



Legislative Proposal aimed at simplifying and extending the flexibility of Dutch BV law

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Introduction

On 15 December 2009, the Dutch House of Representatives adopted a legislative proposal aimed at simplifying and extending the flexibility of Dutch BV law (hereinafter: the Legislative Proposal). Subsequently, on 4 October 2011, the Dutch House of Representatives adopted a legislative proposal for the implementation of the act aimed at simplifying and extending the flexibility of Dutch BV law (hereinafter: the Implementation Act). Both legislative proposals were adopted by the Dutch Senate on 12 June 2012. The legislative proposals will enter into force on 1 October 2012.

The Legislative Proposal aims at simplifying and extending the flexibility of the rules applicable to BV's. The Legislative Proposal offers greater freedom for structuring and a simpler system of protection of creditors. The Implementation Act contains, among other things, the transitional law.

The most significant changes resulting from the Legislative Proposal and the Implementation Act are set out below.

Abolition of minimum share capital

The mandatory minimum share capital of EUR 18,000 will be abolished. At least one share with voting rights is to be held by a person other than the BV itself. Soon, a BV may therefore be incorporated with, for example, only one issued share of EUR 0.01. Such a share will not even need to be paid up immediately.

In connection with the abolition of the mandatory minimum share capital, the legal joint and several liability of the managing directors for legal acts in the name of the BV performed during the period before at least the minimum share capital prescribed by law has been paid will also be abolished.

Authorised capital no longer required

The authorised share capital will no longer be required by law. The requirement that at least one fifth of the authorised share capital is issued and outstanding will also be abolished. However, one could still choose to include an authorised share capital in the articles of association. In that case, one is free to determine the amount thereof and there will be no requirement that at least one fifth of the authorised share capital shall be issued and outstanding.

Other denomination of share capital

The amount of the authorised share capital, the issued share capital and the paid-up part of the issued share capital, as well as the nominal value of the shares, may soon be denominated in another currency than the euro. Especially in international situations, one could have a need for this rule. One is free in choosing a currency; there is no need for a link with the activities of the BV or with the corporate group to which the BV belongs.

Postponement of the obligation to pay

According to the Legislative Proposal, it may be stipulated that the full nominal value of the shares or a part thereof may remain unpaid until after expiry of a certain period of time or until it is called by the BV. Under the present law, such stipulation is only allowed in respect of a part, not exceeding three fourths, of the obligation to pay, on the understanding that in any event the mandatory minimum share capital of EUR 18,000 will have to be paid. In this respect, the Legislative Proposal means a widening of legislation.

Abolition of bank statement and auditors certificate

The requirement for a bank statement in case of a payment on shares in cash upon incorporation of a BV will be abolished. The requirement for an auditors certificate in case of a contribution in kind upon incorporation will also be abolished. The same applies to the auditors certificate in case of a contribution in kind on shares issued after incorporation of a BV. The changes proposed will result in the responsibility for the reality of the capital contribution resting



with the management board.

The requirement for a description of the assets to be contributed in case of a contribution in kind shall remain in force. This applies to the contribution upon incorporation as well as to the contribution on shares issued after incorporation. Soon the description may, however, refer to a date which lies ultimately six months prior to the incorporation or the issue. At present this is five months. The external publication of the description by means of the deposit at the offices of the trade register, will no longer be required.

As the requirement of a declaration of no objection for the incorporation of a BV has already lapsed as per 1 July 2011 and involvement of a bank or auditor will no longer be required, soon the incorporation will be able to take place in only one day.

Abolition of the nachgründung regulation

The so-called nachgründung regulation will be abolished in its entirety. This regulation provides for certain formalities in respect of transactions which the BV concludes with its incorporators or shareholders within the first two years after incorporation and requires, among other things, an auditors certificate and a description. The nachgründung regulation often forms an obstacle for the structuring of acquisitions. The abolition of this regulation therefore means the elimination of an important impediment.

Abolition of prohibition on financial assistance

Pursuant to the Legislative Proposal entering into force the prohibition on financial assistance will also be abolished in its entirety. This prohibition currently restricts the possibility for a BV to grant a loan or to provide security for the benefit of a third party in a view of the acquisition by such third party of shares in the BV's share capital or depository receipts for such shares. This prohibition often forms an obstacle in respect of acquisitions and results in complicated constructions being implemented in order to avoid its application. The abolition of this prohibition eliminates an important obstacle in respect of acquisitions.

Imposing obligations on shareholders


The possibility to impose obligations on shareholders in the articles of association will be extended. This mainly concerns obligations of a contractual nature in relation to the BV or third parties or among the shareholders. Certain obligations which at present are usually arranged for in a shareholders agreement, may in future be included in the articles of association. For instance, the articles of association could impose obligations on shareholders for the purchase of goods or services from the BV.

Abolition of mandatory share transfer restrictions

The mandatory share transfer restrictions will be abolished. The articles of association may even determine that no restrictions on the transfer of shares will apply. Within certain boundaries, one is free to include specifically designed share transfer restrictions. Therefore, one could include regulations for determination of the price in the articles of association. It is also possible to exclude the transfer of shares during a certain period of time. If the articles of association do not include share transfer restrictions, by law share transfer restrictions will apply pursuant to which shares can only be disposed of if they have first been offered to the co-shareholders.

Adoption of annual accounts

According to the Legislative Proposal, if the shareholders are also managing directors, the execution of the annual accounts by all managing directors and supervisory directors shall be deemed to constitute the adoption of the annual accounts by the general meeting. For this, it will be required that all persons with the right to attend meetings, in as far as there are any, have had the opportunity to review the draft annual accounts and have agreed with this manner



of adopting the annual accounts. The adoption of the annual accounts shall be deemed to grant the managing directors and the supervisory directors a discharge.

Depository receipts for shares

Soon, the articles of association are to determine whether or not meeting rights are or can be attached to depository receipts for shares. The transfer of depository receipts for shares to which meeting rights are attached is to be acknowledged by or served upon the BV. The new rules will end the discussions in respect of the question of whether or not depository receipts for shares have been issued with the cooperation of the BV. At present, this is relevant when determining whether or not meeting rights are attached to depository receipts for shares.

Introduction of distribution test

For all forms of distributions on shares a so-called distribution test will be introduced. This involves distributions upon capital reduction, acquisitions of own shares and distributions of profits or at the expense of reserves. The distribution test is to be performed by the management board. It must determine whether the BV as a result of the distribution will be able to continue paying its payable debts. Depending on the specific circumstances, the liquidity, the solvency and the profitability must be taken into consideration when making the decision. In general, one will need to make a forecast for one year following the distribution.

A resolution of the general meeting to make a distribution shall have no effect until the management board has granted its approval. The management board may only refuse to grant its approval if it is aware or reasonably expects that the BV will not be able to continue paying its payable debts.

The managing directors risk personal liability if approval is granted in a rash manner. If the BV goes bankrupt, the recipient of the distribution will be required to repay the distribution if he received the distribution in bad faith.

The new rules partly form a codification of case law and impose an important responsibility on the managing directors, also in corporate groups.

Balance sheet test

The new act will introduce a limited balance sheet test. Distribution of profits or at the expense of reserves shall only be allowed if and to the extent that the equity of the BV exceeds the aggregate amount of the reserves which must be maintained pursuant to the law and the articles of association. If the BV does not have any reserves that must be maintained pursuant to the law or the articles of association, the balance sheet test will not be applicable. Soon, the issued share capital will no longer be relevant when determining whether distributions are allowed.

The Legislative Proposal does not require an interim statement of assets and liabilities, but if the last financial statement is not of a recent date, in many cases it will be advisable to draw up such an interim statement of assets and liabilities.

Lapse of restrictions on acquisition by the BV of shares in its own share capital

The restrictions on the acquisition by the BV of shares in its own share capital will lapse. This also involves the lapse of the restriction that the BV may only acquire shares in its own share capital up to half of its issued share capital. Furthermore, the legal requirements that the articles of association must permit the acquisition and that the general meeting or another body of the BV has granted authorisation for the acquisition, will lapse. The present simplified balance sheet test will also lapse. This test is replaced by a distribution test together with liability penalties for managing directors and a repayment obligation for shareholders who acted in bad faith.

Capital reduction

The possibilities for capital reduction shall be extended. Creditors can no longer oppose a capital reduction. Instead, the distribution test will be introduced together with liability penalties for managing directors and a repayment obligation for shareholders who acted in bad faith.

Shares without voting rights

Pursuant to the Legislative Proposal, the articles of association may rule that shares of a certain class or specification do not share in the profits. Therefore, one could create shares to which only voting rights are attached, e.g. priority shares.

There should always be either profit rights or voting rights or both attached to a share: under the Legislative Proposal it is not possible to create a share without profit rights and without voting rights.

Voting rights attached to shares

Also in respect of voting rights, the Legislative Proposal offers considerable flexibility: the articles of association may determine that on certain shares multiple votes may be cast. The articles of association may also determine that no voting rights are attached to certain shares. This regulation may serve a purpose in respect of business successions and employee participation schemes.

Appointment and dismissal of managing directors and supervisory directors by holders of shares of a particular class

Pursuant to the Legislative Proposal, the articles of association may include regulations to the effect that certain managing directors or supervisory directors are appointed, suspended and dismissed by the meeting of holders of shares of a particular class or specification. It is, however, required that each shareholder with voting rights is entitled to participate in the appointment of at least one managing director and, in case the BV has a supervisory board, one supervisory director. This rule may be important principally in joint venture structures.

Regulation in respect of instruction rights tightened

The regulation providing that the articles of association may determine that the management board must observe instructions of another body of the BV will be tightened. Other than under the present law, such instruction rights are not limited to general instructions. Under the Legislative Proposal, the instructions rights may also concern specific instructions. The management board must observe the specific instructions, unless they conflict with the interests of the BV and the business enterprise affiliated with it.

Adoption of resolutions without holding a meeting

The regulations on the adoption of resolutions without holding a meeting are eased. The requirement that adoption of resolutions without holding a meeting can only take place by unanimous vote will be deleted. Furthermore, resolutions without holding a meeting can also be adopted if there are other persons than shareholders who have the right to attend meetings, such as holders of a right of usufruct or pledge to whom the voting rights or meeting rights accrue and holders of depositary receipts to whom meeting rights accrue, provided that all persons entitled to meeting rights agree with this manner of adopting resolutions. Unless the articles of association determine otherwise, granting approval to the adoption of resolutions without holding a meeting as well as adoption of resolutions itself can take place by e-mail.

Notice period for general meetings reduced

The Legislative Proposal reduces the notice period for general meetings from at least fifteen days to at least eight days.

Adoption of resolutions outside the Netherlands

Under the Legislative Proposal, general meetings may be held outside the Netherlands. The place of the general meetings must be mentioned in the articles of association.

Transitional law

The transitional law is included in the Implementation Act. As a general rule, after implementation, the Legislative Proposal will have immediate effect. The Implementation Act contains, among other things, a limited number of specific transitional provisions. These are dealt with below.

Within one year after implementation of the Legislative Proposal, the shareholders' register will be required to mention whether or not meeting rights accrue to the holders of depositary receipts for shares. If there are holders of depositary receipts for shares which have been issued with the cooperation of the BV, upon the first amendment of the articles of association after the implementation of the Legislative Proposal, the holders of such depositary receipts for shares shall be granted meeting rights.

The new eight days notice period will apply to all general meetings that are held after implementation of the Legislative Proposal. However, in most cases the articles of association will have to be amended prior to the notice of a meeting as they usually indicate a notice period of fifteen days.

Companies that have a supervisory board shall, upon the first amendment of their articles of association after implementation of the Legislative Proposal, be required to include a regulation in the articles of association for situations where supervisory directors are absent or unable to act.

In addition to the specific transitional provisions, pursuant to the Implementation Act a number of general transitional provisions of the Transitional act for the New Dutch Civil Code will apply by analogy. A few consequences of such provisions are set out below.

Legal acts that have been performed contrary to the nachgründung regulation, will after implementation of the Legislative Proposal no longer be subject to annulment.


Legal acts that have been performed contrary to the prohibition on financial assistance, will after implementation of the Legislative Proposal be inviolable.

The present law shall remain applicable in respect of a transfer of shares that is effected after the implementation of the Legislative Proposal if the shares were offered prior to the implementation.

A BV which as a result of a distribution that has been made under the present law can no longer fulfil its obligations after implementation of the Legislative Proposal, shall not be subject to the new regulation. The moment at which the distribution was made will be decisive.

The present law shall remain applicable in respect of a resolution to reduce the issued share capital if the resolution has been adopted prior to the implementation.

Although the transitional legislation aims for a seamless transition, after the implementation of the Legislative Proposal misunderstandings may easily arise. For example, uncertainty may arise as regards the consequences of



provisions in the articles of association which have been copied from statutory provisions which will lapse after the implementation of the Legislative Proposal. Uncertainty may also arise where the articles of association refer to such statutory provisions.

Conclusion

The implementation of the Legislative Proposal shall have significant consequences for existing BV's. The articles of association of these BV's will have to be reviewed to determine whether they are still appropriate.

In this respect, the legislative proposal on management and supervision on management is also relevant. That legislative proposal contains, among other things, new rules for NV's and BV's with regard to situations where a managing director or a supervisory director has an interest that conflicts with the interest of the company and also gives reason for reviewing existing articles of association.

Therefore, it is important to seek timely advice from a Dutch civil law notary.

Further information

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