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Quoted

Exemption from the consolidation duty for intermediate holding companies

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Edition 171

In this edition

Exemption from the consolidation duty for intermediate holding companies

1. Introduction

1.1 As a starting point, all Dutch legal entities falling within the scope of Title 9 Book 2 Dutch Civil Code (**DCC**) are in principle required to prepare and publish standalone annual accounts. In addition, such legal entity may also be subject to the obligation to prepare and publish consolidated accounts. Dutch law contains various exemptions and simplifications regarding the preparation of standalone annual accounts and consolidated accounts. One of the exemptions from the requirement to prepare consolidated accounts is the so-called intermediate holding company exemption set out in Section 2:408 DCC.

1.2 This edition of Quoted first discusses what consolidated accounts are and which entities are subject to the obligation to prepare and publish consolidated accounts. It then describes all requirements for the application of the intermediate holding company exemption and addresses several additional consequences that may arise from its application.

2. Legal Forms

Dutch financial reporting law is largely contained in Title 9 Book 2 DCC. Title 9 Book 2 DCC applies to cooperatives (coöperaties), public limited liability companies (naamloze vennootschappen, NV), private limited liability companies (besloten vennootschappen, BV), mutual insurance associations (onderlinge waarborgmaatschappijen) and, under certain conditions, commercial foundations and associations.1 In addition to these legal entities, Title 9 Book 2 DCC also applies to general partnerships (vennootschappen onder firma) and limited partnerships (commanditaire vennootschappen) whose fully liable partners are all foreign capital companies.2 As the intermediate holding company exemption is included in Title 9 Book 2 DCC, these categories of legal entities and partnerships are eligible to apply the intermediate holding company exemption if they are subject to a consolidation duty.

3. Standalone Annual Accounts

3.1 The management board of an NV or BV[3] is required to prepare standalone annual accounts each year within five months after the end of the financial year and make them available for inspection by the shareholders at the company's offices. Within the same period, the management board must also make available the

1 Section 2:360(3) DCC. Title 9 of Book 2 DCC applies to a commercial foundation or association where the net turnover generated by the undertakings of that foundation or association exceeds EUR 7.5 million for two consecutive financial years.

2 Section 2:360(2) DCC.

3 This edition of Quoted is limited to NV's and BV's. Different deadlines may apply to the other legal entities referred to in paragraph 2. In addition, listed companies are subject to different reporting deadlines pursuant to the Dutch Financial Supervision Act (*Wet op het financieel toezicht*).

management report and the other information, including the auditor's report. This period may be extended by a maximum of five months by a resolution of the general meeting on account of special circumstances. As a general rule, a request for an extension should be made and approved before the expiry of the preparation period. Where this has not occurred, or where an extension has been assumed implicitly, the approval of the general meeting should subsequently be obtained, together with an explanation and justification of the special circumstances concerned.[4]

3.2 The annual accounts are adopted by the general meeting, following which the management board must publish the annual accounts within eight days by filing them with the Dutch Trade Register. The date of adoption must be stated in the annual accounts. The annual accounts may be filed in the Dutch, French, German or English language.

3.3 If the annual accounts have not been adopted within two months after the expiry of the preparation period (five months, plus any extension of up to five months), the management board must publish the annual accounts without delay. In that case, the annual accounts must state that they have not been adopted.

4. Consolidated accounts

4.1 Many Dutch legal entities and partnerships form part of a larger group. In practice, these group structures can be extensive and complex. In order to provide a proper view of the economic activities and performance of a group, Dutch law requires the preparation and publication of consolidated accounts. Consolidated accounts provide insight into the business of the group as a whole and look beyond the separate legal forms of individual legal entities and partnerships and report on the group as if it was a single economic entity.

4.2 Consolidated accounts are defined in the DCC as the annual accounts in which the assets, liabilities, income and expenses of the legal entities and partnerships forming a group or part of a group, together with other entities included in the consolidation, are incorporated as a whole.[5] In principle, the same statutory provisions and deadlines apply to consolidated accounts as apply to standalone annual accounts, as set out in paragraph 3.

4.3 The obligation to prepare and publish consolidated accounts rests primarily on the legal entity that, either alone or together with another group company, heads its group (the head of the group).[6] In addition, any other legal entity that has one or more subsidiaries within its (sub-)group or has dominant control (*overheersende zeggenschap*) over, or central management (*centrale leiding*) of, other legal entities is also required to prepare and publish consolidated accounts (the intermediate holding company).[7] This obligation is referred to as the consolidation duty.

4 Special circumstances justifying an extension may include, among other things, significant uncertainties regarding the valuation of key assets, the absence of the management board, major fraud the full extent of which has not yet been determined, or the failure to complete the statutory audit on time.

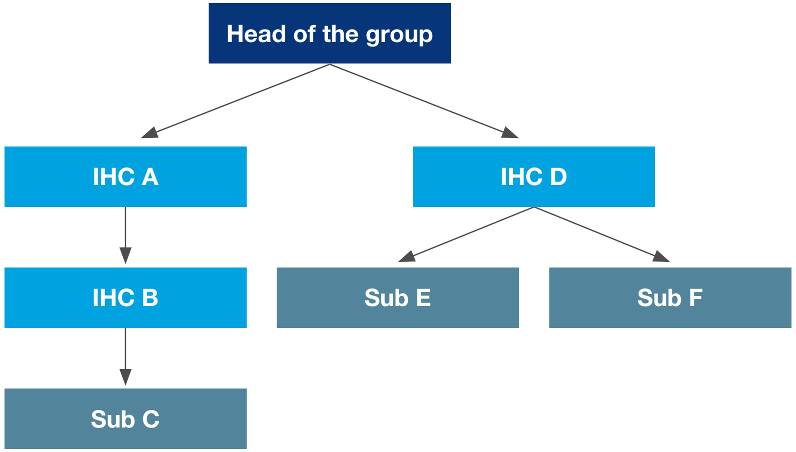
5 Section 2:405(1) DCC.

6 Section 2:406(1) DCC.

7 Section 2:406(2) DCC.

4.4 Where a group structure exists, both the head of the group and each intermediate holding company will generally be subject to a consolidation duty. This results in significant administrative burdens and substantial costs, for example in connection with the statutory audit that is required if the group or subgroup qualifies as medium-sized or large.[8] Moreover, users of annual accounts are generally more interested in the financial information relating to the group as a whole, as presented in the consolidated accounts of the head of the group. As a result, consolidated accounts at a lower subgroup level often provide limited additional value. By way of illustration, consider the following example:

Figure 1



Absent the application of any exemption, the consolidation duty in this structure rests with (i) the head of the group, (ii) intermediate holding company A, (iii) intermediate holding company B, and (iv) intermediate holding company D.

4.5 In addition, each legal entity is, in principle, required to prepare and publish standalone annual accounts. As a result, even in a relatively simple group structure, this leads to four sets of consolidated annual accounts (and seven sets of standalone annual accounts), notwithstanding that the consolidated accounts of the group as a whole will most likely already provide users of the annual accounts with all relevant information.

4.6 In the consolidated accounts, the financial information of the following entities must be included: (i) the legal entity preparing the consolidated accounts (consolidating entity); (ii) its subsidiaries within the group; (iii) other group companies controlled by that legal entity; and (iv) other legal entities over which it can exercise dominant control or central management.[9] Together, these entities constitute the consolidation scope. Assuming only 100% shareholding relationships in Figure 1, the consolidation scope of the head of the group would include all underlying legal entities within the structure.

5. The intermediate holding company exemption

5.1 The intermediate holding company exemption provides an exemption from the consolidation duty applicable to intermediate holding companies. The rationale underlying this exemption is that insight into the financial information of the group as a whole renders it unnecessary to provide separate insight into a subgroup.

8 This is the case where, on a consolidated basis, the group or subgroup no longer exceeds two of the three thresholds set out in Section 2:396 DCC on two consecutive balance sheet dates. These thresholds are: (i) total assets exceeding EUR 7.5 million, (ii) net turnover exceeding EUR 15 million, and (iii) an average of 50 or more employees during the financial year.

9 Section 2:406(1) and (2) DCC.

This rationale is repeatedly reflected in the legislative history of the intermediate holding company exemption.[10]

5.2 In order to apply the intermediate holding company exemption, all conditions set out in Section 2:408 DCC must be satisfied. Before discussing the individual requirements in more detail, a brief overview is set out below:

(a) no written objection to the application of the intermediate holding company exemption has been made by at least ten per cent of the members or shareholders within six months after the beginning of the financial year;
(b) the financial information that the intermediate holding company would otherwise be required to consolidate (its consolidation scope) is included in the consolidated accounts of a higher-tier entity (the consolidating entity - in Figure 1: the head of the group);
(c) the consolidated accounts and management report have been prepared in accordance with Directive 2013/34/EU (the **Accounting Directive**) or equivalent standards;
(d) the consolidated accounts, management report and auditor's report have been prepared or translated into Dutch, French, German or English; and
(e) the consolidated accounts, management report and auditor's report must be filed with the Dutch Trade Register within six months after the balance sheet date, or within one month after a permitted later publication date.

5.3 In addition, the exempt intermediate holding company must state in the notes to its standalone annual accounts that it applies the intermediate holding company exemption.

5.4 Pursuant to Section 2:408 paragraph 4 DCC, the intermediate holding company exemption is not available to listed companies. This applies both to companies whose securities are admitted to trading on a regulated market within the meaning of the Dutch Financial Supervision Act (*Wet op het financieel toezicht*) and to companies whose securities are admitted to trading on a system comparable to a regulated market in a non-EU jurisdiction. Examples are Euronext Amsterdam in the first category and the New York Stock Exchange or Nasdaq in the second category.[11]

6. No shareholder objection (requirement (a))

6.1 No written objection may have been made within six months after the beginning of the financial year by at least ten per cent of the members or shareholders, or by holders of at least ten per cent of the issued share capital.

6.2 The DCC does not require the management board to proactively seek approval for the application of the intermediate holding company exemption. However, in the presence of minority shareholders, it may be desirable from a due care perspective to inform them in a timely manner.

7. Consolidation requirement (Requirement (b))

7.1 The financial information of all entities falling within the consolidation scope of the intermediate holding company must be included in the consolidated accounts of the consolidating entity.

10 See, inter alia: Parliamentary Documents II 1979/80, 16 326, no. 3, p. 16; Parliamentary Documents II 1983/84, 16 551, no. 11, p. 17; and Parliamentary Documents II 1986/87, 19 813, no. 3, p. 15.
11 Section 2:408(4) DCC.

7.2 Assuming that all intermediate holding companies shown in Figure 1 wish to rely on the intermediate holding company exemption, the head of the group must include the financial information of all intermediate holding companies and subsidiaries shown in Figure 1 in its consolidated accounts.

8. Permissible financial reporting frameworks (Requirement (c))

8.1 The consolidated accounts of the consolidating entity must be prepared in accordance with the requirements of the Accounting Directive, EU-IFRS, or the provisions of the directives relating to the consolidated accounts of banks and other financial institutions or insurance undertakings, or in an equivalent manner.

8.2 The possibility of using an equivalent framework facilitates the application of the intermediate holding company exemption where the consolidating entity is located outside the European Union. In any event, preparation in an equivalent manner requires that the consolidated accounts provide information equivalent to that required under the relevant EU directives. It is the responsibility of the consolidating entity to determine, based on the contents of the relevant consolidated accounts, whether this condition is met.

8.3 In 2012, the European Commission recognised US GAAP, Japanese GAAP, Chinese GAAP, Canadian GAAP and Korean GAAP as equivalent in the context of the Prospectus Directive and Transparency Directive.[12] However, that implementing decision has not been updated since 2012.[13]

9. Language requirement (Requirement (d))

For the intermediate holding company exemption to apply, the consolidated accounts, management report and auditor's report of the consolidating entity must all be prepared and published in the same language. The documents may be prepared in Dutch, French, German or English, or translated into one of those languages. These are the same languages in which the annual accounts of a Dutch legal entity may be filed with the Dutch Trade Register.

10. Filing Requirement (Requirement (e))

10.1 The consolidated accounts, management report and auditor's report of the consolidating entity must be filed with the Dutch Trade Register within six months after the balance sheet date, or within one month after a later publication date that is permitted by law. The statutory wording is not entirely clear as to whether the balance sheet date refers to the balance sheet of the consolidating entity or that of the intermediate holding company. The legislative history also does not provide a definitive answer.

10.2 If the balance sheet date is assumed to be the balance sheet date of the consolidating entity, this may produce unusual outcomes in practice. A Dutch intermediate holding company has up to twelve months to publish its (consolidated) annual accounts. By contrast, where the consolidating entity is a listed US corporation, its consolidated accounts generally become publicly available within approximately three months after the end of the financial year.

12 Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, and Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities.

13 Commission Implementing Decision 2012/194/EU of 11 April 2012 amending Decision 2008/961/EC on the use by third-country issuers of national accounting standards of certain third countries and International Financial Reporting Standards for the preparation of their consolidated financial statements.

In that situation, the consolidated accounts would need to be filed with the Dutch Trade Register within the initial six-month period for purposes of the intermediate holding company exemption. In practice, filing the consolidated accounts of the consolidating entity with the Dutch Trade Register is often only considered when the standalone annual accounts of the intermediate holding company are filed. As the intermediate holding company generally has more time available, the six-month period is frequently exceeded. Depending on the facts and circumstances, a more substance-oriented approach may nevertheless permit reliance on the intermediate holding company exemption.

10.3 Where the consolidating entity is a Dutch BV, its consolidated accounts may generally be filed up to twelve months after the end of the financial year. As this constitutes a permitted later publication date, the phrase "within one month after a later publication date permitted by law" would result in a deadline of thirteen months after the end of the financial year. This outcome is remarkable because it exceeds the period available to the intermediate holding company itself for publishing its standalone annual accounts. Yet the intermediate holding company must satisfy all conditions for the application of the intermediate holding company exemption by that date. Since the maximum publication period for a Dutch intermediate holding company is generally twelve months after the end of the financial year, assuming the maximum five-month extension is granted by the general meeting[14], it is advisable not to exceed that twelve-month period.

11. Application of size regimes in the context of the intermediate holding company exemption

11.1 Different regimes may apply to Dutch legal entities. Depending on the category in which the legal entity falls, various exemptions and simplifications are available.[15] A legal entity must meet at least two of the three statutory criteria on two consecutive balance sheet dates in order to qualify for a particular regime.

	Micro	Small	Medium-sized	Large
Total assets	< EUR 450 thousand	< EUR 7,5 million	≤ EUR 25 million	> EUR 25 million
Net-turnover	< EUR 900 thousand	< EUR 15 million	≤ EUR 50 million	> EUR 50 million
Average number of employees	< 10	< 50	< 250	≥ 250

11.2 The relevant thresholds must generally be assessed on a consolidated basis, unless the legal entity applies the intermediate holding company exemption. As a result, application of the intermediate holding company exemption often enables an exempt intermediate holding company to qualify as a micro or small entity. An additional benefit is that, in such cases, the intermediate holding company is not only exempt from the consolidation duty but is also generally exempt from the requirement to prepare a management report and to have its annual accounts audited. Furthermore, only an abbreviated balance sheet must be made public.[16]

14 The relevant provisions are Section 2:210(1) DCC for BVs and Section 2:101(1) DCC for NVs, read in conjunction with Section 2:394(3) DCC. Listed companies are subject to shorter reporting deadlines.

15 Section 2:395a, 2:396 and 2:397 DCC.

16 The exemptions and simplifications available under the size regimes do not apply to, among others, public-interest entities, investment companies, or undertakings for collective investment. They likewise do not apply where the general meeting has resolved otherwise no later than six months after the start of the financial year (see Section 2:398(2), (3) and (7) DCC).

12. Valuation of participating interests

12.1 A legal entity holds a participating interest in another legal entity if, whether alone or together with one or more subsidiaries, it provides or causes capital to be provided to that entity for its own account in order to establish a durable link serving its own activities. Where one-fifth or more of the issued share capital is held, a legal presumption exists that a participating interest is present.[17] This legal presumption may be rebutted.

12.2 Where the legal entity is able to exercise significant influence over the operational and financial policies of the participating interest, the main rule is that the participating interest must be valued in the annual accounts on the basis of its net asset value.[18]

12.3 Deviation from this main rule is only possible if justified by sound reasons disclosed in the notes to the annual accounts. In line with the legislative history, the Dutch Accounting Standards (*Richtlijnen voor de Jaarverslaggeving* - **RJ**) recognise two such reasons: international integration and application of the intermediate holding company exemption.[19] In those circumstances, valuation at cost or current value may be considered. However, valuation at current value is not permitted for participating interests over which significant influence is exercised.[20] Consequently, where the intermediate holding company exemption is applied, valuation at cost is generally the only alternative to valuation at net asset value.

13. Interaction with the group exemption (Section 2:403 DCC)

13.1 In practice, a lack of clarity often exists regarding the interaction between the intermediate holding company exemption and the group exemption of Section 2:403 DCC. The group exemption pursuant to Section 2:403 DCC has been discussed previously in a contribution published in Quoted. That publication can be consulted here.

13.2 In summary, the group exemption exempts a legal entity falling within the scope of Title 9 Book 2 DCC from the obligation to prepare its annual accounts in accordance with that title. Only abbreviated internal annual accounts are required, and no auditor's report is necessary. To apply the group exemption, a consolidating entity must issue a 403 statement. Through such statement, the consolidating entity assumes joint and several liability for obligations arising from legal acts of its underlying group company (**403-company**). In addition, the consolidated accounts of the consolidating entity must be filed with the Dutch Trade Register, similar to the requirements applicable to the intermediate holding company exemption. The filing deadlines are also the same. Moreover, the direct shareholders of the 403 company must declare each year in writing to consent with the application of the group exemption.

17 Section 2:24c DCC.

18 Section 2:389(1) and (2) DCC.

19 Parliamentary Documents II 1987/88, 19 813, no. 5, p. 8; and RJ 214.304.

20 Article 10(3)(c) of the Dutch Decree on Current Value Accounting (*Besluit actuele waarde*).

13.3 An intermediate holding company applying the intermediate holding company exemption does not prepare consolidated accounts and therefore cannot issue a 403 -declaration for its direct or indirect group companies.21 It is, however, possible for the ultimate consolidating entity (in Figure 1: the head of the group) to issue the 403-declaration. In that situation, the intermediate holding company may apply the intermediate holding company exemption, while its subsidiaries may in turn apply the group exemption. In this manner, the facilities offered by Title 9 Book 2 DCC can be utilised to their fullest extent.

13.4 It should be noted that an important difference between the two exemptions is that, for purposes of the group exemption, the consolidated accounts of the consolidating entity must, pursuant to the applicable law, comply with the requirements of the Accounting Directive, EU-IFRS or the directives applicable to banks, financial institutions and insurance undertakings. Unlike the intermediate holding company exemption, for the group exemption preparation under an equivalent framework is not sufficient.[22] The words 'pursuant to the applicable law' indicate that the group exemption may only be applied where the consolidating entity prepares its consolidated accounts under one of these frameworks because the applicable legal system - usually national law - requires it to do so. Accordingly, it is not sufficient that a consolidating entity voluntarily applies one of these European reporting frameworks if the applicable law does not expressly permit or require such application. Nor is it necessary for the consolidating entity itself to have been incorporated under the laws of an EU or EEA Member State, provided that the law of such a state governs the consolidating entity.[23]

21 Section 2:403(1)(f) DCC provides that the legal entity referred to in Section 2:403(1)(c) DCC must issue the 403-declaration. Section 2:403(1)(c) DCC, in turn, requires that the financial information of the 403-company be consolidated by another legal entity or company. As the intermediate holding company does not prepare consolidated financial statements, this requirement cannot be satisfied by the intermediate holding company.

22 Reference is made to paragraph 8.1 and 8.2.

23 Nass, *SDU Commentary on Section 2:403 DCC* (2026).

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