
The Netherlands
Financial Assistance
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INTRODUCTION

This guide gives an overview of the statutory rules in the Netherlands on the provision by companies of financial assistance with a view to the acquisition of shares in their capital. The rules apply irrespective of whether newly issued shares are to be acquired by subscription or whether existing shares are to be acquired from a shareholder. The aim of the rules is to protect shareholders and creditors against the impairment of the company's capital.

The guide will address the rules applicable to public limited liability companies (*naamloze vennootschappen*, "**NVs**"). For private limited liability companies (*besloten vennootschappen*, "**BVs**"), there are no specific restrictions on financial assistance by BVs since they have been repealed in their entirety in 2012.

STATUTORY FRAMEWORK

The rules on financial assistance by NVs are set out in Section 98c of Book 2 of the Dutch Civil Code ("**DCC**"), which implements Article 23 of Council Directive 77/91/EEC of 13 December 1976, also known as the Second Company Law Directive. The relevant rules were significantly eased with the introduction – and the implementation in Dutch law – of Directive 2006/68/EC (the "**Capital Maintenance Directive**").

BAN ON FINANCIAL ASSISTANCE BY NVs

Section 2:98c DCC begins by setting out, in sub-section (1), a general ban on the provision of financial assistance. An NV or a subsidiary thereof is prohibited from doing any of the following with a view to the acquisition of shares in its capital, or depositary receipts for such shares, by a third party:

- providing collateral;
 - guaranteeing the price of the shares;
 - otherwise warranting performance; or
 - assuming liability (whether jointly and severally or otherwise, and whether in addition to or for another party).
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EXCEPTION FOR LOANS

Since 11 June 2008, when the Capital Maintenance Directive was implemented in Dutch law, an important exception to the abovementioned prohibition has applied. The Netherlands chose to make use of the relevant option under that directive and allow an NV to grant loans with a view to the acquisition of its shares (or depositary receipts) by a third party, provided that certain procedural and substantive requirements are satisfied (Section 2:98c(2)-(7) DCC).

- **Procedure**

1. A resolution by the NV's management board is required. In deciding on the loan, the management board must be guided by the interests of the company and of the enterprise connected with it.
2. The board resolution must have the prior approval of the general meeting of shareholders. For unlisted NVs, a two-thirds majority vote is required if less than half of the NV's issued share capital is represented at the meeting. For listed NVs, a 95% majority is required irrespective of the proportion of capital represented at the meeting.
3. At the same time that notice is given of the relevant general meeting, a report containing information on the proposed loan and the accompanying risks must be made available for inspection by shareholders.
4. If the general meeting grants its approval, the abovementioned report must be filed at the trade registry within a period of eight days following the meeting.

- **Substantive requirements**

1. The terms of the loan (including with regard to interest and collateral) must be in line with fair market conditions.
2. The loan must not exceed the amount of the NV's freely distributable reserves. In addition, the company must maintain a non-distributable reserve for the amount of the loan.
3. The creditworthiness of the third party or, in the case of multiparty transactions, of each counterparty thereto, must have been duly investigated.
4. The price for which the shares are acquired must be a fair one (a) if the shares are owned by the company itself (i.e. the seller is the company) or (b) the shares have been newly issued in connection with an increase in the company's capital.

OTHER EXCEPTIONS

Other exceptions to the rules on financial assistance by NVs are as follows:

- **Employees:** if the shares are to be acquired by or for employees of the NV or of one of its group companies, neither the general ban on the provision of financial assistance (Section 2:98c(1) DCC) nor the statutory conditions for the granting of a loan (Section 2:98c(2)-(7) DCC) apply. The same is true where the shares are to be acquired by or for management board members who have an employment contract with the relevant NV.
- **Banks:** the financial assistance rules likewise do not apply to transactions concluded by banks in the normal course of business. This means that an account holder can use credit obtained from a bank to acquire shares in that bank.

CONSEQUENCES OF VIOLATING THE FINANCIAL ASSISTANCE BAN OR FAILING TO SATISFY THE CONDITIONS FOR A LOAN

It is generally accepted that acts in violation of the financial assistance ban are void.

There is no such common agreement regarding the consequences of failing to satisfy the statutory conditions for a loan. The Capital Maintenance Directive does not provide any guidance on this question. The position taken by the government in the parliamentary documents is that the loan is void. Nevertheless, the legal commentators are less absolute on this point, answering the question differently depending on the condition that has not been satisfied.

In addition, management board members who violate the statutory rules on financial assistance can be held liable to the company on the grounds of improper management. It is also possible for them to be held liable to third parties in tort or, if the NV is declared bankrupt, on the grounds of failing to properly perform their duties in the period preceding the bankruptcy.

ONLENDING CONSTRUCTIONS

In practice, an onlending construction is often used. The company borrows money from a bank and provides collateral for the loan. Subsequently, the company onlends the money to a third party who then uses it to acquire shares in the company's capital. In the Muller/Rabo case, the Dutch Supreme Court held that this construction does not violate the financial assistance ban in Section 2:98c(1) DCC because the collateral is provided for the company's own debt to the bank and not *with a view to* the acquisition of shares in its capital by third parties. However, the loan to the third party must meet the statutory conditions set out in Section 2:98c (2)-(7) DCC.