
Malta

Financial Assistance

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Contents

	Page
INTRODUCTION	2
GENERAL OVERVIEW	2
CONSEQUENCES OF PROVIDING UNLAWFUL FINANCIAL ASSISTANCE	3

INTRODUCTION

This guide sets out an overview of the legislation dealing with the concept of financial assistance in Malta as currently regulated by Article 110 of the Companies Act, Cap. 386 of the Laws of Malta (the “**Companies Act**”).

GENERAL OVERVIEW

■ Which are the origins of financial assistance in Maltese law?

Article 110 of the Companies Act is based on Section 54 of the (English) Companies Act of 1948, which also appears to have inspired Article 23 of the Second Company Law Directive of 13 December 1976 (77/91/EEC).

It should also be noted that in 2008, the legislation introduced a number of amendments which permitted the granting of otherwise prohibited financial assistance by private companies upon the fulfillment of certain requirements set out in the law.

■ What constitutes financial assistance under Maltese law?

In general terms, the granting, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, of any financial assistance for the purpose of an acquisition or subscription made or to be made by any person of or for any shares in the company or its parent company.

■ Is financial assistance accepted/permitted under Maltese law?

The general rule is that financial assistance for the purpose of an acquisition or the subscription of shares in a company or its parent company is unlawful and is therefore prohibited under Maltese law.

■ Is there any exception under Maltese law as regards the general prohibition of providing financial assistance to third parties?

Companies Act (Cap. 386, Laws of Malta)

Article 110 (2) and (3) of the Companies Act contain two (2) exemptions from the general rule, namely:

1. transactions effected with a view to the acquisition of shares by or for the company's employees or the employees of a group company; and
2. financial assistance by an investment company with fixed share capital for the purpose of or in connection with the acquisition of its fully paid up shares by another undertaking.

It ought to be emphasised that these exemptions only apply if the financial assistance in question does not have the effect of reducing the company's net assets below the amount of the issued share capital plus any reserves the distribution of which is forbidden by law.

Furthermore, and only with respect to private limited companies, the ban can be rendered inapplicable if certain requirements (which include the passing of shareholders and board resolutions authorising the transaction, together with the filing of a prescribed form with the Registrar of Companies) are fulfilled before the financial assistance is granted.

Merchant Shipping (Shipping Organisations – Private Companies) Regulations (S.L. 234.42, Laws of Malta)

Regulation 26(b) allows private companies regulated by these Regulations to give “whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise,... any financial assistance for the purpose of an acquisition or subscription made or to be made by any person of or for any shares in the company or its parent company”.

The only requirement imposed by these Regulations is that the financial assistance may only be given after notice of the proposed financial assistance has been given to the Registrar of Companies in accordance with a prescribed form.

Securitisation Act (Cap. 484, Laws of Malta)

A securitisation vehicle set up pursuant to the Securitisation Act is exempt from the financial assistance prohibition rules contained in Article 110(1) of the Companies Act unless such securitisation vehicle is constituted as a public company.

CONSEQUENCES OF PROVIDING UNLAWFUL FINANCIAL ASSISTANCE

■ What are the consequences of providing unlawful financial assistance?

While the Companies Act states that it “shall not be lawful” for an undertaking to give the financial assistance referred to in Article 110 (1) (b), it does not impose any specific penalty or civil or criminal sanctions on the company or its directors.

Notwithstanding this, the unlawfulness of the financial assistance necessarily results in the transactions purporting to give the financial assistance being without effect and unenforceable or subject to rescission under the general principles of law.

Furthermore, any directors who cause the company to provide unlawful financial assistance may also be actionable for breach of their duties as directors.