
Spain

Financial Assistance

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INTRODUCTION

This guide sets out an overview of the regulation dealing with the concept of financial assistance in Spain as currently regulated by the Royal Legislative Decree 1/2010 of 2 July 2010, titled Capital Companies Act (the '**Capital Companies Act**') in connection with private limited companies (SL) and public limited companies (SA).

GENERAL OVERVIEW

- **What are the origins of financial assistance in Spanish law?**

Regulation of financial assistance in Spanish law has its origins in Article 23.1 of the Second Company Law Directive of 13 December 1976 (77/91/EEC), and was first incorporated in Law 19/1989 of 25 July as regards the partial amendment and adaptation of the corporate legislation to the EEC Directives. Subsequently, the regulation of financial assistance was included in Article 81 of the Public Limited Companies Act and is now regulated in Articles 143.2 and 150 of the Capital Companies Act, as regards private limited companies and public limited companies respectively.

- **What should be understood as financial assistance under Spanish law?**

In general terms, the direct or indirect advancement of funds by a target company to a third party for the purpose that the aforesaid third party acquires quotas or shares issued by the target company or by any other company in the group to which the target company belongs.

- **Is financial assistance accepted under Spanish law?**

Spanish law does not allow, as a general rule, that private limited companies and/or public limited companies provide financial assistance to third parties for the acquisition of their own quotas or shares or the quotas or shares of a company in the group to which they belong (SL) or of their controlling company (SA).

- **Is there any exception under Spanish law as regards the general prohibition on providing financial assistance to third parties?**

The Capital Companies Act, through its Articles 150.2 and 150.3, regulates two specific exceptions to the general prohibition on providing financial assistance, which are only applicable to public limited companies, whenever the aforesaid financial assistance is provided to:

1. **Employees**, for the purpose that the employees may acquire shares of the employer company or for the acquisition of shares or quotas of another company in the group to which the employer company belongs; and
2. **Banks and other credit institutions** in the ordinary course of the businesses within their corporate purposes, which is paid for out of the company's available assets.

- **Which are the consequences of providing financial assistance?**

- Civil penalties: the financial assistance provided and any derived act may be considered null and void by operation of law; and
- Fines: the infringement of the prohibition on providing financial assistance will be penalised by a fine up to the nominal value of the quotas or shares acquired by the third party. The administrators of the company committing the infraction and, when applicable, those of the controlling company inducing commission thereof will be held responsible therefor.

PRIVATE LIMITED COMPANIES

Article 143.2 of the Capital Companies Act regulates, with respect to private limited companies only, that this specific kind of companies may not advance funds, extend credits or loans, grant security, or provide financial assistance to a third party for the acquisition of its own quotas or the quotas or shares issued by a company in the group to which the private limited company belongs.

PUBLIC LIMITED COMPANIES

- **General rule**

Article 150.1 of the Capital Companies Act regulates, with respect to public limited companies only, that this specific kind of company may not advance funds, grant loans, extend guarantees nor provide any kind of financial assistance for the acquisition of its own shares or for the acquisition of shares or quotas in its controlling company by third parties.

- **Exceptions to the applicability of the general rule as regards public limited companies**

Sections 2 and 3 of Article 150 of the Capital Companies Act foresee two exceptions to the general rule on prohibition of financial assistance, which should only be taken into account in connection with public limited companies:

- Article 150.2 of the Capital Companies Act:

The general prohibition on financial assistance may not apply to transactions carried out for the purpose of facilitating the employees of the public limited company to acquire shares in the company itself or quotas or shares in any other company in the same group.

- Article 150.3 of the Capital Companies Act:

The general prohibition on financial assistance may not apply to transactions carried out by banks and other credit institutions in the ordinary course of the businesses within their corporate purposes which are paid for out of the company's available assets.

Furthermore, as regards this second exception, the Capital Companies Act includes an additional obligation to public limited companies by means of which the company must establish a reserve on the net assets side of the balance sheet equivalent to the total of the credits entered as assets.

CONSEQUENCES OF PROVIDING FINANCIAL ASSISTANCE

■ Civil penalties

Article 6.3 of the Spanish Civil Code will be applied. Therefore, the financial assistance provided and any act derived from it will be considered an act contrary to the mandatory and prohibited rules and shall be null and void by operation of law.

■ Liability of the administration body

Article 157.3 of the Capital Companies Act states that the administrators committing the infraction or, when applicable, those of the controlling company inducing its performance, will be held responsible for the financial assistance, in accordance with the criteria set forth in Articles 225, 226, 236 and 237 of the Capital Companies Act. Therefore, administrators will be liable to the company, the shareholders and the creditors for any damage caused by the financial assistance provided, as long as there has been intentional misconduct or negligence. For these purposes, negligence will be presumed in the absence of proof to the contrary, when the action is contrary to law or to the bylaws.

Administrators' liability also extends to *de facto* administrators. To that end, a *de facto* administrator is both (1) the person who in fact performs the office of administrator, whether duly appointed, with a void or extinguished appointment, or with any other office, and, if applicable, (2) the person acting under the instructions of the administrators of the company.

When there is no permanent delegation of authority from the board to one or more managing directors, all of the provisions regarding duties and liability of administrators will be applicable to the person that is given authority to perform the most senior management of the company, without prejudice to the actions of the company based on its legal relationship therewith.

■ Fines

Article 157.2 of the Capital Companies Act states that the infringement of the prohibition on providing financial assistance will be penalised by a fine up to the nominal value of the quotas or shares acquired by a third party with financial assistance. The amount of the fine will be set according to the significance of the infraction as well as the damage caused to the company, the members thereof and third parties.

OTHER RELATED MATTERS

- **Merger following acquisition of a company with borrowing by the acquiring company**

In a merger of two or more companies, if one of them has taken on debt in the three years immediately preceding the merger in order to acquire control of another participant in the merger or to acquire assets thereof that are essential for its ordinary business or are of importance for its net asset value, the following rules shall apply:

- The draft terms of merger must indicate the funds and timeframe for the resulting company to discharge the debts incurred to acquire control or assets;
- The report of the directors on the draft terms of merger must indicate the reasons for the acquisition of control or of assets and those which, if applicable, justify the merger and contain an economic and financial plan stating the funds and a description of the objectives pursued;
- The experts' report on the draft terms of merger must give an opinion on the reasonableness of the information referred to in the two preceding paragraphs, **and also determine if there is financial assistance. In these cases, the experts' report will be necessary even if the merger resolution is unanimous.**