

Interest deductibility in leveraged acquisitions expected to be further restricted

On 21 December 2015 the Dutch Minister of Finance responded to a white paper by two members of parliament to end perceived harmful behaviour in the Dutch private equity sector. The white paper proposed changes particularly aimed at private equity investors structuring Dutch acquisitions. The response now indicates that the deductibility of interest in leveraged acquisitions will be further restricted as from 1 January 2017.

The white paper

On 24 August 2015, two Members of Parliament (Mr. Nijboer and Mr. Groot) presented a white paper named "*Private Equity: einde aan de excessen*" (*Private Equity: an end to excesses*). The proposals in the white paper include the following:

- To close loopholes in the rules restricting the deductibility of interest on acquisition debt.
- The reintroduction of the financial assistance rules for Dutch BVs.
- Additional rights for the Works Council.

Interest deduction rules

Subject to certain limitations, interest expenses on acquisition debt attracted by a Dutch acquisition vehicle can effectively be deducted from taxable income of the Dutch target companies by forming a fiscal unity (tax consolidation) between the acquisition vehicle and the targets.

In 2012 a rule was introduced that limited the deductibility of interest on acquisition debt (including bank debt) in this situation. In short, interest is not deductible to the extent that the

acquisition is financed for more than 60% with debt. The 60% threshold is subsequently reduced by 5% per year, with a 25% limit after year 7. The rules only apply if the interest on acquisition debt exceeds EUR 1 million.

The white paper addressed that these rules can in practice be avoided, including by way of (i) a debt pushdown, (ii) using the existing grandfathering rules and (iii) effectively "resetting" the 7 year period by transferring the target to a new holding company.

The letter clearly reflects that the Cabinet intends to close these loopholes. Proposals are likely to be made as part of the 2017 Budget, which will be announced in September 2016.

In addition, it was mentioned that the Netherlands intends to participate in a multilateral implementation of a generic interest deduction limitation as part of the OECD initiatives against Base Erosion and Profit Shifting (BEPS). Implementation of a generic measure may impact the need for the current specific anti-abuse provision for acquisition debt.

Key conclusions

- The deductibility of interest on acquisition debt is likely to be further restricted as per 2017.
- As the expected legislative changes are aimed at closing certain existing workarounds, we do not expect any grandfathering rules.
- We recommend that the expected changes are already taken into account when structuring Dutch acquisitions, including in the corresponding financial modelling.

Other aspects

The letter also deals with various other suggestions included in the white paper. We highlight the following.

Financial assistance

The white paper criticised the abolition of the financial assistance rules in 2012 (as part of the more flexible Dutch corporate law rules for

private limited liability companies (BVs)). The letter stipulates that the Cabinet does not see a need to reintroduce these rules. In their view, sufficient safeguards are provided by Dutch law. They referred to the general obligations on directors (and risks of liability) and to specific provisions under the Alternative Investment Fund Managers Directive (and its implementation in Dutch law), such as the "asset-stripping" rules. The letter mentions that the application of the AIFMD and the corresponding provisions in Dutch law will be evaluated in 2017.

Works Council

As regards the Dutch Works Council, the letter suggests to further investigate the position of the Works Council, including whether it should have the right to request information directly from the company's accountant.

Recommendations

The letter makes clear that changes are expected as per 1 January 2017 that will impact the deductibility of interest in leveraged acquisitions.

Although the details are not expected before September 2016, the letter gives guidance on the likely amendments of these rules.

We therefore recommend taking into account the expected legislative changes when structuring transactions, including for purposes of the corresponding financial model.

Given the nature of these proposals, we do not expect grandfathering rules at this stage.

Contacts



Michiel Sunderman
T: +31 20 7119 658
E: michiel.sunderman@cliffordchance.com



Joep Bertrams
T: +31 20 7119 186
E: joep.bertrams@cliffordchance.com



Olaf van der Donk
T: +31 20 7119 211
E: olaf.vanderdonk@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

Clifford Chance, Droogbak 1A, 1013 GE Amsterdam, PO Box 251, 1000 AG Amsterdam

© Clifford Chance 2015

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571. Registered office: 10 Upper Bank Street, London, E14 5JJ. We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications. Clifford Chance LLP is registered in the Netherlands with the commercial register of the Chamber of Commerce under number 34360401. For our (notarial) third party account details, please see www.cliffordchance.com/nlregulatory

www.cliffordchance.com

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Jakarta* ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh ■ Rome ■ São Paulo ■ Seoul ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

*Linda Widyati & Partners in association with Clifford Chance.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.