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## **Sweden**

Financial Assistance

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### Contact

Per Berglöf (partner)  
Olof Hagberg (associate)

Advokatfirman Delphi KB

[per.berglof@delphi.se](mailto:per.berglof@delphi.se)  
[olof.hagberg@delphi.se](mailto:olof.hagberg@delphi.se)

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## INTRODUCTION

This note briefly describes the provisions under Swedish law dealing with the concept of financial assistance. This matter is regulated in chapter 21 of the Swedish Companies Act [Sw. *Aktiebolagslagen (2005:551)*] (the “**Companies Act**”), mainly in section 5 and 11.

As a general rule, the concept of financial assistance is not accepted under Swedish law. The relevant provisions neither include any whitewash procedures. Some exceptions do, however, apply (please see below).

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## GENERAL OVERVIEW

### ■ What should be understood as financial assistance under Swedish law?

Under Swedish law, financial assistance is understood as a company granting an advance, providing loans or providing security for loans in order for the debtor, or for any natural or legal person connected to the debtor, to acquire shares in the company or any parent company in the same group.

Prior to the introduction of provisions on financial assistance in Swedish law in the early 1970s, acquired shares were often financed with funds of the target company. In order to safeguard the creditors of a Swedish company, provisions prohibiting financial assistance were included in Swedish legislation. Initially, only cash loans from the target company to the intended buyer were covered. Afterwards, the scope of the regulation on financial assistance was extended to also include advances and security for loans granted to support the acquisition of shares in the target company.

In order for a transfer of funds from the target company to be considered as financial assistance, the purpose of the transfer needs to be established. Only when the purpose of granting an advance, providing loans or providing security for loans is, for the debtor, to acquire shares in the company, then the transfer can be considered as financial assistance. If the purpose of the transfer is not for the funds to be used to complete the acquisition, but the receiver does so anyway, then the transaction is not covered by the provisions on financial assistance.

### ■ The entities and persons covered by the provisions

The prohibition on financial assistance applies to a transfer of funds from a Swedish limited liability company (Sw. *aktiebolag*). The provisions apply not only to a transfer of funds from the target company, but also to a transfer of funds from subsidiaries of the target company. Financial assistance under the Former Swedish Companies Act [Sw. *Aktiebolagslagen (1975:1385)*] was extended to transfers of funds executed from a parent company to support a potential acquirer of any of its subsidiaries. When introducing the Companies Act, transfers from the target company’s parent company were no longer covered by the concept of financial assistance.

Not only the debtor, but also persons connected to the debtor are covered by the provisions on financial assistance. This means that the prohibition applies also to a transfer

of funds from a company in order for e.g. a shareholder or a director (or their wives and husbands) of the debtor to acquire shares in that company or any of its parent companies.

- **Transfers made after the acquisition**

As mentioned above, only when the purpose of granting an advance, providing loans or providing security for loans is for the debtor, or any connected person, to acquire shares in the company or a parent company, the transfer can be considered as financial assistance. 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. As long as the seller, or a financing third party, for a reasonable period of time bear an actual credit risk, the reasons for the prohibition of financial assistance do not, in the opinion of the Swedish legislator, apply.

There is no clear guidance what may constitute a reasonable time period but generally parties tend to wait for about three months before any upstream loans, security or guarantees are granted to handle acquisition debt. It is common that a credit agreement contains an undertaking for the buyer to procure that members of the target group provide additional security at the request of the lenders. Provided that the undertaking is for the buyer, and not for the group members to grant the relevant security, and also that a reasonable time period has passed after closing, such undertaking is generally considered to be in line with Swedish law.

Limitations under Swedish law relating to financial assistance are usually addressed in the credit and security documentation by standard limitation clauses.

There are no restrictions as to financial assistance for the buyer to grant an advance, provide loans or provide security for loans in order to handle its own acquisition debt. Therefore the buyer can, *inter alia*, grant security and guarantees immediately in connection with the acquisition for the purpose of handling acquisition debt.

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## EXCEPTIONS

An offer from the employer to an employee of the target company, or another company in the same group, is to some extent exempted from the prohibition on financial assistance. The exception applies, as a general rule, if the value of the offered advance, loan amount and security does not exceed two (2) times the Swedish price base amount (in total approximately SEK 90,000) and such offer is directed to not less than one-half of the employees of the company and, with respect to advances or loans, entails that the offered amount is to be repaid within five (5) years through regular repayments.

A person who acquires or holds a unit in an investment fund shall not be deemed to be an acquirer of shares under the provisions on financial assistance.

The Swedish Tax Office, and to some extent the Swedish Financial Supervisory Authority, may grant exemptions from the prohibition on financial assistance. Such exemption may, however, only be granted where required due to special circumstances relating to e.g. change of generations in the shareholders of the company.

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## **PRIVATE AND PUBLIC LIMITED LIABILITY COMPANIES**

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

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## **CONSEQUENCES OF PROVIDING FINANCIAL ASSISTANCE**

Where a company has provided an advance or a loan in violation of the provisions on financial assistance, the recipient shall repay what he or she has received. As regards security granted in violation of the provisions on financial assistance, the undertaking by the company shall not be binding on the company, provided that the company proves that the recipient of the security knew or should have realised that it was unlawful.

Violation of the Swedish financial assistance provisions may also lead to criminal sanctions such as fines or even imprisonment and may further result in personal liability for the directors of the company making the loan.