New rules
New choices
New opportunities

Flex BV Act and One Tier Board Act
Practical Guidelines

New Dutch company law rules

NautaDutilh

Introduction

Dear reader,

As you will be aware, the entry into force of the Flex BV Act will lead to a material overhaul of the rules applicable to the Dutch private company with limited liability (*besloten vennootschap met beperkte aansprakelijkheid* or *B.V.*). In addition, the entry into force of the One Tier Board Act will bring about changes in the corporate governance rules applicable to, inter alia, this type of company. The Flex BV Act will enter into force on 1 October 2012 and it is likely that the entry into force of the One Tier Board Act will follow in January 2013.

Given the scale, scope and complexity of the Flex BV Act and the One Tier Board Act, the new rules are difficult to fully comprehend. This is why NautaDutilh's Flex BV Taskforce has prepared this memorandum, which is intended to give you practical guidelines and advice in relation to a number of important aspects of the new rules.

Please note, however, that the new legislation does not lend itself easily to be described in a manner which is both comprehensive, as well as compact and insightful. We have focused on making this memorandum as informative and as useful as it possibly can be, but as a result of this approach, inevitably, this does not provide (and should not be relied upon as being) an exhaustive overview of all aspects of the Flex BV Act and the One Tier Board Act.

Please note that this memorandum reflects the status of the current and future legislation as at 1 August 2012. Similarly, references to "current rules" are to the rules in force on that date.

If any questions you may have are left unanswered, or if anything in this memorandum is insufficiently clear, please feel free to contact any member of NautaDutilh's Flex BV Taskforce (see chapter 7 for contact details). We will be happy to help.

We hope that you will find this memorandum practical and helpful.

Yours sincerely,

NautaDutilh N.V.

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1. The meaning of the term 'Company'

Although the One Tier Board Act will also bring about changes in the corporate governance rules relating to the Dutch limited liability company (*naamloze vennootschap* or *N.V.*) and the Dutch foundation (*stichting*), this memorandum will focus on the rules that will become applicable to the private company with limited liability (*besloten vennootschap met beperkte aansprakelijkheid* or *B.V.*). References to a 'company' should be interpreted accordingly, unless expressly indicated otherwise.

2. Simplified formalities and restrictions

2.1. Will it become easier and less time consuming to incorporate a company?

Yes, it will no longer be necessary to obtain a formal confirmation from a bank regarding the company's initial issued share capital before it can be incorporated. The Ministerial declaration of no objections, which used to be required for a company's incorporation (and which used to cause a significant timing constraint), was abolished in 2011. In practice, a company can be set up in a matter of a few days.

For the simplification of the formalities concerning a company's incorporation whose initial issued share capital will be paid up (in part or in its entirety) by means of a contribution in kind, please refer to chapter 2.2.

2.2. Will the formalities for making a contribution in kind on shares in a company's capital be simplified?

Yes, the requirement to obtain an auditor's confirmation on the value of the contribution will lapse. However, a description of the contribution will still be required. Although a civil law notary will be involved in the transaction (the deed of issuance must still be in notarial form), he/she will neither be in a position to establish objectively whether the valuation included in the description is accurate, nor whether the contribution will satisfy the payment obligation in respect of the shares to be issued. Therefore, those preparing the description (i.e. the incorporators, if the contribution takes place upon the company's incorporation, and in other circumstances the company's directors) will be responsible for the accuracy thereof, including the valuation attributed to the contribution.

Although the company's incorporators or its directors, as the case may be, should always exert their best efforts to come to an accurate valuation of the contribution, they should take exceptional care in their valuation if the contribution's value is close to the amount of the payment obligation to be satisfied by means of the contribution in kind. If the incorporators or the directors, as the case may be, are uncomfortable in making the valuation (e.g. if there is insufficient financial expertise available to them), it is advisable that they engage an external financial expert, such as an auditor, to provide the necessary support.

2.3. Will the acquisition of assets by a recently incorporated company from its incorporators or shareholders remain subject to a special procedure?

No, the special procedure will be abolished. This restrictive procedure was (next to timing) the main reason for the frequent use of shelf companies.

2.4. How to deal with the financial assistance rules under the new legislation?

The rules concerning financial assistance by a company will lapse altogether. However, the decision to provide financial assistance will still need to meet the customary standards of proper management.

2.5. How to perform a repurchase by a company of its own shares or depository receipts for its own shares?

A number of restrictions concerning repurchase will become less stringent.

A company will be allowed to repurchase all shares in its own capital (provided that they are fully paid up), except for one share with voting rights. One such share must remain issued and outstanding with a third party (i.e. not held by or for the account of the company or a subsidiary). The management board will be allowed to decide on a repurchase of shares without the authorisation of the general meeting.

A repurchase of shares for no consideration will not be subject to any further formalities (as is also the case under the current rules). A repurchase against payment of consideration, however, will only be allowed if:

a. the company's equity exceeds its mandatory reserves (see chapter 3.9) by an amount at least equal to the consideration to be paid; and

b. the management board reasonably expects the company to remain capable of paying its due and payable debts.

The latter requirement implies that the management board should perform a distribution test before deciding on a repurchase against payment of consideration. For further guidance on performing and documenting a distribution test, please refer to chapter 2.9.

Under the new rules, a director liability risk will become inherently associated with the performance of a repurchase without proper distribution testing. Please refer to chapter 5.3 for further information.

The above rules apply mutatis mutandis to a repurchase of depository receipts.

2.6. Will a company's subsidiary be allowed to acquire shares in its (direct or indirect) parent's capital?

An acquisition of shares in a company's capital by a direct or indirect subsidiary (regardless of whether it is subject to Dutch law) against payment of consideration will only be allowed with the prior consent of the (parent) company's management board. In making this decision, the (parent) company's management board will need to assess whether the subsidiary will remain capable of paying its due and payable debts following the acquisition (i.e. a distribution test). If this is the case, the management board must give its consent. For further guidance on performing and documenting a distribution test, please refer to chapter 2.9.

As with a repurchase of shares by the (parent) company itself, a director liability risk will become inherently associated with consenting to the performance of an acquisition of shares in a company's capital by a subsidiary without proper distribution testing. Please refer to chapter 5.3 for further information.

The above rules apply mutatis mutandis to an acquisition by a subsidiary of depository receipts for shares in its (direct or indirect) parent company's capital.

A company's (direct or indirect) subsidiary will not be allowed to subscribe for newly issued share in its (parent) company's capital. This is also prohibited under the current rules.

2.7. Will a company's share capital become a distributable equity component?

Yes, a reduction of a company's issued share capital will become subject to the same formalities as described in chapter 2.8 in relation to distributions. The filing and publication formalities, as well as the subsequent two-month opposition period for creditors, which are stipulated by the current rules, will lapse under the new rules.

2.8. How to make a profit distribution or a distribution out of the distributable reserves?

In principle, the general meeting will remain the corporate body authorised to determine how the company's profits are appropriated (e.g. reservation or distribution). However, the new rules will allow the company's articles of association to grant this authority to another corporate body, whereas under the current rules the company's articles of association can only authorise another corporate body to determine which part of the company's profits should be added to its reserves.

The entitlement to profits must be described in the company's articles of association. Although this rule will not change, it will become possible to deviate from the profit entitlement prescribed by the articles of association with the consent of each individual shareholder, thus providing increased flexibility.

The general meeting will be authorised to declare a distribution of profits (if any) or a distribution out of the distributable reserves, regardless of whether it is in cash, in specie or in the form of shares in the company's capital (stock dividend or bonus shares), to the extent that the company's equity exceeds its mandatory reserves (see chapter 3.9). Under the new rules (i) the company's share capital will no longer form part of this capital cushion requirement, and (ii) the articles of association may grant these powers of distribution to another corporate body.

Additionally, in contrast to the current rules, all distributions will require the consent of the company's management board. The management board must give this consent if it reasonably expects the company to remain capable of paying its due and payable debts. This implies that (i) the management board should perform a distribution test before making its decision, and (ii) if the distribution test is passed, the management board must give its consent. For further guidance on performing and documenting a distribution test, please refer to chapter 2.9.

Under the new rules, a director liability risk will become inherently associated with consenting to a distribution without proper distribution testing. Please refer to chapter 5.3 for further information.

2.9. How to perform a distribution test?

2.9.1. General

Under the new rules concerning a repurchase against payment of consideration and distributions, the management board must assess whether the company is, in brief, reasonably expected to remain solvent. Similarly, in the case of a 'repurchase' of shares (or depository receipts for shares) in the (parent) company's capital by a subsidiary against payment of consideration, the (parent) company's management board will need to assess the subsidiary's solvency. This implies subjecting the company, or its subsidiary, to a distribution test as described below. For simplicity, this chapter will focus on testing the company concerned; it goes without saying that the same applies to subjecting a subsidiary to a distribution test.

Proper distribution testing requires a two-pronged approach, consisting of a continuity test and a liquidity test, both of which are explained and visualised below. As you will see, the horizon for distribution testing is one year. Nevertheless, the directors should take into account matters beyond this horizon if they are aware of them when performing the distribution test.

2.9.2. Continuity test

The management board should first examine the company's continuity. If the company was profitable during previous financial years and if the management board expects the company to be profitable in the current financial year, the directors may proceed to the liquidity test, unless the directors have reason to believe that the company's continuity is in jeopardy.

In all other circumstances, the management board should perform a more rigorous analysis in order to ascertain whether there are indications that the company's continuity for the coming year may be in jeopardy, such as:

a. loans having been provided by the company that will mature without the company having a realistic prospect of these loans being repaid, or other indications that the company's debtors will not be able to satisfy their obligations towards the company;

b. excessive use by the company of short-term credit lines in order to finance its fixed assets;

c. indications that the company's lenders will withdraw their financial support of the company;

d. negative operating cash flow appearing from the company's financial statements or financial prognoses;

e. the company having a negative outlook based on material financial indicators, such as solvability and rate of return;

f. material operating losses incurred by the company or material write-downs of assets which generate cash flow for the company;

g. the company not being able to satisfy its debts as they mature, or not being able to meet its other obligations under the terms of the loans provided to it;

h. a shift from the company purchasing goods on credit to the purchasing goods by means of cash on delivery;

i. the company not being able to secure funding for the development of new products or other necessary investments;

j. key employees leaving the company without them being replaced or other problems in respect of the company's personnel;

k. the loss of an important sales market, concession, license or an essential supplier;

l. a shortage of raw materials important to the company's business;

m. legal proceedings against the company which, if successful for the claimant, will result in a payment obligation that the company will likely not be able to satisfy; and/or

n. changes in rules and regulations and/or government policy which are likely to have a negative impact on the company and its business.

If one or more indicators are applicable, this does not automatically mean that the management board should block the envisaged repurchase or distribution. Some indicators may have more serious consequences than others, and some of them may be compensated by other circumstances (e.g. raising additional cash through a divestment of assets in order to deal with a liquidity shortfall). All relevant matters at hand should be taken into account in determining the company's continuity.

If the management board has become satisfied that the company's continuity for the coming year is sufficiently safeguarded, it should proceed to the liquidity test.

2.9.3. Liquidity test

The liquidity test is aimed at assessing how much cash is available to the company for satisfying its payment obligation in respect of the envisaged repurchase or distribution. This liquidity is calculated on the basis of two financial indicators. The first of these indicators uses elements from the company's quick ratio, applied as follows:

current assets -/- inventory -/- current liabilities = capacity for payment

In principle, the outcome of this calculation will determine the maximum amount that the company will be able to pay in connection with a repurchase or distribution.

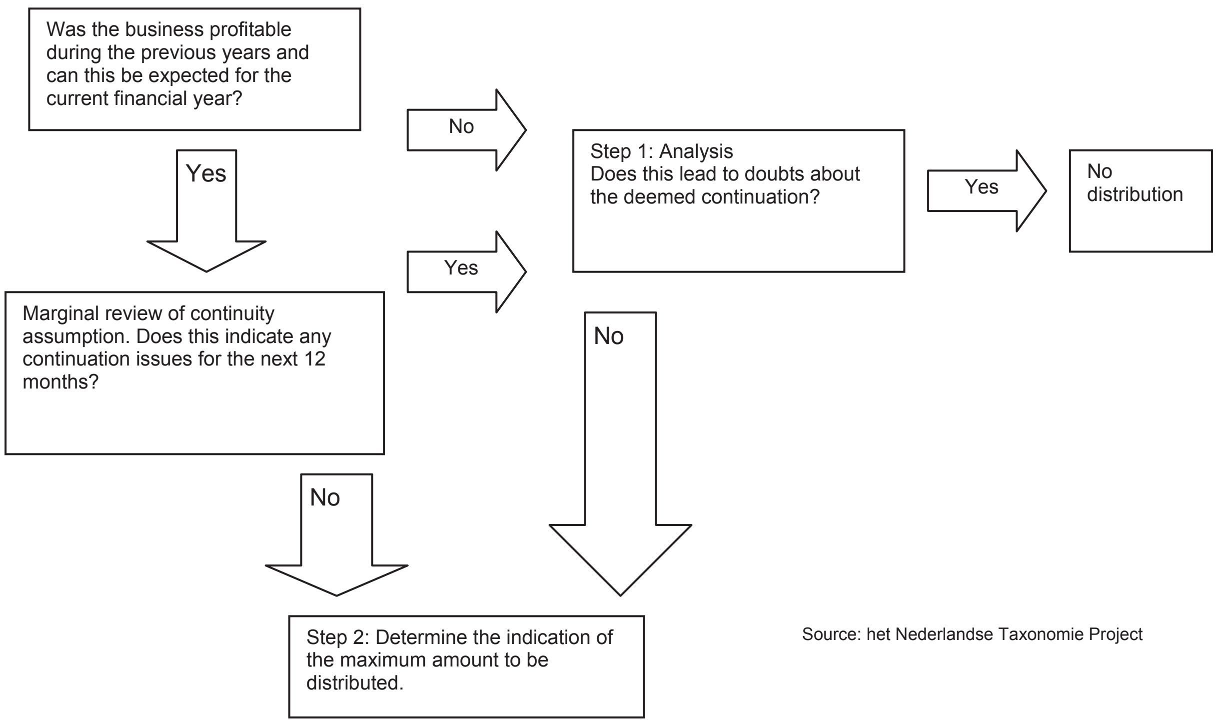
However, a second financial indicator should also be taken into account in this respect, i.e. the company's operating cash flow. This is determined on the basis of the following formula:

result after taxes + write-offs +/- fluctuations in asset value, provisions and working capital

Working capital in this context means the company's receivables, supplies and short-term debts. Matters such as material one-off profits or losses comprised in the company's result after taxes, contemplated (large) investments, newly raised funding and extraordinary costs will also have an impact on the company's operating cash flow and should thus be taken into account accordingly in making this calculation.

Once the management board has established the company's operating cash flow, the directors will have better insight as to whether (and to which extent) this is expected to put pressure on or relieve pressure from the company's liquidity position. Consequently, in making a final decision on the envisaged repurchase or distribution, the management board should adjust the available capacity for payment (calculated as described above) to account for the operating cash flow.

2.9.4. Flowchart for distribution testing



Source: het Nederlandse Taxonomie Project

2.9.5. Involving a financial expert

If the directors are uncomfortable in performing the distribution test (e.g. if there is insufficient financial expertise available to them), it is advisable that they engage an external financial expert, such as an auditor, to provide the necessary support.

2.9.6. Documentation

Given the importance of distribution testing (see also chapter 5.3), the management board should formally document how this process took place, what the results of their analyses were, which conclusions the management board drew from those results, and whether an (internal or external) financial expert was involved. Since the distribution testing will culminate in a 'go or no-go' decision by the management board, it would be a logical choice to document these matters as part of the management board's decision-making in the minutes of a board meeting, or as recitals in a written board resolution.

3. Shares, share capital and equity

3.1. Can a company have shares without profit rights and/or shares without voting rights?

Yes, but a share without profit rights must carry voting rights and vice versa. An interest in the company which entitles the holder neither to profit rights nor to voting rights will not qualify as a share.

3.2. Must shares in a company's capital remain denominated in Euro?

No, the nominal value of shares in a company's capital may be denominated in any currency. Companies incorporated before 1 January 2002 can also still have the nominal value of their shares denominated in Dutch guilders.

3.3. May the nominal value of shares in a company's capital have more than two decimals?

Yes. Due to this increased flexibility, it will become easier to perform stock splits or reverse stock splits with a ratio resulting in complex fractions.

3.4. Will a company still be required to have an authorised share capital?

No, the authorised share capital will become an optional restriction. By removing the authorised share capital from the company's articles of association, new shares can be issued without having to worry about exceeding the 'ceiling' imposed by the authorised share capital.

3.5. Will a minimum (issued) share capital requirement apply to the company?

No, although this may be different for companies which perform regulated activities (and which must thus comply with capital requirements under regulatory law). However, a company must have at least one share issued and outstanding with a third party (i.e. not held by or for the account of the company or a subsidiary) and this share must be paid up, either in part or in full. Consequently, from a corporate law perspective, it will become possible for a company to have an issued share capital of only € 0.01.

The requirement that a company's issued share capital must at least equal 20% of its authorised share capital will lapse.

3.6. Will companies remain subject to mandatory share transfer restrictions?

No, share transfer restrictions will become optional and may thus be removed from the company's articles of association, making its shares (or shares of a specific class or designation) freely transferable. There will also be more flexibility to tailor share transfer restrictions to the specific wishes of the shareholders.

The transferability of shares can also be excluded for a specific (lock-up) period. Although this is no novelty, lock-up arrangements are generally contractual, rather than included in the company's articles of association. The new rules explicitly clarify that the latter is also allowed. There are no limitations as to the lock-up period, albeit that the principles of fairness and reasonableness will overrule restrictions which are unreasonably harsh on shareholders.

Although this will depend on the nature of the business carried out by the company and the relationship between the joint venture partners, a lock-up period of five years will generally be acceptable. However, a longer lock-up period can be justified if substantial investments were made at the start-up of the company's business or during the development of that business.

3.7. Will share transfers, share issuances or the creation or transfer of share pledges and usufructs still need to be effected by notarial deed?

Yes, this will not change.

3.8. Which components will form a company's equity?

As is the case under the current rules, a company's equity will be formed by the following components:

a. issued share capital or, if shares have not been fully paid up, the paid up and called up share capital;

b. mandatory reserves (see chapter 3.9);

c. share premium and other reserves; and

d. non-appropriated profits.

3.9. Which reserves will form a company's mandatory reserves?

In this memorandum, the term 'mandatory reserves' means those reserves which the company must maintain, either pursuant to an obligation imposed by its articles of association or pursuant to a statutory obligation. The statutory reserves are exhaustively listed in the Dutch rules on annual accounts and comprise, in brief:

a. the revaluation reserve;

b. the reserve relating to incorporation, share issuance, research and development costs;

c. the participation reserve;

d. the exchange rate fluctuation reserve relating to subsidiaries and hedges in relation thereto; and

e. two types of stock exchange fluctuation reserves (relevant only for regulated investment companies and banks).

4. The general meeting

4.1. Will physical general meetings be required?

The main rule that at least one physical meeting must be held annually will lapse. However, the new rules do stipulate that, if no physical meeting is held during a financial year, at least one shareholder resolution must be adopted in writing in that period (see chapter 4.6). Generally, this single resolution will concern the adoption of the company's annual accounts and related matters.

If each shareholder is also a director of the company, the signing of the annual accounts by the directors and the members of the supervisory board (if any) will constitute a resolution of the general meeting to adopt those accounts, satisfying the requirement to have at least one physical general meeting or to adopt at least one written shareholder resolution. However, the adoption of the annual accounts in this manner does require that:

a. all other persons with meeting rights (see chapter 4.2) have been given the opportunity to take note of the annual accounts;

b. all such persons have given their consent to adopt the annual accounts in this manner; and

c. the company's articles of association do not prohibit the adoption of the annual accounts in this manner.

4.2. Which persons have meeting rights at a general meeting?

The following persons have meeting rights (i.e. the right to attend and speak at general meetings):

a. all shareholders (regardless of whether they have voting rights), except for those whose meeting rights have been suspended (see below);

b. holders of depository receipts, if meeting rights have been attributed to them (see chapter 4.3);

c. usufructuaries with voting rights and/or meeting rights; and

d. pledgees with voting rights and/or meeting rights.

Under the new rules, a company which has repurchased shares in its own capital, or a subsidiary that has 'repurchased' shares in its (parent) company's capital, is a shareholder and will thus have meeting rights in respect of the company's general meeting.

As is the case under the current legislation, it will be possible for the articles of association to provide that a person's meeting rights are excluded during that person's failure to comply with a statutory obligation, or an obligation imposed by the company's articles of association. In addition, a shareholder's meeting rights (inter alia) can be excluded if that shareholder does not meet a requirement stipulated by the articles of association.

Directors and members of the supervisory board (if any) are also allowed to attend the general meeting; they have an advisory vote, but they do not have 'meeting rights' in the sense as described above.

4.3. When will depository receipt holders have meeting rights in the general meeting?

The company's articles of association may stipulate whether the holders of depository receipts have meeting rights. The articles of association may also authorise a corporate body to attribute meeting rights to, or to revoke them from, depository receipt holders.

If a company has issued depository receipts with its cooperation (under the current rules):

a. those will be considered to be depository receipts with meeting rights (under the new rules) by operation of law;

b. upon the first amendment to its articles of association on or following 1 October 2012, the articles of association must explicitly specify that meeting rights are attached to those depository receipts; and

c. the company will be required to register the holders of those depository receipts (and the relevant particulars relating thereto) in its shareholders' register ultimately on 1 October 2013.

4.4. Can physical meetings be held outside the Netherlands?

Yes, the articles of association may identify one or more locations outside the Netherlands where general meetings may be held. However, holding meetings outside the Netherlands may have negative consequences for the company's 'tax substance' in the Netherlands.

For an existing company, an amendment to its articles of association for the purpose of facilitating general meetings outside the Netherlands will require:

a. a unanimous vote in a general meeting where the company's entire share capital is represented; and

b. the consent of all other persons with meeting rights (see chapter 4.2).

In a general meeting held at a location not specified in the articles of association and not being located in the company's corporate seat, valid resolutions may nevertheless be adopted if (i) all persons with meeting rights (see chapter 4.2) have consented to the location of the meeting and (ii) the company's directors and the members of its supervisory board (if any) have been given the opportunity to render advice concerning the resolutions to be adopted at that meeting. At such a meeting, in contrast to the current rules which require a quorum of 100%, resolutions can be adopted with due observance of the regular majority and quorum requirements stipulated by law or by the company's articles of association.

4.5. Will the notice period for convening a general meeting change?

Yes, the notice period will become eight days, instead of fifteen days.

4.6. Will it become more practical to adopt shareholder resolutions in writing?

In contrast to the current rules, it will become possible for the company's general meeting to adopt written resolutions even if there are others with meeting rights (see chapter 4.2), provided, however, that all persons with meeting rights have consented to this manner of decision-making. Although there are no formal requirements specifying how this consent should be given (the consent can be given by electronic means, such as e-mail), for evidential purposes, it would be prudent to properly document this.

Additionally, the requirement of unanimity and a quorum of 100% currently stipulated in respect of written shareholder resolutions will be abolished. Under the new rules, such resolutions can be adopted with due observance of the regular majority and quorum requirements that apply to resolutions adopted at a physical meeting.

As is the case under the current rules, the directors and the members of the supervisory board (if any) must be given the opportunity to render advice on the subject of a written shareholder resolution before it is adopted.

5. Corporate governance

5.1. Who will appoint, dismiss and suspend the company's directors and the members of its supervisory board (if any)?

Subject to certain (already existing) exceptions, the power to appoint, dismiss and suspend directors and members of the supervisory board will remain vested in the general meeting.

However, under the new rules, it will become possible for a company's articles of association to stipulate that:

a. all or certain directors and/or members of the supervisory board are appointed by the meeting of shareholders of a certain class or designation, provided that each shareholder with voting rights can participate in the decision-making regarding the appointment of at least one director or member of the supervisory board, respectively; and/or

b. a corporate body (other than the general meeting) has the power to dismiss directors and/or members of the supervisory board.

This additional flexibility, however, will be restricted (under circumstances) if the company is subject to what is known as the 'structure regime'.

Except for the new rule that a one tier board will be allowed to suspend an executive director at all times, the main rule on suspension of directors and members of the supervisory board will not change: the corporate body authorised to appoint a director or a member of the supervisory board, is also authorised to suspend him/her.

The current rules provide that a binding nomination for the appointment of a director or a member of the supervisory board must contain at least two names for each vacancy. For this reason, binding nominations currently often comprise the name of the person who should be appointed, and the name of a 'dummy'. Under the new rules, this will no longer be necessary since it will be possible for a binding nomination to consist of only one nominee. It will remain possible for the general meeting to set aside a binding nomination by supermajority vote.

5.2. Will Dutch law provide for a one tier board?

Yes. Although it is already possible to form a management board which resembles a one tier board, the new rules will explicitly facilitate this. Consequently, it will become possible to better distinguish between executive and non-executive directors, and to define their respective tasks and duties. Additionally, it will become possible for a company subject to what is known as the 'structure regime' to establish a one tier board.

According to the new rules on the one tier board, a company's articles of association may provide for a division of tasks and duties among the executive and non-executive directors, provided that non-executive directors shall always be charged with the supervision of the (entire) board. Also, it will be possible for certain resolutions to be validly adopted by one or more members of the one tier board (rather than by the board as a whole), provided that the resolutions concern matters which form part of the tasks and duties allocated to them. This will require a provision in the articles of association specifying or facilitating such an arrangement.

Under the new rules, the chairman of the one tier board must be a non-executive director. Additionally, neither the right to propose a person for appointment as (executive or non-executive) director nor the right to determine the remuneration of the executive directors can vest in an executive director. Similarly, executive directors shall not take part in the decision-making regarding their own remuneration.

As is the case for supervisory directors (both under the current and under the new rules), non-executive directors must be individuals.

5.3. Will a director be at an increased risk of liability under the new rules?

In principle, no. The main rule that a director will not become exposed to liability as long as he/she properly fulfils his/her duties, will remain unchanged; the new rules mainly codify existing case law on director liability. However, the new rules also supplement existing case law by explicitly providing for a higher level of detail. Under the new rules, director liability will arise if:

a. the company becomes insolvent following (i) a repurchase against payment of consideration or a distribution, other than in the form of shares (stock dividend or bonus shares) or (ii) by crediting an amount to pay up existing shares in part or in full; or

b. a company's subsidiary becomes insolvent following a 'repurchase' of shares (or depository receipts for shares) in the (parent) company's capital against payment of consideration.

In that case, each director who knew or should reasonably have foreseen the company's (or subsidiary's) insolvency will become liable towards the company (or the subsidiary) to compensate its resulting payments deficit, increased with statutory interest. However, a director can be exonerated if he/she can demonstrate:

a. that he/she is not to blame for the performance of the repurchase or the making of the distribution (e.g. if the director took no part in the decision-making in this respect); and

b. not to have failed to take measures aimed at averting the (negative) consequences of the repurchase or distribution.

Under circumstances, a director can be compensated if he/she settles a liability as referred to above. Please refer to chapter 5.5 for further information.

5.4. Will a member of the supervisory board be at an increased risk of liability under the new rules?

In principle, no. The main rule that a member of the supervisory board will not become exposed to liability as long as he/she properly fulfils his/her duties, will remain unchanged. However, if a member of the supervisory board acts as a person who determines or co-determines the company's policy, the rules on director liability described in chapter 5.3 will apply equally to that member of the supervisory board.

5.5. Will a shareholder be at an increased risk of liability under the new rules?

In principle, a shareholder's liability will remain limited to satisfying the payment obligation in respect of his shares. However, if a company's shareholder receives a consideration in connection with a repurchase or a distribution which is followed by the company's insolvency, and the shareholder knew or should reasonably have foreseen the insolvency, then under the new rules (which mainly codify existing case law) the shareholder will be required to compensate the company for its resulting payments deficit, increased with statutory interest. This liability is capped at an amount equal to the value received by it under the unlawful repurchase or distribution, plus statutory interest.

If, at that time, the directors have already settled their liability as referred to in chapter 5.3 (to the extent that such liability arises), then the shareholder must compensate the directors instead of the company. There is no possibility of exoneration for a shareholder in this respect.

5.6. How to deal with conflicts of interests?

Under the current rules, a company must be represented by its supervisory board (if it has one) if a director has a conflict of interests with the company in the performance of a transaction. The articles of association may provide for other rules (e.g. they may stipulate that the conflicted director is nevertheless authorised to represent the company), but the general meeting will always have the right, and must always be given the opportunity, to appoint a special representative in the case of a conflict of interests. Acts performed by a director on the company's behalf in violation of these rules are considered to be null and void.

Under the new rules, the tenet of conflicts of interests will gravitate towards internal decision-making, rather than limiting a director's powers of external representation. If a director has, directly or indirectly, a personal conflict of interests with the company or its business on a particular matter, he/she will be excluded from the deliberation and decision-making in that respect. If this leads to a situation where the management board cannot adopt a resolution (e.g. as a result of the management board becoming inquorate or if all of its members have a conflict of interests), then the resolution must be adopted by the supervisory board. If the company has not established a supervisory board, the resolution must be adopted by the general meeting, unless the articles of association provide otherwise (e.g. by referring the matter back to the management board, with those having a conflict of interests being allowed to participate in the decision-making). Similar rules apply if a member of the supervisory board has a conflict of interests.

In contrast to the current rules on conflicts of interests, a violation of the new rules in that respect will not lead to an act being null and void. In stead, the resolution will become subject to (internal) nullification through court proceedings. Although a conflict of interests will no longer affect the validity of an act performed following the enactment of the new legislation, a counterparty who knew of the violation of the (new) conflicts of interests rules will be considered to have acted unlawfully and will become exposed to liability for damages as a result of the unlawful act.

The transitional law in relation to conflicts of interests stipulates that the general meeting may, once the new rules have become effective, ratify any act performed by a director in violation of the (current) rules regarding conflicts of interests. As a 'safety net' procedure, the company's general meeting could adopt such a resolution in general terms, ratifying all acts performed at any point in time, thereby securing that acts performed in the past can no longer be affected by a conflict of interests under the current rules.

Provisions in the articles of association which reflect or give effect to the current rules regarding conflicts of interests will be disregarded upon enactment of the new rules.

5.7. May a person be a director or a member of the supervisory board of more than one company?

Yes, but there will be limitations in the case of an appointment to the management board or the supervisory board of what is considered to be a 'large company', i.e. a company which meets at least two of the following criteria on two consecutive balance sheet dates (without interruption):

a. the value of its assets exceeds € 17.5mln, based on the acquisition and creation costs;

b. its net turnover exceeds € 35mln;

c. it has, on average, 250 employees or more.

For the purpose of testing whether a company is a large company, the assets, net turnover and employees of its group companies are also taken into account, to the extent that the company would be required to consolidate their financial information if it were to prepare consolidated annual accounts. This rule, however, will not apply if the company voluntarily applies an exemption from consolidation of a part of its group (*groepsdeel*).

A person may not be appointed as a director (or, in the case of a one tier board, as executive director) of a large company, if he/she is already:

a. a member of the supervisory board, or a non-executive director, of three or more other large companies (including large limited liability companies, known as *N.V.'s*) and/or 'large foundations' (i.e. a foundation which meets similar requirements as a large company, or a foundation required by law to prepare financial reporting equivalent to annual accounts); or

b. the chairman of the supervisory board or a one tier board of one or more other large companies (including *N.V.'s*) or large foundations.

Similarly, a person may not be appointed as a member of the supervisory board (or, in the case of a one tier board, as non-executive director) of a large company, if he/she is already a member of the supervisory board, or a non-executive director, of five or more other large companies and/or large foundations, with chairmanships counting double.

As indicated above, these limitations only apply to companies that qualify as large companies. Also, large companies (including *N.V.*'s) and large foundations that belong to the same group are considered to be one and the same entity for the purpose of the above-mentioned limitations. In other words, a person may be appointed to the management board or the supervisory board of an unlimited number of companies, if those are ordinary (i.e. not large) companies or if they are group companies. Additionally, positions with non-Dutch entities will not count towards the limitations as described above. The same will apply (de facto) to most foundations with cultural, religious or charitable objects, as they will generally not be 'large foundations'.

If a director or a member of the supervisory board already transgresses the limitations described above once the new rules come into effect, no action needs to be taken. The appointments will remain valid and the director or member of the supervisory board will not be required to step down. The limitations will only apply to new appointments and reappointments after the above-mentioned limitations come into force.

The nullity of an appointment as a result of the above-mentioned limitations having been transgressed will not affect the validity of the decision-making in the relevant corporate body. In addition, if the nullity concerns the appointment of a director, the acts performed by him/her on the company's behalf will be valid and binding on the company if the 'director' was registered with the Dutch Trade Registry upon the performance of the act, provided that the third party was unaware that the 'director' was unduly appointed and thus not authorised to represent the company.

Consequently, although null and void appointments may occur once the new rules have become effective, we do not expect that this will lead to major difficulties.

5.8. Will gender equality play a role in the composition of the board of directors and/or supervisory board?

Yes, (temporary) rules will be enacted relating to gender equality. Under these new rules, the management board or the supervisory board of a company that meets the criteria of a 'large company' (see chapter 5.7) will be considered to have a balanced composition if, out of the individuals sitting on the board, at least 30% of them are men and at least 30% of them are women.

In respect of these companies, a balanced board composition must be taken into account and observed, to the extent possible, when:

a. appointing directors or proposing them for appointment;

b. preparing the profile concerning the size and composition of the supervisory board or (in the case of a one tier board) the non-executive directors (such a profile is required if the company applies what is known as the 'structure regime'); or

c. appointing members of the supervisory board or (in the case of a one tier board) non-executive directors, or designating, recommending or proposing them for appointment.

The above rules apply equally to companies that do not meet the criteria of a large company if they act as:

a. a director of a company that does meet these criteria (including *N.V.'s*); or

b. a director of another company (including *N.V.'s*) which in turn acts as director of a company that does meet these criteria (including *N.V.'s*).

The gender equality requirement reflected above is based on the principle of 'comply or explain'. In other words, there will be no sanction for not having a balanced board composition. In stead, the company will need to explain in its annual report:

a. the reasons for not having a balanced board composition;

b. how the company has tried to come to a balanced board composition; and

c. how the company intends to come to a balanced board composition in the future.

The current expectation is for the above rules concerning gender equality to lapse by operation of law on 1 January 2016. This date might shift forward if the One Tier Board Act enters into force after 1 January 2013.

6. Do you need to amend your articles of association?

It is common for a company's articles of association to mirror many of the (current) rules described above. As you will have seen, these will become less stringent or obsolete as a result of the enactment of the new rules. An important question is whether the provisions of the articles of association will remain in full force and effect when they reflect rules that are replaced, amended or removed altogether. It could be argued that these provisions should be treated as voluntary restrictions which, for that reason, must be observed. In order to stifle any possible dispute in this respect, an amendment to the articles of association may be necessary (or at least advisable) to ensure that the company can unequivocally take full advantage of the possibilities and flexibility offered by the new rules. Until the articles of association have been updated, they could remain unnecessarily cumbersome and inflexible.

In connection with the above, it should be noted that, if (i) a company's articles of association are amended on or following 1 October 2012, and (ii) that company has a supervisory board, then the articles of association must provide how the supervisory board's role will be temporarily exercised if one or more of its members is/are absent or prevented from acting (currently, the articles of association only need to contain these provisions in relation to the management board). Similarly, if a company has issued depository receipts with its cooperation (under the current rules), its articles of association must explicitly specify that meeting rights are attached to those depository receipts upon the first amendment to the articles of association on or following 1 October 2012.

NautaDutilh's Flex BV Taskforce includes civil law notaries and candidate-notaries who are well-versed in advising on how to prepare articles of association for the new legislation. This can even be arranged for in advance of the entry into force of the Flex BV Act and the One Tier Board Act. In fact, the Flex BV Taskforce have designed articles of association which comply with the current, as well as the new rules, while not becoming unnecessarily inflexible once the new legislation has been enacted.

For further information in this respect, please feel free to contact any of the members of our Flex BV (see chapter 7 for contact details).

7. Conclusion and contact details

If you require any further information or if you have any questions regarding the matters described above, please do not hesitate to contact any of the members of NautaDutilh's Flex BV Taskforce.

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