



# Companies Act 1985

## 1985 CHAPTER 6

### PART V

#### SHARE CAPITAL, ITS INCREASE, MAINTENANCE AND REDUCTION

### CHAPTER VII

#### REDEEMABLE SHARES ; PURCHASE BY A COMPANY OF ITS OWN SHARES

#### *Redemption or purchase of own shares out of capital (private companies only)*

#### **171 Power of private companies to redeem or purchase own shares out of capital**

- (1) Subject to the following provisions of this Chapter, a private company limited by shares or limited by guarantee and having a share capital may, if so authorised by its articles, make a payment in respect of the redemption or purchase under section 160 or (as the case may be) section 162, of its own shares otherwise than out of its distributable profits or the proceeds of a fresh issue of shares.
- (2) References below in this Chapter to payment out of capital are (subject to subsection (6)) to any payment so made, whether or not it would be regarded apart from this section as a payment out of capital.
- (3) The payment which may (if authorised in accordance with the following provisions of this Chapter) be made by a company out of capital in respect of the redemption or purchase of its own shares is such an amount as, taken together with—
  - (a) any available profits of the company, and
  - (b) the proceeds of any fresh issue of shares made for the purposes of the redemption or purchase,

is equal to the price of redemption or purchase ; and the payment permissible under this subsection is referred to below in this Chapter as the permissible capital payment for the shares.

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- (4) Subject to subsection (6), if the permissible capital payment for shares redeemed or purchased is less than their nominal amount, the amount of the difference shall be transferred to the company's capital redemption reserve.
- (5) Subject to subsection (6), if the permissible capital payment is greater than the nominal amount of the shares redeemed or purchased—
  - (a) the amount of any capital redemption reserve, share premium account or fully paid share capital of the company, and
  - (b) any amount representing unrealised profits of the company for the time being standing to the credit of any reserve maintained by the company in accordance with paragraph 34 of Schedule 4 (revaluation reserve),
 may be reduced by a sum not exceeding (or by sums not in the aggregate exceeding) the amount by which the permissible capital payment exceeds the nominal amount of the shares.
- (6) Where the proceeds of a fresh issue are applied by a company in making any redemption or purchase of its own shares in addition to a payment out of capital under this section, the references in subsections (4) and (5) to the permissible capital payment are to be read as referring to the aggregate of that payment and those proceeds.

## **172 Availability of profits for purposes of s. 171**

- (1) The reference in section 171(3)(a) to available profits of the company is to the company's profits which are available for distribution (within the meaning of Part VIII); but the question whether a company has any profits so available and the amount of any such profits are to be determined for purposes of that section in accordance with the following subsections, instead of sections 270 to 275 in that Part.
- (2) Subject to the next subsection, that question is to be determined by reference to—
  - (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),
 as stated in the relevant accounts for determining the permissible capital payment for shares.
- (3) The relevant accounts for this purpose are such accounts, prepared as at any date within the period for determining the amount of the permissible capital payment, as are necessary to enable a reasonable judgment to be made as to the amounts of any of the items mentioned in subsection (2)(a) to (c) above.
- (4) For purposes of determining the amount of the permissible capital payment for shares, the amount of the company's available profits (if any) determined in accordance with subsections (2) and (3) is treated as reduced by the amount of any distributions lawfully made by the company after the date of the relevant accounts and before the end of the period for determining the amount of that payment.
- (5) The reference in subsection (4) to distributions lawfully made by the company includes—
  - (a) financial assistance lawfully given out of distributable profits in a case falling within section 154 or 155,

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- (b) any payment lawfully made by the company in respect of the purchase by it of any shares in the company (except a payment lawfully made otherwise than out of distributable profits), and
  - (c) a payment of any description specified in section 168(1) lawfully made by the company.
- (6) References in this section to the period for determining the amount of the permissible capital payment for shares are to the period of 3 months ending with the date on which the statutory declaration of the directors purporting to specify the amount of that payment is made in accordance with subsection (3) of the section next following.

### **173 Conditions for payment out of capital**

- (1) Subject to any order of the court under section 177, a payment out of capital by a private company for the redemption or purchase of its own shares is not lawful unless the requirements of this and the next two sections are satisfied.
- (2) The payment out of capital must be approved by a special resolution of the company.
- (3) The company's directors must make a statutory declaration specifying the amount of the permissible capital payment for the shares in question and stating that, having made full inquiry into the affairs and prospects of the company, they have formed the opinion—
- (a) as regards its initial situation immediately following the date on which the payment out of capital is proposed to be made, that there will be no grounds on which the company could then be found unable to pay its debts, and
  - (b) as regards its prospects for the year immediately following that date, that, having regard to their intentions with respect to the management of the company's business during that year and to the amount and character of the financial resources which will in their view be available to the company during that year, the company will be able to continue to carry on business as a going concern (and will accordingly be able to pay its debts as they fall due) throughout that year.
- (4) In forming their opinion for purposes of subsection (3)(a), the directors shall take into account the same liabilities (including prospective and contingent liabilities) as would be relevant under section 517 (winding up by the court) to the question whether a company is unable to pay its debts.
- (5) The directors' statutory declaration must be in the prescribed form and contain such information with respect to the nature of the company's business as may be prescribed, and must in addition have annexed to it a report addressed to the directors by the company's auditors stating that—
- (a) they have inquired into the company's state of affairs; and
  - (b) the amount specified in the declaration as the permissible capital payment for the shares in question is in their view properly determined in accordance with sections 171 and 172; and
  - (c) they are not aware of anything to indicate that the opinion expressed by the directors in the declaration as to any of the matters mentioned in subsection (3) is unreasonable in all the circumstances.

- (6) A director who makes a declaration under this section without having reasonable grounds for the opinion expressed in the declaration is liable to imprisonment or a fine, or both.

#### **174 Procedure for special resolution under s. 173**

- (1) The resolution required by section 173 must be passed on, or within the week immediately following, the date on which the directors make the statutory declaration required by that section; and the payment out of capital must be made no earlier than 5 nor more than 7 weeks after the date of the resolution.
- (2) The resolution is ineffective if any member of the company holding shares to which the resolution relates exercises the voting rights carried by any of those shares in voting on the resolution and the resolution would not have been passed if he had not done so.
- (3) For purposes of subsection (2), a member who holds such shares is to be regarded as exercising the voting rights carried by them in voting on the resolution not only if he votes in respect of them on a poll on the question whether the resolution shall be passed, but also if he votes on the resolution otherwise than on a poll; and, notwithstanding anything in a company's articles, any member of the company may demand a poll on that question.
- (4) The resolution is ineffective unless the statutory declaration and auditors' report required by the section are available for inspection by members of the company at the meeting at which the resolution is passed.
- (5) For purposes of this section a vote and a demand for a poll by a person as proxy for a member are the same (respectively) as a vote and demand by the member.

#### **175 Publicity for proposed payment out of capital**

- (1) Within the week immediately following the date of the resolution for payment out of capital the company must cause to be published in the Gazette a notice—
- (a) stating that the company has approved a payment out of capital for the purpose of acquiring its own shares by redemption or purchase or both (as the case may be);
  - (b) specifying the amount of the permissible capital payment for the shares in question and the date of the resolution under section 173 ;
  - (c) stating that the statutory declaration of the directors and the auditors' report required by that section are available for inspection at the company's registered office; and
  - (d) stating that any creditor of the company may at any time within the 5 weeks immediately following the date of the resolution for payment out of capital apply to the court under section 176 for an order prohibiting the payment.
- (2) Within the week immediately following the date of the resolution the company must also either cause a notice to the same effect as that required by subsection (1) to be published in an appropriate national newspaper or give notice in writing to that effect to each of its creditors.
- (3) " An appropriate national newspaper" means a newspaper circulating throughout England and Wales (in the case of a company registered in England and Wales), and

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a newspaper circulating throughout Scotland (in the case of a company registered in Scotland).

- (4) References below in this section to the first notice date are to the day on which the company first publishes the notice required by subsection (1) or first publishes or gives the notice required by subsection (2) (whichever is the earlier).
- (5) Not later than the first notice date the company must deliver to the registrar of companies a copy of the statutory declaration of the directors and of the auditors report required by section 173.
- (6) The statutory declaration and auditors' report—
  - (a) shall be kept at the company's registered office throughout the period beginning with the first notice date and ending 5 weeks after the date of the resolution for payment out of capital, and
  - (b) shall during business hours on any day during that period be open to the inspection of any member or creditor of the company without charge.
- (7) If an inspection required under subsection (6) is refused, the company and every officer of it who is in default is liable to a fine and, for continued contravention, to a daily default fine.
- (8) In the case of refusal of an inspection required under subsection (6) of a declaration or report, the court may by order compel an immediate inspection of that declaration or report.

## **176 Objections by company's members or creditors**

- (1) Where a private company passes a special resolution approving for purposes of this Chapter any payment out of capital for the redemption or purchase of any of its shares—
  - (a) any member of the company other than one who consented to or voted in favour of the resolution; and
  - (b) any creditor of the company,may within 5 weeks of the date on which the resolution was passed apply to the court for cancellation of the resolution.
- (2) The application may be made on behalf of the persons entitled to make it by such one or more of their number as they may appoint in writing for the purpose.
- (3) If an application is made, the company shall—
  - (a) forthwith give notice in the prescribed form of that fact to the registrar of companies; and
  - (b) within 15 days from the making of any order of the court on the hearing of the application, or such longer period as the court may by order direct, deliver an office copy of the order to the registrar.
- (4) A company which fails to comply with subsection (3), and any officer of it who is in default, is liable to a fine and for continued contravention, to a daily default fine.

## **177 Powers of court on application under s. 176**

- (1) On the hearing of an application under section 176 the court may, if it thinks fit, adjourn the proceedings in order that an arrangement may be made to the court's satisfaction for

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the purchase of the interests of dissentient members or for the protection of dissentient creditors (as the case may be); and the court may give such directions and make such orders as it thinks expedient for facilitating or carrying into effect any such arrangement.

- (2) Without prejudice to its powers under subsection (1), the court shall make an order on such terms and conditions as it thinks fit either confirming or cancelling the resolution; and, if the court confirms the resolution, it may in particular by order alter or extend any date or period of time specified in the resolution or in any provision in this Chapter which applies to the redemption or purchase of shares to which the resolution refers.
- (3) The court's order may, if the court thinks fit, provide for the purchase by the company of the shares of any of its members and for the reduction accordingly of the company's capital, and may make such alterations in the company's memorandum and articles as may be required in consequence of that provision.
- (4) If the court's order requires the company not to make any, or any specified, alteration in its memorandum or articles, the company has not then power without leave of the court to make any such alteration in breach of the requirement.
- (5) An alteration in the memorandum or articles made by virtue of an order under this section, if not made by resolution of the company, is of the same effect as if duly made by resolution ; and this Act applies accordingly to the memorandum or articles as so altered.