Oury Clark Quick Guides:

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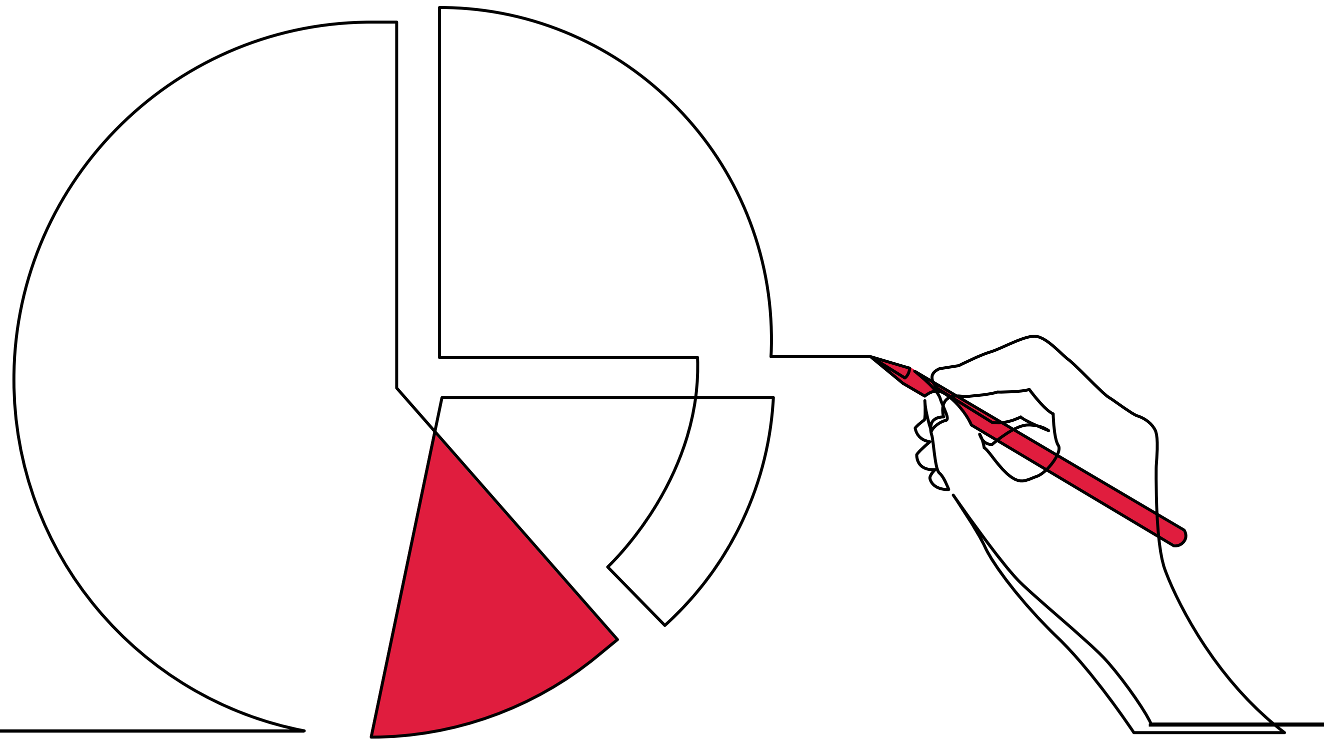
Buyback of Shares



Commercial: A22

The share buyback procedure enables a private company in England and Wales to purchase its own shares from an existing shareholder in certain specific circumstances.

The rules about companies purchasing their own shares are pretty complicated so as to protect the company's creditors, and, as such, it is always a good idea to seek legal assistance before attempting the process.

1. Pre-Buyback Considerations

1.1 Company Articles:

There is no requirement under the Companies Act 2006 (the "CA 2006") for a company's articles to include a specific authority for the company to purchase its own shares. Nevertheless, a company's articles must be checked to ensure that they do not actively restrict or prohibit the company from purchasing its own shares. Where a company's articles expressly restrict or prohibit buybacks, the articles may be amended by special resolution of tis shareholders to remove the prohibition or restriction.

1.2 Financing the Buyback:

A buyback can be funded by any of the following means:

- distributable profits;
- capital; or
- new issue of shares.

How the buyback is financed will determine the procedure to be followed to carry out the buyback. Generally, a company can only easily buyback its shares using the distributable profits of the company, but below we explain in more detail all 3 options.

1.3 Restrictions on Transfers:

The articles and any other shareholder agreement should be checked to ensure that there are no pre-emption provisions or similar restrictions which may require shares to be offered to the existing members before they can be transferred to any other party, including the company. If triggered, these provisions would need to be complied with, waived or amended before the company undertakes a buyback.

2. Different Types of Buybacks

2.1 Purchase out of Distributable Profits:

Often, through distributable profits is the simplest means of funding a buyback is, i.e. profits of a company that could otherwise be paid out as a dividend. When considering whether to make a distribution, the directors should consider whether the company will be solvent following the distribution. To do this, they should consider any change to the company's financial position since the date to which the relevant accounts were drawn up, as well as looking forward to the future cash requirements of the business (which will involve taking into account the effect of actual and contingent liabilities as well as any other transactions which may alter the company's distributable reserves).

This is an accounting matter and advice will need to be obtained from the company's accountants before proceeding.

2.2 Purchase out of Capital

Only private limited companies (as opposed to public companies) can purchase their own shares out of capital, subject to any restriction or prohibition in the company's articles.

Unless the buyback falls within the de minimis cash exemption (see section 2.4), any payment out of capital must strictly follow a prescribed procedure as follows:

- The shareholders approve the buyback content and pass a separate special resolution to approve the buyback out of capital;
- The directors are then required to make a directors' statement confirming that the Company will be able to pay debts and carry on as a going concern;
- An auditor's report must be issued stating that the auditor has inquired into the company's state of affairs and is satisfied that the company is solvent;
- A public notice of the proposed payment out of capital must be filed in the Gazette; and
- the company must file at Companies House the special resolution approving a payment out of capital within 15 days of the resolution being passed.

2.4 Purchase out of New Issue of Shares

A company can issue new shares to raise the necessary monies for the purpose of funding the buyback. There is no set time period between issuing the shares and effecting the buyback, but prudently, the buyback should take place within a few months following the issue of new shares in order to show a clear link between the share issue and the buyback.

The company must ensure that the new shareholders are entered in the register of members before using the proceeds of the share issue to complete the buyback.

2.4 De Minimis Exemption:

A company can carry out a small buyback of shares out of capital without having to undertake the full process set out in section 2.2 by taking advantage of the "de minimis" exemption (a buyback of the lower of £15,000 and 5% of nominal value of the fully paid up share capital of the company), provided that it is authorised to do so in its articles. If not, the Company will need to adopt a new article which expressly permits a payment out of capital via this route.

3. General Requirements for Buybacks

3.1 Share Buyback Contract:

A buyback contract is an agreement between the company and one or more shareholders whose shares are to be purchased. It can be a simple agreement providing for the company to purchase the relevant shares or to become entitled or obliged to purchase the shares at a later date.

3.2 Shareholder Approval for the Buyback Contract:

The buyback contract must be approved by a resolution of the shareholders. An ordinary resolution will normally suffice, unless the articles require a higher majority, and the company may implement the share buyback at any time after the shareholder resolution approving the buyback contract is passed.

4. Buybacks for an employees' share scheme

Special rules apply if a company is proposing to carry out a buyback for the purpose of, or pursuant to, an employees' share scheme. The Buyback Regulations 2013 permit:

- shares to be paid for after purchase and/or in instalments;
- a simplified process for buying back out of capital involving a special resolution supported by a solvency statement; and
- for a general authority to be granted in advance specifying the date on which it is to expire, which must not in any case be later than 5 years after the date on which the resolution is passed.

5. Steps Post-Buyback

Any shares bought back by a company pursuant to the steps outlined above:

- If purchased out of distributable profits, may be cancelled or held in treasury,
- If purchased from the proceeds of a new issue of shares, from capital or from cash using the de minimis exemption, must be cancelled,

5.1 Filing Requirements and Company Records

- Where buyback contracts are approved by ordinary resolution, there is no need to file the ordinary resolution with Companies House. However, if there is a restriction within the company's articles and the buyback contract needs to be approved via special resolution, the special resolution must be filed with Companies House.
- The special resolution approving a payment out of capital must be filed with Companies House within 15 days of the resolution being passed.
- A return must be filed with Companies House within 28 days beginning with the date that the shares are delivered to the company using Form SH03. If the value of the shares being bought by the company exceeds £1000, stamp duty is payable at 0.5%, and Form SH03 must be sent to HMRC for stamping and stamp duty paid prior to filing.
- If the shares are cancelled immediately (as opposed to being held in treasury), a notice of cancellation must be filed with Companies House within 28 days beginning with the date that the shares are delivered to the company via Form SH06, which includes a statement of capital.

5.2 Update Statutory Register of the Company

The register of members, register of transfers; and the company's statutory register must be updated to reflect the cancellation of shares following the buyback or any shares held in treasury by the company.

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