

COMPANIES ACT 2006

EXPLANATORY NOTES

COMMENTARY

Part 18: Acquisition by Limited Company of Its Own Shares

Chapter 2: Financial Assistance for Purchase of Own Shares

986. The following sections replace Chapter 6 of Part 5 of the 1985 Act which contains a prohibition on the giving of financial assistance (broadly defined) by a company or any of its subsidiaries for the purpose of the acquisition of shares in itself. There are exceptions which apply to all companies, contained in section 153 of the 1985 Act, and a relaxation of the general rule for private companies in sections 155 to 158 of that Act.
987. As recommended by the CLR (Final Report, paragraph 10.6), the Act abolishes the prohibition on private companies giving financial assistance for a purchase of own shares and, as a consequence, the relaxation for private companies (sometimes referred to as the “whitewash” procedure) is no longer required. The provisions in sections 155 to 158 have therefore been repealed and are not carried forward in the Act.

Section 678: Assistance for acquisition of shares in public company

988. This section replaces section 151(1) and (2) of the 1985 Act and restates section 153(1) and (2) of that Act. The key change is that the prohibition on private companies providing financial assistance for a purchase of own shares is not carried forward.
989. The general prohibition on the giving of financial assistance by a public company is required by the Second Company Law Directive (77/91/EEC) and this prohibition is retained in *subsection (1)*. As under the current law, the prohibition extends to post-acquisition assistance (see *subsection (3)*).
990. The prohibition on the giving of post-acquisition assistance only applies if the company in which the shares were acquired is a public company at the time that the assistance is given (see *subsection (3)*). It follows that where a company has re-registered as a private company since the shares were acquired and is a private company at the time the post-acquisition assistance is given, the prohibition in this section will not apply. However, if at the time the shares were acquired the company was a private company, but at the time the post-acquisition assistance is given it has re-registered as a public company, the prohibition will apply.
991. The provisions of section 153(1) and (2) of the 1985 Act are retained in *subsections (2) and (4)* which carry forward the current exemption from the prohibition on the giving of financial assistance: namely, that such assistance is not prohibited if the principal purpose of the assistance is not to give it for the purpose of an acquisition of shares, or where this assistance is incidental to some other larger purpose of the company and (in either case) where the assistance is given in good faith in the interests of the company. As now, in these circumstances no offence is committed by the company or its officers (see section 680). The changes introduced by section 678 also give statutory effect to the decision in *Arab Bank plc v. Mercantile Holdings Ltd* [1994] 2 All ER 74: namely,

that the statutory prohibition on a company giving financial assistance for the purpose of acquiring its own shares or shares in its holding company does not apply to the giving of assistance by a subsidiary incorporated in an overseas jurisdiction.

992. In the Arab Bank case, Millett J considered the geographical scope of section 151 of the 1985 Act and concluded that this had inadvertently been altered during the consolidation of UK companies legislation in 1985. In particular, the 1985 Act appears to go further than the 1980 Act and, in interpreting the current provision, Millett J applied the presumption that, in the absence of a contrary intention, section 151 could not have extra-territorial effect. The difficulty with the 1985 Act provision arises as a result of how the prohibition is framed: in particular, the prohibition applies “*to the company or any of its subsidiaries*” and “*subsidiary*”, as defined in section 736 of the 1985 Act, includes foreign companies. The prohibition in the Act is restricted to UK public companies and their UK subsidiaries as a result of the definition of “company” in section 1. Subsection (1) of that section makes it clear that, unless the context otherwise requires, “company” means a company which is formed and registered under the Act or a former UK Companies Act.

Section 679: Assistance by public company for acquisition of shares in its private holding company

993. This section replaces sections 151(1) and (2) and 153(1) and (2) of the 1985 Act.
994. Like section 678 this section does not carry forward the prohibition on private companies providing financial assistance for a purchase of own shares, but the current prohibition on the giving of financial assistance by a public company subsidiary for the purpose of an acquisition of shares in its private holding company is retained. Section 679 also retains the prohibition on the giving of post-acquisition assistance by a public company subsidiary.