Financial Assistance Rules:

Application to distributions made by an Irish unlimited company

Introduction

Under the Irish Companies Act 2014 (as amended) (the "**Act**"), there are certain rules that prohibit a company from providing financial assistance for any acquisition (broadly defined) of shares in the company itself or any holding company (up to parent company level) ("**Financial Assistance**"). The provision of Financial Assistance is prohibited under Irish law (unless certain prescribed statutory approvals are put in place in advance of the provision of such assistance).

There are also certain exemptions to the application of the Financial Assistance rules, including an exemption for dividends that are made out of profits available for distribution (the "**Exemption**"). Irish unlimited liability companies ("**ULC**"), as distinct from Irish limited liability companies, are not required to have distributable profits to justify distributions under Irish law. Accordingly, some caution is required where distributions are **not** made out of distributable profits as the Exemption does not apply in such cases.

Where a ULC makes a distribution otherwise than out of profits, and the proceeds of that distribution are ultimately used for the purposes of an acquisition of shares in the company itself or any of its holding companies, such distribution may be deemed to amount to the provision of Financial Assistance.

In this article, we examine: (i) the application of the Financial Assistance rules to circumstances where a ULC makes a distribution otherwise than out of profits; and (ii) how a ULC can put those certain prescribed statutory approvals in place in advance to allow the ULC to validly make such distributions.

Financial Assistance Rules – The Basics

Irish companies are prohibited from providing Financial Assistance for the purpose of an acquisition (by subscription, purchase, exchange or otherwise) by any person of shares in the company or its parent company. If the Financial Assistance rules are not complied with, they can affect the validity of a transaction and result in criminal and civil sanctions against directors.

This prohibition:

a) forms part of the capital maintenance rules designed to protect a company's shareholders and creditors from misuse of its assets; and

b) applies whether the Financial Assistance is given: (a) directly or indirectly; or (b) by means of a loan or guarantee, the provision of security or otherwise.

Financial Assistance is prohibited unless:

a) the transactions giving rise to the Financial Assistance fall within one of the permitted exemptions to the Financial Assistance rules under the Act (the "**Permitted Exemptions**"); or

b) the Financial Assistance is authorised, in advance, via adoption of a procedure known as the "Summary Approval Procedure" (the "**SAP**") under the Act.

A distribution not made out of profits available for distribution does not fall under the list of Permitted Exemptions. Accordingly, a ULC in such circumstances must avail of the SAP process.

Authorising Financial Assistance - Summary Approval Procedure

The SAP effectively "blesses" or sanctions, from a Financial Assistance perspective, any proposed distributions of a ULC that are not made out of distributable profits. A key point to note is that the SAP process must be carried out in advance of the making of any distribution (and cannot be availed of retrospectively). The SAP involves the following key steps:

a) during a meeting of the board of directors, all or a majority of the directors approve the provision of Financial Assistance and sign a declaration (the "**Declaration**") affirming that the company will be in a position to pay its debts as they fall due for a period of twelve months (effectively a solvency declaration);

b) following the making of the Declaration, a special shareholder resolution of the company (the "**Resolution**") is passed; and

c) the Declaration and a copy of the Resolution are publicly filed at the Irish Companies Registration Office.

Availing of the SAP procedure in these circumstances is very common and widely-utilised by Irish companies to mitigate any risk of falling foul of the Financial Assistance rules.

Once the SAP process has been completed, a distribution **not** made out of distributable profits as approved and made by a ULC in the following 12 month period by the relevant company would be covered from a Financial Assistance perspective.

Conclusion

While distributions made out of profits would not trigger Financial Assistance concerns, ULCs should bear caution of the risk that distributions not made from distributable profits may in some cases trigger such concerns. To safeguard against any risk, in circumstances where a ULC makes a distribution otherwise than out of profits and where there is a sense that the underlying funds may be used for the purposes of a share acquisition at company or holding company level, the ULC should consider availing of the SAP in advance of any such distribution to ensure that: (i) such distribution is valid and in compliance with the Act; and (ii) the directors are protected from any potential civil or criminal liability.

For more information on the above, or for further guidance and insight in respect of distributions and the application of the Irish financial assistance rules generally, please contact Pat English, Ross Cashell, Catherine Carrigy or your usual Matheson LLP contact.

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