

Application of the consolidation exemption for intermediate holding companies in the Netherlands

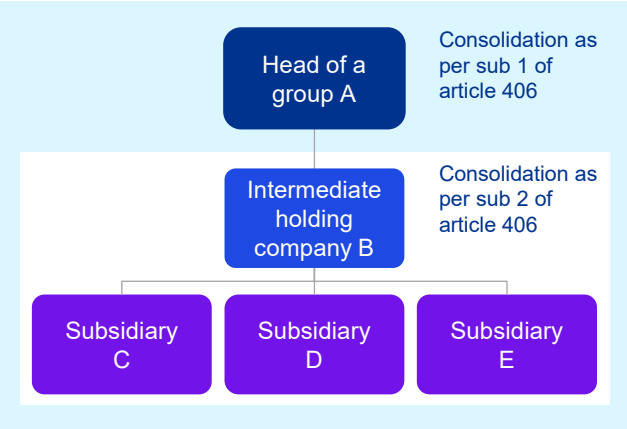
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01. Introduction

Dutch law¹ requires a legal company, which is the head of a group, to prepare consolidated financial statements. This consolidation requirement also applies for intermediate holding companies in a group structure.

The requirements to prepare consolidated financial statements are illustrated below:



Certain reliefs in the context of consolidation scope and the preparation of consolidated financial statements exist in the Netherlands. These reliefs are as follows:

-  Article 407² sub 1 provides exemptions with respect to the consolidation scope (i.e. which entities have to be consolidated).
-  Article 407 sub 2 provides exemptions of consolidation for small groups.
-  Article 408 provides an exemption for intermediate holding companies³ to prepare consolidated financial statements.

In the remainder of this factsheet, we will focus on the application of article 408.

Compliance with all of the requirements of article 408 should be carefully taken into consideration. Inappropriate application of the consolidation exemption based on article 408 could result in a situation in which the consolidated financial statements are not prepared, audited and filed, while they should have been.

This may result in a serious deficiency in the insight to be provided by the financial statements as per article 362 sub 1, due to the absence of the consolidated financial statements. The aspect of directors' liability should also be carefully considered in this context.

This publication aims to provide insights and clarifications on the correct application of article 408.

The structure of this publication is as follows:

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Note: (1) Article 2:406 sub 1 of Part 9 of the Dutch Civil Code (DCC); hereinafter referred to as 'article 406'.
(2) Unless otherwise mentioned, all articles as referred to are part of Book 2, Title 9 of the DCC.
(3) The term 'intermediate holding' (company) is used for practical reasons, since the consolidation exemption as provided by article 408 is mostly applied by intermediate holding companies. The scope of article 408 can, however, be broader. A company applying article 408 may also have own operational activities.

02. Requirements

Before discussing potential application issues, it is, firstly, important to gain an understanding of the requirements for applying the consolidation exemption provided by article 408.

According to article 408 sub 1 consolidation of a group member may be omitted, provided that:

- a. no written objection has been made to the legal entity within six months of the start of the financial year against the application of the cited article by at least 10% of the members or the holders of at least 10% of the issued capital⁴;
- b. the financial information that the legal entity should consolidate is included in the consolidated financial statements of a larger entity;
- c. the consolidated financial statements and the management report of the larger entity are prepared in accordance with the rules of Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJEU 2013, L 182)⁵ or in accordance with the rules of one of the directives of the Council of the European Communities concerning the financial institutions and the consolidated financial statements of banks and other financial institutions or insurance companies. If these provisions need not to be observed, then the financial statements referred to must be prepared in an equivalent manner;
- d. the consolidated financial statements with the auditor's report and management report of the larger entity, insofar as they are not prepared in or translated into Dutch, are prepared in or translated into French, German or English, all in the same language; and
- e. each time within six months after the balance sheet date, or within one month after a permitted later publication, the documents or translations referred to in point d. must be filed at the offices of the Trade Register in the Netherlands.

In addition, the intermediate holding company applying the consolidation exemption should disclose this in the notes to their financial statements (sub 3 of article 408).

The consolidation exemption based on article 408 cannot be applied by intermediate holding companies whose securities (e.g. shares and/or bonds) are traded on a regulated market within a member state of the European Union ('EU') market or on a comparable non-EU member state regulated market, for example, the New York Stock Exchange ('NYSE') (sub 4 of article 408).



Note: (4) In order to determine the aforementioned percentage, both the shares with voting rights as well as the shares with profit-sharing rights count. This concerns an exception to the principal rule that shares without voting rights do not count for various criteria and quorums based on the held equity interest.

(5) Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJEU 2013, L 182) is hereinafter referred to as the EU Directive on financial statements.

03. Additional reliefs

In addition to the consolidation exemption itself, additional reliefs are available for a company that correctly applies article 408:



Participating interests in which significant influence is exercised, can be measured at cost in the separate financial statements as an alternative for net asset value.



The intermediate holding company does not have to disclose information on equity and results of entities in which the participating interest held by the intermediate holding company is at least 20%.



In absence of consolidated financial statements, the assessment on the size regime⁶ of an intermediate holding company (i.e. micro, small, medium-sized or large) is based on the separate financial statements. The details of group companies are not factored in the determination of the total assets. Income from dividends is not considered to be net turnover. Aforementioned can provide for additional reliefs in terms of audit requirements and preparation and publication of financial statements.

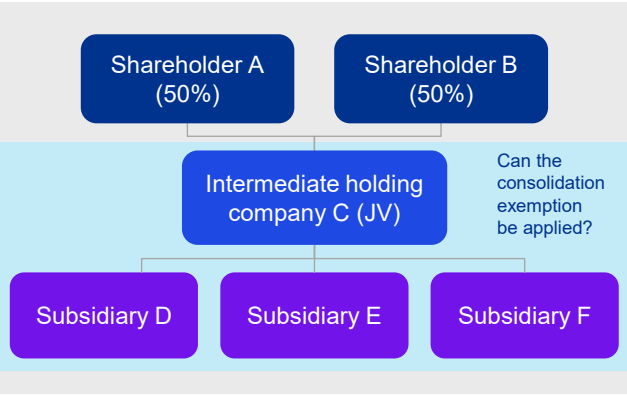


Note: (6) When reference is made to the size regime of the company, this should be read as either micro, small, medium-sized or large.

04. Method of consolidation

The financial information that the legal entity should consolidate is included in the consolidated financial statements of a larger entity. [point b of sub 1 of article 408]

Consider the following fact pattern. Shareholders A and B both own 50% of the shares in an intermediate holding company C and both A and B have individually no control over C. Intermediate holding company C ('C') is considered to be a joint venture ('JV') and is proportionally consolidated by shareholder A and shareholder B.



In practice, different methods of recognizing and measuring C at the level of shareholders A and B could exist. This depends on the applied financial reporting framework. The financial information of C could be proportionally consolidated by A and/or B. Alternatively, C is accounted for based on the net asset value method. Both methods, however, do not result in an integral consolidation of C as part of the consolidated information of A or B.

In accordance with article 408 and the description of the definition of 'part of a group' in article 406 sub 2, this must involve a consolidation pursuant to the integral method. Consolidation at a higher level pursuant to the proportional method implies, after all, that the legal entity and its group companies do not form part of a group because the legal entity is not part of a larger group. Referring back to the stated fact pattern, it is noted that C is not integrally consolidated by either shareholder A or shareholder B. C cannot opt for the consolidation exemption, since it is not in compliance with article 408.



05. Publication of financial statements of the parent company

The financial information that the legal entity should consolidate is included in the consolidated financial statements of a larger entity. [point b of sub 1 of article 408]

Special consideration should be made regarding the timing of the publication of the consolidated financial statements of the parent company in the context of sub b of article 408.

Consider the following fact pattern for the Dutch parent company and the Dutch intermediate holding. The financial statements of both entities are subject to an audit:



On the date of preparation⁷ (and issuance of the auditor’s report) of the financial statements of the intermediate holding company (1 March), published financial statements of the parent company are not available. In our view, the intermediate holding company does not meet this requirement of article 408.

As part of the aforementioned fact pattern, the intermediate holding company would not be able to apply article 408, while preparing the intermediate holding company’s financial statements.

In our view, in order to comply with this requirement, preparation of the intermediate holding company’s financial statements has to be postponed until, at least, 10 April.



Note: (7) ‘Prepare’ in this section means the action that results in the financial statements being authorised for issue by management to shareholders. This is the moment of dating and signing the financial statements by the management board.

06. Timing of filing of financial statements

Each time within six months after the balance sheet date, or within one month after a permitted later publication, the documents or translations must be filed at the offices of the Trade Register in the Netherlands. [point e of sub 1 of article 408]

Consider the following fact pattern, in which the intermediate holding company has a German listed company as a parent. This parent has published its consolidated financial statements in Germany on 10 April. The financial statements of both entities are subject to audit.



In order to meet the requirements of point e of sub 1 of article 408, management of the intermediate holding company must publish the financial statements of the German parent at the Trade Register in the Netherlands.

The question may be asked whether for 'permitted later publication' a view should be taken of the filing term which applies to the consolidating (parent) company or of the filing term which applies to the intermediate holding company.

In our view, the filing term which applies to the consolidating (parent) company is the most obvious interpretation of condition e. In view of the legislative history on this matter. In general, this implies that to comply with condition e., there will be two filing moments:

1. first the filing of the financial statements of the consolidating (parent) company, i.e. within six months after the balance sheet date or within one month after a permitted later publication, which applies to the consolidating (parent) company; and
2. at a later moment, the filing of the financial statements of the intermediate holding company itself that makes use of article 408, i.e. within the regular filing term that applies to this company.

Example

The financial statements of a foreign parent are adopted in April. The Dutch intermediate holding company prepares its financial statements in August and in doing so wants to make use of article 408. The Dutch intermediate holding company is required to file the consolidated financial statements of the parent by 30 June at the latest with the Dutch Trade Register. There are two points at which the Dutch intermediate holding company can file:

1. the consolidated financial statements, auditor's report and the management report of the foreign parent on 30 June; and
2. the financial statements of the intermediate holding company no later than 8 days after the adoption of those (i.e. 8 October in adjacent fact pattern).

07. Basis of preparation

The consolidated financial statements and the management report of the larger entity are prepared in accordance with the rules of the EU Directive on financial statements or in accordance with the rules of one of the directives of the Council of the European Communities concerning the financial institutions and the consolidated financial statements of banks and other financial institutions or insurance companies. If these provisions need not to be observed, then the financial statements referred to must be prepared in an equivalent manner. [point c of sub 1 of article 408]

The question here arises which other reporting frameworks are considered to be 'equivalent'. The EU has already performed an analysis of which GAAPs are considered to be similar. The overview below provides a selection of similar reporting frameworks:

-  Dutch Generally Accepted Accounting Principles ('GAAP')
-  International Financial Reporting Standards ('IFRS') as approved by the International Accounting Standards Board ('IASB')⁸
-  IFRS as approved by the IASB and endorsed by the EU
-  United States ('US') GAAP as applied by the listed companies overseen by the Securities and Exchange Commission ('SEC')
-  Japanese GAAP as applied by the listed companies overseen by the Japanese Financial Services Agency ('JFSA')
-  GAAP of the People's Republic of China

Note: (8) As per Dutch Accounting Standard ('RJ') 217 paragraph 214.
(9) <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02008D0961-20150101>

For a complete overview of similar reporting frameworks, reference is made to the following [document](#)⁹.

It could be the case that the larger group prepares the consolidated financial statements based on a reporting framework which is not included in the online database. A detailed assessment needs to be performed to determine whether the applied reporting framework, including the accounting policies as applied by the group, is equivalent to the requirements of the EU Directive on financial statements.

'Equivalent' should be evaluated in a broader context than just the accounting policies applied. The process of establishment of the reporting framework should be considered and evaluated as well. Elements, such as the presence of a conceptual framework and a due process of preparing and adjusting accounting standards, are relevant here.

As an example, consider US GAAP as applied by the listed companies and overseen by the Securities and Exchange Commission ('SEC'). This accounting framework is considered to be a similar reporting framework, although under the application of US GAAP, goodwill is not systematically amortised, as opposed to Dutch GAAP.

As from 1 January 2021, EU Directives are no longer applicable in the United Kingdom ('UK'). In addition, UK GAAP is not considered a priori as an equivalent accounting framework, as a decision thereon is still outstanding.

This means that it should be assessed whether UK GAAP financial statements prepared on or after 1 January 2021 are equivalent to financial statements prepared in accordance with the EU Directive on financial statements.

08. Acquisitions throughout the year

An intermediate holding company could be subject to changes in its shareholder composition. Consider the situation in which an acquisition of a group occurs during the year and by which the previous parent company now becomes an intermediate holding company itself.

Alternatively, an intermediate holding company could change its shareholders during a reporting year while being transitioned from one larger group to another, thus remaining an intermediate holding company but as part of another group.

The question becomes relevant whether or not article 408 can be applied in these situations. A number of diverging practices exist. A selection of practices are described below.

The consolidation exemption is applied since the financial data are consolidated based on the consolidation requirements applicable to the larger group. The acquirer will use the acquisition accounting amounts to recognize the acquiree. The profit or loss of the acquiree for the period up to the acquisition date will be part of equity of the acquisition balance of the acquiree.

The consolidation exemption is applied since the intermediate holding company's full year consolidated statement of profit or loss is included in the financial statements of the larger group on a pro forma basis. This is done in addition to the acquisition accounting and subsequent consolidation applied by the acquirer.

The consolidation exemption is applied since the intermediate holding company's full year consolidated statement of profit or loss is included in the financial statements of the larger group on a pro forma basis, but only if the acquisition is completed close to the reporting date. This is done in addition to the acquisition accounting and subsequent consolidation applied by the acquirer.

The consolidation exemption is not applied since the financial data that the legal person should consolidate are not for the full year included in the consolidated annual accounts of a larger company.

Due to the aspect of existence of practices, we recommend that legal advice should be obtained, taking into account the facts and circumstances of the specific case.

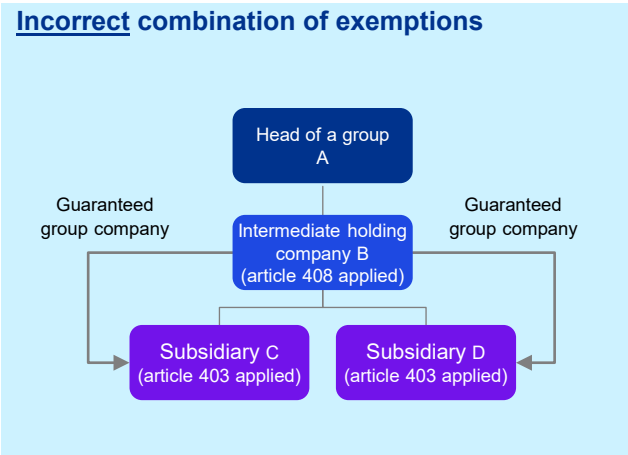


09. Combination of exemptions

Special attention should be given to a potentially inappropriate combination of exemptions. In this context, we discuss the combination of article 408 with the application of article 403.

Under the application of article 403, guaranteed group companies do not have to prepare financial statements in accordance with the provisions of Part 9, Book 2 of the DCC. These companies only need to prepare an abbreviated company balance sheet and an income statement, which do not need to be published.

In practice, the following situation could apply:

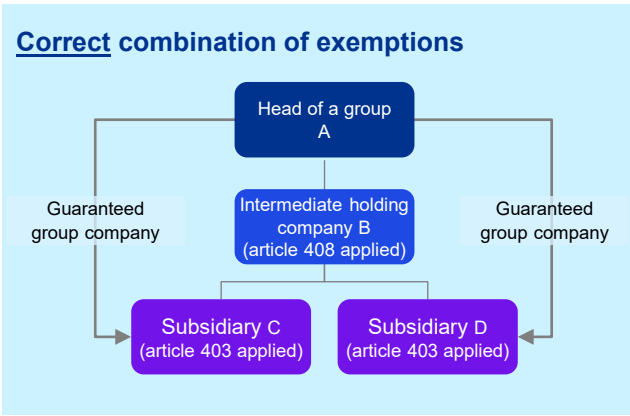


Article 403 requires that financial information of the guaranteed group companies C and D is included in the consolidated financial statements of the guarantor B.

Given that company B does not prepare consolidated financial statements following the consolidation exemption provided by article 408, the requirement from article 403 is not met and the exemptions provided by article 403 in combination with the exemptions provided by article 408 cannot be applied. This is also reiterated as part of RJ 217.216¹⁰.

Note: (10) RJ 217.216 states that if pursuant to article 408, the legal entity does not prepare consolidated financial statements, a legal entity in its group for which the legal entity has issued a statement pursuant to article 403(1)(f) may not make use of the provisions in article 403(1) that the financial statements do not have to be laid out in accordance with the provisions of Part 9 of Book 2.

A way to still be able to apply the exemption provided by article 408 and article 403 at the levels of company B, C and D would be the following:



In the aforementioned situation, the financial information of the guaranteed group companies C and D is included in the consolidated financial statements of the guarantor A that is not applying the consolidation exemption provided by article 408. The exemptions provided by article 408 and 403 can be applied at the levels of B, C and D under the assumption that all of the other requirements of article 403 and 408 are met.



10. First-time application of the consolidation exemption

The question arises which size regime is applicable for a company when the consolidation exemption is applied for the first time and, based on the assessment of the company financial statements of the intermediate holding company, the size regime of the company¹¹ decreases.

A company does not need to switch to a different regime until it has met the relevant criteria on two consecutive balance sheet dates, without subsequent interruption on two consecutive balance sheet dates.

Two alternative views exist in practice, which are discussed below.

View 1:

There is no (economic) purpose served to continue with the size regime applied before the application of article 408, due to the aspect that the consolidated information of the parent company is published. In our view, it is not unreasonable to immediately apply the new regime. However, it is recommended to obtain legal advice in this situation.



View 2:

As an alternative view, being a literal reading of Dutch law, the size regime applied before the application of article 408 continues to be applied during the first year under the application of article 408.



Note: (11) When reference is made to the size regime of the company, this should be read as either micro, small, medium-sized or large.

11. Discontinuation of the consolidation exemption

A situation could occur in which an intermediate holding company can no longer apply the consolidation exemption. This could be triggered by the inability to comply with one or more of the requirements as per sub 1 of article 408.

In this particular situation, two potential issues require attention.

Issue 1:

Firstly, a question arises which size regime is applicable for a company when the consolidation exemption is no longer applied for the first time.

Based on the assessment of the company financial statements of the intermediate holding company, the size regime could increase.

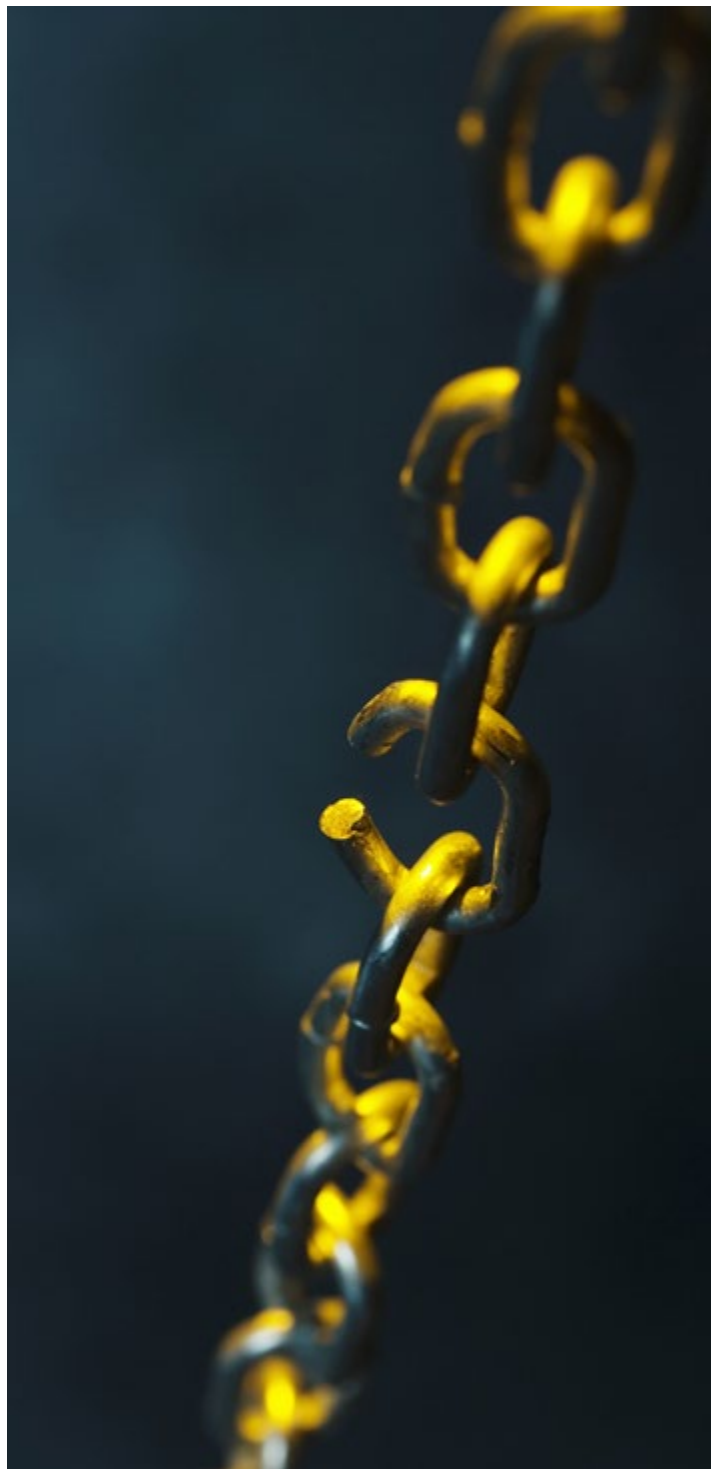
This situation is in essence the opposite of the situation discussed in section 10. As such, the treatment should be applied consistently. If view 1 (or view 2) is elected when the consolidation exemption is firstly applied, then the same view should also be applied in case the consolidation exemption is no longer applied.

Issue 2:

Secondly, a question arises if comparative (prior year) information should be presented in case consolidated financial statements are prepared for the first time.

Based upon article 363 sub 5, comparative information is seen as an integral part of current year's financial statements.

As such, in our view, comparative consolidated information should be presented in case the consolidation exemption is no longer applied for the first time.



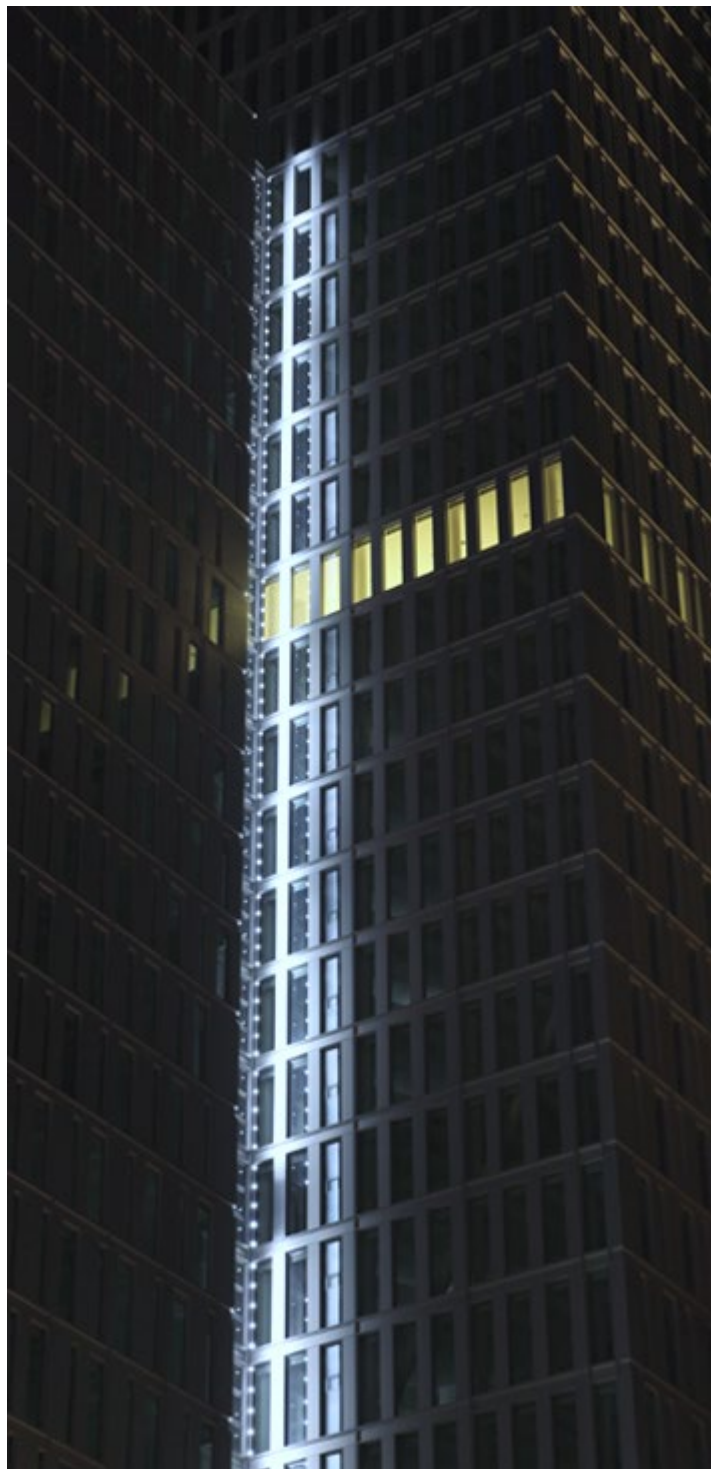
12. IFRS

An intermediate holding company has the option, as per article 362 sub 8, to voluntarily apply IFRS as endorsed by the EU. By virtue of IFRS 10¹² paragraph 4, IFRS also provide for a consolidation exemption.

The question arises if the consolidation exemption as per IFRS 10.4 can be applied in case the requirements of article 408 are not all met.

The European Commission ('EC') has taken the position that in assessing whether a company should prepare consolidated financial statements or not, compliance with local legislation should be adhered to.

Therefore, an intermediate holding company should assess the compliance with the requirements provided by article 408. If these requirements are not all met, then the consolidation exemption as per IFRS 10.4 cannot be applied as a substitute.



Note: (12) IFRS 10 'Consolidated Financial Statements'.

13. Standard Business Reporting

The decree on electronic filing with the trade register ('Besluit elektronische deponering handelsregister') came into force on 14 April 2016. This decree requires companies in the Netherlands to submit their annual report, which includes the (consolidated) financial statements, electronically to the Dutch Chamber of Commerce.

Electronic publication to the Chamber of Commerce is performed in eXtensible Business Reporting Language ('XBRL') format by means of Standard Business Reporting ('SBR').

Depending on the size of the company, the decree is applicable via a phased introduction as demonstrated below:

Mandatory electronic filing ¹³ (reporting years starting on or after)	
Micro	1 January 2016
Small	1 January 2016
Medium-sized	1 January 2017
Large	1 January 2024 (current expectation)

The question arises on how the decree should be implemented while at the same time complying with the requirements of article 408. It is noted that the decree is only applicable for documents that are required to be submitted to the Chamber of Commerce based on article 394.

In this context, companies applying the consolidation exemption based on article 408 need to publish their company-only financial statements. Such statements may need to be published in electronic form, if applicable, given the size of the company.

However, exemptions for electronic filing for medium-sized entities exist. A medium-sized company could be exempted from electronic filing if the company forms part of a group in which the parent company is a large Dutch company. Alternatively, if a medium-sized company forms part of a group in which the parent company is legally domiciled in an EU member state and for which a uniform electronic reporting format is established at EU level, this medium-sized company is also exempt.

As mentioned, the decree is only applicable for documents based on article 394. It is recognized that consolidated financial statements of the larger group may not be available in XBRL format. The Ministry of Economic Affairs and Climate ('ministerie van Economische Zaken en Klimaat') clarified¹⁴ that the consolidated financial statements, to be published based on sub d of article 408, can be submitted to the Dutch Chamber of Commerce either via email or in a hard copy format.



Note: (13) <https://www.kvk.nl/english/filing/how-can-you-file-your-financial-statements/>

(14) Ministerie van Economische Zaken en Klimaat 'Vragen en antwoorden over verplichting van elektronisch deponeren van jaarstukken in het handelsregister bij de Kamer van Koophandel' Augustus 2021. https://www.kvk.nl/download/kvk_Elektronisch_deponeren_jaarstukken_aug2021_tcm109-500692.pdf



How KPMG can help

Correct application of the consolidation exemption for intermediate holding companies can be a complex accounting topic, depending on the underlying facts and circumstances.

We can support you with the correct application of this exemption.

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