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Companies Bill 2012 Analysis

Changes to the rules governing Financial Assistance (section 83)

[This note is based on the version of the Companies Bill 2012, as initiated]

Key points

- *Scope of the prohibition curtailed somewhat with the deletion of “in connection with” and the introduction of a “principal purpose” test*
- *A number of extensions/clarifications to the exceptions to the prohibition on the giving of financial assistance*
- *Existing “whitewash” procedure will be replaced by new Summary Approval Procedure with some significant changes*
- *Transactions in contravention of section 83 prohibition will be voidable against persons who have actual or “imputed” notice of the relevant facts*

Introduction

Section 83 of the Companies Bill 2012 (the “Bill”) proposes to make some significant changes to the provisions on the prohibition on the giving of financial assistance as they are currently set out in section 60 of the Companies Act 1963 (the “1963 Act”). Some of the key elements of these proposed amendments are discussed below.

The scope of the prohibition

At present the giving of financial assistance by a company “for the purpose of *or in connection with*” a purchase of or subscription for shares in itself or its holding company is prohibited by the 1963 Act, subject to certain exceptions or, in the case of most private companies, to the transaction being “whitewashed” in accordance with the procedures set out in sections 60(2)-(11). In practice, the wording “in connection with” has led to a conservative approach by practitioners when dealing with the issue of financial assistance. In this regard and similar to the approach adopted in the UK, the Bill provides for the deletion of the words “in connection with” and in addition, includes a clarification provision, which provides that, if the company’s “principal purpose” in giving the financial assistance is not to give it for the purpose of any such acquisition of shares or if the financial assistance is only an incidental part of some larger purpose then, provided the assistance is given in good faith and in the interests of the company, it is not prohibited. This is a welcome development which should be useful in limiting the scope of the prohibition on financial assistance and thereby making the implementation of commercial transactions less cumbersome in the future.

Permitted financial assistance

Section 60(12) of the 1963 Act expressly excludes a number of transactions from the prohibition on the giving of financial assistance. The exclusions are now covered by section 83(6) of the Bill which includes the following extensions and/or clarifications:

- ***The purchase or redemption of own shares*** under sections 106 and 109 of the Bill and the giving of financial assistance for the purpose of such purchase or redemption is now expressly excluded from the prohibition (section 83(6)(d)).
- ***The refinancing exemption*** has been extended to cover any number of subsequent refinancings where the original financial assistance was whitewashed (section 83(6)(h)).
- ***The exemption for representations, warranties or indemnities*** given to a purchaser or subscriber for shares in the company or its holding company has been extended to include representations, warranties or indemnities given to affiliates of or persons connected with such a purchaser or subscriber or a director of such an affiliate or connected person (section 83(6)(i)).
- ***The exemption for the payment by a company of fees and expenses*** of the advisers to any subscribers for shares in the company has been extended to cover the advisers to any purchaser of shares in the company (and similarly the advisers of the company or its holding company) (section 83(6)(j)).

The new Summary Approval Procedure

Part 4 Chapter 7 of the Bill contains a new Summary Approval Procedure (“SAP”), which in many ways is similar to the existing financial assistance whitewash procedure, but which has been extended to apply (with some variations in their respective provisions) to a number of other “restricted activities” including reduction in company capital, variation of company capital on reorganisations and prohibitions of loans etc. to directors and connected persons.

In the context of financial assistance, the SAP continues to require a directors’ statutory declaration and a special resolution of the members. The main differences between the SAP as it applies to financial assistance and the existing whitewash procedure under section 60 of the 1963 Act are as follows:

- ***Failure to deliver the directors’ statutory declaration to the Registrar within 21 days invalidates the activity in question (section 202(3)).***
- ***The Bill expands upon the matters to be addressed in the directors’ statutory declaration*** to include, for example, the circumstances in which the transaction or arrangement is to be entered into and the benefit which will accrue to the company directly or indirectly from entering into the transaction or arrangement.
- The Bill contains a new provision which specifically provides that, ***in determining whether the company will be able to pay or discharge its debts and other liabilities in full, the directors will not be required to assume (where relevant) either that the company will be called upon to pay moneys on foot of a guarantee given or, as the case may be, that security given will be realised.***
- Whereas the existing law provides that a director who makes a statutory declaration without having reasonable grounds for the opinion as to solvency will be guilty of an offence (liable to imprisonment for a period not exceeding 6 months or to a fine not exceeding €1,904.61 or to both (Section 60(5)), the Bill goes further and provides that ***the court may***, on the application

of a liquidator, creditor, member or contributory of the company or the Director of Corporate Enforcement, ***declare that the director shall be personally responsible, without any limitation of liability, for all or any of the debts of the company...***". The Bill restates the existing rebuttable presumption that the directors did not have reasonable grounds for their opinion as to solvency if (a) the company is wound up within the period of 12 months after the making of the statutory declaration and (b) its debts are not paid or provided for in full within the period of 12 months after the commencement of the winding up.

- Section 60(7) of the 1963 Act provides that unless all of the members of the company vote in favour of the requisite special resolution, the transaction whereby the financial assistance is to be given cannot be carried out before the expiry of a period of thirty days after the date of that resolution. The Bill instead provides that the 30-day waiting period can be dis-applied where members holding more than ***90% in nominal value of each class of issued shares*** and entitled to attend and vote at general meeting ***have voted in favour of the special resolution*** (section 212(2)).

Consequences of breach of section 83: the doctrine of imputed notice

As is the case under section 60(14) of the 1963 Act, the Bill provides that any transaction in contravention of section 83 shall be voidable at the instance of the company against any person (whether a party to the transaction or not) who had notice of the facts which constitute such breach. However, while the courts have held that "notice" under section 60(14) means actual notice rather than constructive notice, the Bill specifically refers to "actual or imputed" notice (section 83(9)). This extends the scope of the section considerably so that counterparties who, while they do not have actual notice, may be found to have imputed notice (for example, where that person's agent (which includes, for example, legal counsel) has notice) and may then find that the contract in question is voidable as against them at the instance of the company.

Public Limited Companies

Part 17 of the Bill contains the provisions applicable to public limited companies (PLCs) and contains a number of amendments to the general provisions in Parts 1-14 in respect of PLCs. As is the case currently with respect to the whitewash procedure, the SAP may not be used in the case of PLCs. There are also further modifications to section 83 in its application to PLCs, the majority of which reflect the current law.

As regards private limited subsidiaries of PLCs, section 83(7) provides that a private limited subsidiary shall not be able to provide financial assistance in accordance with the SAP for the purpose of the acquisition of shares in its parent public company. However, it is worth noting that section 83(8) does provide some potential flexibility on this point by providing that the Minister may, by regulations, specify circumstances in which a private limited subsidiary may provide financial assistance in accordance with the SAP in such circumstances.

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