# Italy
Financial Assistance
IBA Corporate and M&A Law Committee 2017

## Contact

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## INTRODUCTION

This guide offers a general overview of the financial assistance rules in Italy. The Italian Civil Code (ICC) currently regulates financial assistance for joint stock companies (*società per azioni*) and limited liability companies (*società a responsabilità limitata*).

## GENERAL OVERVIEW

### How is financial assistance defined under Italian law?

Under Italian law, financial assistance is defined as the granting of loans or the giving of guarantees, directly or indirectly, by a company to any of its stockholders or any third parties, to purchase or subscribe the company's stock (shares in the case of joint stock companies, and quotas in the case of limited liability companies).

### What is the history of financial assistance in Italy?

The regulation of financial assistance in Italy began long before the implementation of any supranational directive. In fact, the Italian Commercial Code of 1882 contained a provision on financial assistance, which was subsequently maintained in the 1942 Italian Civil Code.

With the implementation of the Second Company Law Directive of 13 December 1976 (77/91/EEC), the ICC provisions on financial assistance were partially amended to conform to the EEC Directive. The subsequent implementation in Italy of the new Second Company Law Directive of 6 September 2006 (2006/68/EC) introduced radical changes to the rules on financial assistance.

Article 2358 of the ICC currently regulates financial assistance for joint stock companies and Article 2474 of the ICC for limited liability companies.

### Was financial assistance traditionally prohibited under Italian law?

Traditionally, financial assistance was prohibited by Italian law. In fact, the former rules on financial assistance prohibited companies from, directly or indirectly, granting loans or giving guarantees for the purchase or subscription of its own stock.

There was only one exception to this general prohibition, which applied to joint stock companies only: financial assistance transactions to promote the purchase by employees of shares issued by the company or its affiliates were permitted. The amount, however, could not exceed the aggregate amount of any distributable profits and reserves resulting from the last approved financial statements.

### Does the new regulation permit financial assistance in Italy?

The implementation of the New Second Company Law Directive introduced a general principle whereby only joint-stock companies (and not limited liability companies) may grant loans and give guarantees for the purchase or subscription of their own shares, subject to compliance with certain conditions set out by the ICC.

## LIMITED LIABILITY COMPANIES

### The prohibition to provide financial assistance

Under Article 2474 of the ICC, limited liability companies may not grant loans or give guarantees for the purchase or subscription of their own quotas, with no exceptions.

## JOINT STOCK COMPANIES

### The requirements under the new regulation

The new Article 2358 of the ICC allows joint stock companies to give financial assistance if the following requirements are met:

1. an extraordinary shareholders' meeting approves the transaction in advance;
2. the directors prepare a report, prior to the adoption of the above resolution describing the transaction from a legal and economic standpoint, and outlining:
    a. the terms and conditions of the transaction;
    b. the business purpose of the transaction;
    c. the company's interest in the transaction;
    d. the company's ability to sustain the connected financial risk; and
    e. the price at which the company shares will be purchased or subscribed;
3. the directors attest in the above report that:
    a. the transaction will be carried out at market conditions; and
    b. the creditworthiness of the counterparty has been assessed and confirmed;
4. if (a) directors of the company or its controlling company, or (b) the controlling company itself, or (c) third parties acting on behalf of the directors are to be provided financial assistance, the report attests that the transaction is in the company's best interest;
5. the report is:
    a. lodged with the company's registered office 30 days before the extraordinary shareholders' meeting; and
    b. filed, together with the minutes of the shareholders' meeting authorising the transaction, with the companies' register within 30 days after the date of the shareholders' meeting;
6. the aggregate amount of all loans and guarantees cannot exceed the aggregate amount of any distributable profits and reserves resulting from the last approved financial statements; and
7. a special purpose non-distributable reserve for an amount equal to the aggregate of all loans and guarantees is registered in the company's financial statements.

If the shares to be purchased under the provisions above are already held by the company as own shares, the price will need to be determined on the basis of their fair market value, in line with the regime applicable when a shareholder withdraws from the company.

If the company is listed, this price will need to be based on the weighted average price at which the shares were traded in the six months before the call notice for the shareholders' meeting.

### Purchase or subscription of shares by employees

Except for the requirement relating to the aggregate amount of loans and guarantees under point (6) above, and the requirement relating to the special purpose non-distributable reserve under point (7) above, the other requirements set forth in points (1) to (5) above do not apply to transactions carried out to promote the purchase of shares by employees of the company or its affiliates.

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## CONSEQUENCES OF PROVIDING FINANCIAL ASSISTANCE

### The consequences of breaching the rules on financial assistance

*Criminal consequences*

Breaching Article 2358 of the ICC does not constitute a specific crime under Italian law *per se*. However, according to certain commentators, the directors of a company providing financial assistance in breach of the above article could be held liable for crimes set out by other provisions of Italian criminal and bankruptcy law, to the extent the specific actions or omissions whereby such financial assistance is provided to violate such other provisions.

*Civil consequences*

Although the ICC does not specify the consequences of breaching Article 2358 of the ICC, according to the main commentators and recent case law, any agreement in breach of the financial assistance rules must be considered null and void.

Moreover, the directors of the company or its affiliates may, *inter alia*, be held liable vis-à-vis the company, the relevant affiliate, or their shareholders or creditors, for damages caused by the transaction.

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## OTHER RELEVANT ISSUES

### Own shares as a guarantee

The reform of the financial assistance rules did not amend the provision contained in Article 2358 of the ICC whereby a company cannot accept its own shares as a guarantee. Therefore, this principle continues to apply to both joint stock companies and limited liability companies. This prohibition does not apply to transactions carried out to promote the purchase or subscription of shares by employees of the company or its affiliates.

### Related party transactions

The new Article 2358 of the ICC is without prejudice to the ICC provisions on related party transactions, whose requirements apply (in addition to those set out by the above article) to financial assistance transactions involving related parties.

### Merger leveraged buy-out

The new Article 2358 of the ICC is also without prejudice to the ICC provisions on merger leveraged buy-outs (MLBO), whose requirements apply (in addition to those set out by the above article) to financial assistance transactions that contemplate a merger.

In particular, under Article 2501-*bis* of the ICC, more information is required for an MLBO transaction compared to that for an ordinary merger. This includes:

- the merger plan must set out the financial resources available to repay the company's financial indebtedness post-merger;
- a report by the independent auditor of one of the companies involved in the merger must certify the correctness of the accounting figures contained in the merger plan;
- a report by the boards of directors of each of the companies involved in the merger must illustrate and justify the merger from an economic and legal standpoint, and contain an economic and financial plan demonstrating the sustainability of the post-merger indebtedness; and
- a report by an independent expert must attest that the above boards of directors' sustainability analysis is reasonable.