

New Companies Ordinance
Briefing Notes on Part 6
Distribution of Profits and Assets

INTRODUCTION

Part 6 (Distribution of Assets and Profits) of the new Companies Ordinance (“new CO”) contains provisions that deal with distribution of profits and assets of a company to members.

POLICY OBJECTIVES AND MAJOR CHANGES

2. Part 6 does not introduce fundamental changes to the distribution provisions in the Companies Ordinance (Cap. 32) (“Cap. 32”) as the rules under Cap. 32 have generally worked well and provided certainty. It mainly reorganises the provisions in Cap. 32 and proposes some minor technical amendments.

Position under Cap. 32

3. The specific provisions on distributions are contained in sections 79A to 79P of Part IIA of Cap. 32. While the usual form of distribution is dividend, under the Cap. 32 regime, “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 capital and distribution in a winding up. Distribution can only be made out of profits available for the purpose. A company’s profits available for distribution are its accumulated, realised profits (so far as previously not distributed or capitalised) less its accumulated, realised losses (so far as not previously written off in a reduction or reorganisation of capital)¹.

¹ Section 79B(2) of Cap. 32.

4. There are further restrictions for listed companies². The consequences of unlawful distribution are provided for³.

Position and key provisions in the new CO

(I) Reorganising the provisions and modernising the language

5. Part 6 mainly reorganises, with some modifications, the provisions under Cap. 32 in a more logical, user-friendly and readable way and modernises the language to facilitate easier understanding.

6. Part 6 contains provisions relating to the distribution of profits and assets to members. It is divided into four Divisions. Each Division has a specific function. **Division 1** defines or otherwise explains the expressions used in Part 6. **Division 2** deals with the prohibitions and restrictions on distributions by a company to its members. **Division 3** contains provisions supplementary to Division 2, for example **section 302** provides that the amount of a distribution that may be made lawfully is to be determined by reference to certain financial items as stated in the financial statements specified in Division 4. **Division 4** specifies the financial statements for the purposes of **section 302**. The specified financial statements for distribution purpose are the annual financial statements, the interim financial statements and the initial financial statements. These are the same under Cap. 32.

(II) Technical amendments

7. There are technical amendments to change the terms used in Part 6 in accordance with the changes made in other Parts of the new CO. For example, the term “accounts” will be replaced by “financial statements” as in Part 9, and the expression “purchase of a company’s own shares” will be replaced by the term “buy-back” as in Part 5. References to “capital redemption reserve” and “share premium account” will be removed in parallel with the introduction of the no-par regime in Part 4.

² Section 79C of Cap. 32: a listed company can only make a distribution if the amount of its net assets is not less than the aggregate of its called-up share capital and undistributable reserves, and to the extent that the distribution does not reduce the amount of those assets to less than that aggregate.

³ Section 79M of Cap. 32: if the member to whom the distribution is made knows or has reasonable grounds to believe that it is made in contravention of the law he is liable to repay to the company.

TRANSITIONAL AND SAVING ARRANGEMENTS

8. Part 6 applies to a proposed distribution where the referential financial statements cover a period that commences after the commencement of the new CO (**section 295**). If the financial statements are for a financial year or period beginning before the commencement of the new CO, then the financial statements should be prepared according to the Cap. 32 accounting provisions and the distributions proposed on the basis of such financial statements should be made according to Part IIA of Cap. 32.

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