

Tokyo Legal Newsletter July 2009

Introduction

This is the July 2009 edition of our periodical Tokyo Newsletter (Legal). This Newsletter is intended for Japanese businesses investing in or through the Netherlands, Belgium and Luxembourg and the EU. It provides a summary update of developments in corporate, banking and securities law in these jurisdictions and also touches on developments of European Union Law.

The Netherlands

- [New Japanese-Dutch Convention on Social Security](#)

Belgium

- [The End of Golden Parachutes ?](#)

Luxembourg

- [Amendments to the SICAR Law](#)

EU

- [EU Commission launches Draft Directive on Alternative Investment Fund Managers](#)

The Netherlands

New Japanese-Dutch Convention on Social Security

Japan and the Netherlands have signed a convention and an administrative arrangement concerning statutory social security. The convention entered into force on 1 March 2009 and prevents double insurance obligation and double insurance premium payment, which makes it attractive for Japanese investors in the Netherlands and vice versa. The convention determines in which country an expatriate must pay mandatory social security contributions.

During their foreign posting employees who are temporarily transferred can in principle remain insured up to five years in the country responsible for the foreign posting (the "transferring country"). Preconditions in this respect are that prior to the foreign posting, the employee is covered in the transferring country by a mandatory social security scheme and that the employee remains employed by the employer in the transferring country. A form shall need to be issued by the transferring to evidence that the employee remains subject to the social security legislation of the transferring country. The convention contains a unilateral clause concerning co-insurance of family members that is exclusively applicable to the family members of Japanese employees.

Belgium

The End of Golden Parachutes ?

Introduction

As a consequence of the recent events in the financial sector, a consensus has developed to address excessive severance payments by introducing a ceiling for the so-called golden parachutes of directors of listed companies, and to ensure that the shareholders of listed companies gain more insight in the remuneration policy of the company, as well as (limited) influence thereon. This consensus was eventually outlined in draft laws which are under debate in the Senate. The key provisions of these draft laws are discussed below.

Outline of the Draft Law concerning Golden Parachutes

The first draft introduces a ceiling for the total of all indemnities, of any kind, which are paid to an executive director upon or after termination of his/her duties or relationship with the company or its subsidiaries. The ceiling would apply regardless of who takes the initiative to terminate and

July 2009

Loyens & Loeff is an independent provider of corporate legal services. Our close cooperation with prominent international law and tax law firms makes Loyens & Loeff the logical choice for large and medium-size companies operating domestically or internationally.

The Tokyo Newsletter provides a summary update of developments in corporate, banking and securities law in the Netherlands, Belgium and Luxembourg and is intended for Japanese businesses investing in or through the Netherlands, Belgium or Luxembourg. It is published both in English and Japanese. The Newsletter also touches on European Union law and on recent publications or developments involving Loyens & Loeff.

In view of its summary nature, the Newsletter does not form a substitute for advice. Although this Newsletter has been compiled with great care, we cannot accept any liability for the consequences of making use of this issue without our cooperation.

Should you have any questions further to this Newsletter, please contact Pieter Leguit at our Tokyo office.

Loyens & Loeff GJB Office Tokyo
Pieter Leguit
12F, Nishimoto Building
3-23 Kanda Nishikicho
Chiyoda-ku
Tokyo 101-0054
t +81 3 5281 5587
f +81 3 5281 5589
pieter.leguit@loyensloeff.com
www.loyensloeff.com

would also apply in case of termination by mutual agreement. The ceiling would in principle be set at 12 months' remuneration. For executive directors who have effectively worked longer than 20 or 25 years for the company, a higher indemnity with a maximum of 15 months' remuneration or 18 months remuneration respectively may be applied. Note that the draft law merely provides for a maximum for the indemnities; it does not grant directors any entitlement thereto.

As a rule the limitation applies to the total of all possible indemnities which the director receives as a result of his/her departure. Additional payments into a pension scheme are also taken into account and so are indemnities paid pursuant to a non competition provision. The payment of additional pension contributions on previously paid amounts is not taken into consideration.

Scope

The ceiling would apply to directors of Belgian companies whose securities are freely traded on the Belgian or a foreign stock market, as well as to the autonomous public companies Belgacom and the National Bank of Belgium.

Sanction

Directors will not be able to claim more than the maximum permitted indemnities even if this was contractually agreed upon. Would the company nevertheless pay out more, its directors would be personally liable for this breach.

Corporate Governance

The Belgian government furthermore wishes to ensure that the Board of Directors of listed companies apply a transparent payment policy with respect to their shareholders, and that the shareholders can influence the remuneration policy. The new system is to an important extent inspired by the 2009 Belgian Code on Corporate Governance (the 2009 Code)

The Good Governance

Statement The new regime obliges listed companies to add to their annual report a statement concerning corporate governance. The statement must amongst others mention that the 2009 Code is applied as the reference code for corporate governance within the company, why certain parts of the code may possibly not be applied, a description of internal control mechanisms, the shareholding structure, the powers and the composition of the corporate bodies.

The Remuneration Report

The statement on good governance must include a remuneration report, providing an accurate description of the remuneration policy within the company for the past year and for the next two years, as well as the criteria for the evaluation of executive directors. The remuneration report must be submitted to the vote of the general meeting. This meeting can approve or reject the report. Although a rejection by the shareholders does not affect existing contractual provisions, it serves as a signal to the Board of Directors that it should adjust its remuneration policy.

The Remuneration Committee

Within the Board of Directors of listed companies a remuneration committee must be instituted, consisting of non-executive members of the Board of Directors. The remuneration committee's task is to make defined proposals to the Board of Directors in connection with the remuneration policy of the executive directors, the members of the management committee and the persons in charge of the daily management within the company. If the company has a works council, the remuneration committee shall communicate the abovementioned remuneration report to the works council.

Luxembourg

Amendments to the SICAR Law

The Luxembourg Parliament adopted, on 15 October 2008, certain amendments to the law of 15 June 2004 relating to the investment company in risk capital (the "SICAR Law"). These modifications aim at modernising the SICAR Law after four years of successful implementation. You will find below a summary of the principal points of attention:

Compartmentalisation

SICARs may henceforth be created with multiple compartments, allowing for segregation of assets and risks. Each such compartment will correspond to a distinct part of the assets and liabilities of the SICAR. In other words, the rights of investors and of creditors relating to a specific compartment will be limited to the assets of that compartment only.

Well-informed Investors

The definition of well-informed investor has been updated to reflect certain legislative changes which occurred over the last four years. The SICAR Law now further exempts from certification persons who are involved in the management of the SICAR, including the management of the assets of the SICAR (that is, the personnel of an appointed investment manager or investment adviser).

Name

The name of the SICAR merely needs to include the words "investment company in risk capital" or "SICAR" without the requirement to mention the corporate form adopted.

Share Capital

The one million euro minimum capitalisation requirement, which has to be reached within one year from the authorisation of the SICAR, will take share premiums into account, if any.

Limited Partnership

The SICAR Law and the parliamentary documents further clarify the regime applicable to SICARs adopting the form of a limited partnership (*société en commandite simple*) in several ways:

- i. limited partnerships may adopt a variable capital structure;
- ii. as a result of the variable capital election, distributions made to limited partners are not subject to later repayment on the grounds that they did not correspond to actual profits made by the limited partnership;
- iii. the identity of the limited partners does no longer need to be published in the official trade register; and
- iv. the Anglo-Saxon practice that consists in establishing the limited partnership with the minimum capital amount and, for the remainder, loan commitments has been validated.

Fair Value Concept

The concept of probable realisation value estimated in good faith is replaced by the "fair value" concept.

Custodian Bank's Duties

The detailed monitoring duties formerly imposed on the custodian bank have been repealed, thus providing for more contractual freedom.

Net Asset Value

SICARs are no longer obliged to calculate and publish a net asset value.

Custodian Bank's Duties

The detailed monitoring duties formerly imposed on the custodian bank have been repealed, thus providing for more contractual freedom.

Net Asset Value

SICARs are no longer obliged to calculate and publish a net asset value.

EU

EU Commission launches Draft Directive on Alternative Investment Fund Managers

Introduction

On 30 April 2009 the European Commission issued a first draft of the EU Directive on Alternative Investment Fund Managers ("Fund Managers"). The draft Directive is the Commission's response to the call for regulation of the alternative investment fund industry in view of the risks inherent to alternative investment funds.

Authorisation and Scope

The draft Directive provides that no Fund Manager may provide management services to any alternative investment fund without prior authorisation by the competent authority of its home Member State in accordance with the draft Directive. An alternative investment fund (a "Fund") is defined as any collective investment undertaking that is not authorised as a UCITS (an Undertaking for Collective Investment in Tradable Securities). The draft Directive therefore covers the entire alternative investment fund industry: (fund of) hedge funds, venture capital and

private equity funds, real estate funds, commodity funds, infrastructure funds, et cetera.

The authorisation requirement will apply to any EU established Fund Manager, *i.e.* any person or entity that μ directly or through delegation μ provides management services to a Fund, irrespective of whether the Fund is domiciled inside or outside the EU.

The draft Directive will not apply to:

- certain institutions that are already subject to financial markets supervision, such as UCITS and their managers, credit institutions (banks), pension funds and insurers;
- certain supranational organisations, such as the World Bank, the ECB and the IMF;
- Fund Managers that manage Funds of which the assets under management (including leverage) do not exceed a threshold of EUR 100 million in the aggregate;
- Fund Managers that manage Funds which are unleveraged, which do not provide for redemption rights during the first 5 years after constitution, and of which the assets under management do not exceed a threshold of EUR 500 million in the aggregate; and
- Fund Managers providing management services to any Fund that is not marketed in the EU.

Fund Managers that do not reach the above thresholds may however opt-in to benefit from the regime of the Directive.

Authorisation and Operating Conditions

The draft Directive contains authorising and operating conditions that apply to all Fund Managers. In addition, there are disclosure requirements that apply to Fund Managers that systematically employ high levels of leverage, and to Fund Managers that acquire controlling stakes in companies.

The general authorising and operating conditions for Fund Managers include:

- *Capital Requirements*
A Fund Manager's equity must amount to at least EUR 125.000. If the portfolios of Funds managed exceed EUR 250 million, the Fund Manager should have an additional amount of equity equal to at least 0.02% of the amount by which the value of the Funds' portfolios exceed EUR 250 million.
- *Conduct of Business Rules*
Fund Managers are subject to ongoing conduct of business rules to the effect that the Fund Manager shall act prudently. In particular, the Fund Manager must implement adequate internal risk management and control systems and must maintain procedures to identify, prevent, manage and disclose conflicting interests.
- *Valuation*
Fund Managers must appoint an independent valuator in respect of each Fund to establish the value of the Fund's assets as well as its shares or units at least once a year. Open ended Funds would require valuation on the occasion of each issue or redemption of shares or units.
- *Safekeeping and Verification of Ownership of Assets*
Fund Managers must appoint an independent depositary in respect of each Fund they manage for the safekeeping and verification of ownership of assets acquired by such Fund. Only EU based credit institutions may be appointed as depositaries.
- *Delegation*
A Fund Manager may only delegate certain tasks to third parties (*i.e.* not to the depositary or the valuator) upon the prior authorisation of the competent authority of its home Member State. Portfolio- or risk management may only be delegated to third parties that are themselves authorised as Fund Managers. Delegation may not frustrate adequate supervision of the Fund Manager and the third parties must be creditworthy, qualified and capable.
- *Transparency*
Fund Managers must make available an audited annual report for each Fund they manage. The Commission will issue implementing measures as to the content and format of the annual report. Furthermore, the following information must be disclosed to the Fund's investors: the investment strategy and objectives, the type of assets in which the Fund may invest, the investment techniques the Fund may employ, leverage conditions (constraints, types and sources and associated risks), information on third party service providers, liquidity risk management, all fee charges and expenses and the maximum amounts thereof, and the existence and contents of preferential treatment of investors. Also, a Fund Manager must periodically make certain specific disclosures to the competent

authorities of its home Member State, including an annual report of each Fund it manages.

Fund Managers systematically employing high levels of leverage must make additional disclosure on a quarterly basis to their investors and the competent authority of the Member State regarding the maximum level and total amount of leverage, types of leverages (cash borrowings, securities lending, leverage embedded in derivatives) and main sources of leverage. High levels of leverage are deemed systematically employed when the combined level of all sources exceed the value of the equity capital of the Fund in two out of the past four quarters. Leverage seems to be measured on the level of the Fund; leverage employed by portfolio companies seems to be irrelevant in this respect.

The draft Directive furthermore provides that a Fund Manager acquiring a controlling interest in a nonlisted EU domiciled company must notify the company and all other shareholders, and must disclose its intentions with regard to the company. A "controlling interest" means 30% of the voting rights, acquired individually or with other Fund Managers through an agreement. This specific transparency requirement does not apply if the company employs fewer than 250 employees, has an annual turnover not exceeding EUR 50 million and/or an annual balance sheet total not exceeding EUR 43 million.

Marketing

The draft Directive permits a Fund Manager to market Funds to professional investors only. Member States may impose additional requirements on Fund Managers for marketing Funds to retail investors.

Cross Border Marketing – EU Passport

One important benefit for Fund Managers will be that, once authorised in their home Member State, they may market their EU-domiciled Funds cross border within Europe to professional investors (EU passport). The draft Directive provides for a notification procedure according to which a Fund Manager must notify the relevant Member State of its intent to provide management services cross border. Member States may not impose additional requirements to any such Fund Manager.

Cross Border Marketing – Third Country Elements

The draft Directive provides for a framework for the cross border marketing:

- of Funds that are domiciled in third countries; and
- of Funds by Fund Managers that are established in third countries.

The cross border marketing by EU-established Fund Managers of Funds that are domiciled in third countries will be subject to compliance of the same notification procedure as regards EU-domiciled Funds, and will in addition be conditional upon the relevant third country and the Member State having concluded an agreement which ensures compliance of the requirements on the exchange of information in accordance with the OECD Model Tax Convention.

Also, Member States may permit non-EU established Fund Managers to market Funds to professional investors in the EU if, in addition to the conditions for the cross border marketing of third country Funds, the following conditions are met:

- the Fund Manager is subject to equivalent prudential and ongoing supervision in the relevant third country;
- EU Fund Managers are allowed comparable market access in the relevant third country; and
- the competent authorities of the third country and the Member State have concluded an agreement ensuring the exchange of information to monitor the activities of the Fund Manager relevant to the systemic risks and the orderly functioning of the financial markets in which the Fund Manager is active.

The Commission will issue further implementing measures in this respect of these "third country" elements of the Directive. As a result, these parts of the Directive will not come into force after a period of 3 years following the prescribed implementation date of the Directive. Until then, Funds domiciled in third countries may be marketed by EU Fund Managers on European soil to the extent permitted by national laws of the relevant Member State. Fund Managers established outside the EU would, pending implementation of the third country elements of the Directive, seem to only have access to an EU member state if authorised in accordance with the national laws thereof.

Implementation

If approved by the European Parliament in 2009 the Directive may come into force in 2011. The grandfathering provision of the Directive still seems to be under discussion. The draft Directive is being fiercely debated both inside and outside the European Parliament and it is yet uncertain in which form the Directive will make it into law.

Amsterdam . Antwerp . Arnhem . Aruba . Brussels . Curaçao . Dubai . Eindhoven . Frankfurt
Genève . London . Luxembourg . New York . Paris . Rotterdam . Singapore . Tokyo. Zurich

attorneys, tax lawyers & civil law notaries