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Bill on management and supervision adopted by Dutch Upper House

On 31 May 2011, the Upper House of the Dutch Parliament adopted the Bill on management and supervision (the "Act"). It is envisaged that the Act will enter into force on 1 January 2012.

Set out below are the most important elements of the Act. For a detailed overview of the contents of the Act, please refer to our client briefing "Bill on management and supervision adopted by the Dutch Lower House (December 2009)".

Key issues

- One-tier board
- New rules on conflicts of interest
- Multiple board memberships
- Relationship between company and director
- Gender diversity

One-tier board

The Act facilitates the creation of a one-tier board in NVs and BVs. The articles of association must provide that the powers of the board are divided between executive directors and non-executive directors. The division of tasks may be further elaborated on in board regulations or board decisions. The chairman of the board must be a non-executive director. The task of supervision on the performance of duties by the board cannot be withdrawn from the non-executive directors. It is generally held that the personal liability of a non-executive director is comparable to that of a member of the management board. Companies with labour (*works council*) co-determination are also allowed to opt for a one-tier board.

New rules on conflicts of interest

The existing rules for NVs and BVs provide that if the company concludes an agreement with a third party where a management board member has a conflict of interest, the agreement is voidable by the company or by its receiver in bankruptcy. The new conflict rules no longer affect agreements between the company and third parties. They provide that if a member of the (management, supervisory or one-tier) board has a conflict of interest with the company, such member has to abstain from participating and voting on the subject concerned. If all management board members are conflicted, the matter is referred to the supervisory board. In case of a one-tier board or if there is no supervisory board (or if all its members are conflicted), the shareholders' meeting adopts the relevant resolution, unless the articles of association state otherwise.

Multiple board memberships

The Act contains a heavily discussed amendment maximising the number of board memberships. A member of the management board of a Large Entity (see below) may not be:

- a member of the supervisory board or a non-executive director in more than two other Large Entities; or
- the chairman of the supervisory board or one-tier board in another Large Entity.

Furthermore, a person may not be a member of the supervisory board or a non-executive director in more than five Large Entities, whereby the position of chairman of a supervisory board or one-tier board counts twice.

A Large Entity is a BV, NV or foundation that meets at least two of the following requirements (in each given financial year):

- the value of the assets according to the balance sheet exceeds € 17.5 million;
- the net turnover exceeds € 35 million; and
- the average number of employees is 250 or more.

Non-compliance with these rules will lead to the latest appointment being invalid. The rules do not apply to:

- intra-group board memberships;
- boards of non-Dutch legal entities;
- advisors to boards; and
- board memberships obtained before the Act takes effect. The Minister of Justice has promised to clarify in a separate bill that these rules do not apply either to foundations with a cultural, charitative or religious aim.

Relationship between company and director

The legal relationship between a management board member and a company listed on a regulated market or a comparable system in a non-member state, will no longer be considered an employment relationship. This new rule does not affect existing employment agreements.

Gender diversity

The Act contains a temporary rule (until 1 January 2016) providing - in short - that at least 30% of the members of a (one-tier or two-tier) board in a Large Entity (see above) should be female and at least 30% male. Non-compliance with this provision must be explained in the company's annual report.

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