

**The Act on management and supervision of NV and BV
companies (*Wet bestuur en toezicht in naamloze en besloten
vennootschappen*)**

Further information

If you would like further information on any aspect of the Act on management and supervision of NV and BV companies (*Wet bestuur en toezicht in naamloze en besloten vennootschappen*) please contact a person mentioned below or the person with whom you usually deal.

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Contents

INTRODUCTION	1
A ONE-TIER BOARD SYSTEM	1
MAXIMUM NUMBER OF POSITIONS FOR BOARD MEMBERS	1
GENDER DIVERSITY	1
CONFLICT OF INTEREST	2
ALLOCATION OF DUTIES AND DIRECTOR'S LIABILITY	2
EMPLOYMENT RELATIONSHIP BETWEEN LISTED NV'S AND MANAGEMENT BOARD MEMBERS	2

INTRODUCTION

On 25 September 2012 the Upper House adopted the legislative Act on management and supervision¹ (the "**Management and Supervision Act**" or the "**Act**"). The Act is expected to enter into force on 1 January 2013. The Act introduces the following six principal changes:

1. a one-tier board structure for public limited companies (*naamloze vennootschappen*; "**NV's**") and private companies with limited liability (*besloten vennootschappen met beperkte aansprakelijkheid*; "**BV's**");
2. maximum number of board positions of board members of "large" NV's, BV's and foundations²;
3. gender diversity for "large" NV's and BV's³ ;
4. new conflict of interest rules of board members of NV's and BV's;
5. new rules on assignment of responsibilities and allocation of liability of board members of Dutch legal entities;
6. no longer Dutch mandatory employment protection for members of management boards of listed NV's.

A ONE-TIER BOARD SYSTEM

The Management and Supervision Act embeds the one-tier board system consisting of executive directors and non-executive directors of NV's and BV's in Dutch law, in addition to the existing two-tier board system. In the two-tier board system the supervisory board members are part of a separate corporate body (*orgaan*), whereas the one-tier board comprises both executive and non-executive members.

The non-executive members will have a supervisory role. The general affairs of the company will be the responsibility of all board members, both executive and non-executive. As part of the management board the non-executive members:

- a) are subject to director's liability similar to executive board members; and

- b) are directly involved in the decision-making process of the board and board resolutions.

MAXIMUM NUMBER OF POSITIONS FOR BOARD MEMBERS

The Management and Supervision Act contains a maximum number of positions that each member of a management or supervisory board of a "large" NV, BV or foundation⁴ (a "**Large Company**") is allowed to hold. A person may not be appointed as a member of a management board in a Large Company if he or she has more than two supervisory positions (as supervisory board member or as non-executive board member) with other Large Companies, or if he or she is a chairman of a supervisory board or a one-tier board of another Large Company. Supervisory board members and non-executive board members are not allowed to hold more than five supervisory or non-executive positions in Large Companies. A chairmanship of a supervisory board or a one-tier board will count as two supervisory board positions.

If the appointment of a person exceeds the allowed number of supervisory positions held by that person, such appointment will be void. However, the fact that such board member participated in the decision-making of a certain resolution does not affect the validity of that resolution. Any position as a board member of any group company of a Large Company does not count when determining the maximum number of supervisory positions. The maximum number of supervisory positions does not apply to appointments which have taken place before the Act becoming effective, but will apply to reappointments of board members. Furthermore, the maximum number of supervisory positions does not apply to foundations having charity, cultural or religious objectives.

GENDER DIVERSITY

The Management and Supervision Act aims to ensure that "large" NV's and BV's⁵ have a balanced allocation of board positions between men and women. At least 30% of the positions on the management and supervisory boards are to be held by women (not exceeding 70% to ensure a balanced composition). If the composition of a company's board is not balanced according to the Act, this does not have any consequences in terms of (i) invalidity of the resolutions passed by such boards or (ii) invalidity of the appointment of members of a company's board. Non-compliance with the gender diversity rule is allowed, but must be explained in the company's annual report.

¹ *Wet van 6 juni 2011 tot wijziging van boek 2 van het Burgerlijk Wetboek in verband met de aanpassing van regels over bestuur en toezicht in naamloze en besloten vennootschappen*. Legislative number 31 763.

² A company shall be considered as "large" if it meets at least two of the following three criteria: (i) the value of the assets according to the balance sheet with explanatory notes, on the basis of the cost of acquisition and production cost, exceeds EUR 17.5 million; (ii) the net turnover exceeds EUR 35 million; and (iii) the average number of employees equals or exceeds 250.

³ See footnote 2.

⁴ See footnote 2.

⁵ See footnote 2.

CONFLICT OF INTEREST

The Management and Supervision Act contains new provisions on conflict of interest of members of the management board and supervisory board. Under the Act a conflict of interest situation will as a rule only have an internal effect: there will no longer be a restriction of the authority of the members of the management board to bind the company vis-à-vis third parties. Any member of the management board or supervisory board having a direct or indirect personal interest conflicting with the interest of the company shall no longer be allowed to participate in the decision-making process (i.e. deliberation and voting) in the event of a direct or indirect personal conflict of interest with the company.

If the decision-making process by the management board is blocked as a result of all board members being conflicted, the supervisory board shall be authorised to make the decision. If the company does not have a supervisory board or if all members of the supervisory board are conflicted too, the resolution will be adopted by the general meeting of shareholders, unless the articles of association provide otherwise. The latter also applies if all members of the supervisory board have a conflict of interest.

Non-compliance with these conflict of interest provisions results in the right for the company to (i) annul the resolution concerned, and/or (ii) claim compensation of damages from the conflicted board member. However, a defect in the decision-making does not affect the authority of the members of the management board to bind the company vis-à-vis third parties. A resolution adopted by one or more conflicted board members may be ratified through a board resolution. For such resolution the same rules shall apply as those applicable to the resolution to be ratified (i.e. that the conflicted directors may not participate in the decision-making process of the ratification resolution).

ALLOCATION OF DUTIES AND DIRECTOR'S LIABILITY

Pursuant to the Management and Supervision Act an allocation of duties of board members may be made in the articles of association (*statuten*) or the by-laws of the management board (*bestuursreglement*). This provision applies to all Dutch law incorporated legal entities. Notwithstanding any allocation of duties, each management board member will remain responsible for the performance and decisions made by the management board (so-called principle of collective responsibility).

As a consequence of the principle of collective responsibility, all management board members of the legal entity are liable towards the legal entity for damages as a result of improper management. An individual board member may successfully

reject liability for improper management if (i) taking into account the responsibility allocation, he or she cannot be seriously blamed and (ii) he or she was not negligent in taking measures to avoid the results of the improper management. In view of the foregoing, management board members must monitor the general management performed by the other members periodically (by making enquiries) and take measures in case of any improper management.

EMPLOYMENT RELATIONSHIP BETWEEN LISTED NV'S AND MANAGEMENT BOARD MEMBERS

The Management and Supervision Act provides that a management board member no longer has an employment relationship (*arbeidsovereenkomst*) with a listed NV, but instead an agreement for services (*overeenkomst van opdracht*). The NV may terminate the agreement for services without having to regard mandatory employee protection rules.

The tax position of the management board members of listed NV's will remain unchanged, as the relationship will be regarded as a notional employment agreement for Dutch income tax purposes. The service agreement will be considered an employment agreement from a social security perspective if the management board member performs his services, as a rule, at least two day equivalents per week.

The new rules only apply to any new arrangement between the listed NV and its management or executive board members. Any employment agreements already existing at the effective date of the Act will remain unaffected.

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