
Ireland

Financial Assistance

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INTRODUCTION

This note provides a guide to the prohibition in Irish law against a company providing assistance for any acquisition of its own shares. It begins by setting out the scope of the prohibition before providing a list of transactions that are not prohibited. It explains the summary approval procedure (“**SAP**”) that can be used to validate financial assistance given by a private company. Finally, it sets out the consequences of providing financial assistance in breach of the prohibition.

SCOPE OF THE PROHIBITION

The Companies Act 2014 (the “**Act**”) came into operation on 1 June 2015 and introduced significant reforms in company law in Ireland. Section 82 of the Act prohibits any Irish incorporated company, public or private, from directly or indirectly providing financial assistance for the purpose of an acquisition (by subscription, purchase, exchange or otherwise) of shares in itself or in its holding company.

Section 82 can be breached by providing financial assistance by way of a loan, guarantee, security or otherwise and such assistance is not lawful unless exempted, or validated using the SAP. The prohibition is not confined to these forms of assistance. For example, the courts have previously found that the purchase by the company of an asset from the intended purchaser of shares at an inflated price will be classed as financial assistance (*Eccles Hall Limited v Bank of Nova Scotia* 3 February 1995 (HC)). In addition, a severance payment made by a company to one (1) of its former directors where this severance payment is in fact consideration for the transfer of that director's shares to another member of the company will also be seen as financial assistance (*Re Greenore Trading* [1980] ILRM 94).

As the term “financial assistance” is not defined by legislation it is difficult to come up with a comprehensive list of the types of transactions that are covered. In considering whether a transaction is prohibited, one should look at the commercial realities of the situation and whether the only or main purpose behind the transaction is to help the purchaser to buy the shares (*CH Ireland Inc (in liquidation) v Credit Suisse Canada* [1999] 4 IR 542).

A helpful clarification under the Act is contained in section 82(5), which explains that financial assistance in relation to the acquisition of shares in a company or its holding company is not prohibited if the company's principal purpose in giving assistance is not to give it for the purpose of any such acquisition and the assistance is given in good faith in the interests of the company. The Act also clarifies that financial assistance is not prohibited where the assistance is only an incidental part of some larger purpose of the company and the assistance is given in good faith in the interests of the company.

EXCEPTIONS TO THE PROHIBITION

In addition to the “principal purpose” exception mentioned above, section 82(6) lists a number of other scenarios which are excluded from the definition of financial assistance:

- (i) the giving of financial assistance in accordance with the SAP or the 'whitewash' procedure under the "non-repealed" Companies Act 1963-2013;
- (ii) the payment of a dividend or the distribution of profits available for distribution;
- (iii) the discharge of a liability lawfully incurred by the company;
- (iv) the lending of money by a company in the ordinary course of its business provided that, in the case of a public limited company ("**plc**"), either the company's net assets are not reduced or the financial assistance is provided out of the profits available for dividend;
- (v) the purchase or redemption of the company's shares or the giving of financial assistance for the purpose of such purchase or redemption;
- (vi) certain transactions involving the acquisition of shares by company employees provided that, in the case of a plc, either the company's net assets are not reduced or the financial assistance is provided out of the profits available for dividend;
- (vii) the giving of representations, warranties or indemnities to a person who has purchased or subscribed for shares in the company or its holding company;
- (viii) the payment of fees and expenses of the advisers of any subscriber for shares in the company or its holding company and of the company or its holding company that are incurred in connection with that subscription;
- (ix) the incurring of any expense by a company in order to facilitate the admission to, or the continuance of, a trading facility of securities of its holding company on a stock exchange or securities market, including the expenses associated with the preparation and filing of documents required under the laws of any jurisdiction on which the securities in question are admitted to trading or are afforded a trading facility;
- (x) the incurring of expenses to ensure compliance by the company or its holding company with the Irish Takeover Panel Act 1997 or an instrument thereunder or any measures for the time being adopted by the State to implement Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids;
- (xi) the reimbursement of expenses of an offeror by an offeree company or by the subsidiary of an offeree company pursuant to an agreement approved by, or on terms approved by, the Irish Takeover Panel; and
- (xii) the payment of professional fees and commission to intermediaries in connection with the allotment of shares. The commission paid must not exceed ten per cent (10%) of the money received from the allotment.

SUMMARY APPROVAL PROCEDURE

One of the most significant features introduced by the Act is the SAP which provides a standardised process modelled on the old 'whitewash' procedure under the Companies Act 1963-2013. The procedure permits certain restricted activities that would otherwise be prohibited. It is a means by which companies can engage in financial assistance while ensuring that the persons those restrictions are designed to protect, consent to the action. The SAP must occur before the financial assistance is provided, as the procedure cannot be availed of retrospectively.

Not all company types may use the SAP, for example, a private company cannot use the SAP to provide financial assistance for the purchase of shares in its parent public company. The SAP is also not available to a private company with a 'restricted person' as a director or secretary (that is, a person who was a director or secretary of an insolvent company and who, following a court declaration, is restricted from acting in those roles for a period of five (5) years).

The SAP involves the following steps:

- **Step 1: Board Meeting**

The board of directors must convene a meeting, which shall not be held more than thirty (30) days before the passing of the shareholder resolution. The directors must make a written declaration (see below) at the meeting. If a company has more than two (2) directors then the declaration must be made by a majority of directors.

- **Step 2: Declaration of Directors**

All or a majority of the directors must make a declaration setting out:

- (a) the circumstances and nature of the transaction or arrangement giving rise to financial assistance;
- (b) the person(s) to or for whom the financial assistance is being given;
- (c) the purpose for which the company is providing financial assistance;
- (d) the nature of the benefit which will accrue to the company directly or indirectly from providing the financial assistance; and
- (e) that the directors have made a full inquiry into the affairs of the company and having done so, they have formed the opinion that the company having entered into the transaction will be able to pay or discharge its debts and liabilities in full as they fall due for a period of twelve (12) months following the giving of the financial assistance.

The Act also usefully clarifies that directors, when considering whether a company will be able to discharge its debts in full, do not have to assume that the company will be called on to pay moneys on foot of a guarantee provided, or that security given over its assets will be realised.

Where a director makes the declaration without having reasonable grounds for the opinion as to solvency, the High Court may declare that the director shall be personally responsible, without limitation of liability, for all of the debts or other liabilities of the company. If the company is wound up insolvent within twelve (12) months of making the declaration there is a rebuttable presumption that the declaration was made without reasonable grounds. The "reasonable steps" that may be appropriate for the directors to undertake will vary and will depend on the type of business and the factual circumstances of each case.

Whilst an independent and/or auditors' report is not required for a SAP approving financial assistance, given the potential liability for directors it is common that the directors will require certain financial information on which to base their opinion, particularly for the 12 month "look forward" period.

The declaration must be provided to the shareholders (see below) so that they can approve the giving of financial assistance.

- **Step 3: Shareholder Approval**

The shareholders of the company must pass a special resolution (i.e. at least seventy five per cent (75%) of members present in person or by proxy voting must vote in favour of it) approving the financial assistance not more than twelve (12) months prior to the financial assistance being given and within thirty (30) days of the declaration above being made.

If the resolution is unanimously passed, it takes effect immediately and the financial assistance can be given immediately. If the resolution is passed by a majority, rather than by all members entitled to vote, it will not be treated as having been passed until twenty one (21) days after the last member signs, unless an earlier effective date is referred to in the resolution and all voting members agree to waive the twenty one (21) day period. Unless members holding at least ninety per cent (90%) of each class of voting shares in issue vote in favour of the special resolution, the company must wait thirty (30) days from the resolution being passed before giving the financial assistance.

- **Step 4: Filing**

The directors' written declaration must be lodged with the Companies Registration Office in Ireland within twenty one (21) days of the financial assistance being given. The shareholder resolution must be lodged in the Companies Registration Office within fifteen (15) days.

CONSEQUENCES OF PROVIDING FINANCIAL ASSISTANCE IN BREACH OF IRISH LAW

Failure to comply with section 82 is a criminal offence and any financial assistance granted in breach of section 82 is voidable.

(i) **Criminal Liability for the Company Directors and the Company Secretary**

If a company contravenes section 82, the company and any officer (e.g. directors, company secretary, etc.) of it who is in default shall be guilty of a category 2 offence under the Act. An officer of the company convicted of a category 2 offence can potentially be liable on summary conviction to a class A fine, imprisonment for up to twelve (12) months, or both and on conviction on indictment to a fine of up to €50,000, imprisonment of up to five (5) years, or both.

(ii) **Civil Liability**

Civil actions may be brought by a liquidator, creditor or a member of a company or the Office of the Director of Corporate Enforcement where a declaration was made without reasonable grounds. As mentioned above, a director who has signed the declaration may be personally liable for all and any of the debts and liabilities of the company.

(iii) **Effect on the Validity of the Transaction**

If a company enters into a transaction in contravention of section 82, the transaction will be voidable at the instance of the company against any person (whether a party to the transaction or not) who "had notice of the facts" that constitute such contravention. As the party asserting that a breach took place, the company must show that the person against whom the relief is sought had actual notice of the breach before or at the time that the transaction took place (*Re Cognotec Limited* 30 July 2010 (HC)).

(iv) Court Order to Remedy Breach

The court may order a person who is convicted of an offence under the Act to remedy the breach in respect of which that person was convicted. The extent to which this provision may be used in relation to financial assistance is yet to be tested.