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## **France**

Financial Assistance

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## INTRODUCTION

This guide sets out an overview of the regulation dealing with the concept of financial assistance in France as currently regulated by the French Commercial Code (the “**Commercial Code**”).

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## GENERAL OVERVIEW

### ■ What are the origins of financial assistance under French law?

The origin of the French law regulation regarding financial assistance comes from Article 23.1 of the Second Council Directive of 13 December 1976 (77/91/EEC). Such regulation was first incorporated into Law No. 81-1162 of 30 December 1981 relating to the implementation of Directive 77/91/EEC. It was subsequently set out in the Commercial Code under Article L.225-216.

France did not transpose Directive 2006/68/EC of 6 September 2006, which amended Directive 77/91/EEC to authorize a company, under certain conditions, to provide financial assistance to a third party willing to acquire its shares.

### ■ What should be understood by financial assistance under French law?

Financial assistance is generally defined as the granting of funds (*i.e.* credit support) by a target company (and sometimes its subsidiaries) to a third party for the purpose, whether directly or indirectly, of acquiring shares of the target company.

### ■ Is financial assistance authorized under French law?

As a general rule, French law prohibits the granting by a target company of financial assistance to third parties for the acquisition of its own shares. This prohibition only applies to stock companies (“*sociétés anonymes*” and “*sociétés par actions simplifiées*”), which are the most common forms for companies.

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

Article L.225-216 of the Commercial Code provides for two (2) specific exceptions to the general prohibition of financial assistance:

1. transactions made by credit institutions and financing companies in the ordinary course of business; and
2. transactions carried out to enable employees to purchase shares in their employing company, one of said company’s subsidiaries or a company which is a member of a group savings scheme, as provided for under Articles L.3344-1 and L.3344-2 of the French Labour Code.

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

1. Civil sanctions: financial assistance as well as any loan, credit or security granted within the framework of said assistance may be judged to be null and void by courts.
2. Criminal fines: the Chairman, Chief Executive Officer and Directors of a company may incur a EUR 150,000 fine if they carry out, in the name of the company, transactions regarded as financial assistance.

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## **FRENCH RULES RELATING TO FINANCIAL ASSISTANCE**

- **General rule**

Paragraph 1 of Article L.225-216 of the Commercial Code provides, with respect to stock companies ("*sociétés anonymes*" and "*sociétés par actions simplifiées*") only, that a company shall not advance funds, grant loans and grant securities to enable a third party to subscribe or purchase its own shares.

- **Exceptions to the applicability of the general rule**

Paragraph 2 of Article L.225-216 of the Commercial Code provides for two (2) exceptions to the general rule of prohibition of financial assistance:

1. transactions made by credit institutions and financing companies in the ordinary course of business; and
2. transactions carried out to enable employees to purchase shares in their employing company, one of said company's subsidiaries or a company which is a member of a group savings scheme, as provided for under Articles L.3344-1 and L.3344-2 of the French Labour Code.

These rules applicable to financial assistance do not prevent the holding company from granting a pledge over the target company's shares, the distribution of dividends or a share capital repayment by the target company to the buyer where the corresponding proceeds serve the acquisition debt service.

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## **CONSEQUENCES OF PROVIDING FINANCIAL ASSISTANCE**

- **Civil penalties**

Article L.225-216 of the Commercial Code does not provide for civil penalties in case of infringement.

However, pursuant to the general rules applying to the nullity under commercial law (Article L.235-1 of the Commercial Code), any transaction carried out in breach of the provision of Article L.225-216 may be deemed null and void by the courts.

In this respect, any loan, credit or security granted by a company for the acquisition of its own shares by a third party may be subject to nullity.

- **Liability of corporate officers**

Under general rules relating to civil liability, the officers of a company are liable towards the company and third parties if they do not comply with applicable legal rules.

They are also liable towards the company in case of mismanagement ("*faute de gestion*") which basically means that they are liable for their decisions or actions which violate the company's "best interests", even if such violation was unintentional (as a result of a careless decision or in case of negligence).

Moreover the officers may be held liable towards the company, its shareholders or its creditors for any damage caused as a result of financial assistance.

- **Fines**

Article L.242-24 of the Commercial Code provides that the Chairman, Chief Executive Officer and Directors of the company may incur a fine of up to EUR 150,000 if they carry out - in the name of the company - transactions prohibited by paragraph 1 of Article L.225-216 of the Commercial Code.

Both the target company's officers and the purchasing company's officers may be punished under this provision.

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## **OTHER RELATED MATTERS**

- **Merger between the holding company and the target company soon after the acquisition**

The prohibition laid down in Article L.225-216 of the Commercial Code could be interpreted broadly by courts.

In this regard, a careful approach should be adopted with respect to a merger between the holding company and the target company occurring soon after the acquisition.

Such merger may appear fraudulent and as infringing Article L.225-216 of the Commercial Code if its purpose is to facilitate the use of the target company's assets in order to repay or to secure the acquisition debt.

- **Modification of the corporate nature of the target company prior to the acquisition**

The regulation dealing with financial assistance does not apply to *sociétés à responsabilité limitée (SARL)* or *sociétés en nom collectif (SNC)* as such companies do not have stocks (*actions*) but rather equity interests (*parts sociales*). However, if a target company would be transformed into one of these companies shortly prior to its acquisition and subsequently issued a guarantee or granted security in respect of facilities used for the acquisition or subscription of its own shares, it is likely that this scheme would be construed as a fraudulent transaction if the sole purpose of such transformation was to circumvent the financial assistance regulations.