

Dutch Law on management and supervision to enter into force

The Law on management and supervision (*Wet bestuur en toezicht*) was adopted by the Dutch Upper House of Parliament in 2011. Before it could enter into force certain provisions had to be clarified. The bill containing these clarifications was adopted by the Upper House on 25 September 2012. The new rules will most likely enter into force on 1 January 2013. The highlights of these rules are set out below.

One-tier board

The new rules facilitate the creation of a one-tier board in NVs and BVs, including companies subject to labour co-determination rules (*structuurregime*). In order to create a one-tier board, the articles of association must provide that the tasks of the board are divided among one or more non-executive directors and one or more executive directors. A more detailed division of tasks may be provided in the articles of association, the board regulations or a board resolution. The executives may not be allocated the task of (i) chairman of the board, (ii) setting the remuneration of executive directors, (iii) supervising the board's overall performance, or (iv) nominating a director. Executives may be suspended by the board.

Conflicts of interest

Under the existing rules a managing director's conflict of interest may affect the power of managing directors to represent the company and, therefore, the validity of the transaction. The new rules abolish this consequence and focus on the board's internal decision making process, similar to the Dutch corporate governance code. If a member of the management board or the supervisory board has a conflict of interest, he or she has to refrain from the deliberations and decision making on the issue concerned. If all members of the management board have a conflict of interest, the issue has to be resolved by the supervisory board. If there is no supervisory board or if all its members also have a conflict of interest, the issue has to be resolved by the shareholders meeting (unless the articles of association provide otherwise). Non-compliance of this rule leads to the resolution concerned being voidable.

Limitation of board memberships

The number of memberships of two-tier boards and one-tier boards in large NVs, BVs and foundations (hereafter "Large Entity", as defined below) will be limited in the two following ways:

- A person cannot be appointed as managing director or executive director:
 - if he or she is a supervisory director or non-executive director in more than two other Large Entities or
 - if he or she is the chairman of the supervisory board or the one-tier board of another Large Entity.
- A person cannot be appointed as supervisory director or non-executive director:
 - if he or she is a supervisory director or non-executive director in more than four other Large Entities, whereby the position of chairman of the supervisory board or one-tier board counts twice.

These limitations do not apply to advisory positions, or to any positions with non-Dutch entities. Any number of supervisory and/or non-executive directorships within a group are counted as one.

A Large Entity is an NV, BV or foundation which, according to its balance sheet, meets at least two of the following criteria: (i) asset value exceeding €17.5 million according to the balance sheet; (ii) the financial year's net turnover exceeding €35 million; (iii) number of employees in the financial year on average 250 or more.

- The above calculations have to be made on the basis of the consolidated accounts if made up.
- The limitations only apply to foundations which have a statutory obligation to draw up annual accounts, ie most charitable and cultural foundations are excluded.
- The limitations do not apply to appointments made before the rules entered into force. However, existing appointments have to be taken into account when applying the rules to appointments made after the rules have entered into force.

The limitations only apply if and when an NV, BV or foundation is a Large Entity on two subsequent balance sheet dates. For example, if the entity is a Large Entity on 31 December 2018 and again on 31 December 2019, the rules apply from 31 December 2019. Similarly, the limitations are no longer applicable when the entity has not qualified as a Large Entity on two subsequent balance sheet dates.

The Minister of Justice (*Minister van Veiligheid en Justitie*) has indicated that the law, when entered into force, has immediate effect in the sense that it applies immediately to NVs, BVs and foundations which qualified as a Large Entity on two balance sheet dates preceding the date on which the rules entered into force.

If an appointment leads to the maximum permitted number of directorships being exceeded, such appointment is null and void. However, this does not affect the validity of the decisions taken by the board.

Binding nominations

The articles of association of NVs and BVs may provide that managing and supervisory directors are appointed on the basis of a binding nomination. Until now, the binding nomination should consist of two persons. Under the new rules, binding nominations may consist of one person. For BVs, this rule will enter into force on 1 October 2012, as it is part of the law liberalising the rules for BVs. Please refer to our client briefing of 10 July 2012, "Reform private company law (Flex BV) effective from 1 October 2012" and to our Quick reference guide to the most important changes of private company law (Flex BV).

Employment contract

Under the new rules, the legal relationship between a listed NV and its managing or executive director can no longer be qualified as an employment agreement. Employment contracts existing at the moment the new rules come into force, will remain effective. This rule does not apply if the managing or executive director is employed with a foreign subsidiary.

Gender diversity

Management and supervisory boards of NVs and BVs meeting the requirements for Large Entities (see above) ("Large Companies") should consist of at least 30% women and of at least 30% men, to the extent that the board members are natural persons. The same applies to NVs and BVs which conduct the management of a Large Company, or of a company conducting the management of a Large Company. The provisions on gender diversity do not refer to any balance sheet dates or to consolidated accounts, as

is the case with the provision on the limitation of board memberships. This seems to be an omission.

Non-compliance must be explained in the annual report. The rule is temporary and will expire on 1 January 2016.

Status of other bills in the field of corporate law

Law amending inquiry proceeding before Enterprise Court

Status: Adopted by the Upper House.

Entry into force: 1 January 2013.

Contains the following provisions, which apply to cooperatives, mutual insurance societies, NVs, BVs, foundations and associations with full legal capacity which maintain an enterprise for which, under the law, a works council must be instituted:

- If the company which is the subject of the requested inquiry has an issued share capital of €22.5 million or more, the shareholder(s) requesting the inquiry must have at least 1% of the issued share capital or an interest representing a market value of at least €20 million.
- The company will receive the right to request an inquiry into the policy of the shareholders meeting or the conduct of individual shareholders.

Bill on corporate governance

Status: Adopted by Lower House of Parliament in July 2012.

Expected entry into force: Not before 1 January 2013.

Contains the following provisions:

- Additional disclosure requirement to the Netherlands Authority for the Financial Markets (*Stichting Autoriteit Financiële Markten*, "AFM") for shareholdings or voting stakes of 3% or more in NVs that are listed on a regulated market in a Member State.
- Disclosure requirements as to shareholdings include gross short positions expressed in percentage of share capital in NVs that are listed on a regulated market in a Member State.
- Increase of threshold from 1% to 3% of the share capital and abolition of the €50 million market value threshold for proposing items on the agenda of the shareholders meeting of NVs (both listed and non-listed).

- Rules regulating the identification of shareholders by companies listed on Euronext Amsterdam, and the right of shareholders of such companies to request information exchange.

Bill on claw-back of bonuses

Status: To be discussed and voted on in the Lower House.
Expected entry into force: Unknown.

Contains the following provisions, which apply to NVs and certain financial entities:

- Supervisory board may adjust bonuses and severance payments of executives to an appropriate level if payment would be unacceptable according to the standards of reasonableness and fairness.
- Company may claw back bonuses and severance payments if payment was made based on incorrect information concerning achievement of targets or the fulfilment of conditions.
- In takeover situations increase of value of shares or options held by managing directors (in the period of four weeks before the announcement of the bid to four weeks after its completion) to be deducted from director's pay.

Bill on the profession of auditors

Status: Under discussion in the Upper house.
Expected entry into force: Not before 1 January 2013.

Contains, amongst others, the following provisions affecting public interest entities (*organisaties van openbaar belang*, "PIEs"), which include Dutch companies that are listed on a regulated market in a Member State as well as non-listed banks and insurers:

- Mandatory audit firm rotation after eight consecutive financial years with a cooling-off period of two years.
- Prohibition on the audit firm that performs statutory audits for a PIE performing any other activities with such organization in order to safeguard the independence of that audit firm.
- Obligation for PIEs to notify the AFM which audit firm it intends to appoint for the performance of its statutory audits, before it has officially appointed the respective audit firm.
- Statutory audits for PIEs will only be performed under the responsibility of an external auditor, being a Registered Accountant (*Registeraccountant*) and can no longer be performed by administration consultants.

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