

FINANCIAL ASSISTANCE UNDER ARTICLE 322 OF THE COMPANIES CODE - SLCM SERRA LOPES, CORTES MARTINS & ASSOCIADOS

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One of the most interesting, anachronistic and perhaps most disrespected rules in Portuguese corporate law is the (prohibition of) "*financiacional assistencia*", under Article 322 of the Portuguese Commercial Companies Code ("CSC").

Despite the name being of the charitable kind, what this rule actually contains is, on the contrary, a rigid, generic and very nearly absolute prohibition which states that a limited company cannot lend money, provide funds or provide guarantees for another person or entity to buy or subscribe shares representing its own capital.

In simple terms, this rule is aimed, in the context of limited companies, at preventing the possibility of acquiring the "*dog*" using its own "*hair*" (the picture is not pretty, but is certainly suggestive).

This prohibition – which originated in English Law and is today, in one form or another, contemplated in all the legal systems of the countries of the European Union – establishes (at least at first sight) a sound, balanced and just vision of corporate law, which seeks to defend the solidity of the capital structure of the company and the sacrosanct principle of the "intangibility of the share capital", the equal treatment of shareholders (not allowing a few to access "company assets" to finance their entry into the college of shareholders), even the interests of the creditors of the company and, directly or indirectly, other stakeholders. It would seem, on the contrary, indefensible that a legal system did not protect the "hair of its own dogs".

In effect, by establishing this prohibition in companies that do not have their capital dispersed among the public (contrary to what happens in many other legal systems), in companies that have one or more shareholders and regardless of the will of such shareholders (even when it is decidedly consensual or even unanimous), in companies and situations where the solidity of the capital is not (and will not be) minimally endangered and, finally, constraining any acts or agreements that contravene such prohibition with the force and stigma of "nullity" (which can be invoked at any time and by any interested party), the Portuguese legislator proves to be one of the most faithful crusaders for this prohibition, which seems to remain applicable strictly and absolutely – thus preventing or limiting (at least to the honest individuals) the possibility of buying, selling and restructuring said companies – even where there is, undeniably, no legitimate interest to be defended or preserved.

We stand firm in the defence of the "hair", even when there is no more "dog".

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