

The Act on Management and Supervision

On January 1, 2013 the Act on management and supervision (**‘Wet Bestuur en Toezicht’**) amending the rules on management and supervision within a public limited liability company (NV) and a private limited liability company (BV) came into force. The Act introduces inter alia the possibility to adopt a one-tier board, as an alternative to the existing two-tier board consisting of a separate management board and a supervisory board. 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 companies as of the date of the Act.

Major changes Act

The following changes to the Dutch Civil Code (**‘DCC’**) for NV and BV companies are now in effect:

1. Legal basis for the one-tier board

The act now provides a legal basis for the one-tier board system. Companies, including those governed by the “structure regime”¹, will be able to choose for a one-tier board as an alternative to the two-tier board. The one-tier board² consists of a board of directors which includes both executive and non-executive members. The executive board members will be responsible for the company’s daily management, the non-executive board members have at least the statutory task to supervise the management performed by all board members. Each board member is responsible for the performance of general conduct of affairs of the company and may be liable for mismanagement of one of more of the other board members (joint responsibility). The non-executive board members are part of the board of directors and therefore subject to managing director’s liability.³ A board member will be liable in full unless such person can prove that taking into account the duties allocated to him/her, the mismanagement was not attributable to him/her and he/she did not neglect to take measures to prevent the mismanagement. A division of duties may increase the possibilities to reduce or avoid such liability. The specific duties allocated to each individual board member may be incorporated into the articles of association or another corporate document such as board regulations.

¹Dutch BVs and NVs that (i) employ at least 100 employees in the Netherlands, (ii) have a works council, and (iii) an issued share capital greater than EUR 16.000.000, are required to have a supervisory board.

²Companies had already an opportunity to institute a one-tier system, but there was no explicit legal basis.

³In a two-tier board the management board and the supervisory board are two separate corporate bodies. By nature, the supervisory board members have less influence on the decision-making process of the management board. A supervisory board member will in principle not be subject to managing director’s liability and will only be responsible and/or liable for the supervision of the management board, or its failure thereof or therein, or by performing acts management.

2. Conflict of interest

Formerly, a board member could not represent the company if such person had a direct or indirect interest which conflicted with the interests of the company. An agreement entered into by a board member on behalf of the company with a third party could be annulled in certain circumstances. Under the Act, such conflict now only impacts the internal decision-making and will no longer affect the validity of a resolution or an agreement entered into with a third party.⁴ Under the Act, a board member⁵ having a conflict with the interests of the company may not participate in the deliberation and adoption of management resolutions. If the board member breaches this rule, the resolution can be nullified and he/she can be held liable to the company. If a management board resolution cannot be adopted due to a conflict interest, the resolution must be taken by the supervisory board. If there is no such supervisory board, the resolution must be taken by the general meeting of shareholders, unless the articles of association provide otherwise. Any provisions in existing articles of association that limit the power of board members to represent the company are no longer in effect and are disregarded. A management board member therefore can represent the company notwithstanding any contrary provision in the articles of association. We recommend removing such provisions from the articles of association to avoid any disparity between the governing law and the articles of association when representing the company.

3. The employment status of management board members of listed companies

The legal relationship between a board member and a listed company shall no longer be regarded as an employment agreement. This means that a board member will not have the protection provided under Dutch employment law, such as compensation in case of an unfair dismissal. However, existing employment agreements are grandfathered. Also, it will remain possible for a board member to enter into an employment contract with a subsidiary of a listed company.

4. Gender diversity

“Large”⁶ NVs and BVs, including those governed by the “structure” regime, will be deemed to have a more balanced participation by men and women on their management and supervisory boards.

⁴In the absence of a provision to the contrary in the articles of association.

⁵Whether executive or non-executive in a one-tier board, or whether managing or supervisory director in a two-tier board.

⁶A company will be considered as “large” if, according to its consolidated balance sheet, it meets at least two of the following criteria 1) the value of the assets, based on the acquisition price and production cost, exceeds EUR 17.5 million, 2) the net turnover exceeds EUR 35 million, and 3) the average amount of employees is at least 250, for two consecutive years.

At least 30% of the positions on the management and supervisory boards should be held by men and at least 30% by women, insofar as these positions are distributed among individuals. This balanced allocation applies to the appointment, recommendation or nomination of management board members (both executive and non-executive board members in a one-tier board) and supervisory board members. Large companies that do not comply with these targets, must explain in its next annual report why the positions have not been allocated in a more balanced manner, how the companies have attempted to come to a more balanced allocation of positions, and what it intends to do so to point in future (under the so-called “comply or explain principle”). Such principle is derived from the Corporate Governance Code (“Code Frijns”) to limited companies in the Netherlands.

5. Limitation of supervisory board positions

The Act also introduces rules limiting the number of supervisory positions that may be held by a management board member (both executive and non-executive board members in a one-tier board), supervisory board member or a member of another type of supervisory body created in the articles of association. The restrictions concerning the number of supervisory positions held apply to NVs, BVs and foundations which qualify as ‘large’ entities (see above for the definition of this term⁷). Such companies or foundations may not appoint a person as management board member if he/she is already supervisory board member of more than two ‘large’ companies or foundations or is the chairman of the supervisory board or one-tier board of such as company or foundation. A person may not be appointed as a supervisory board member if he/she is already a member of the supervisory board of five or more “large” companies or foundations. Chairmanship of the supervisory board or an one-tier board counts as two supervisory positions. The limitations only applies for new appointments or reappointments that are made after that the Act’s entered into force.

6. Next Legal Update

On November 13, 2012 the so-called Corporate Governance Act has been approved by the Upper House of the Dutch Parliament. The Act is scheduled to take effect as of July 1, 2013. The purpose of the Act is to strengthen the corporate governance of listed companies by curbing shareholder activism and promoting dialogue between shareholders and the management board.

The major provisions of the Corporate Governance Act will be reflected in our next Legal Update.

If you have any questions or appreciate receiving more information on this

⁷A foundation is considered large if i) it operates a business, 2) it has a statutory obligation to draw up financial statements or a similar document; and 3) it has met at least two of the criteria as mentioned above for the NV and BV.

legal update, please contact your regular contact at WLP-Law or any of the undersigned at +31 (0)88 2001300 or by e-mail:

Neill André de la Porte:	andredelaporte@wlp-law.com
Arjan de Boode:	deboode@wlp-law.com
Hans Mouthaan:	mouthaan@wlp-law.com

This legal update is intended to highlight issues for general reference only. It is not comprehensive nor does it constitute legal, tax or financial advice. Any information contained herein is subject to change at our discretion. This information should not be relied upon in any specific factual or legal situation and does not cover all laws or regulations that may be applicable. You should seek professional advice before making use of any of the information. WLP-LAW gives no warranty as to the accuracy or completeness of this information. No liability whatsoever is accepted by WLP-LAW in this respect. This legal update relates to Netherlands law only.

WLP-LAW is located at Antonio Vivaldistraat 52-3, 1083 HP Amsterdam, the Netherlands. For more info, please visit us at www.wlp-law.com.