
Portugal

Financial Assistance

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INTRODUCTION

This chapter intends to provide an overview of the Portuguese legal regime applicable to financial assistance.

GENERAL OVERVIEW

■ What legal provisions govern financial assistance in Portugal?

Financial assistance was firstly governed in Portugal in 1986, with the approval and entering into force of the Commercial Companies Code (the “PCCC”) (approved by Decree-Law no. 262/86, of 2 September 1986, as amended).

Since then, financial assistance has been ruled by article 322 of the PCCC, regarding limited companies by shares (*sociedades anónimas*). Currently, this article has the wording approved by Decree-Law no. 280/87, of 8 July 1987 and rectified by Decree-Law no. 257/96, of 31 December 1996.

■ How can financial assistance be defined under Portuguese law?

In general terms, financial assistance may be defined as the granting of a loan, or the provision in any other way of funds or a guarantee by a company in favor of a third party (including its shareholders) in order for this third party to subscribe or acquire shares in that company’s share capital.

Based on article 322 of the PCCC, the following elements are usually identified as requisites of financial assistance:

(i) Acts consisting of financial assistance

The PCCC does not provide a definition of financial assistance. Instead, it sets out the acts may be considered as consisting of financial assistance: granting of loans or the provision of funds in any other way and the granting of guarantees by a limited company by shares (*sociedade anónima*) for the subscription or acquisition of its own shares.

(ii) Specific intention of the involved parties

In order to consider the existence of financial assistance, it is required that the loan, funds or guarantee are granted for the benefit of a third party and that this third party accepts this act with the common purpose of allowing the subscription or the acquisition of shares representative of the grantor’s share capital.

Furthermore, financial assistance is deemed as such either if it is provided directly or indirectly to the third party and regardless of the moment in which it is provided (either before, simultaneously with or after the purchase of the company’s shares).

- **Is financial assistance permitted under Portuguese law?**

As a general rule, financial assistance is not permitted under Portuguese law.

In this regard, it is worth mentioning that Directive no. 2006/68/CE, of the European Parliament and of the Council of 6 September 2006, which facilitates the provision of financial assistance (by replacing the general prohibition rule by certain requisites that need to be observed whilst providing financial assistance) was not transposed into Portuguese legal framework.

- **Are there any exceptions under Portuguese law as regards the general prohibition of providing financial assistance?**

Yes, there are. Pursuant to the PCCC, there are two (2) situations where the provision of financial assistance to third parties is permitted:

- (i) transactions carried out by banks or other financial institutions in the normal course of their business; and
- (ii) transactions carried out for the acquisition of shares by or on behalf of the company's employees or by or on behalf of the employees of an associate company.

As regards this exception, it is discussed whether it shall apply also to former employees who have already retired, to services providers or to the company's or associate companies' directors.

In any of these cases, however, the company's net assets may not become, as a result of such a transaction, less than the sum of its subscribed share capital and the total of its legal and statutory reserves that may not be freely distributed.

Should this rule not be observed, the general consequences set out for financial assistance (indicated herein below) apply.

However, and unlike other EC legal regimes, Portuguese law does not expressly require companies to create an unavailable reserve in the amount of the credit resulting from the provision of financial assistance.

EXTENSIONS OF THE PROHIBITION

Article 325-B, no. 1, of the PCCC extends the general prohibition of providing financial assistance to the granting of loans, other funds or guarantees by a dependent company in favour of a third party in order for this third party to subscribe or acquire shares in the parent company's share capital.

On the other hand, it is discussed whether the granting of loans, funds or guarantees between companies of the same group or by the parent company for the acquisition of shares in the subsidiaries may involve financial assistance.

Another debated question arising from this regime is whether the provision of financial assistance by a company for the acquisition of convertible bonds or warrants (whose underlying shares are the company's shares) is included in this prohibition.

FINANCIAL ASSISTANCE BY PRIVATE LIMITED COMPANIES BY QUOTAS (“*sociedades por quotas*”)

The prohibition of financial assistance set out in article 322 of the PCCC is as regards private limited liability companies by shares (*sociedades anónimas*) and there is no similar provision regarding private limited liability companies by *quotas* (*sociedades por quotas*).

There is no consensus amongst scholars as regards the applicability, by analogy, of that regime to private limited liability companies by *quotas*.

Therefore, it is questionable whether the prohibition of providing financial assistance shall be extended to this type of companies.

CONSEQUENCES OF PROVIDING FINANCIAL ASSISTANCE

■ Nullity

Pursuant to article 322 of the PCCC, the contracts and acts consisting of financial assistance (except if carried out under the exceptions established by law and referred to above) are null and void.

Therefore, all effects of those contracts and acts must be annulled. In particular, the third party who benefitted from the loans or funds granted by the company which provided financial assistance must reimburse those loans or funds to the said company.

Correspondingly, if the respective share deal has already been executed, it must, in principle, be reverted (unless, according to some scholars, this share deal is considered independent from that contract or act and it is necessary to protect a *bona fide* third party, which requires a case-by-case analysis).

■ Directors' liability

- Civil liability: pursuant to the general provisions on directors' liability, directors may be held liable both before the company, its shareholders and its creditors for the damages incurred by them as a result of the provision of financial assistance.
- Criminal liability: the director of a company which, intentionally and in violation of the law, by any means provides financial assistance on behalf of the company may be punished with a penalty of up to 120 days.

LEVERAGED BUY-OUTS

Leveraged buy-outs are not expressly governed by Portuguese law.

Therefore, it is necessary to carry out an analysis on a case-by-case basis regarding the particulars of the transaction, so as to ascertain the risks of it involving financial assistance.

In any case, several scholars tend to consider that in these cases the relevant interests (in particular, creditors' and minority shareholders' interests) are already protected under the provisions specifically applicable to these transactions, meaning that Article 322 of the PCCC would not, *prima facie*, apply.