

# The Flex BV: an improved legal framework for structured finance transactions

It is expected that, after a long legislative process, on 1 July 2012 a considerable number of amendments will be made to the rules of Dutch company law that apply to a Dutch private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid*; "BV"). The current rules follow many of the EU rules that apply on a mandatory basis to a public limited company (*naamloze vennootschap*). These rules do, however, not apply to BVs and they are therefore currently more strictly regulated than required from an EU law perspective.

The amendments will create a very flexible regime, making a BV an even more attractive vehicle for structured finance transactions. Set out below is a summary of the main changes that may be relevant for the structured finance practice.

## Share capital

**BVs will no longer require an authorised capital (*maatschappelijk kapitaal*) and no minimal capital requirements will apply. It will therefore be possible to incorporate a BV with as little as €1 of capital. The capital can be denominated in foreign currency. Shares do not need to be paid up in full upon issue and the parties are free to make arrangements as to when this is to happen.**

It will be possible to make contributions in kind without the need to obtain an auditor's statement that confirms the value of the contributions. The auditor's statement in connection

with transactions entered into between the BV and its incorporator or shareholder within the first two years of its incorporation will also be abolished.

A BV will be entitled to repurchase its own shares, as long as one share remains outstanding with a third party. It can also reduce its share capital without having to go through the lengthy procedure that currently applies. Also the restrictions on financial assistance will be abolished.

A BV may, however, not repurchase shares if its shareholders' equity minus the acquisition price is less than the reserves which the company must maintain pursuant to the law and

its articles of association. A repurchase is also not permitted if the board knows or should reasonably expect that, following the repurchase, the company can no longer continue to pay its debts. If the company repurchases shares in breach of this rule, the members of the board can be held personally liable for the deficit resulting from the repurchase. The seller of the shares will also be liable if he has or should reasonably have been aware that as a consequence of the repurchase, the BV would no longer be able to pay its debts.

## Shares

A BV may have non-voting shares with dividend right as well as voting shares without dividend rights. Each voting share must have at least one vote, but the articles of association can provide that particular classes of shares can exercise multiple votes.

It is also no longer required to include provisions in the articles of association that restrict the transferability of shares (such as making a transfer subject to shareholders' or the board's approval or providing for a right of first refusal). However, the articles of association can include provisions that restrict the transferability of shares, provided that these restrictions do not result in the transferability becoming impossible or extremely difficult (although it is possible to prohibit the transfer of shares altogether during a certain (reasonable) period of time).

If a shareholder wishes to transfer shares but cannot do so because of applicable transfer restrictions, he must always be able to dispose of his shares for a price that can under the new rules be agreed between the parties (and is therefore no longer required to be equal to fair market value).

## Shareholders' meetings

The articles of association can

provide that shareholders' meetings can be held outside the Netherlands. It is no longer necessary to hold a physical annual general meeting: it can also be done by way of written resolution.

## Distributions

A BV can distribute its capital and profits provided that it does not distribute in excess of the reserves which it must maintain pursuant to the law and its articles of association. A distribution requires the approval of the board. The board should not give such approval if it knows or should be aware that as a consequence of such distribution, the BV can no longer pay its debts. If the board nonetheless gives its approval in these circumstances, its members could be held personally liable for the deficit resulting from the distribution.

## Shareholders' arrangements

The new rules also allow the inclusion in the article of associations of certain arrangements between shareholders, such as tag-along rights and drag-along rights, special requirements in relation to the identity of the shareholder as well as other arrangements between shareholders of a contractual nature. The inclusion of these provisions in the articles of

association have as advantage that a breach may have third party effect and that the BV can, if the shareholder fails to comply, suspend the payment of dividends and the exercise of voting rights by the defaulting shareholder.

## How to benefit from changes

Given that most of the new provisions are of a non-mandatory nature and therefore often only apply if the articles of association expressly provide so, it will usually be necessary to amend the articles of association if any of the above changes are to be implemented in relation to an existing BV. Recently the requirements of a declaration of no objection for the incorporation of a BV or the amendment of its articles of association has been abolished, so that such an amendment can be effected without too many formalities (although a notarial deed is still required).

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