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New rules
New choices
New opportunities

Flex BV in group holding structures

New Dutch company law rules

NautaDutilh

To limit potential liability
it would be advisable for the
management board to keep
a careful record of its reasons
for and decisions on distributions

Introduction

New Dutch company law rules on private companies, contained in the Private Company Law (Simplification and Flexibilisation) Act (known for short as the Flex BV Act), will enter into force on 1 October 2012. The One-Tier Board Act, another new piece of legislation with important practical consequences, is expected to enter into force on 1 January 2013.
This brochure outlines a number of practical applications of the new flexible rules to group holding structures, including on the following topics:

- the need for and usefulness of amendments to the articles of association
- the end of the ready-made ('shelf') BV
- changes to capital: simpler procedure and greater responsibility for management board members

Group companies' articles of association: amendment not necessary, but nonetheless desirable?

A frequently asked question is whether the articles of association of BVs (private limited liability companies) need to be amended pursuant to the new legislation. The short answer is: no, that is not necessary. Only if an existing BV has a supervisory board should provision be made – when the articles of association are next amended – to regulate the situation where there are supervisory board vacancies or members are unable to perform their duties. If depositary receipts for shares have been issued with the cooperation of the BV, provision must be made in the articles of association for holders of these depositary receipts to have meeting rights.

In addition to these mandatory changes, it could be worthwhile making other changes to the articles of association, especially for companies within a group structure. One example is the possibility to introduce a power to issue specific instructions to the management board (as further detailed below).

Additionally, many BVs have included provisions in their articles of association that are derived from the existing statutory rules on private companies. Examples are provisions about dividends, financial assistance and share buy-backs. An important question is therefore what will happen to these provisions in the articles when the new statutory rules are introduced. Will they remain in force or can they simply be ignored? The enclosed Annex 'Flex BV Guide to the BVs articles of association' sets out how the Flex BV Act and One-Tier Board Act will affect a number of important common provisions in a BV's articles of association. If certain (old) statutory rules (whether or not in modified form) have also been included in the articles of association, they may from the date of entry into force of the Flex BV Act be treated as a 'choice' and hence become binding on the company. If one wishes to be able to make use of the new, more flexible statutory provisions, the articles of association will have to be amended.

Power to issue specific instructions

Under the new company law rules it will be possible to include a provision in the articles of association of BVs requiring the management board to follow specific instructions of another corporate body of the BV. Within a group structure this is often the general meeting of shareholders. The management board must then comply with these instructions unless they conflict with the BV's interests. At present, there is only a power to issue instructions about general policies.

The inclusion in the articles of association of one or more subsidiaries of a specific power to issue instructions gives the group management an extra legal basis for pursuing a group policy. The general meeting of shareholders may, for example, instruct subsidiaries to conclude or terminate certain contracts, suspend payments, appoint or dismiss personnel, establish or close down departments, and so forth.

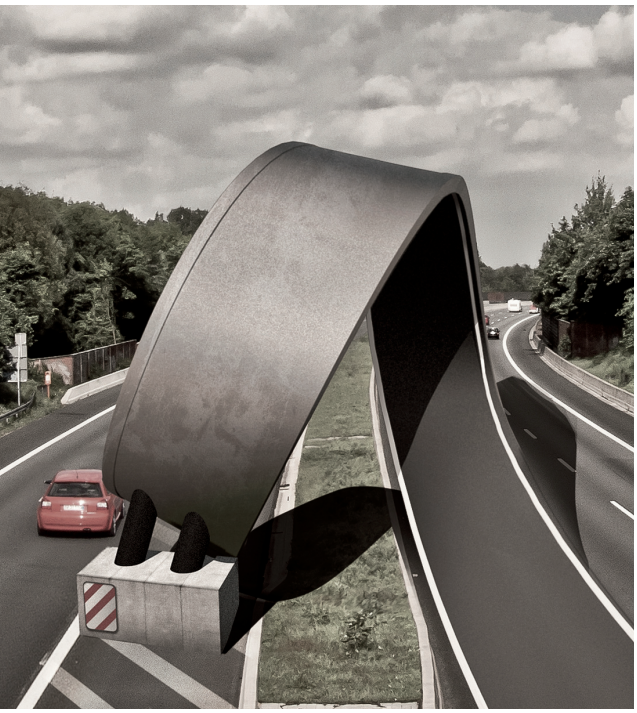
It should be noted, however, that even where the general meeting of shareholders issues a specific instruction the management board must still assess the BV's interests independently. If the management board does not act in the interests of the company (taking into account the broader interests of the group) it will be liable, even if the act was made pursuant to a specific instruction.

It should also be noted that a shareholder who systematically issues instructions to the management board of his subsidiary runs the risk of being treated as the de facto policymaker (i.e. as a de facto member of the management board). The shareholder may then be liable as though he were a management board member.

One-page articles of association

The number of matters that must be included by law in a BV's articles of association will be reduced. This will make it possible to draft even shorter articles of associations ('one pagers') for group companies. These would include a number of basic elements, including the seat and object of the company, the nominal amount of the shares, a provision for cases where one or more management or supervisory directors are absent or unable to act and, if applicable, a statement that holders of depositary receipts for shares have the right to attend shareholder meetings.

Group-wide rules, policy rules and approval arrangements could then be included in group by-laws with which all or some of the group companies must comply. Unlike articles of association, group by-laws would not have to be made public and could be easily amended without the need to amend the articles of association. The downside is that by-laws are not binding on the company. Whereas a resolution that conflicts with the articles of association is void, the same would not automatically be true of a resolution that conflicts with the group by-laws. This drawback could in fact be overcome by including an obligation in the articles of association to comply with the group by-laws.



Conflicts of interest

Under the old law on BVs, a management board member who had a conflict of interest with the company was not authorized to represent the BV. If he nonetheless did so, a transaction with third parties could, in some circumstances, be invalid. The new One-Tier Board Act provides that a conflict of interest only has consequences for internal decision-making. A management or supervisory board member who has a direct or indirect personal interest that conflicts with the interests of the BV in relation to a decision on a transaction, may not take part in the deliberations and decision-making. If he nonetheless does so, the decision will be voidable and he may be held liable towards the BV. The transaction with the third party will however be valid.

Under the new regulation, a management board member who has a conflict of interest may therefore represent the BV even if this is explicitly prohibited by the current articles of association.

In the case of BVs, the new rule can be set aside in case of situations where ALL management and supervisory board members have a conflict of interest with the company and it is therefore impossible to reach a decision. This can be done by including a provision in the articles of association that management board members who have a conflict of interest may in such case nonetheless take part in the decision-making.

Structuring of the group

Incorporation and structuring of BVs
End of ready-made BVs

The incorporation of a new BV will become a lot easier. Since 1 July 2011 it has no longer been necessary to obtain a ministerial certificate of no objection, and once the Flex BV Act enters into force some other requirements will also lapse. In principle, all that will be needed to form a BV is a notarial deed and powers of attorney for the founders.
This means that it will no longer be necessary to resort to expensive ready-made ('shelf') BVs in order to save time and avoid post-formation constraints (so-called 'Nachgründung', also see below).

The incorporation and structuring of BVs will become more flexible in other ways as well. Several requirements will be abolished under the new legislation, including:

- the requirement of minimum share capital;
- capital contribution statement when payment is made in cash;
- auditor's statement when shares are paid for in kind;
- the obligation to include the authorised capital in the articles of association;
- the obligation to denominate share capital in euros;
- Nachgründung: the additional requirements in respect of transactions entered into by a BV with its founders or shareholders within two years of its initial registration in the trade register;
- the financial assistance rules governing the provision of assistance by the BV upon the acquisition of shares.

Capital protection rules to change: simpler procedure, but greater responsibility for management board members

Under the new company law rules it will be easier to change the capital of a BV. Various requirements and restrictions concerning capital reductions will cease to apply. These include:

- the requirement that a resolution to reduce capital should be deposited at the trade register;
- the protection period of two months for creditors;
- the need for a shareholders' resolution in case of a share buy-back (the management board will in future be entitled to buy back shares if the 'distribution test' described below is fulfilled); and
- the restriction that dividends and distributions made from reserves are permitted only if there are sufficient distributable reserves.

The present statutory system of capital protection will be replaced by a system in which management board members and shareholders may be liable if their imputable acts prejudice the rights of creditors of the BV. In essence, this is an implementation of existing case law on the liability of management board members and shareholders in the event of changes in share capital. The statutory responsibilities of management board members and shareholders are reflected, above all, in the new rules on distributions:

- The scope for distributions is broadened: distributions will in future be permitted insofar as the net assets exceed the reserves that have to be maintained by law or under the articles of association (such reserves being generally limited).

- A ‘distribution test’ is introduced: in future, the approval of the management board is required for every distribution resolution of the general meeting of shareholders (profit, reserves, etc.); this approval may be refused only if the management board knows or should reasonably foresee that the BV will be unable to pay its due and payable debts after making the distribution. In making this assessment the management board is, in principle, required to look ahead for a period of one year. It is up to the management board itself to decide on the basis of what documentation it will determine the scope of a distribution and carry out the distribution test.

- If the BV proves to be insolvent after a distribution is made, the management board members or the de facto policymaker (this could also be the shareholder in the case of a group company) will be jointly and severally liable to the BV for the shortfall resulting from the distribution, plus interest at the statutory rate. Again, a condition of liability is that the management board member knew (or should reasonably have foreseen) at the moment of the distribution that the BV would become insolvent. A management board member will not be liable if he proves that he is not to blame for the distribution by the BV and that he was not negligent in failing to take measures to avert the consequences.

- Clawback from the shareholder: the recipient of the distribution (generally the shareholder) who knows or should reasonably have foreseen that the BV would become insolvent as a result of the distribution will also be liable to the BV. If the members of the BV’s management board have already paid for the shortfall, the shareholder will be liable to the management board members. The liability will not exceed the amount of the distribution received, plus interest at the statutory rate.

How can a management board member/shareholder limit his risks?

To limit liability risks it is advisable to keep a careful and explicit record of the resolutions on distributions and of the management board's reasons for them. Generally speaking, the management board member need not – in any event according to the legislator's explanatory memorandum – consult experts such as accountants for the distribution test within a group context if it is evident from the BV's accounts that there are sufficient net assets for a distribution. If the distribution is made on the basis of the most recent annual accounts, allowance will often already have been made for the distribution in the accounts. Moreover, the auditor will only issue an unqualified audit opinion if the continuity of the BV is guaranteed for at least one year.

In view of the extra emphasis on management board liability, management board members will, in cases of doubt (particularly where circumstances or expectations change), wish to provide more convincing proof that the distribution test was fulfilled. Accountants can play a role in this respect by drawing up cash flow and balance sheet forecasts. The authorities are also currently investigating whether it would be possible to develop software enabling management board members to determine relatively simply (by reference to the existing electronic accounts of the BV) how much room there is for distributions.

Approval of annual accounts – where a management board member is also the shareholder, signature constitutes approval

If all shareholders of a BV are also members of its management board, the signature on the annual accounts by all management board members and supervisory board members will in future also constitute approval of the annual accounts (this can be excluded in the articles of association). This approval results in the automatic discharge from liability of the management board members and supervisory board members. A condition of such discharge is that all other persons with meeting rights have been given the opportunity to become familiar with the annual accounts and have consented to this manner of approval.

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