

Israel Desk E-mail Bulletin

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More flexible creditor protection regime for Dutch public companies

Introduction

On 27 May 2008, the Dutch Upper House of Parliament passed legislation (the "Bill"), providing for improved possibilities for Dutch public companies with limited liability (*N.V.*) to finance and restructure capital. The most important changes are:

1. Removal of the limitation that an *N.V.* can hold shares in its own capital up to a maximum of 10% of its issued capital;
2. Certain forms of contribution in kind on shares will no longer require an auditor's statement regarding the value of such contribution; and
3. Loans by an *N.V.* to third parties with a view to the acquisition of shares in its own capital will under circumstances no longer be considered as financial assistance.

The Bill is expected to come into force on or around 1 July 2008. The Bill forms the implementation of the Directive 2006/68/EG (the "Directive"), which is an amendment of the 'Second Directive' (77/91/EEG) of 13 December 1976 regarding creditor protection of public companies. The purpose of the Directive is to ease the creditor protection regime so that public companies can respond to developments in the market in an easier and more cost-efficient manner, without prejudicing the interests of shareholders and creditors.

Below we will also refer to the Dutch private company with limited liability (*B.V.*). The *B.V.* regime was before introduction of the new legislation discussed herein, in the relevant areas less stringent than the *N.V.* regime. The Bill will lead to a situation where differences between the *N.V.* and the *B.V.* regimes become smaller and the *N.V.* regime will in certain situations become even more flexible. It should be noted however that the rules applicable for a *B.V.* will change drastically upon implementation of the bill for the simplification of the *B.V.* regime, which is expected late 2009. Where we refer to a *B.V.* in this bulletin, reference is made to the current *B.V.* regime.

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The experience of the members as regards the Israeli market is combined with their extensive knowledge of international tax law, corporate structuring, banking and securities law, regulatory law, employment law. In addition to being part of the Israel Desk, the members also participate in Loyens & Loeff teams that focus on specific industries and sectors, such as energy, real estate, private equity, fund structuring, corporate finance, and financial products.

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Re 1 – Purchase of its own shares

Currently, an N.V. may only acquire shares in its own capital for no consideration or up to the amount of the freely distributable reserves, whereby the nominal value of the shares held by the company may not exceed 10% of its issued share capital. Such purchase of shares by an N.V. is only allowed if such is provided for in the articles of association and if the shareholders' meeting has granted an authorisation to the management board, which authorisation will be valid for a maximum period of 18 months.

In the Bill, the 10% requirement has been deleted. If the company is listed on a regulated market or a multilateral trading facility, a threshold of 50% of the issued capital applies. For all N.V.'s, the Bill provides that at least one share may not be held by the company or a subsidiary. Additionally, for non listed companies the maximum term of the authorization by the shareholders' meeting to the board will be extended to 5 years.

For the B.V., the regime remains unchanged. This means that the nominal value of the shares held by the B.V. may not exceed 50% of its issued share capital. The requirement of having sufficient freely distributable reserves also applies to the B.V.

Re 2 – Contribution in kind

Currently, in the event of a contribution in kind on shares in an N.V., the following applies. The incorporators or the N.V., as the case may be, must make a description of the contribution, in respect whereof an auditor's statement, confirming the value of the contribution, is required.

The Bill provides for an alternative procedure for certain types of contribution in kind, in which no description and auditor's statement are required. Such alternative procedure may be followed for contributions in kind in the form of (i) securities and money market instruments; (ii) assets that have already been valued by a recognized independent auditor; and (iii) assets of which the value may be derived from audited annual accounts.

If prior to the contribution, it appears that the value of the contribution in kind has changed due to extraordinary circumstances, then a description and auditor's statement must nonetheless be issued. If a contribution set out sub (ii) or (iii) above has taken place post incorporation and if such circumstances have occurred, the shareholder(s) representing (jointly) at least 5% of the issued capital may demand that the management board will as yet prepare such description and obtain an auditor's statement.

The possibility for the alternative procedure only applies for the N.V.. For the B.V., a regime similar to the current rules for the N.V. applies.

Re 3 – Financial assistance

Currently, an N.V. may not, with a view to the subscription or acquisition of shares in its share capital by a third party, issue loans, provide collateral, guarantee the stock price, otherwise warrant or in any other way bind itself jointly and severally with or for third parties.

Under the Bill, the N.V. will be allowed to issue loans to such third parties, provided however that (i) the loan (including the interest rate and the security granted by the borrower) is entered into under fair market conditions; (ii) the amount of the loan does not exceed the freely distributable reserves; (iii) the creditworthiness of the third party has been duly investigated; (iv) if the shares are newly issued or sold by the N.V., the purchase price is fair; (v) six months have not yet passed since the end of the previous financial year, without annual accounts having been adopted; and (vi) the decision to issue the loan has been approved by the shareholders' meeting (whereby a majority of 2/3 of the votes cast is required if less than 50% of the issued capital is represented at the meeting). The N.V. must maintain a non-distributable reserve up to the amount of the loan.

If the N.V. is listed, the shareholder approval as referred to sub (vi) above requires a 95% majority vote.

The new financial assistance regime will still be more stringent than the regime that currently applies for the B.V. A B.V. may issue a loan to such third parties up to the amount of the freely distributable reserves and to the extent provided for in the articles of association (for which also a non-distributable reserve must be maintained).

Members of the Israel Desk visit Tel-Aviv on a regular basis. If you would like to make an appointment or would like to receive more information with respect to the above, please feel free to contact jeroen.janssen@loyensloeff.com or any other member of the Israel Desk.

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