



# Companies Act 1985

## 1985 CHAPTER 6

### PART VIII

#### DISTRIBUTION OF PROFITS AND ASSETS

##### *Limits of company's power of distribution*

#### **263 Certain distributions prohibited**

- (1) A company shall not make a distribution except out of profits available for the purpose.
- (2) In this Part, " distribution " means every description of distribution of a company's assets to its members, whether in cash or otherwise, except distribution by way of—
  - (a) an issue of shares as fully or partly paid bonus shares,
  - (b) the redemption or purchase of any of the company's own shares out of capital (including the proceeds of any fresh issue of shares) or out of unrealised profits in accordance with Chapter VII of Part V,
  - (c) the reduction of share capital by extinguishing or reducing the liability of any of the members on any of the company's shares in respect of share capital not paid up, or by paying off paid up share capital, and
  - (d) a distribution of assets to members of the company on its winding up.
- (3) For purposes of this Part, a company's profits available for distribution are its accumulated, realised profits, so far as not previously utilised by distribution or capitalisation, less its accumulated, realised losses, so far as not previously written off in a reduction or reorganisation of capital duly made.

This is subject to the provision made by sections 265 and 266 for investment and other companies.

- (4) A company shall not apply an unrealised profit in paying up debentures, or any amounts unpaid on its issued shares.
- (5) Where the directors of a company are, after making all reasonable enquiries, unable to determine whether a particular profit made before 22nd December 1980 is realised or

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unrealised, they may treat the profit as realised; and where after making such enquiries they are unable to determine whether a particular loss so made is realised or unrealised, they may treat the loss as unrealised.

#### **264 Restriction on distribution of assets**

- (1) A public company may only make a distribution at any time—
- (a) if at that time the amount of its net assets is not less than the aggregate of its called-up share capital and undistributable reserves, and
  - (b) if, and to the extent that, the distribution does not reduce the amount of those assets to less than that aggregate.

This is subject to the provision made by sections 265 and 266 for investment and other companies.

- (2) In subsection (1), " net assets " means the aggregate of the company's assets less the aggregate of its liabilities (" liabilities " to include any provision for liabilities or charges within paragraph 89 of Schedule 4).

- (3) A company's undistributable reserves are—
- (a) the share premium account,
  - (b) the capital redemption reserve,
  - (c) the amount by which the company's accumulated, un realised profits, so far as not previously utilised by capitalisation of a description to which this paragraph applies, exceed its accumulated, unrealised losses (so far as not previously written off in a reduction or reorganisation of capital duly made), and
  - (d) any other reserve which the company is prohibited from distributing by any enactment (other than one contained in this Part) or by its memorandum or articles;

and paragraph (c) applies to every description of capitalisation except a transfer of profits of the company to its capital redemption reserve on or after 22nd December 1980.

- (4) A public company shall not include any uncalled share capital as an asset in any accounts relevant for purposes of this section.

#### **265 Other distributions by investment companies**

- (1) Subject to the following provisions of this section, an investment company (defined in section 266) may also make a distribution at any time out of its accumulated, realised revenue profits, so far as not previously utilised by distribution or capitalisation, less its accumulated revenue losses (whether realised or unrealised), so far as not previously written off in a reduction or reorganisation of capital duly made—
- (a) if at that time the amount of its assets is at least equal to one and a half times the aggregate of its liabilities, and
  - (b) if, and to the extent that, the distribution does not reduce that amount to less than one and a half times that aggregate.
- (2) In subsection (1)(a), "liabilities" includes any provision for liabilities or charges (within the meaning of paragraph 89 of Schedule 4).

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- (3) The company shall not include any uncalled share capital as an asset in any accounts relevant for purposes of this section.
- (4) An investment company may not make a distribution by virtue of subsection (1) unless—
  - (a) its shares are listed on a recognised stock exchange, and
  - (b) during the relevant period it has not—
    - (i) distributed any of its capital profits, or
    - (ii) applied any unrealised profits or any capital profits (realised or unrealised) in paying up debentures or amounts unpaid on its issued shares.
- (5) The " relevant period " under subsection (4) is the period beginning with—
  - (a) the first day of the accounting reference period immediately preceding that in which the proposed distribution is to be made, or
  - (b) where the distribution is to be made in the company's first accounting reference period, the first day of that period,and ending with the date of the distribution.
- (6) An investment company may not make a distribution by virtue of subsection (1) unless the company gave to the registrar of companies the requisite notice (that is, notice under section 266(1)) of the company's intention to carry on business as an investment company—
  - (a) before the beginning of the relevant period under subsection (4), or
  - (b) in the case of a company incorporated on or after 22nd December 1980, as soon as may have been reasonably practicable after the date of its incorporation.

## **266 Meaning of " investment company "**

- (1) In section 265 "investment company" means a public company which has given notice in the prescribed form (which has not been revoked) to the registrar of companies of its intention to carry on business as an investment company, and has since the date of that notice complied with the requirements specified below.
- (2) Those requirements are—
  - (a) that the business of the company consists of investing its funds mainly in securities, with the aim of spreading investment risk and giving members of the company the benefit of the results of the management of its funds,
  - (b) that none of the company's holdings in companies (other than those which are for the time being in investment companies) represents more than 15 per cent, by value of the investing company's investments,
  - (c) that distribution of the company's capital profits is prohibited by its memorandum or articles of association,
  - (d) that the company has not retained, otherwise than in compliance with this Part, in respect of any accounting reference period more than 15 per cent, of the income it derives from securities.
- (3) Notice to the registrar of companies under subsection (1) may be revoked at any time by the company on giving notice in the prescribed form to the registrar that it no longer

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wishes to be an investment company within the meaning of this section; and, on giving such notice, the company ceases to be such a company.

- (4) Section 359(2) and (3) of the Income and Corporation Taxes Act 1970 and section 93(6)(b) of the Finance Act 1972 apply for purposes of subsection (2)(b) as for those of section 359(1)(b) of the Act first mentioned.

#### **267 Extension of ss. 265, 266 to other companies**

- (1) The Secretary of State may by regulations in a statutory instrument extend the provisions of sections 265 and 266 (with or without modifications) to companies whose principal business consists of investing their funds in securities, land or other assets with the aim of spreading investment risk and giving their members the benefit of the results of the management of the assets.
- (2) Regulations under this section—
- (a) may make different provision for different classes of companies and may contain such transitional and supplemental provisions as the Secretary of State considers necessary, and
  - (b) shall not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House.

#### **268 Realised profits of insurance company with long term business**

- (1) Where an insurance company to which Part II of the Insurance Companies Act 1982 applies carries on long term business—
- (a) any amount properly transferred to the profit and loss account of the company from a surplus in the fund or funds maintained by it in respect of that business, and
  - (b) any deficit in that fund or those funds,
- are to be (respectively) treated, for purposes of this Part, as a realised profit and a realised loss ; and. subject to this, any profit or loss arising in that business is to be left out of account for those purposes.
- (2) In subsection (1)—
- (a) the reference to a surplus in any fund or funds of an insurance company is to an excess of the assets representing that fund or those funds over the liabilities of the company attributable to its long term business, as shown by an actuarial investigation, and
  - (b) the reference to a deficit in any such fund or funds is to the excess of those liabilities over those assets, as so shown.
- (3) In this section—
- (a) "actuarial investigation" means an investigation to which section 18 of the Insurance Companies Act 1982 (periodic actuarial investigation of company with long term business) applies or which is made in pursuance of a requirement imposed by section 42 of that Act (actuarial investigation required by Secretary of State); and
  - (b) "long term business" has the same meaning as in that Act.

## **269 Treatment of development costs**

- (1) Subject as follows, where development costs are shown as an asset in a company's accounts, any amount shown in respect of those costs is to be treated—
  - (a) under section 263, as a realised loss, and
  - (b) under section 265, as a realised revenue loss.
- (2) This does not apply to any part of that amount representing an unrealised profit made on revaluation of those costs ; nor does it apply if—
  - (a) there are special circumstances in the company's case justifying the directors in deciding that the amount there mentioned is not to be treated as required by subsection (1), and
  - (b) the note to the accounts required by paragraph 20 of Schedule 4 (reasons for showing development costs as an asset) states that the amount is not to be so treated and explains the circumstances relied upon to justify the decision of the directors to that effect.

### *Relevant accounts*

## **270 Distribution to be justified by reference to company's accounts**

- (1) This section and sections 271 to 276 below are for determining the question whether a distribution may be made by a company without contravening sections 263, 264 or 265.
- (2) The amount of a distribution which may be made is determined by reference to the following items as stated in the company's accounts—
  - (a) profits, losses, assets and liabilities,
  - (b) provisions of any of the kinds mentioned in paragraphs 88 and 89 of Schedule 4 (depreciation, diminution in value of assets, retentions to meet liabilities, etc.), and
  - (c) share capital and reserves (including undistributable reserves).
- (3) Except in a case falling within the next subsection, the company's accounts which are relevant for this purpose are its last annual accounts, that is to say those prepared under Part VII which were laid in respect of the last preceding accounting reference period in respect of which accounts so prepared were laid; and for this purpose accounts are laid if section 241 (1) has been complied with in relation to them.
- (4) In the following two cases—
  - (a) where the distribution would be found to contravene the relevant section if reference were made only to the company's last annual accounts, or
  - (b) where the distribution is proposed to be declared during the company's first accounting reference period, or before any accounts are laid in respect of that period,the accounts relevant under this section (called "interim accounts" in the first case, and "initial accounts" in the second) are those necessary to enable a reasonable judgment to be made as to the amounts of the items mentioned in subsection (2) above.
- (5) The relevant section is treated as contravened in the case of a distribution unless the statutory requirements about the relevant accounts (that is, the requirements of this and

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the following three sections, as and where applicable) are complied with in relation to that distribution.

### **271 Requirements for last annual accounts**

- (1) If the company's last annual accounts constitute the only accounts relevant under section 270, the statutory requirements in respect of them are as follows.
- (2) The accounts must have been properly prepared in accordance with this Act, or have been so prepared subject only to matters which are not material for determining, by reference to items mentioned in section 270(2), whether the distribution would contravene the relevant section ; and, without prejudice to the foregoing—
  - (a) so much of the accounts as consists of a balance sheet must give a true and fair view of the state of the company's affairs as at the balance sheet date, and
  - (b) so much of the accounts as consists of a profit and loss account must give a true and fair view of the company's profit or loss for the period in respect of which the accounts were prepared.
- (3) The auditors must have made their report on the accounts under section 236; and the following subsection applies if the report is a qualified report, that is to say, it is not a report without qualification to the effect that in the auditors' opinion the accounts have been properly prepared in accordance with this Act.
- (4) The auditors must in that case also have stated in writing (either at the time of their report or subsequently) whether, in their opinion, the matter in respect of which their report is qualified is material for determining, by reference to items mentioned in section 270(2), whether the distribution would contravene the relevant section ; and a copy of the statement must have been laid before the company in general meeting.
- (5) A statement under subsection (4) suffices for purposes of a particular distribution not only if it relates to a distribution which has been proposed but also if it relates to distributions of any description which includes that particular distribution, notwithstanding that at the time of the statement it has not been proposed.

### **272 Requirements for interim accounts**

- (1) The following are the statutory requirements in respect of interim accounts prepared for a proposed distribution by a public company.
- (2) The accounts must have been properly prepared, or have been so prepared subject only to matters which are not material for determining, by reference to items mentioned in section 270(2), whether the proposed distribution would contravene the relevant section.
- (3) " Properly prepared " means that the accounts must comply with section 228 (applying that section and Schedule 4 with such modifications as are necessary because the accounts are prepared otherwise than in respect of an accounting reference period) and any balance sheet comprised in the accounts must have been signed in accordance with section 238 ; and, without prejudice to the foregoing—
  - (a) so much of the accounts as consists of a balance sheet must give a true and fair view of the state of the company's affairs as at the balance sheet date, and
  - (b) so much of the accounts as consists of a profit and loss account must give a true and fair view of the company's profit or loss for the period in respect of which the accounts were prepared.

- (4) A copy of the accounts must have been delivered to the registrar of companies.
- (5) If the accounts are in a language other than English and section 241(3)(b) (translation) does not apply, a translation into English of the accounts, certified in the prescribed manner to be a correct translation, must also have been delivered to the registrar.

### **273 Requirements for initial accounts**

- (1) The following are the statutory requirements in respect of initial accounts prepared for a proposed distribution by a public company.
- (2) The accounts must have been properly prepared, or they must have been so prepared subject only to matters which are not material for determining, by reference to items mentioned in section 270(2), whether the proposed distribution would contravene the relevant section.
- (3) Section 272(3) applies as respects the meaning of " properly prepared ".
- (4) The company's auditors must have made a report stating whether, in their opinion, the accounts have been properly prepared : and the following subsection applies if their report is a qualified report, that is to say it is not a report without qualification to the effect that in the auditors' opinion the accounts have been so prepared.
- (5) The auditors must in that case also have stated in writing whether, in their opinion, the matter in respect of which their report is qualified is material for determining, by reference to items mentioned in section 270(2), whether the distribution would contravene the relevant section.
- (6) A copy of the accounts, of the auditors' report under subsection (4) and of the auditors' statement (if any) under subsection (5) must have been delivered to the registrar of companies.
- (7) If the accounts are. or the auditors' report under subsection (4) or their statement (if any) under subsection (5) is. in a language other than English and section 241(3)(b) (translation) does not apply, a translation into English of the accounts, the report or the statement (as the case may be), certified in the prescribed manner to be a correct translation, must also have been delivered to the registrar.

### **274 Method of applying s. 270 to successive distributions**

- (1) For the purpose of determining by reference to particular accounts whether a proposed distribution may be made by a company, section 270 has effect, in a case where one or more distributions have already been made in pursuance of determinations made by reference to those same accounts, as if the amount of the proposed distribution was increased by the amount of the distributions so made.
- (2) Subsection (1) of this section applies (if it would not otherwise do so) to—
  - (a) financial assistance lawfully given by a public company out of its distributable profits in a case where the assistance is required to be so given by section 154.
  - (b) financial assistance lawfully given by a private company out of its distributable profits in a case where the assistance is required to be so given by section 155(2).

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- (c) financial assistance given by a company in contravention of section 151. in a case where the giving of that assistance reduces the company's net assets or increases its net liabilities,
- (d) a payment made by a company in respect of the purchase by it of shares in the company (except a payment lawfully made otherwise than out of distributable profits), and
- (e) a payment of any description specified in section 168 (company's purchase of right to acquire its own shares, etc.),

being financial assistance given or payment made since the relevant accounts were prepared, as if any such financial assistance or payment were a distribution already made in pursuance of a determination made by reference to those accounts.

(3) In this section the following definitions apply—

" financial assistance " means the same as in Chapter VI of Part V;

"net assets" has the meaning given by section 154(2)(a); and

" net liabilities ", in relation to the giving of financial assistance by a company, means the amount by which the aggregate amount of the company's liabilities (within the meaning of section 154(2)(b)) exceeds the aggregate amount of its assets, taking the amount of the assets and liabilities to be as stated in the company's accounting records immediately before the financial assistance is given.

(4) Subsections (2) and (3) of this section are deemed to be included in Chapter VII of Part V for purposes of the Secretary of State's power to make regulations under section 179.

## **275 Treatment of assets in the relevant accounts**

- (1) For purposes of sections 263 and 264, a provision of any kind mentioned in paragraphs 88 and 89 of Schedule 4, other than one in respect of a diminution in value of a fixed asset appearing on a revaluation of all the fixed assets of the company, or of all of its fixed assets other than goodwill, is treated as a realised loss.
- (2) If, on the revaluation of a fixed asset, an unrealised profit is shown to have been made and, on or after the revaluation, a sum is written off or retained for depreciation of that asset over a period, then an amount equal to the amount by which that sum exceeds the sum which would have been so written off or retained for the depreciation of that asset over that period, if that profit had not been made, is treated for purposes of sections 263 and 264 as a realised profit made over that period.
- (3) Where there is no record of the original cost of an asset, or a record cannot be obtained without unreasonable expense or delay, then for the purpose of determining whether the company has made a profit or loss in respect of that asset, its cost is taken to be the value ascribed to it in the earliest available record of its value made on or after its acquisition by the company.
- (4) Subject to subsection (6), any consideration by the directors of the value at a particular time of a fixed asset is treated as a revaluation of the asset for the purposes of determining whether any such revaluation of the company's fixed assets as is required for purposes of the exception from subsection (1) has taken place at that time.
- (5) But where any such assets which have not actually been revalued are treated as revalued for those purposes under subsection (4), that exception applies only if the directors are satisfied that their aggregate value at the time in question is not less than



the aggregate amount at which they are for the time being stated in the company's accounts.

- (6) Where section 271(2), 272(2) or 273(2) applies to the relevant accounts, subsections (4) and (5) above do not apply for the purpose of determining whether a revaluation of the company's fixed assets affecting the amount of the relevant items (that is, the items mentioned in section 270(2)) as stated in those accounts has taken place, unless it is stated in a note to the accounts—
- (a) that the directors have considered the value at any time of any fixed assets of the company, without actually revaluing those assets,
  - (b) that they are satisfied that the aggregate value of those assets at the time in question is or was not less than the aggregate amount at which they are or were for the time being stated in the company's accounts, and
  - (c) that the relevant items in question are accordingly stated in the relevant accounts on the basis that a revaluation of the company's fixed assets which by virtue of subsections (4) and (5) included the assets in question took place at that time.

## **276 Distributions in kind**

Where a company makes a distribution of or including a non-cash asset, and any part of the amount at which that asset is stated in the accounts relevant for the purposes of the distribution in accordance with sections 270 to 275 represents an unrealised profit, that profit is to be treated as a realised profit—

- (a) for the purpose of determining the lawfulness of the distribution in accordance with this Part (whether before or after the distribution takes place), and
- (b) for the purpose of the application of paragraphs 12(a) and 34(4)(b) of Schedule 4 (only realised profits to be included in or transferred to the profit and loss account) in relation to anything done with a view to or in connection with the making of that distribution.

### *Supplementary*

## **277 Consequences of unlawful distribution**

- (1) Where a distribution, or part of one, made by a company to one of its members is made in contravention of this Part and, at the time of the distribution, he knows or has reasonable grounds for believing that it is so made, he is liable to repay it (or that part of it, as the case may be) to the company or (in the case of a distribution made otherwise than in cash) to pay the company a sum equal to the value of the distribution (or part) at that time.
- (2) The above is without prejudice to any obligation imposed apart from this section on a member of a company to repay a distribution unlawfully made to him; but this section does not apply in relation to—
  - (a) financial assistance given by a company in contravention of section 151, or
  - (b) any payment made by a company in respect of the redemption or purchase by the company of shares in itself.
- (3) Subsection (2) of this section is deemed included in Chapter VII of Part V for purposes of the Secretary of State's power to make regulations under section 179.

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**278 Saving for provision in articles operative before Act of 1980**

Where immediately before 22nd December 1980 a company was authorised by a provision of its articles to apply its unrealised profits in paying up in full or in part unissued shares to be allotted to members of the company as fully or partly paid bonus shares, that provision continues (subject to any alteration of the articles) as authority for those profits to be so applied after that date.

**279 Distributions by special category companies**

Where a company's accounts relevant for the purposes of this Part are special category, sections 265 to 275 apply with the modifications shown in Schedule 11.

**280 Definitions for Part VIII**

- (1) The following has effect for the interpretation of this Part.
- (2) "Capitalisation", in relation to a company's profits, means any of the following operations (whenever carried out)—
  - (a) applying the profits in wholly or partly paying up unissued shares in the company to be allotted to members of the company as fully or partly paid bonus shares, or
  - (b) transferring the profits to capital redemption reserve.
- (3) References to profits and losses of any description are (respectively) to profits and losses of that description made at any time and, except where the context otherwise requires, are (respectively) to revenue and capital profits and revenue and capital losses.

**281 Saving for other restraints on distribution**

The provisions of this Part are without prejudice to any enactment or rule of law, or any provision of a company's memorandum or articles, restricting the sums out of which, or the cases in which, a distribution may be made.