

Bills Committee on Companies Bill

Comparison Table for Part 6 – Distribution of Profits and Assets

PURPOSE

To facilitate clause-by-clause examination of Part 6 (Distribution of Profits and Assets) of the Companies Bill (CB), this paper provides a comparison table, at **Annex**, on the provisions in Part 6 and the relevant provisions in the Companies Ordinance (Cap 32) or the company laws of comparable jurisdictions, where applicable. Transitional and saving arrangements for Part 6 are set out in sections 49 and 50 of Schedule 10 to the CB.

PART 6 OF THE CB

2. The major proposals and policy issues concerning Part 6 are set out in Annex A to LegCo Paper CB(1)2175/10-11(01), which was considered by Members at the meeting on 3 June 2011. Our responses to issues raised by Members at that meeting and the meeting on 17 June relating to Part 6 are as follows:-

Meeting Date	Issued raised by Members	Administration's response (LegCo Paper No.)
3 June	(a) Enquiry about directors' obligations where they become aware of matters affecting the propriety of the payment of a dividend before the dividend is paid; and (b) Suggestion that provisions on distribution in-specie similar to	CB(1)2439/10-11(05)

Meeting Date	Issued raised by Members	Administration's response (LegCo Paper No.)
	those in the Companies Act 2006 of the United Kingdom should be provided for in the CB.	
17 June	Enquiry about the practice for distribution in-specie in Hong Kong.	CB(1)2636/10-11(02)

ADVICE SOUGHT

3. Members are invited to note the contents of this paper and provide their views.

**Financial Services and the Treasury Bureau
Companies Registry
11 October 2011**

Comparison Table for Part 6

This table includes provisions in the third (i.e. “Derivation”) column that indicate the corresponding or original section in the Companies Ordinance (CO) of the clause concerned in the Companies Bill (CB), where applicable. Where reference has been made to the relevant statutory provision(s) in other jurisdictions, such provision(s) is/ are also cited in that column. We use the term “Existing law” to mean that the clause is restating an existing section in the CO as set out in the “Derivation” column without change in substance, although the actual wording may be different from the existing section as improvements are made to the drafting language and style.

A list of abbreviations used is as follows:-

CO: Companies Ordinance (Cap 32)

UKCA 2006: United Kingdom Companies Act 2006

Clause	Contents	Derivation	Position in CO	Position in CB
Division 1: Preliminary				
286	Interpretation	CO ss.79A(1) and (2), 79C(2) and 79F(2)	(i) Sets out the meaning of a number of terms and expressions used in the CO provisions relating to the distribution of profits and assets. (ii) “Distribution” means every description of distribution of a company’s assets to its members whether in cash or otherwise, except distribution by way of bonus shares, redemption or buy-back of shares, reduction of	Existing law, except that:- (i) with the introduction of cls.279 to 281 allowing a company to give financial assistance for acquisitions of the company’s shares based on a solvency test, such lawful financial assistance is excluded from the definition of “distribution” so that

Clause	Contents	Derivation	Position in CO	Position in CB
			capital and distribution in a winding up.	<p>there is no need for such transactions to satisfy Part 6 where the solvency test in Part 5 is satisfied;</p> <p>(ii) with the abolition of par value, references to capital redemption reserve and share premium accounts are removed;</p> <p>(iii) reference to a company's memorandum is removed; and</p> <p>(iv) some new definitions (e.g. "financial items") are added to improve drafting.</p>
287	Realized profits and losses	CO ss.79A(3) and 79B(4) c.f. UKCA 2006 s.853(4)	"Realized profits", in relation to a company's accounts, are those profits which fall to be treated as realized in accordance with principles generally accepted with respect to the determination for accounting purpose of realized profits at the time those accounts are prepared.	Existing law, except that it is now clarified that the provision also applies to "realized losses".
288	Certain amount to be	CO s.79K	(i) Any provision (including one for depreciation or diminution in value as well as provisions for	Existing law.

Clause	Contents	Derivation	Position in CO	Position in CB
	regarded as realized profit or loss		<p>liabilities, charges or losses) is treated as a realized loss.</p> <p>(ii) As an exception, a “revaluation provision” which is a provision for diminution in value of a fixed asset appearing on a revaluation of all the fixed assets (other than goodwill) is not treated as a realized loss.</p> <p>(iii) For the exception in (ii) to apply, it is not necessary for a revaluation of all the fixed assets to be recorded in the accounts. However, certain procedural and disclosure requirements must be complied with, e.g. the directors have considered the value of the relevant assets and disclosure is made in the notes to the accounts.</p> <p>(iv) If:-</p> <p>(a) on revaluation of a fixed asset, an unrealized profit is shown to have been made; and</p> <p>(b) on or after revaluation, a sum is written off or retained for depreciation of that asset</p>	

Clause	Contents	Derivation	Position in CO	Position in CB
			<p>over a period;</p> <p>then an amount equal to the amount by which that sum exceeds the sum which would have been so written off or retained for depreciation of that asset over that period, if that profit had not been made, is treated as a realized profit.</p>	
289	<p>Certain amount relating to insurance company with long term business to be regarded as realized profit or loss</p>	CO s.79E	<p>For the purposes of determining whether there is a realized profit, the definition of realized profits is displaced in favour of special rules in the case of long-term insurance business.</p>	Existing law.
290	<p>Distribution in kind: certain amount to be regarded as realized profit</p>	CO s.79L	<p>Where a company makes a distribution consisting of or including a non-cash asset, and any part of the amount at which the asset is stated in the accounts relevant to the distribution represents an unrealized profit, that profit is to be treated as realized for the purposes of the distribution.</p>	Existing law.

Clause	Contents	Derivation	Position in CO	Position in CB
291	Application of Part		No corresponding provision in the CO.	New provision that confines the application of Part 6 to a proposed distribution where the referential financial statements cover a period that commences after the commencement of Part 6.
292	Saving for other restraints on distribution	CO s.79P	The statutory provisions are without prejudice to any restrictions in the common law or imposed by the company's articles on the sums available for distribution or the cases in which a distribution may be made.	Existing law except that reference to a company's memorandum is removed.
Division 2: Prohibitions and Restrictions				
293	Prohibition on certain distributions	CO s.79B(1) and (2)	A company can only make a distribution out of profits available for that purpose. A company's profits available for distribution are its accumulated, realized profits (so far as not previously distributed or capitalized) less its accumulated, realized losses (so far as not previously written off in a reduction or reorganization of capital).	Existing law.
294	Listed company may	CO s.79C(1)	An additional restriction on listed companies: a listed company can make a distribution only if, after	Existing law.

Clause	Contents	Derivation	Position in CO	Position in CB
	only make certain distributions	and (3)	giving effect to such distribution, the amount of its net assets is not less than the aggregate of its called up share capital and undistributable reserves (e.g. a reserve prohibited by the articles to finance a distribution) as shown in the relevant accounts.	
295	Restriction on application of unrealized profits	CO s.79B(3)	A company shall not apply an unrealized profit in paying up debentures, or any amounts unpaid on its issued shares.	Existing law.
296	Financial Secretary may modify or exempt provisions in relation to investment company	CO s.79D	The Financial Secretary may, on the application of an investment company, modify or exempt the company from the requirements of ss.79B and 79C, subject to such conditions he considers appropriate.	Existing law.
297	Consequences of unlawful distribution	CO s.79M	If the member to whom the distribution is made knows or has reasonable grounds to believe that it is made in contravention of the Ordinance, he is liable to repay to the company.	Existing law.

Clause	Contents	Derivation	Position in CO	Position in CB
Division 3: Provisions Supplementary to Division 2				
298	Justification of distribution by reference to financial statements	CO s.79F(1) and (2)	Whether or not a distribution can be made is determined by a company's "relevant accounts". S.79F(2) lists out the items of the "relevant accounts" that determine the amount available for distribution, namely, profits, losses, assets, liabilities, provisions, share capital and reserves (including undistributable reserves).	Existing law.
299	Successive distributions	CO s.79J	Where distribution(s) (e.g. an interim dividend or a buy-back) has/have already been made by reference to a particular set of accounts, in determining the lawfulness of any further distribution by reference to the same accounts, the directors must take into account those previous distributions.	Existing law.
Division 4: Specified Financial Statements				
300	Last annual financial statements specified for purposes of	CO ss.79F(3) and 79G	(i) Distributions are made by individual companies and not by groups. The group accounts are therefore not relevant for the purpose of determining a company's profits available for distribution.	Existing law with modifications to take into account the new requirements for preparation of financial statements in accordance with Part 9, as follows:- (a) The holding company's own

Clause	Contents	Derivation	Position in CO	Position in CB
	section 298		<p>(ii) Except where “interim accounts” or “initial accounts” are used (please see the items for cl.301 and cl.302 below), the relevant accounts are the company’s last annual accounts circulated to members.</p> <p>(iii) The accounts must have been properly prepared in accordance with the CO, and must give a “true and fair” view or “true and correct” view of the state of the company's affairs, subject only to matters not material for determining the lawfulness of a distribution.</p> <p>(iv) The accounts must also be accompanied by the report of the auditors.</p>	<p>statement of financial position would be included in the notes to the consolidated financial statements pursuant to Part 9.</p> <p>(b) A holding company may rely on its annual consolidated financial statements to make a distribution if it is not required to prepare its individual financial statements under Part 9.</p> <p>(c) The CO requirement (s.79G(2)) for the financial statements to give a “true and fair” or “true and correct” view is replaced with a requirement that the annual financial statements be properly prepared in accordance with Part 9.</p> <p>Consequently, whether the financial statements should give a “true and fair” view would depend on the requirements of Part 9.</p>

Clause	Contents	Derivation	Position in CO	Position in CB
301	Interim financial statements specified for purposes of section 298	CO ss.79F(4) and 79H	<p>(i) If the proposed distribution cannot be justified by reference to the last annual accounts, the relevant accounts are the company’s “interim accounts”.</p> <p>(ii) Interim accounts of a listed company must have been “properly prepared”, subject only to matters not material for determining the lawfulness of the distribution.</p> <p>(iii) “Properly prepared” means that the accounts must comply with s.123, including the “true and fair” requirement. These requirements may be applied with necessary modifications where the accounts are prepared otherwise than in respect of a financial year.</p> <p>(iv) The balance sheet must be signed by the directors. A copy of the accounts must have been delivered to the Registrar of Companies before the distribution is made.</p> <p>(v) The requirements regarding the form and content of interim accounts for listed companies do not apply to non-listed companies. Instead, the only requirement for</p>	<p>(i) Existing law with modifications to take into account the new requirements for preparation of financial statements under Part 9.</p> <p>(ii) The CO requirement (s.79H(3)) for the accounts to give a true and fair view is replaced with a requirement that the financial statements must be prepared in accordance with Part 9 (except in relation to such matters which are not material for determining the distributable profit and except for modifications to take into account that the financial statements are not for a full financial year).</p> <p>(iii) As proposed by the Law Society of Hong Kong at the Bills Committee meeting with deputations on 9 April 2011, we agree that cl.301(6) should be amended to clarify that interim financial statements are to be delivered to the Registrar of</p>

Clause	Contents	Derivation	Position in CO	Position in CB
			<p>non-listed companies arises from the general definition in s.79F(4) – the accounts are necessary to enable a reasonable judgment to be made as to profits, losses, assets and liabilities, provisions, and share capital and reserves.</p>	<p>Companies for the purpose of registration. As such, cl.301(6) will be amended as “[a] copy of ... to the Registrar for registration...” (with words in bold to be added).</p>
302	Initial financial statements specified for purposes of section 298	CO ss.79F(4) and 79I	<p>(i) Where it is proposed to make a distribution before any accounts have been laid before the general meeting, “initial accounts” are used to determine whether there are distributable profits.</p> <p>(ii) The requirements for “initial accounts” are the same as “interim accounts” (please see the item for cl.301 above) except that the interim accounts are not required to be audited but the initial accounts (for listed companies) must be accompanied by a report by the auditors stating whether, in their opinion, the accounts have been “properly prepared”.</p>	<p>(i) The explanation for cl.301 above also applies to this cl.302.</p> <p>(ii) Similarly, we will amend cl.302(7) as cl.301(6) so that the former would read, “[a] copy of...to the Registrar for registration...” (with words in bold to be added).</p>