
Sweden

Financial Assistance

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INTRODUCTION

This note briefly describes the provisions under Swedish corporate law that deal with financial assistance. The concept is regulated by Chapter 21 of the Swedish Companies Act (Aktiebolagslagen (2005:551)): principally sections 5, 6, 8, 11 and 12.

The Swedish rules apply to both public and private limited liability companies, and no whitewash procedures are available (although there are some exemptions to the rules).

GENERAL OVERVIEW

What should be understood as financial assistance under Swedish law?

Under Swedish law, the relevant rules prohibit a limited liability company (*aktiebolag*) from granting an advance or providing loans or security for loans, in order for a debtor, or any natural or legal person connected to a debtor, to acquire shares in the company or any parent company within the same group (defined as a group with a Swedish parent company).

The rules relating to financial assistance were introduced during the early 1970s to safeguard the creditors of Swedish companies. Prior to this, share acquisitions were commonly financed using the target company's funds. Initially, only cash loans from the target company to the intended buyer were covered, but the scope of the rules eventually was extended to include advances and security for loans granted to support the acquisition of shares in the target company. When Sweden joined the European Union, the rules were amended to comply with the Second Company Law Directive.

In addition to the rules on financial assistance, Swedish law also includes a more general prohibition on a limited liability company granting a loan to its shareholders or its board members (or the managing directors or relatives of such shareholders and board members).

There are certain exemptions to this prohibition, including loans to shareholders within the same group (defined as a group with an EU entity as a parent company). This general loan prohibition will not be further addressed in this article.

Entities and persons covered by the provisions

The prohibition on financial assistance applies to a transfer of funds *from* a Swedish limited liability company if that company is the target company or a subsidiary of the target company. The rules apply to both public and private limited liability companies.

The rules cover loans *to* the debtor, or any person connected to the debtor. For this purpose, connected persons (whether individuals or legal entities) include shareholders, board members and managing directors, and any of their respective close relatives.

Types of loans covered

The rules apply to any advance, loan or security provided by a company in order for the debtor (or its connected persons) to acquire shares in that company or any parent company. The financial assistance rules only apply when the *purpose* of the loan or security is to make such acquisition. Granting an advance, providing loans and providing security for loans *after* completion of the relevant acquisition are not covered by the concept of financial assistance.

However, in order to establish that the loan was not granted for the purpose of the acquisition, the buyer (or a financing third party) must bear an actual credit risk for a reasonable period of time following the acquisition. There is no clear guidance as to what constitutes an 'actual credit risk', but the circumstances at hand must be considered.

It is common for a credit agreement to contain an undertaking on the buyer to ensure that members of the target group provide additional security at the request of the lenders. Provided that the undertaking itself is on the buyer and not on the group members, and that a reasonable period of time has passed after closing, such undertakings are generally considered to be in line with Swedish law. Limitations under Swedish law relating to financial assistance are usually addressed by standard limitation clauses in the credit and security documentation.

There are no financial assistance-related restrictions on the buyer granting an advance, or providing loans or security for loans, in order to handle its own acquisition debt. A buyer is therefore able to immediately grant security and guarantees for the purpose of handling acquisition debt.

EXEMPTIONS

A company may offer an employee of either the target company, or another company in the same group as the target, an advance, loan or security to acquire shares, provided:

- the value does not exceed two times the Swedish 'price base amount' (*prisbasbelopp*)¹ – in total, approximately SEK 97,000 based on rates at the time of writing; such offer must be directed to at least half of the company's employees; and,
- with respect to advances or loans, repayment is made within five years by way of regular repayments.

In relation to investment funds, a person who acquires or holds a unit in an investment fund is not considered to be an 'acquirer of shares' under the provisions on financial assistance.

The Swedish Tax Agency (or the Swedish Financial Supervisory Authority, for companies under its supervision) may grant exemptions from the prohibition on financial assistance. Such exemptions may only be granted, however, where certain special circumstances apply, such as when there is a generational change to the shareholders of a company. This exemption may not be granted to a public company providing an advance, loan or security for the acquisition of shares in the public company itself.

¹ An amount set each year by the Swedish government and used in various tax system and social insurance calculations.

PRIVATE AND PUBLIC LIMITED LIABILITY COMPANIES

The provisions on financial assistance under Swedish law are largely the same for both private and public limited liability companies. The only difference is that exemptions from the prohibition on financial assistance by the Swedish Tax Agency and the Swedish Financial Supervisory Authority may not be granted to public companies.

CONSEQUENCES OF PROVIDING UNLAWFUL FINANCIAL ASSISTANCE

In the event that a company has provided an advance or a loan in violation of the provisions on financial assistance, the recipient must repay the amount received.

As regards security granted by a company in violation of the provisions on financial assistance, the company will not be bound by the undertaking, provided that it can prove that the recipient knew, or should have known, that the granting of security was unlawful.

Violation of the Swedish financial assistance provisions may also lead to criminal sanctions, such as fines and personal liability – including the possibility of imprisonment – for the directors of the company making the loan.

Finally, for natural persons and certain types of associations (not limited liability companies), a forbidden loan will be taxed as income for that person.