



LAW ANSWERED

SAMPLE CHAPTER FROM OUR BUSINESS LAW & PRACTICE ELECTIVE GUIDE

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SETTING UP A COMPANY

INCORPORATION OF A COMPANY (ss. 7-16)

Send to the registrar at Companies House:

- 1) Application form **IN01**.
- 2) Memorandum of Association – legal statement signed by all initial shareholders agreeing to form the company.
- 3) Articles of Association (**s. 9(5)(b)**);
 - a) If no special Articles are attached, the Model Articles (“**MA**”) will apply automatically (**ss. 18(2) & 20(1)**).
 - b) If the company wishes to “*entrench*” any of its Articles, making them harder to amend, they must notify the registrar and submit a statement of compliance (**ss. 22-24**).
- 4) Fee:
£50 from 1 May 2024.

According to s. 9, the application form (IN01) must contain:

1:	Name of company, type of company and company’s registered office.
2:	Principal Business activity of the company
3:	Whether the company is public or private and whether members’ liability is limited or unlimited
4:	List of initial directors and first Company Secretary and their addresses.
5:	Memorandum of association , stating (per s. 8): <ol style="list-style-type: none">a) That the subscribers wish to form a company;b) That they agree to each take at least one share; andc) The name of the subscribers, their signatures and the date.
6:	Section 10 statement of capital , setting out the: <ol style="list-style-type: none">a) Total number of shares being taken out by the subscribers (s. 10(2)(a));b) Aggregate nominal value of the shares (s. 10(2)(b));c) Total number of shares in each class and the rights attaching to those shares (e.g. owners of preference shares may not be entitled to vote) (s. 10(2)(c));d) The amount to be paid up on each share (s. 10(2)(d));e) Details of all of the above (a-d) for each individual subscriber (s. 10(4)).
7:	Details of Persons with Significant Control (“PSC”)
8:	Section 13 statement of compliance.

The company must nominate a **registered office** for service of documents (**s. 86 CA**). The company may also nominate a SAIL on form **AD02**.

ARTICLES OF ASSOCIATION

The company must have Articles of Association (**s. 18**), which must be registered with CH. A company may either choose to have (*see immediately below*):

MODEL ARTICLES (unamended)	The MA will apply automatically unless the company expressly includes amended articles (s. 20);
AMENDED MODEL ARTICLES	A company may choose to alter particular articles (<i>see below</i>). Where the CA is silent, changes may be made to the MA. It is only necessary to expressly include articles that differ from the MA (s. 26(2)); or
ENTIRELY TAILOR-MADE ARTICLES	A company may choose to have entirely tailor-made articles, though this is relatively rare.

COMMON ALTERATIONS TO THE MA

- Limits on objects – a company's objects will be **unrestricted** unless limits are specified in the articles (**s. 31**);
- Removing the **chairperson's casting vote**;
- **Increasing the quorum** for board meetings above 2;
- Removing the prohibition on directors voting on matters in which they have an interest;
- Allowing a company to **change its name** by something other than an SR, such as by a board resolution (**ss. 77(1)(b) & 79**);
- Making the **directors' duties** more or less onerous;
- Reviewing the directors' **authority to allot shares**; and
- Reviewing the shareholders' statutory **pre-emption rights**.

The **Articles can only be amended by SR (s. 21)**. Where the MA are amended using **s. 21**, a copy of the amended Articles must be filed with CH **within 15 days (s. 26)**.

Only certain amendments to the AAs will work – apply the **legality and commerciality tests**:

LEGALITY TEST	<ul style="list-style-type: none"> • AAs are not enforceable if they conflict with the CA. • If the CA is silent on an issue, the AAs take precedence. • ASK: does the CA refer specifically to the issue at hand, i.e. mention a specific procedure for how a matter should be dealt with? • For example: the Articles cannot exclude the written resolution procedure (s. 300), and a director cannot entrench their position to prevent them being removed by an OR (s. 168) but remember that the Articles may include a Bushell v Faith clause (<i>see Removal of Directors section</i>).
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COMMERCIALITY TEST	<ul style="list-style-type: none"> • Does the proposed Article suit the company – will it be commercially effective? • ASK: is the proposed Article better for a big or a small company? What will the effect of the Article be in the short and long term? • For example: how many directors are there? If there are an even number, then they will need a casting vote or other mechanism for resolving deadlock.
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You must take care to ensure that all rights and obligations are expressly written into the AAs – the presumption is that someone inspecting public records must be made aware of all the rights and obligations contained in them; accordingly **further rights or obligations will not be implied into the AAs** (*Bratton Seymour Service Co v Oxborough*).

CHOOSING A COMPANY NAME

A company can change its name by SR (s. 77).

There are restriction on what a company can call itself. A company's name **cannot**:

- be misleading, cause harm or pose a risk;
- be offensive e.g. "*Prostitutes Ltd*";
- suggest an association with government, a local authority or a public body, or use certain sensitive words, e.g. "*British*", "*National*", "*Association*", "*Council*", "*Authority*", "*Post Office*", "*Trade Union*", "*Health Service*", "*Police*" or "*University*";
- use certain restricted professional names without permission from the relevant professional body (e.g. solicitors, architects, building societies and Olympic associations);
- Be more than 160 characters long;
- Be in a computer code;
- be the same as or too similar to another existing company's name;
 - if the pre-existing company can argue that there is a value attributable to its name (known as "**goodwill**") then it can object (and also note that an action in **passing off** may be instituted by the other company); and
 - if a name is too similar, the company can later be required to change it;
- Be used to facilitate crime;
- Suggest a non-existent connection with an overseas government; or
- Give a false or misleading impression to the public.

REMEMBER: a private limited company's name must end with "*Limited*" or "*Ltd*" (s. 59).

A new offence has been created under **ECCTA** for failure to change a company name within 28 days of the receipt of a direction to change. A fine of up to £1,000 can be levied.

EFFECT OF REGISTRATION

Upon registration a company will be issued with a certificate of incorporation (detailing its name, registered number, date of incorporation etc.). This is proof of registration (**s. 15**).

At the point of incorporation, the company becomes capable of exercising its powers (**s. 16(3)**). The subscribers to the memorandum of association become shareholders (**s. 16(5)**) and the company's directors and secretary are officially appointed (**s. 16(6)**).

The company is now a separate legal person, capable of entering into contracts (and being sued) in its own right (*Salomon v Salomon*). The shareholders' liability is limited to the value of their shares.

NOTE: the company will not be bound by any contracts entered into with third parties prior to incorporation. If the company purports to enter into a contract then the person contracting is personally liable on that contract (**s.51(1)**).

REGISTER OF PERSONS HAVING SIGNIFICANT CONTROL ("PSC REGISTER")

All UK companies (with the exception of those subject to the **Disclosure and Transparency Rules**) must keep a PSC Register, which lists information on people who have significant control over the company, i.e. those who – directly or indirectly – own more than 25% of the shares, hold more than 25% of the voting rights, have the right to appoint or remove a majority of directors or have "*significant influence or control*" (**Part 21A CA 2006; s. 81 & Sch. 3 Small Business, Enterprise and Employment Act 2015**). Any person may inspect the PSC Register (**s. 7900 CA 2006**). The requirement to maintain this will be abolished (together with the need to keep local registers of directors when the full provisions of **ECCTA** – see below are in effect). There is no date for this yet.

ECONOMIC CRIME AND CORPORATE TRANSPARENCY ACT 2023 ("ECCTA") – CH UPDATES

This new legislation which is coming into effect in stages from March 2024 significantly increases the powers and responsibilities of CH and impacts arrangements for company formation as well as ongoing regulation.

NEW REQUIREMENTS UNDER ECCTA

- 1) Subscribers must provide a statement confirming that the purpose of incorporation is for a lawful purpose and that activities will be lawful.
- 2) Identity verification is required for those interacting with CH including new and registered directors and PSC and those delivering documents to the Registrar. New directors will also confirm that they are not subject to disqualification. The verification process will be one-off through an authorised provider or through the use of identification documents and photos. Non-compliance at the end of the transition period may attract criminal sanctions.
- 3) A confirmation statement must be filed annually confirming the information on the register is correct. This is needed even if there have been no changes.

- 4) The Registrar is gaining new powers to query information and request additional information in relation to what is filed. Powers will be conferred to allow the registrar to remove or decline information filed and to annotate the register if it is deemed confusing. There are new specific objectives for the Registrar as follows
- Ensure that the person responsible for filing documents complies;
 - Ensure that the information on the register is correct and complete;
 - Ensure the register does not give a misleading impression; and
 - Prevent companies from unlawful activity or from facilitating the unlawful activity of others.
- 5) An offence of failure to provide information is being created, and provisions allow for the specification of the form and manner in which further information is to be provided. The Registrar may reject documents if they appear inconsistent with information previously provided. The Registrar will be able to specify how the inconsistency must be dealt with. There are powers to remove information from the register. The Registrar can demand the electronic delivery of documents.
- 6) New members must notify the Registrar of the required information within 2 months of becoming members and existing members have 2 months to notify any changes of information.
- 7) The Registrar may pro-actively share information with other public bodies.
- 8) Enforcement provides for penalties, annotation of the company record, criminal prosecutions or striking the company from the record.

You may need to check when the various provisions above have come into full effect. Changes are needed at CH to facilitate enforcement of the new regulations, and these are in the course of being made.

POST-REGISTRATION CONSIDERATIONS

The directors are required to appoint auditors unless they reasonably resolve that audited accounts are unlikely to be required (**s. 485**).

The directors may wish to change the company's accounting reference date (**s. 392**).