
Belgium

Financial Assistance

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Contact

Wouter Ghijssels

Stibbe, Brussels

wouter.ghijssels@stibbe.com

Pieter Nobels

Stibbe, Brussels

pieter.nobels@stibbe.com

William Poelmans

Stibbe, Brussels

william.poelmans@stibbe.com

Contents

	Page
INTRODUCTION	2
FINANCIAL ASSISTANCE UNDER BELGIAN LAW	2
OTHER POINTS OF INTEREST FROM A BELGIAN LAW PERSPECTIVE	4

INTRODUCTION

This guide provides a concise overview of the Belgian rules on financial assistance for a Belgian open limited liability company (*naamloze vennootschap/société anonyme*), as per Article 7:227 of the Belgian Code of Companies and Associations (the Financial Assistance Rules).

Please note that the Belgian Company Code also provides rules on financial assistance for:

- A private company (*besloten vennootschap/société privée*), as per Article 5:152, Belgian Code of Companies and Associations; and
- a co-operative company (*coöperatieve vennootschap/société cooperative*), as per Article 6:118, Belgian Code of Companies and Associations.

These financial assistance rules are similar to those which apply to open limited liability companies, save for some minor differences inherent to the specific characteristics of each company type.

FINANCIAL ASSISTANCE UNDER BELGIAN LAW

Origin of the Financial Assistance Rules

The (first) Financial Assistance Rules were introduced into Belgian law by the law of 5 December 1984, which implemented European Union Directive 77/91/EEC of 13 December 1976. It provided for a general prohibition for a limited liability company to grant advances, issue loans or provide security with a view to the acquisition of (or the subscription to) its shares by a third party.

The Royal Decree of 8 October 2008, implementing Directive 2006/68/EC of 6 September 2006, amended the Financial Assistance Rules in such a way that a limited liability company is principally allowed to provide financial assistance, subject to compliance with certain conditions and formalities.

The introduction of the Belgian Code of Companies and Associations in 2019 led legal doctrine to opine that the Financial Assistance Rules were eased. While this is the case (in part) for the private company and the cooperative company, the Financial Assistance Rules for limited liability companies have remained largely the same, since the legislator remains bound by Directive 2017/1132 of 14 June 2017.

Definition of financial assistance

For the purposes of the Financial Assistance Rules, financial assistance can be defined as the assistance by a limited liability company, in the form of granting advances, issuing loans or providing security, for the purpose of the acquisition of such limited liability company's shares, profit participation certificates or stock certificates (referred to as shares hereafter) by a third party. Accordingly, the Financial Assistance Rules will only apply if:

- the financial assistance takes the form of granting advances, issuing loans or providing security (these concepts are broadly interpreted); and
- a causal link exists between the financial assistance and the acquisition of the shares of the limited liability company providing the assistance, which implies that the financial assistance must contribute to or facilitate the acquisition of such shares.

The causal link between the financial assistance and the acquisition of the shares should not be interpreted too narrowly.

Summary of the Financial Assistance Rules

The Belgian Financial Assistance Rules generally allow a limited liability company to provide financial assistance for the purpose of the acquisition of its shares by a third party, subject to compliance with the following conditions and formalities.

The financial assistance must take place under the responsibility of the board of directors at fair market conditions (in particular, but not exclusively, with respect to the interest rate received by the company and/or the security granted to it).

In the event that the third party receiving the financial assistance acquires shares directly from the assisting company, either through the sale of shares such company had repurchased or through subscription to a capital increase, such acquisition or subscription must be at fair market value.

The credit standing of each counterparty (eg creditors, guarantors and providers of security) must be duly investigated *in concreto* by the board of directors.

The transaction is subject to the prior approval of the general meeting of shareholders: such approval require a special quorum (at least 50 per cent of the shares representing the corporate capital) and a majority requirement (at least 75 per cent of the votes). The board of directors must prepare a special report indicating:

- the *rationale* and the terms and conditions of the transaction;
- the benefit for the company in entering into the transaction;
- the liquidity and solvency risks for the company attached to the transaction; and
- the price at which the third party intends to acquire the shares.

This report must be provided to the shareholders, together with the invitation to the general meeting of shareholders. While publication of the full report is no longer required, a copy of the report must now be filed in the company file kept at the registry of the competent commercial court. The filing thereof must be published in the Belgian Official Gazette.

The amount of the financial assistance is limited to the amount that is available for (dividend) distribution. The company must create, on its balance sheet, a non-distributable reserve which is at least equal to the amount of the financial assistance.

The these conditions and formalities, except for the requirement of sufficient distributable reserves, do not apply to:

- financial assistance to the employees of the target company (or an affiliated company) for the purposes of the acquisition of the shares of the target company (or an affiliated company); and
- financial assistance to a company of which at least 50 per cent of the voting rights are owned by employees of the target company (or an affiliated company), for the purposes of the acquisition by such company of the shares of the target company, representing at least 50 per cent of voting rights (a so-called management buy-out).

Sanctions in case of breach of the Financial Assistance Rules

If financial assistance is provided in breach of the Financial Assistance Rules, the following sanctions may be applied.

Nullity of the transaction

Any interested party can claim the nullity of any transaction in breach of the Financial Assistance Rules.

Civil liability

Any breach of the Financial Assistance Rules may impair the civil liability of directors (and of the members of the managing board). Third parties involved in the transaction, such as the lending bank or the purchaser of the shares, could also be held liable in some cases if it can be demonstrated that such parties had knowledge of and the intention to participate in a breach of

the Financial Assistance Rules.

Following the introduction of the Belgian Code of Companies and Associations, the pre-existing criminal sanctions were abolished.

OTHER POINTS OF INTEREST FROM A BELGIAN LAW PERSPECTIVE

In addition to the specific Financial Assistance Rules, any transaction involving financial assistance must also comply with the general Belgian corporate law requirements. The most relevant of these are:

- the *corporate benefit rule*: ie, the legal requirement that companies are legal entities that intend to make profits;
- the transaction not being *ultra vires*: ie, whether the transaction is allowed by the company's corporate purpose clause as set forth in its articles of association; and
- the rule that any transaction entered into by a company must be in its corporate interest.

With respect to the latter requirement, the rules existing under Belgian law with respect to the corporate interest of a company do not contain well-defined guidelines. The proper application of any such rules depends on the business issues affecting the company, which can only (and must) be properly assessed by its board of directors.

For a transaction to be considered as being in a company's corporate interest, it should allow the company to realise an (at least indirect) patrimonial interest for its own account. In light of the introduction of the Belgian Code of Companies and Associations, this no longer solely equates to pursuing profit. The group interest can be taken into account to support the individual corporate interest of a company. In addition, the amount of the intra-group guarantee or loan should not be disproportionate to the financial means of the company (usually expressed as a percentage of its net assets or balance sheet total).

The company, its directors and members of the management board should act prudently and make an informed assessment on a case-by-case basis as to whether:

- any other general legal provision is breached; and
- the financial assistance is in the interest of the company.