

Companies Acts

1963-2012

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Companies Acts 1963-2012 is a compendium of Irish company legislation (Acts of the Oireachtas and statutory instruments). Every relevant piece of company legislation is included, fully consolidated, with incisive commentary on each section. The annotations explain the amendments, cross-refer to the definitions sections, give the corresponding UK provision and provide detailed notes on relevant case law.

New to this edition are:

- Companies (Amendment) Act 2012
- European Communities (Mergers and Divisions of Companies) (Amendment) Regulations 2011
- European Communities (Group Accounts) Regulations 2010
- European Communities (Directive 2006/46/EC) (Amendment) Regulations 2010
- European Communities (Transitional Period Measures in Respect of Third Country Auditors) Regulations 2009
- Updated cross-references to the Companies Act 2006 (UK)

All legislation has been updated to reflect changes brought about by the Fines Act 2010 and the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

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B L O O M S B U R Y

UK legislation

See CA 2006, ss 582(1)–(2), 585, 588.

27 Prohibition on allotment of shares at a discount

- (1) Subject to subsection (4) the shares of a company shall not be allotted at a discount.
- (2) Where shares are allotted in contravention of subsection (1), the allottee shall be liable to pay the company an amount equal to the amount of the discount and shall be liable to pay interest thereon at the appropriate rate.
- (3) Section 26(4) shall apply for the purposes of this section as it applies for the purposes of that section.
- (4) The repeal of section 63 of the Principal Act effected by section 3(2) shall not affect an application for an order sanctioning the issue of shares at a discount which has been made to the court under that section and which has not been withdrawn or disposed of before the appointed day, or an order made on or after that day in pursuance of any such application, and—
- any such application may be proceeded with and any such order, if not made before the appointed day, may be made as if that section had not been repealed; and
 - shares may be allotted at a discount in accordance with any such order (whether made, before, on or after the appointed day) accordingly.

Definitions

'the appointed day': C(A)A 1983, s 1(3), s 2(1); 'the appropriate rate': C(A)A 1983, s 2(1), (7); 'company': CA 1963, s 2(1); 'the court': CA 1963, s 2(1); 'the Principal Act': C(A)A 1983, s 2(1); 'share' CA 1963, s 2(1).

Notes

Prohibition on allotment of shares at a discount: C(A)A 1983, s 27 places on a statutory footing a well established common law principle, namely that a company may not issue shares at a discount (ie below par value).¹ Payment of at least the par value is the price for shareholders of achieving limited liability.² So, for example, a company may not issue €1 debentures which are convertible into shares with a par value of less than €1 since to do so would be to indirectly issue shares at a discount.³ One way of effecting a discount allotment of shares at a discount would be to allot the shares for a non-cash consideration the value of which was artificially inflated.⁴ As a guard against such potential abuses it is stipulated that in the case of a plc (or a private company or an unlimited company which has duly resolved to re-register as a plc)⁵ the allotment must be preceded by an independent valuation of the consideration in question.⁶ However, in the case of other companies, there is no statutory mechanism for the valuation of the non-cash consideration payable in respect of an allotment of shares. Indeed, the courts have consistently held⁷ that they will not inquire into the adequacy of the consideration paid for such shares unless:

- there is evidence of fraud; or
- the contract demonstrates on its face that the consideration is manifestly inadequate or illusory.⁸

Although the court will not normally assess the adequacy of the non-cash consideration which has been paid for shares, it may be prepared to do so where the directors have themselves failed to make any such assessment in advance of the allotment.⁹

¹ See *Ooregum v Chapman's* [1904] 2 Ch 108; *Ibid.*
² *Mosley v K*
³ Shares may however, be considered as having been paid up if the consideration which has been paid is equal to the par value. See C(A)A 1983, s 2(1); *Re Heyford* [1934] 1 Ch 346; *Ooregum v Chapman's Corporation* [1904] 2 Ch 108; *Duke Group* [1990] 1 All ER 385; *Ooregum v Chapman's Corporation* [1895] 2 Ch 108; *Pa*
⁴ *Tintin Explor Ltd v Glen* [1904] 2 Ch 108; *Pa*
⁵ *Syndicate, An*

Consequence of all becomes liable to pay together with interest the value without notice (as a purchaser) will also be liable to pay the discount plus interest for the shares. The trustee or nominee of the creditor is not liable for this liability to pay up the shares in full.⁴ Full liability is not imposed on the allottee or the company in good faith and in violation of the prohibition on allotment at a discount.

¹ C(A)A 1983, s 2(1);
² C(A)A 1983, s 2(1);
³ *Re Munster Bank*
⁴ *Re Newtownards*
⁵ *Hirsche v Sims*

UK legislation

See CA 2006, ss 580(1)–(2), 585, 588.

28 Payment for

(1) Subject to subsection (2), shares shall not be paid up at least as to their par value unless the premium on them has been paid up.

¹ See *Ooregum Gold Mining Co of India v Roper* [1892] AC 125; *Re Theatrical Trust Ltd, Chapman's Case* [1895] 1 Ch 771; *Re Wragg* [1897] 1 Ch 796; *Mosely v Koffyfontein Mines Ltd* [1904] 2 Ch 108.

² *Ibid.*

³ *Mosley v Koffyfontein Mines Ltd* [1904] 2 Ch 108.

⁴ Shares may be issued either for cash or for a non-cash consideration; C(A)A 1983, s 26. See, however, both C(A)A 1983, ss 26, 29 and 37 for the restrictions on the types of non-cash consideration which may be accepted by a plc or by a private company or unlimited company which has resolved to re-register as a plc.

⁵ See C(A)A 1983, s 37(1).

⁶ C(A)A 1983, ss 30-33.

⁷ *Re Heyford Co, Pell's Case* (1869) 5 Ch App 11; *Re Baglan Hall Colliery Co* (1870) 5 Ch App 346; *Ooregum Gold Mining Co of India v Roper* [1892] AC 125; *Re Theatrical Trust Ltd, Chapman's Case* [1895] 1 Ch 771; *Re Wragg Ltd* [1897] 1 Ch 796; *Re Leinster Contract Corporation* [1902] 1 IR 349; *Hong Kong and China Glass Co v Glen* [1914] 1 Ch 527; *Pilmer v Duke Group Ltd* [2001] 2 BCLC 773.

⁸ *Ooregum Gold Mining Co of India v Roper* [1892] AC 125; *Re Theatrical Trust Ltd, Chapman's Case* [1895] 1 Ch 771; *Re Wragg Ltd* [1897] 1 Ch 796; *Mosley v Koffyfontein Mines Ltd* [1904] 2 Ch 108; *Park Business Interiors Ltd v Park* [1992] BCLC 1034.

⁹ *Tintin Exploration Syndicate Ltd v Sandys* (1947) 177 LT 412; *Hong Kong and China Gas Co Ltd v Glen* [1914] 1 Ch 527; *Re White Star Line Ltd* [1938] 1 All ER 607; *Re Alkaline Reduction Syndicate, Ames' Case* [1896] WN 79; *Park Business Interiors Ltd v Park* [1992] BCLC 1034.

Consequence of allotting shares at a discount: If shares are issued at a discount, the allottee becomes liable to pay to the company in cash a sum equivalent to the amount of the discount together with interest.¹ Moreover, any subsequent holder of the shares (other than a purchaser for value without notice of the contravention or a person deriving his title from an innocent purchaser) will also be jointly and severally liable to pay to the company the amount of the discount plus interest, even though he may already have paid his predecessor in title full value for the shares.² The liability of the allottee or subsequent holder to pay the amount of this discount plus interest arises regardless of whether he holds the shares in his own right or as agent, trustee or nominee or by way of security.³ Moreover, where the company goes into liquidation, this liability to pay up the discount plus interest arises even if there are sufficient assets to pay the creditors in full.⁴ Furthermore, if the company is unable to recover the amount of the discount from the allottee or from subsequent holders of the shares, it will be entitled to recoup the sum in question from the directors who were responsible for the discount, even though they had acted in good faith and in what they considered to be the company's best interests in effecting the allotment at a discount.⁵

¹ C(A)A 1983, s 27(2).

² C(A)A 1983, s 27(3).

³ *Re Munster Bank (Dillon's Claim)* (1886-87) 17 LR Ir 341.

⁴ *Re Newtownards Gas Co* (1885-86) 15 LR Ir 51; *Welton v Saffrey* [1897] AC 299.

⁵ *Hirsche v Sims* [1894] AC 654.

UK legislation

See CA 2006, ss 580(1), (2).

28 Payment for allotted shares

(1) Subject to subsection (4), a public limited company shall not allot a share except as paid up at least as to one-quarter of the nominal value of the share and the whole of any premium on it.