

**The Act on simpler and more flexible rules for BV companies
(*Wet vereenvoudiging en flexibilisering bv-recht*)**

Further information

If you would like further information on any aspect of the Act on simpler and more flexible rules for BV companies (*Wet vereenvoudiging en flexibilisering bv-recht*) please contact a person mentioned below or the person with whom you usually deal.

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INTRODUCTION

On 12 June 2012 the Upper House adopted the legislative Act introducing simpler and more flexible rules for Dutch private companies with limited liability¹ (the "Act"). The Act will become effective on 1 October 2012. Given the desire for more flexibility in structuring businesses, joint ventures and corporate groups, the Act introduces simpler and more flexible rules for Dutch private companies with limited liability (*besloten vennootschappen met beperkte aansprakelijkheid*) ("BV's"). The main changes under the Act are set out below.

CAPITAL AND CAPITAL PROTECTION

Minimum Capital

The current minimum issued share capital of EUR 18,000 will be abolished under the Act. A BV should have an issued share capital of at least EUR 0.01.

The requirement that at least 25% of the issued nominal share capital must be paid up will be cancelled. The payment obligation can be partially or fully postponed for a definite or indefinite period.

Authorised share capital

Articles of association of a BV may, but no longer need to, provide for a maximum nominal share capital to be issued (the so-called authorised share capital). If the articles of association provide for an authorised share capital, it is no longer required that at least 20% of the authorised share capital must be issued.

Nominal value

Under the Act the nominal value of shares may be denominated in a currency other than Euro.

Payment in cash, bank statement

A bank statement confirming payment in cash on shares at the incorporation of a BV will no longer be required. The bank statement concerning payments on shares in a foreign currency after incorporation of the BV will also be abolished.

Contribution in kind

If shares will be paid up by way of contribution in kind, the management board of the BV must prepare a description of the contribution. The Act maintains this requirement, both for contributions at incorporation and after incorporation. The requirement of an auditor's statement confirming the value of the contribution in kind will be abolished.

Nachgründung

The provision in the Dutch Civil Code regarding *nachgründung*, containing requirements for transactions entered into between a BV and an incorporator or shareholder within two years of the BV's initial registration with the trade register, will be deleted. The management board should assess whether the BV should enter into such transaction and the conditions thereof.

Financial assistance

The restrictions and prohibitions regarding a BV offering security or providing loans for the acquisition of shares in its share capital will be cancelled. Instead the general rule that the BV must have corporate benefit in entering into the relevant transaction must also be applied to transactions which have an element of financial assistance. This means that the management board must assess whether the entering into such transaction is in the interest of the BV.

Repurchase of shares

The Act abolishes certain restrictions in respect of repurchase of shares, such as (i) the requirement that a repurchase of shares is only possible if no more than six months have lapsed after the end of a financial year without annual accounts having been adopted and (ii) the requirement that maximum 50% of the issued share capital may be repurchased. After the repurchase at least one share with voting rights must be held by a party other than the BV or its subsidiaries.

Shares may only be repurchased if the acquisition price can be paid from the freely distributable reserves of the BV. Furthermore, the management board must assess whether the BV will be able to continue paying its payable debts after the repurchase has taken place. Management board members are jointly and severally liable for a deficit resulting from the repurchase if they knew or should reasonably have foreseen that the BV would not be able to continue paying its payable debts after the repurchase.

Capital reduction

The creditor objection procedure in respect of a reduction of the nominal share capital will be abolished. The provisions regarding distributions (distribution test by the management board and liability risk of management board members in case the company shall become insolvent after the capital reduction) will apply *mutatis mutandis* to capital reductions.

¹ *Wet van 12 juni 2012 tot wijziging van Boek 2 van het Burgerlijk Wetboek in verband met de aanpassing van de regeling voor besloten vennootschappen met beperkte aansprakelijkheid (Wet vereenvoudiging en flexibilisering bv-recht)*. Legislative numbers 31 058 and 32 426.

DISTRIBUTIONS

Under the Act each resolution to distribute profits, requires the approval of the managing board to have effect. The managing board should assess whether the company will be able to continue to pay its due and payable debts after the distribution. If the managing board knows or should reasonably foresee that the company will not be able to continue to pay these debts, it should refuse its approval. If the managing directors approve the distribution anyway, they are jointly and severally liable towards the BV for the deficit resulting from the distribution.

A shareholder receiving a distribution must compensate the deficit resulting from such distribution up to the amount of the distribution plus interest, if he knew or reasonably could have foreseen that the BV could not continue paying its due and payable debts after the distribution.

Articles of association of a BV may provide for shares without or with limited rights to share in the profits.

VOTING RIGHTS AND DECISION MAKING

Voting rights

Under the Act articles of association of a BV may provide for shares without voting rights. Shares without voting rights may not be excluded from the right to share in the profits. Holders of shares without voting rights have the right to attend shareholders' meetings.

The articles of association may deviate from the general rule that the number of votes attached to shares is proportional to the nominal value of the shares.

Shareholders' meetings

The Act makes it possible that one or more shareholders representing at least 1% of the issued capital may require the management board and supervisory board to convene a shareholders' meeting without court intervention. Upon such request the meeting must be held within four weeks, unless the relevant board, acting reasonably, means there is a compelling reason for not holding the meeting.

The period for convening a general meeting is reduced to 8 days.

The following persons are entitled to attend the meetings: (i) shareholders, (ii) holders of a right of pledge or usufruct having voting rights, (iii) holders of a right of pledge or usufruct not having voting rights if so determined in the articles of association and (iv) holders of depositary receipts if so determined in the articles of association.

The Act confirms the possibility that the meetings are held outside the Netherlands.

Decision making

The general meeting of shareholders may adopt resolutions in writing or through electronic means of communication (i.e. without holding a physical meeting), provided all persons entitled to attend the shareholders meeting have agreed with such manner of adopting the resolution. Unanimity is no longer required for resolutions adopted without holding a meeting.

APPOINTMENT AND DISMISSAL OF BOARD MEMBERS, INSTRUCTIONS

Appointment and dismissal

The articles of association may provide that a meeting of holders of a specific class of shares is authorised to appoint and dismiss its own management board members. The same applies to appointment and dismissal of supervisory board members.

The requirement that a binding nomination for the appointment of a board member must include at least two persons per vacancy is abolished; a nomination of one person only will be valid.

Instructions

Under the Act the articles of association may provide that a corporate body of a BV is authorised to give specific binding instructions to the management board. The management board must observe such instructions, unless the board, acting reasonably, means that would not be in the interest of the BV.

TRANSFER OF SHARES

The obligation to include share transfer restrictions in the articles of association of a BV is abolished. BVs have the following options in respect of share transfer restrictions:

- a) a right of first refusal of the other shareholders;
- b) no share transfer restrictions. In this case the articles of association need to provide that shares may be transferred freely;
- c) tailor-made share transfer restrictions, for instance requiring the approval of a body of the BV for any transfer of shares.

Furthermore, it is possible to include a lock-up period for the transfer of shares in the articles of association.

OBLIGATIONS OF SHAREHOLDERS

The Act provides for more flexibility to impose contractual obligations on shareholders in the articles of association, such as an obligation to provide a loan to the BV or the obligation to supply certain products to the BV. Contractual obligations may not be imposed on a shareholder by way of a resolution without the relevant shareholder having agreed thereto. However, new shareholders will be bound by the obligations already laid down in the articles of association at the time they become a shareholder.

DEPOSITARY RECEIPTS

The Act no longer contains the distinction between depositary receipts issued with or without the co-operation of the company. Instead, the articles of association provide whether depositary receipt holders have the right to attend shareholders' meetings. The shareholders register must include the details of the holders of depositary receipts having meeting rights.

DISPUTE SETTLEMENT

The company and its shareholders are offered more flexibility by introducing the possibility to deviate from the statutory dispute settlement rules in the articles of association or in an agreement, for instance by opting for having the dispute settled by arbitration or by the Enterprise Chamber of the Amsterdam Court of Appeal. The chosen dispute settlement mechanism may not make the transfer of shares impossible or excessively difficult.

TRANSITORY LAW

In general, the new provisions under the Act will apply immediately as from the date the Act enters into force. The Act does not require amendments of articles of association of existing BV's in order to comply with the new rules. However, to make use of the new flexible rules, amendment of the articles of association may be necessary.

We shall be pleased to review any current articles of association in the context of the new rules.

TAX CONSEQUENCES

Although the Act does not include direct changes to Dutch tax laws, it does have a number of consequences for Dutch tax purposes (these consequences mostly relate to the introduction of shares without voting rights and shares without profit rights). Below, we will briefly address the most important tax consequences for foreign investors investing in the Netherlands

Fiscal unity

Under current Dutch tax law, a parent company and subsidiary can form a fiscal unity for Dutch corporate income tax ("**CIT Fiscal Unity**") purposes if the parent company holds the legal and beneficial ownership of at least 95% of the shares in the nominal paid in capital of the subsidiary.

As a result of the introduction of shares without voting rights in order to be able to form a CIT Fiscal Unity as per 1 October 2012 the shares held by the parent company must also entitle the parent company to at least 95% of the voting rights in the subsidiary. This means that forming (and continuing) a CIT Fiscal Unity will require some further attention. In parliamentary discussions the State Secretary for Finance has already announced that the Fiscal Unity Decree (*Besluit fiscale eenheid 2003*) will be amended to that effect.

Substantial interest

A foreign investor that holds a so-called 'substantial interest' in a BV may become taxable with Dutch corporate income tax (at the standard rate of 25%). Generally, a substantial interest in a BV exists where a foreign investor holds at least 5% of the issued share capital. A substantial interest in a BV can also exist if a foreign investor holds at least 5% of a certain class of shares.

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