

Dutch implementation of the EU Transparency Directive per 1 January 2009

31 December 2008

Introduction

On 1 January 2009, the Dutch act implementing the EU Transparency Directive will come into force (the "**Act**"). The Act will amend the Financial Markets Supervision Act (*Wet op het financieel toezicht*, the "**FMSA**").

This legal alert explains the scope of the Act and identifies the most important changes resulting from the Act.

Scope of the Act

The Act applies to issuers ("**Issuers**") whose financial instruments have been admitted to trading on a:

- (i) regulated market¹ and whose home member state is the Netherlands; or
- (ii) regulated market in the Netherlands, in as far as this relates to the publication of an annual disclosure document and price-sensitive information.

The Netherlands as home member state

Most provisions of the Act only apply to Issuers whose home member state is the Netherlands (situation (i) above). The Netherlands is the home member state:

- (i) if an Issuer of shares or debt securities with a denomination per unit of less than EUR 1,000 (or its equivalent in other currencies):
 - has its registered seat in the Netherlands; or
 - has its registered seat in a country outside the European Economic Area ("**EEA**") and is required to file an annual disclosure document with the Netherlands Authority for the Financial Markets ("**AFM**") pursuant to article 10 of the Prospectus Directive; or
- (ii) if an Issuer is not covered by (i) where the Issuer's securities have been admitted to trading on a regulated market in the Netherlands.

What will change?

The most significant provisions for Issuers relate to periodic financial reporting and the dissemination of information to and treatment of investors. The provisions below apply to an Issuer with the

¹ See for a list of regulated markets: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:280:0005:0011:en:PDF>

Netherlands as its home member state, unless explicitly stated otherwise.

I Periodic financial reporting

Annual financial report

An Issuer's annual financial report must be published no later than four months after the end of each financial year. This means a reduction of one month (from five to four) for listed Dutch public companies with limited liability (*naamloze vennootschap*). Contrary to current Dutch law, the four-month period cannot be extended. As under existing Dutch law, there is no requirement that the annual financial report must be approved by the general meeting of shareholders within the above-mentioned period.

The annual financial report must include (i) the audited annual financial statements, (ii) the annual report and (iii) a responsibility statement (see below).

Half-yearly financial report

The Act also introduces the requirement for Issuers to publish half-yearly financial reports. Although this is a new requirement under Dutch law, it was already a listing requirement of Euronext Amsterdam. The half-yearly financial report must be published as soon as possible but no later than two months after the end of the first six months of the financial year (the current Euronext Amsterdam term is four months).

The half-yearly financial report must include (i) the half-yearly financial statements, (ii) the half-yearly report, (iii) a responsibility statement and (iv) the auditor's report (if any). There is no requirement for half-yearly financial statements to be audited or reviewed. The half-yearly report should, however, mention whether there has been an audit or review. It must also include information on material related party transactions.

Interim management statements

The Act also requires an issuer whose shares are admitted to trading on a regulated market to publish an interim management statement ("IMS") during each half-year period. An IMS must be made in the period between ten weeks after the beginning and six weeks before the end of the relevant six-month period. The information provided should cover the

period between the beginning of the relevant six-month period and the date of publication of the IMS.

An IMS must include an overview of the important events and transactions that have taken place during the relevant period and their impact on the financial position of the Issuer and its group and a general description of the financial position and performance of the Issuer and its group during the relevant period.

No IMS is required if the Issuer already publishes such quarterly financial statements pursuant to laws applicable to it.

Responsibility statement

Both the annual financial report and half-yearly financial report need to include a statement of persons responsible at the Issuer (*i.e.* responsibility statement). The names and functions of responsible persons must be clearly stated in such statement. The members of the managing board and supervisory board of a Dutch company are currently already required to sign the annual financial statements. The responsibility statement is an additional requirement, but Dutch legislators have stated that it is not intended that the responsibility statement brings about any changes in the Dutch liability rules for annual financial statements of Dutch companies as laid down in the Dutch Civil Code (*Burgerlijk Wetboek*).

The Act does not prescribe a standard text for a responsibility statement, but the responsible persons must state that to the best of their knowledge:

- (a) the *annual financial statements* give a true and fair view (*getrouw beeld*) of the assets, liabilities, financial position and profit or loss of the Issuer and its consolidated companies;
- (b) the *annual report* gives a true and fair view of the position as per the balance sheet date, the development during the financial year of the Issuer and its group companies included in the annual financial statements, together with a description of principal risks it faces;
- (c) the *half-yearly financial statements* give a true and fair view of the assets, liabilities, financial position and profit or loss of the

Issuer and its consolidated companies;
and/or

- (d) the *half-yearly report* gives a true and fair view of the position as per the balance sheet date, the development during the financial year of the Issuer and its group companies included in the half-yearly financial statements, together with the expected development (with particular attention to investments and events on which the development of turnover and profitability depends to the extent it is not detrimental to vital interests of the Issuer).

Term of public availability of financial information

The annual financial report and the half-yearly financial report must remain publicly available for at least five years. There is no statutory period prescribed for the IMS.

Language of financial reports

Issuers with financial instruments admitted to trading on a regulated market in the Netherlands may publish their financial reports in either Dutch or English. Issuers with listings in other EEA states as well must also publish in the language determined by the supervisory authority of such state or a language customary in the sphere of international finance. These language rules also apply to "regulated information" (see below).

Reporting standards

Dutch Issuers should apply International Financial Reporting Standards (IFRS) in their consolidated annual financial statements. EEA Issuers with the Netherlands as home member state should determine pursuant to the rules of their country of incorporation whether consolidated statements are required and if so, should apply IFRS. Non-EEA Issuers with the Netherlands as home member state must apply the same rules as Dutch Issuers (*i.e.* Dutch law). There are, however, important exceptions to this rule (see below). The same rules apply to the half-yearly financial statements.

Equivalent reporting standards for Non-EEA Issuers

Non-EEA Issuers with the Netherlands as home member state may apply their local Generally Accepted Accounting Principles (GAAP) instead of IFRS as explained above, if the European Committee has approved the application thereof. In

such case, the local GAAP is considered to be equivalent to IFRS.

On 12 December 2008, the European Committee has decided that as of 1 January 2009 non-EEA Issuers may report in:

- (a) IFRS adopted for use in the EU pursuant to Regulation (EC) No 1606/2002;
- (b) IFRS (as published by the International Accounting Standards Board);
- (c) US GAAP or Japanese GAAP; or
- (d) Canadian, Chinese, Indian or South Korean GAAP.

Reporting in the GAAPs mentioned under (d) is allowed until 31 December 2011. However, Chinese GAAP has already substantially converged with IFRS. Canada, India and South Korea have committed themselves to a transition to IFRS before 31 December 2011. It is therefore expected that by that time this transitory provision is no longer necessary.

Please note that although this exception applies, there are a few additional requirements in Dutch law which have been implemented via a decree.

By regulation of 12 December 2008, the European Committee has also amended the Prospectus Regulation in the same manner as set out above. Issuers who publish a prospectus in the EEA are thus allowed to present their historical financial information in either IFRS or the GAAPs mentioned above.

Transitory provisions for financial reporting

The new financial reporting rules take effect for financial years starting on or after 1 January 2008 and will not apply to the whole or part of any annual financial period which commenced before 1 January 2008. So, for example, an Issuer with a financial year beginning on 1 January 2008 must apply the Act for the first time to:

- (a) the annual financial report for 2008;
- (b) the half-yearly report for the first six months of 2009; and
- (c) the IMS for the first interim period (Q1) of 2009.

II Information requirements

The Act also introduces several requirements for Issuers relating to the dissemination of information and the treatment of shareholders and bondholders.

Equal treatment

An Issuer must ensure equal treatment of its shareholders and bondholders who are in the same position with respect to the provision of information and the charging of costs relating thereto. In addition, shareholders and bondholders may not be prevented from exercising their rights by proxy. Consequently, the Dutch statutory provision that allows companies to limit the potential use of proxies by shareholders in their articles of association is no longer available for Dutch listed companies.

Regulated information

An Issuer is required to make regulated information publicly available. Regulated information is all information that an Issuer (or any other person who has applied for the admission of financial instruments to trading on a regulated market without the Issuer's consent) is required to disclose under the Act. This includes:

- the annual and half-yearly financial reports;
- the IMSs;
- the annual information document;
- changes to rights of securities' holders;
- public offer information; and
- price-sensitive information.

Regulated information must be communicated in a way which makes clear that the information is regulated information and clearly identifies the Issuer concerned, the subject of the information and the time and date of the press release. Regulated information may not be accompanied by advertising if this could be misleading.

Method of publication

Regulated information must be disseminated by an Issuer via a press release in the Netherlands. In the event of listings in other EEA states besides the Netherlands, the press release must be issued simultaneously in all the relevant states. The regulated information must also be filed with the AFM concurrently with publication.

For publication of the annual and half-yearly financial reports and an IMS a press release suffices in which the publication thereof is announced with a reference to the Issuer's website where the information is available in full. However, if it also contains price-sensitive information, it should be disclosed in full in the press release itself.

An Issuer is also required to have a website and publish all price-sensitive information forthwith on its website as well. This information must remain on the website for at least one year. When the Issuer is an investment institution, price-sensitive information may also be published on the website of the manager.

Filing with the AFM

Issuers incorporated in the Netherlands are required to file their annual financial reports (including statements and accompanying documents) with the AFM within five days of adoption by the general meeting of shareholders. The AFM will forward these documents within three days to the Trade Register of the Chamber of Commerce. Filing with the AFM is deemed to be a filing with the Chamber of Commerce. Also, an Issuer incorporated in the Netherlands must notify the AFM when it has not adopted its annual financial statements within six months of the end of its financial year.

Please note that the annual financial report must be filed twice with the AFM. Once when it is published (see above) and once when adopted.

Amendments of articles of association

Currently, Issuer's whose securities are admitted to trading on Euronext Amsterdam must consult with Euronext Amsterdam in advance on any proposed amendment to the Issuer's articles of association. With the introduction of the Act, the Issuer must not only inform the regulated market (Euronext Amsterdam), but also the AFM of the draft amendment. Such notice must be made no later than the day of convocation of the general meeting of shareholders where the change will be voted on or where the shareholders will be informed.

Relocated provisions

Under the FMSA there are provisions to file an annual disclosure document with the AFM (art. 10

of the Prospectus Directive) and to disclose price-sensitive information. These provisions have been moved substantially unchanged within the FMSA as the publication and filing of this information will fall under the rules for regulated information. These provisions apply to Issuers with financial instruments admitted to trading on a regulated market in the Netherlands irrespective of their home member state.

Publication of amendments of rights

Issuers are furthermore obliged to publish all information on amendments to rights attached to a particular class of shares forthwith. This obligation also applies to rights issued by the Issuer to acquire its shares (such as options or convertible notes) and other securities.

More exceptions

The Act also provides for certain exceptions to requirements regarding the IMS and information that must be provided for shareholders' meetings. However, this amendment will be included in the Exemption Regulation FMSA (*Vrijstellingsregeling Wft*) which amendment has not yet been published.

III Other amendments

Financial Reporting Supervision Act

The Financial Reporting Supervision Act (*Wet toezicht financiële verslaggeving*) will also be amended. Currently, on the basis of this act the AFM only has authority to review the annual financial report, ask questions, make recommendations and commence legal proceedings at the Enterprise Chamber (*Ondernemingskamer*) of the Amsterdam Court of Appeal to restate the relevant report. This will be extended to include half-yearly financial reports. However, the AFM will not have the authority to commence legal proceedings.

In addition, besides applying to Issuers incorporated in the Netherlands whose securities have been admitted to trading on a regulated market in the Netherlands, or the EEA or a non-EEA state, the Financial Reporting Supervision Act will also apply to non-Dutch Issuers whose home member state is the Netherlands.

Disclosure of voting rights and shareholdings

The Act (via a decree) also implements a few changes to the disclosure requirements of voting rights and shareholdings in issuers² (chapter 3 of part 5 of the FMSA). The following amendments appear to be most relevant:

- (a) the definition of options is expanded to include financial instruments that provide a right to acquire (depository receipts for) shares; and
- (b) a person who is required to disclose an interest in voting rights or shares in an issuer, should know that he has met, exceeded or fallen below a statutory threshold (which requires notification to the AFM) no later than two days after the transaction has taken place.

² This includes Dutch public companies with limited liability with shares listed on a regulated market in the Netherlands or EEA or non-EEA issuers whose shares are admitted to trading in the Netherlands.

Contact information

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