

New Flex-BV**Major overhaul Dutch corporate law as of October 1, 2012**

On October 1, 2012 the Act to simplify private limited liability companies in the Netherlands (BV's) came into force. The main purpose of the Act is to enhance the use of BV companies through greater freedom in structuring such companies, also referred to as "Flex-BV's".

This legal update sets forth the major changes and new opportunities under the Act. We also address the need for amending current articles of association of existing BV's as of the date of the Act.

Finally, we address the upcoming Act on management and supervision, which will come into effect in the Netherlands as of January 1, 2013.

Major changes**Major changes Flex BV**

The following changes to the Dutch civil code for BV companies are now in effect:

Capital

The minimum capital requirement of EUR 18,000 no longer applies and the articles of association need not specify any authorized capital. BV's can not issue bearer shares.

No bank statement on issued capital at or after incorporation is required.

No accountant's statement is required for contribution on shares at or after incorporation.

Shares

A BV's capital may be denominated in Euros, US Dollars or any other currency.

The par value can be set in a fraction of cents or more.

Share certificates may now be issued for registered shares.

The articles of association need not contain a so-called 'transfer restriction on shares', and/or even may wholly restrict the transfer of shares for a limited period of time.

The Act introduces the possibility of non-voting shares.

Financial assistance

Dividend rights may but need not be allocated to shares; however, at all times at least one (1) share must be issued and be outstanding with full voting and dividend rights.

All rules limiting a BV's ability to provide security or guarantees of any sort in connection with the acquisition of shares in its capital have been abolished. Although such financial assistance rules no longer apply, management of a BV must verify whether the granting of such security or guarantee is within the BV's corporate interests and consider the consequences thereof on the financial position of the BV, including its ability to pay its debts.

Depositary receipts

The Act requires a BV to confirm whether holders of existing depositary receipts (*certificaten*) are entitled to so-called "meeting rights". Meeting rights are newly defined under the Act as the right to attend and address general meetings (of shareholders) of a BV. Such confirmation should be made at the earlier of (i) the first amendment to the BV's articles or (ii) October 1, 2013. Failing the same, the existing rules regarding depositary receipt holders under the 'old law' must be respected. In such case, adoption of shareholder resolutions by written consent (without holding an actual meeting) remains prohibited.

Management of BV's must register the holders of meeting rights (including those persons holding depositary receipts, who have been acknowledged by such management as having meeting rights) in the company's shareregister. Failing the same, again the rules under the old law regarding depositary receipt holders remain applicable.

General meetings

The notice period for convening shareholder meetings has been reduced from 15 days to 8 days prior to the day of the meeting.

General meetings can now be held in and outside of the Netherlands.

General meetings, being the corporate body at which the shareholders are present or represented, no longer have exclusivity in appointing or dismissing managing directors. Such power can now be allocated to classes of shares or certain shareholders. This is in particular interesting for private equity investors.

If management and shareholders are one and the same person (legal or otherwise), the signing of the annual accounts shall be regarded as automatic adoption of the annual account and discharge for management performed by each managing director; a specific annual general meeting is in such case no

Distributions and creditor protection

Impact on existing BV's

longer required. One can, however, opt out of this feature in the articles of association.

The Act introduces the right to adopt shareholder resolutions by written consent without holding an actual meeting, even if the articles of association do not provide for the same. The Act continues to require, however, (a) that management and the supervisory board, if any, are consulted on such procedure in advance, and (b) consent of all persons with meeting rights on such procedure. In addition, such written consent resolutions need no longer be adopted unanimously by all shareholders.

In the absence of capital requirements and allocation of non-distributable reserves which existed under the 'old law', the Act now freely allows distributions by resolution of the general meeting. However, any such resolution is subject to the approval of BV's managing board. The managing board must withhold approval if it knows or should know that the distribution will cause the BV not to be able to pay its due and payable debts now or in the foreseeable future. A period of one year has been formulated as a guideline by several authors to assess such future ability to pay its debts. Distributions in violation of such test will cause each managing director being personally liable for the deficit and the recipient shareholder(s) being required to remit any amounts distributed unless such shareholders were acting in good faith when adopting the resolution and receiving the amounts under the distribution. A managing director may rebut the presumption of liability by proving he or she can not be blamed for the breach of such rules, and he or she was not negligent in taking appropriate action to avoid the consequences of such distributions.

The Act, similar to the 'old law', assumes Book 2 of the Dutch civil code (DCC) on BV companies to be of mandatory effect, unless the law provides an opt-out.

However, it is not easily determined whether such opt-out applies. In particular, this is difficult when analyzing articles of association of existing BV's. E.g. the Act, as shown, has made the 'financial assistance' regulations obsolete. What if current articles of association specifically provide for the financial assistance prohibition by verbatim copy of the (old) article 207c of Book 2 DCC. Several authors differ on the effect thereof. In addition, under the 'old law', it was required to maximize the authorized capital at 5 times the issued capital and at all times at least 20% of the authorized capital was required to be issued and outstanding. What if current articles of association require such

Act on management and supervision

80/20 rule, whilst the law no longer requires the same. Again, authors differ on the effect thereof.

In view of existing uncertainty, we suggest that the articles of association of current BV's are reviewed, and on many points amended to avoid uncertainty or misinterpretation. WLP-LAW can assist you in such review and arrange for amendment of the articles of association.

On June 6, 2012 the Act amending the rules on management and supervision of Dutch NV's and BV's was published in the Dutch Official Gazette (*staatsblad*), the "One-Tier Board Act". The One-Tier Board Act is scheduled to take effect as of January 1, 2013. The One-Tier Board Act introduces the possibility to adopt a 'one-tier' board. In addition, the conflict of interest provisions under the current DCC will be significantly amended by limiting a violation thereof to have "internal" effect only. For 'large' companies, additional rules are introduced on the maximum number of board positions for management and supervisory boardmembers and a quota for gender diversity.

The major provisions of the One-Tier Board Act will be reflected in our next Legal Update.

Contact

If you have any questions or appreciate receiving more information on this legal update, please contact your regular contact at WLP-LAW or any of the undersigned at +31(0)88 2001300 or by email:

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