KEY POINTS

- The new amendments to s 76 of the Singapore Companies Act which came into force on 1 July 2015, exempt private companies (other than subsidiaries of public companies) from the financial assistance provisions, and give public companies and their subsidiaries more leeway when providing financial assistance.
- The section introduces a "material prejudice" exception to the financial assistance prohibition.

Feature

Author Annabelle Yip

Financial assistance in Singapore

In this article, Annabelle Yip considers the newly amended financial assistance prohibition in Singapore's new Companies Act.

When Singapore embarked on the massive exercise of reviewing the Singapore Companies Act (Companies Act) in 2007, it was anyone's guess whether and in what form the principles surrounding capital maintenance would survive this round of review of the Companies Act.

In the previous large scale exercise in the mid-2000s, the law relating to capital maintenance was reformed substantially. Amongst other changes, the concepts of par value and authorised capital were abolished, and share buybacks (where a company repurchases its own shares) and treasury shares were introduced.

When the Report of the Steering Committee formed for the review of the Companies Act (Steering Committee) was released in June 2011, it made clear that the Steering Committee considered, but was not persuaded, that the capital maintenance regime should be entirely abolished in favour of solvency tests as a means to protect creditors. The Steering Committee acknowledged that this was a possible development over the longer term, but was of the opinion that it was not necessary to adopt such a policy at the present time. Instead, the Steering Committee proposed refinements and tweaks to improve the capital maintenance regime.

Some feel that the Steering Committee could have been bolder, instead of adopting an incremental approach which, one might argue, valued the familiarity and assurance of retaining long-standing provisions familiar to industry practitioners.

Indeed, one key capital maintenance concept, which this article discusses, is that of the prohibition against financial assistance rendered by a company for the acquisition of its own shares or those of its holding company (financial assistance) in s 76 of the Companies Act.

In brief, s 76 provided that except as otherwise provided by the Companies Act, a company shall not, directly or indirectly, give financial assistance for the purpose of, or in connection with:

- the acquisition by any person, whether before or at the same time as the giving of financial assistance, of shares in the company or its holding company or ultimate holding company; or
- the proposed acquisition by any person of such shares.

Section 76 set out limited exceptions to the rule. These included two exceptions which put a heavy onus on directors to make a solvency statement and come to an opinion that the financial assistance is in the company's best interests and the terms of which are fair and reasonable to the company.

Another long-standing exception in s 76(10), more frequently relied on, involved a whitewash given by shareholders passing a special resolution (ie approved by 75% or more of the shareholders present and voting at a general meeting of which not less than 14 days' written notice is given in the case of a private company and not less than 21 days' written notice is given in the case of a public company) to approve the financial assistance, where prescribed information is set out in the notice of meeting, and after the resolution is passed, the resolution is published in a daily newspaper in Singapore and a 21-day period is given for objections to be lodged to the Court by members, debenture holders or creditors of the company.

Section 76 has, over the years, been criticised for a lack of clarity in terms of its policy direction and application and the underlying objectives that it serves, whilst offering inadequate protection for the same reasons of uncertainty and difficulty in application. This troubling element of ambiguity has been compounded by the fact that financial assistance issues often potentially arise in otherwise innocuous corporate transactions involving an acquisition of shares of a Singapore company, impeding beneficial transactions that do not come within the mischief sought to be addressed by the prohibition.

The Steering Committee's Report noted that all leading jurisdictions have reformed this area, moving towards eliminating or relaxing restrictions on financial assistance.

The Report notably stated that the Steering Committee was initially in favour of abolition of financial assistance prohibitions for all companies. However, the final decision – doubtlessly influenced by the views of the Monetary Authority of Singapore as summarised in the Report – was that financial assistance would be abolished only for private companies (other than subsidiaries of public companies) and would not be abolished for public companies.

(By way of explanation, a "public company" in the context of the Companies Act refers to a company (incorporated in Singapore) other than a private company. A "private company" in turn is defined as a company the constitution of which restricts the right to transfer its shares, and limits to not more than 50 the number of its members (counting joint holders as one person and not counting any person in the employment of the company or of its subsidiary or any person who, while previously in the employment of the company or of its subsidiary, was and thereafter has continued to be a member of the company)).

Feature

Biog box
Annabelle Yip is a partner at Wong Partnership LLP in Singapore.
Email: annabelle.yip@wongpartnership.com

So, in summary, a public company can be, but is not necessarily, listed on a stock exchange. And a company which is a directly or indirectly held subsidiary of a public listed corporation incorporated outside Singapore, does not necessarily fall within the meaning of a subsidiary of a public company and is thus not caught by the s 76 prohibition, if it does not have, as its direct or indirect holding company, a public company incorporated in Singapore so defined.)

Nevertheless, s 76 has undergone a number of important amendments, giving public companies and their subsidiaries more leeway when providing financial assistance. In proposing the amendments, the Steering Committee was influenced by the need to have clarity on when the financial assistance prohibition is breached, and that it should not be so broad as to cover necessary and acceptable transactions.

The exceptions described above were retained, and new exceptions were added, including a "material prejudice" exception adapted from the Australian approach.

In summary, the Companies (Amendment) Act, which came into force fully on 3 January 2016 (the financial assistance amendments came into effect earlier on 1 July 2015), amended s 76 such that it now provides that only a public company or a company whose holding company or ultimate holding company is a public company shall not, directly or indirectly, give any financial assistance for the purpose of or in connection with:

- the acquisition by a person, whether before or at the same time as the giving of financial assistance, of shares or units of shares in the company or its holding company or ultimate holding company; or
- the proposed acquisition by any person of such shares.

Newly introduced exceptions to the financial assistance prohibition include a distribution of company assets by way of dividends lawfully made.

The new "material prejudice" exception provides that financial assistance is not prohibited if: (i) the assistance does not materially prejudice the interests of the company or its shareholders or the company's ability to pay its creditors; (ii) the board of directors of the company passes a resolution that the company should give the assistance (setting out the full grounds of the board's opinion) and that the terms on which the assistance is to be given are fair and reasonable to the company. The resolution must be lodged with the Registrar of Companies, and prior to the giving of financial assistance, the directors who voted in favour of the resolution must not have changed their opinion that the terms on which the assistance is to be given are fair and reasonable to the company.

As the Steering Committee noted in its Report, financial assistance provisions cause difficulty in structuring transactions since they tend to cause delay.

While the financial assistance prohibition was retained for public companies and subsidiaries of public companies, the relaxation of the prohibition has still made several types of transactions easier to structure and effect. The burden in terms of administrative steps, time and cost has been reduced.

Notably, when an offeror which is a private company, takes a public listed company target private in a takeover or scheme of arrangement, the target no longer needs to go through the cumbersome financial assistance whitewash procedures in s 76 after becoming a private company and the offeror's subsidiary, when it pays a dividend or extends a loan to the offeror (now its holding company) to assist the offeror to settle the financing that it had taken out to fund the takeover or scheme of arrangement.

In another scenario, a private company buyer who acquires a private company target from a public listed company, may procure the target to obtain financing and pay a dividend to the buyer which is its new holding company, which the latter can use to pay down its loan, or even to fund the balance of the purchase price if the seller agrees to delay receipt of the full purchase price on completion, without having to contend with the application of s 76.

The newly amended law also potentially makes it easier for management buyouts, since the management, with their own money and the backing of a private equity or venture capital firm, is not likely to take the form of a public company. Security from the target can be signed immediately after closing, instead of waiting for whitewash waiver procedures to be completed, as would have been the case in the past.

Even a company which is a public company or a subsidiary of a public company can still provide financial assistance in reliance on the "material prejudice" exception, which is a more succinct, less time-consuming alternative to the whitewash exception in s 76(10) of the Companies Act.

In conclusion, financial assistance prohibitions continue to apply to public companies and subsidiaries of public companies; however, going by the Steering Committee's Report, the writing may well be on the wall. In any case, the recently amended s 76 is still an improvement over the previous position as it will make the structuring of M&A transactions simpler without compromising the protections afforded to companies and their shareholders and creditors. ■

Further Reading:

- Cross-collateralisation arrangements in French portfolio deals [2014] 11 JIBFL 723.
- Financial assistance for the acquisition of shares in private companies: finally laying the undead to rest [2008] 6 JIBFL 289.
- LexisPSL: Banking & Finance: Financial Assistance practice notes.