of shares under the settlement system operated by Euroclear UK & Ireland Limited, also known as the CREST system (see [www.euroclear.co.uk](http://www.euroclear.co.uk)). That system is regulated by the Uncertificated Securities Regulations 2001 (S.I. 2001/3755, as amended).
5. Article 4 also supplements, in the same way, the definition of "cash consideration" which applies for the purposes of section 727(1)(a). That section permits a company to sell for a cash consideration any shares which it holds as treasury shares.

#### Mandatory Impact Tests

1. We do not believe that there will be an impact on the equality strands as the proposals impact on companies and not on individuals. We have, however looked at each of the equality initial tests individually and we are confident that there is no impact.
2. We do not believe that there will be any impacts on competition
3. The making and implementation of the Companies Act 2006 have been guided by "Think Small First" principles. These proposals will have no significant adverse impact on small firms.

## Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

**Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.**

<b>Type of testing undertaken</b>	<b><i>Results in Evidence Base?</i></b>	<b><i>Results annexed?</i></b>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	No	Yes/No
Sustainable Development	No	Yes/No
Carbon Assessment	No	Yes/No
Other Environment	No	Yes/No
Health Impact Assessment	No	Yes/No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	No	Yes/No
Rural Proofing	No	Yes/No

## Annexes

