Regulations concerning Local Authority Guarantees


§ 1 Applicability
These Regulations apply where any local authority provides a surety or any other financial guarantee for activity conducted by others than the local authority itself.

§ 2 Guarantee of collection/guarantee of payment
Where a local authority provides a guarantee for the financial obligations of a third party, the local authority may only bind itself by means of a guarantee of collection. The body with the power of approval may grant a dispensation where the creditor in the principal relationship is a private person.

§ 3 Limitation of duration
Any resolution concerning the provision of a guarantee and any contract or certificate of guarantee shall always specify the duration of the guarantee. In the case of guarantees linked to investments the duration of the guarantee shall not exceed the life of the investment object.

In the case of any guarantee for operating costs the period of the guarantee shall be made as short as possible.

Any guarantee for an employee’s loan shall, in addition to being subject to the limitations provided by the first and second paragraphs of this section, be limited to the duration of the contract of employment.

The guarantee period may not exceed 2 years from the date on which the claim against the principal debtor falls due. No guarantee may be provided with a duration exceeding 40 years.

§ 4 Maximum amount
Any resolution concerning the provision of a guarantee and any contract or certificate of guarantee shall always specify the maximum liability covered by the guarantee.

§ 5 Guarantees for small amounts
Guarantees in respect of which the maximum liability is inferior or equal to the sum of 500,000 kroner do not require state approval.

§ 6 Guarantee for previous liability in the case of conversion to a limited company
Any local authority may provide a guarantee for debts for which it was previously directly liable, where the activity that was previously conducted by the municipal or county authority itself is separated out into a company with limited liability, and the debt is at the same time transferred to the company. The same applies where activity that has been conducted by a joint local authority partnership with unlimited pro-rata liability is transferred to a company with limited liability. In such cases the security may be provided in the form of a guarantee of payment.

Such guarantees as are mentioned in the first paragraph of this section shall be subject to the approval of a state authority in the usual manner.
§ 7 Commencement

These Regulations apply from 1 March 2001. From the same date Regulation No. 4046 of 9 February 1993 concerning local authority provision of security is hereby repealed.

Comments:

On section 1 Applicability

This provision specifies the applicability of these Regulations. The Regulations have the same applicability as the Act itself. By the term “surety” is meant the usual third-party guarantees by which the municipal/county authority undertakes to assume another’s liability. The expression “any other financial guarantee” is meant to include what are called the independent guarantees, i.e. those guarantees that are not linked to another claim. This means inter alia that a promise to a sports club, for example, to cover any deficit arising from a sports arrangement, is subject to the approval of the Ministry even though this guarantee does not give the sports club’s creditors any right to make a claim against the local authority. However, an ordinary promise to pay out a particular sum will not be a guarantee. The distinctive feature of a guarantee is that the promise of payment of money is conditional upon a future event, the occurrence of which is unpredictable.

Further it is apparent that it is only guarantees for activities conducted by others than the municipal/county authority that are included. These Regulations do not include guarantees that the local authority gives for its own performance – those guarantees that are termed unconditional. The local authority is free to give such guarantees irrespective of the provisions of section 51 of the Local Government Act and the Regulations issued in pursuance thereof.

On section 2 Guarantee of collection/guarantee of payment

The provisions apply only to third-party guarantees (surety). It follows from the first sentence that as a general rule the municipal/county authority may only provide a guarantee for the financial obligations of others in the form of a guarantee of collection. From the second sentence it is apparent that a dispensation may be given – i.e. it becomes possible to provide a guarantee of payment where the creditor for the obligation for which the guarantee is provided is a private individual.

An exception has also been made from the requirement concerning guarantee of collection in those cases that are dealt with in section 6. For further details of this, see the comments on these provisions.

On section 3 Limitation of duration

The first sentence of the first paragraph provides that any resolution concerning the provision of a guarantee and any contract or certificate of guarantee shall specify the duration of the guarantee. The second sentence provides that if the guarantee relates to investments, the period of the guarantee may not exceed the life of the investment object.

The second paragraph means that guarantees linked to operating costs should be made as short as possible, but does not lay down any fixed period of time. In the comments on the corresponding provision in the earlier Regulations it says that guarantees for operating purposes should as a general rule be limited to the individual year of operations, and there
may be reason to take such a limitation of duration as a basis. However, this provision is no obstacle to the provision of operating guarantees of longer duration.

The third paragraph provides a specific rule for loans to employees. Under the Act local authorities are free to provide guarantees for the obligations of their employees – in practice it will be a matter of loans for housing etc. The third paragraph provides that guarantees for employees’ loans may not be valid for a longer period than that for which the person concerned is employed by the municipal/county authority. Care must be taken to ensure that this is stated in the contract/certificate of guarantee.

The guarantee period must be set so that it affords the creditor in the principal relationship a reasonable amount of time for recovery in the event of default. This means that the guarantee period ought to extend somewhat beyond the date on which the principal claim falls due. The first sentence of the fourth paragraph lays down a maximum limit of 2 years from the date on which the principal obligation is to be fulfilled. The second sentence sets a maximum limit for the duration of guarantees. Not under any circumstances may guarantees be provided with a validity of more than 40 years, including the two-year time limit in the first sentence. Care must be taken to ensure that this is made clear from the contract/certificate of guarantee, where it is not for other reasons obvious that the guarantee is of shorter duration.

On section 4 Maximum amount

This provision requires that any resolution concerning the provision of a guarantee and any contract or certificate of guarantee shall put a figure on the upper limit of the liability guaranteed by the local authority in the individual case.

On section 5 Guarantees for small amounts

The second sentence of subsection 3 of section 51 of the Local Government Act provides authority for laying down by regulations that guarantees for minor amounts do not require state approval. The provision in section 5 of the Regulations means that guarantees in respect of which the maximum liability (cf. § 4) is inferior or equal to 500,000 kroner do not require state approval. The assessment will be related to the total ceiling that has been set for a guarantee for the purpose in question. It is not possible to provide two or more minor guarantees for the same purpose and the same principal debtor in order that each individual guarantee shall come under the limit of 500,000 kroner.

On section 6 Guarantee for previous liability in the case of conversion to a company

This provision builds on section 4 of the previous Regulations, but has been somewhat amended.

In some cases it may be appropriate for a municipal/county authority to separate out activity that has been conducted by the local authority itself – usually in the form of a local authority firm (section 11 of the Local Government Act) or a local authority undertaking (Chapter 11 of the Local Government Act) – and to transfer it to a company with limited liability, typically a company limited by shares. It may then also be appropriate to transfer to the company any debt that is linked to the activity. The local authority is not relieved of its liability for the earlier debt until the creditor may be deemed to have relieved the local authority of liability. In the absence of such acceptance it is presumed that the local authority is jointly and severally liable with the company for earlier debt. The provision in section 6 of the
Regulations allows for the local authority in such cases to provide an explicit guarantee for the company’s obligation to pay this debt, so that the local authority’s direct liability for debt is converted to a guarantee liability. As a general rule such a guarantee must be given as a guarantee of collection, cf. section 2 of the Regulations. Pursuant to the third sentence of section 6, however, the possibility has been opened up of providing a guarantee of payment in such cases. This exception follows directly from the Regulations – a guarantee of payment does not require a dispensation in these cases.

Where the local authority provides a guarantee here, it will have a right to claim indemnity from the company, if the local authority must cover the whole or parts of the liability for debt that is transferred to the company. The local authority should consider whether the claim for indemnity ought to be safeguarded through a security interest in the company’s assets.

Any resolution concerning an explicit guarantee of the kind mentioned above will be subject to the approval of a state authority in order to be valid, cf. the first paragraph of section 51 of the Local Government Act.

Where any activity that has been conducted in the form of a local authority partnership with unlimited pro-rata liability is transferred to a company with limited liability, it may in the same manner be appropriate to transfer liability for debt to the new company (company limited by shares). If debt for which the general partnership was directly liable is to be transferred to the company limited by shares, the consent of the creditors is required in order for the general partnership to be relieved of liability. Where the general partnership is dissolved, the participating local authorities are not relieved of the liability they previously had as members of the partnership unless the creditors accept this. For local authority partnerships under Act No. 6 of 29 January 1999 this follows from section 36, in which it is provided that the participants have after dissolution of the partnership the same liability as earlier. For general partnerships under Act No. 83 of 21 June 1985 the same thing follows from the third paragraph of section 3-28. The same must be presumed to apply to local authority partnerships with their basis in section 27 of the Local Government Act.

In practice the creditors are usually protected by the fact that the previous participants provide an explicit certificate of guarantee for their liability for earlier debt. The provision of section 6 allows for the local authorities to provide such a guarantee in these cases. As a general rule such a guarantee must be provided in the form of a guarantee of collection cf. section 2. In the third sentence of section 6, however, the possibility of providing a guarantee of payment is opened up here. This exception follows directly from the Regulations; no dispensation is required in order to be allowed to provide a guarantee of payment in these cases.

Any resolution concerning, or any certificate of, an explicit guarantee of such a kind as mentioned above will be subject to the approval of a state authority in order to be valid, cf. the first paragraph of section 51 of the Local Government Act.

Where the participants must cover the obligations of the company limited by shares in accordance with their guarantee liability, they will have the right to claim indemnity from the limited company. The local authorities should consider whether there is a need to safeguard this claim for indemnity through a security interest in the company’s assets.

The provisions of sections 1 to 5 of these Regulations also apply in those cases in which such guarantees are provided as mentioned in section 6.
The provision of section 6 only allows guarantees for liability for debt the local authority had prior to the separating out/conversion into a company with limited liability. Any guarantees for other obligations must be considered in accordance with the normal rules – irrespective of section 6.