Newsletter

Publication of the annual accounts

November 2008

Textile manufacturer Zeeman Groep BV deliberately refrained from filing annual accounts with the Chamber of Commerce. For reasons of competition the manufacturer said. According to recent reports, stricter supervision is to be announced. This newsletter discusses the obligation of Dutch limited companies (*kapitaalvennootschappen*) to file annual accounts and the (legal) consequences of failing to publish them (timely).

Introduction

Dutch private and public limited companies, mutual insurance associations and corporations, but also commercial associations and foundations and some foreign undertakings, are obliged to make their annual accounts for every financial year public, by filing them with the Chamber of Commerce's Commercial Register. They are also obliged to make the annual report public at the same time, unless the annual report remains available for public inspection in house, and a copy thereof is provided at cost upon request. This newsletter relates only to the Dutch private limited company, the BV (*besloten vennootschap*), not preparing consolidated annual accounts nor qualifying for consolidation.

Annual accounts and annual report

By annual accounts is meant: simple annual accounts consisting of a balance sheet, the profit and loss account with explanatory notes (and consolidated accounts if the company draws up such accounts). The annual report must be prepared by the management board and contains the board's vision of the general course of events regarding the company and its expectations. The annual report must be in line with the annual accounts and they may not be in conflict with each other. Publication, background The background for mandatory publication could be described as follows: declaration by the management board of 'safe' accounts and responsibility for the company's policy followed (although the effect of this is, in particular, intended to be internal, for the BV's shareholders), provision of market related information, annual accounts as a resource to help protect capital and assets, information for creditors and, lastly, stipulation of the profit made.

Timing

The annual accounts must be made public within 13 months of the end of the relevant financial year, by filing them with the Commercial Register. This means that a BV's annual accounts for the financial year 2005 had to be filed with the Commercial Register by 31 January 2007 at the latest. The basis for this deadline can be found in the following legal deadlines: the management board draws up the annual accounts within 5 months (with a possible extension of a maximum of 6 months on the grounds of special circumstances) as of the end of the financial year, and submits them to the general meeting of shareholders for adoption. The general meeting adopts the annual accounts within 2 months of their preparation by the company's management board. Finally, the management board must file for deposit the annual accounts with the Commercial Register within 8 days of their adoption. Although a calculation shows that this would make the maximum time period 13 months plus 8 days, the relevant law explicitly cites the 13-month deadline. This 13- month deadline is also taken into account when sanctions are imposed (see below).

© EVERSHEDS FAASEN
Eversheds Faasen is lid van Eversheds International Limited.

Sanctions
The law recognizes four sanctions for failure to comply with the obligation to make annual accounts public on time. Firstly, in some circumstances a criminal-law sanction, namely a fine (or imprisonment), may be imposed on (either separately or jointly) the company, the management board, the supervisory board (if such a board exists), or equivalent persons, and, lastly, the shareholders. The tax inspectorate and financial control authorities (FIOD/ECD) record failure to timely file the annual accounts and forward this official report to the Public Prosecution Office. The Public Prosecution Office may then institute criminal proceedings. The judge may ultimately impose a term of imprisonment of a maximum of six months or a financial penalty of EUR 16,750.00. It is contended that under particularly exceptional circumstances, this fine may increase to EUR 67,000 or even EUR 670,000 per day. The Public Prosecution Office may also call for supplementary measures, including closing down of the undertaking and publication of the judgment. Secondly, any interested party may demand that the company complies with its obligation to make the annual accounts public. Thirdly, if the company is declared bankrupt, the administrator may hold every member of the management board and/or the supervisory board (if such a board exists) and/or equivalent persons severally liable for the entire deficit in the company's assets. Fourthly, a BV may, by order of the Chamber of Commerce, be dissolved if it is a matter of failure to file for a period of more than 25 months in combination with, to summarize, supplementary failure, such as continuing failure to pay the fee owed for registration with the Chamber of Commerce, no registration of a director with the Commercial Register, or failure to respond to a demand to pay taxes owed. Dissolution may also ensue if two of the three supplementary conditions have been complied with.

Exemptions
The law recognizes a number of exemptions from the obligation to publish. These include exemption of a subsidiary company consolidated by the parent company in its own annual accounts. In addition, (certain) foreign companies are not obliged to file if they are also not subject to this obligation in their home country. The most general exemption is the exemption that may be granted by the Ministry of Economic Affairs. Companies that are unable to draw up, verify and file annual accounts on the grounds of 'important reasons' may apply to the Minister of Economic Affairs to be exempted there from. 'Important reasons' are an 'open' norm that has not (yet) been elaborated on in detail. The case law on this subject states that they must involve 'circumstances that prevent adequate annual accounts from being drawn up'. Exemptions of this kind are rarely granted.

Conclusion
Practice has shown that many (directors of) companies are insufficiently aware of, firstly, the existence of the obligation to publish annual accounts, and, secondly, the consequences that may ensue from failure to comply with this obligation, not only for the company but also for the directors themselves. Thus it is advisable to be stringent in ensuring that the annual accounts are drawn up, adopted and filed for publication with the Commercial Register on time.

Eversheds Faasen
Sectie Banking, Securities & Finance Law

Marek Kupperman
Partner

marekkupperman@eversheds.nl
Tel +31 (0)20 5600 652
Fax +31 (0)20 5600 502
Mob +31 (0)6 2502 3921

Lucas Lustermans
Associate

lucaslustermans@eversheds.nl
Tel +31 (0)20 5600 661
Fax +31 (0)20 5600 502
Mob +31 (0)6 5265 5523

© EVERSHEDS FAASEN
Eversheds Faasen is lid van Eversheds International Limited.

This newsletter is made on 28 November 2008. It is intended as general guidance only and it is not a substitute for detailed advice in specific circumstances. Therefore no responsibility is accepted by Eversheds Faasen for any errors and omissions, and no one should act upon such information without appropriate professional advice after a thorough examination of the particular situation.

Eversheds Faasen is a member of Eversheds International Limited.

Eversheds Faasen B.V. renders legal and notarial services. All services rendered are subject to the general conditions of Eversheds Faasen B.V. filed with the Chamber of Commerce of Amsterdam.

Amsterdam
Wibautstraat 224
1097 DN Amsterdam
Tel +31 (0)20 5600 600
Fax +31 (0)20 5600 500

Rotterdam
Bahialaan 502
3065 WC Rotterdam
Tel +31 (0)10 2425 360
Fax +31 (0)10 2425 385

EVERSHEDS FAASEN

© EVERSHEDS FAASEN
Eversheds Faasen is lid van Eversheds International Limited.