

Legal Alert

Bill on management and supervision: limitation of managing/supervisory director positions. Managing director of a listed company no longer an employee.

17 December 2009

Introduction

1. The Second Chamber of the Dutch Parliament approved a bill on Management and Supervision on 8 December 2009. The bill provides, among other things, a legal basis for the one-tier board for Dutch companies and introduces new rules in respect of conflict of interest. The bill also includes provisions which result from two amendments to the bill. These provisions are the main focus of this Legal Alert and could have significant impact on practice if these provisions in their present form remain unchanged. One amendment concerns the maximum number of supervisory positions a person may hold, which amendment was adjusted by the Second Chamber of the Dutch Parliament on 15 December 2009 (the “**Irrgang Amendment**”). The other amendment includes that managing directors of specific listed companies may no longer have employment agreements with the company (the “**Weekers and Van Vroonhoven-Kok Amendment**”).
2. The First Chamber has not yet considered the bill. The bill is not expected to enter into force before 1 July 2010.

Limitation of the number of supervisory positions (Irrgang Amendment)

3. The Irrgang Amendment aims, according to the explanation, to safeguard the quality of management and supervision of a legal entity, to prevent conflicts of interest and to contribute to breaking through the “old boys’ network”. This aim is to be achieved by putting limitations on the number of positions that a person may hold.
4. The rules concern the NV, BV and Foundation which meet at least two of the following criteria (a “**Large Company**”):
 - a. the value of the assets according to the balance sheet with explanation is, on the basis of purchase and production price, more than EUR 17.5 mln;
 - b. the net turnover is more than EUR 3.5 mln;
 - c. the average number of employees is 250 or more.

Other Dutch legal entities, such as the association and cooperation, will not be affected. Foreign legal entities and their supervisory positions will also not be affected.

5. A person may not be managing director of a Large Company if he holds more than two

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supervisory positions with a Large Company or if he acts as chairman of the supervisory board, or, in case of a one-tier board, the managing board of a Large Company.

6. A person may not hold a supervisory position with a Large Company if he holds five or more supervisory positions with Large Companies.
7. Acting as chairman in a supervisory position will count twice, since the position includes two supervisory positions.
8. Having a supervisory position in a group company of a legal entity will not be counted when addressing the question of whether someone may be appointed as managing or supervisory director of that legal entity.
9. A transitional regime will be provided for. A person may continue in his position who, at the time of the act entering into force, holds more positions than is allowed. The new rule will apply, however, to re-appointment or new appointments.

Questions and answers concerning the Irrgang Amendment

Q: How many supervisory positions may I hold after the implementation of the new rules?

A: The maximum is 5 for a supervisory director and 2 for a managing director. Two elements are important when determining the maximum. First and foremost, the limitation applies only to an NV, BV or Foundation that qualifies as a Large Company. In addition, this maximum is in effect when it concerns supervisory positions with an NV, BV or Foundation that qualifies as a Large Company. Supervisory positions with other Dutch or foreign legal entities will not be counted. A person who holds 5 supervisory positions as described above may not hold a supervisory position with an NV, BV, or Foundation that qualifies as a Large Company.

Q: What is meant by a supervisory position?

A: A relevant supervisory position is being a supervisory director in a two-tier system or being a non-executive director in a one-tier system with an NV, BV or Foundation that qualifies as a Large Company. As a result, this is equal to the position in a supervisory body as established by the articles of association of a legal entity.

Q: I am a supervisory director of a foreign legal entity. Will this be counted?

A: No, only supervisory positions with an NV, BV, and Foundation are relevant.

Q: I am a supervisory director of 3 Large Companies and also a managing director of a Large Company. My re-appointment as managing director is coming up. Will the rules have an impact on this?

A: Yes, although the bill provides for a transitional regime with no retroactive effect on existing situations, in the event of (re-)appointments the new rules apply.

Q: I am a supervisory director of 2 Large Companies and have been invited to become a member of the managing board of a foundation administration office (*Stichting Administratiekantoor*). May I accept this invitation?

A: Assuming that the foundation does not qualify as a Large Company, you may be appointed to the managing board of the foundation.

Q: I hold 5 supervisory positions with Large Companies, one of them as a chairman. I would like to accept a new supervisory position while giving up 1 current one. Is that possible?

A: No, pursuant to being a chairman your total adds up to 6. Unless you give up the position as a chairman, you will have to give up 2 positions.

Q: I am chairman of the supervisory board of a Large Company. I would like to accept the position of managing director of a Large Company. Is that possible?

A: No, a managing director of a Large Company may not hold the position of chairman of the supervisory board of a Large Company.

Q: Following entry into force of the bill I intend to accept the position of managing director of a Large Company as well as 3 supervisory positions. The supervisory positions relate to 2 NV's that qualify as Large Companies and 1 BV that does not qualify as a Large Company. After 6 months also the BV qualifies as a Large Company. Does this affect my position as managing director?

A: Although the bill does not provide for a clear answer, we assume that the position of managing director is terminated by operation of law. The bill does not refer to the time of appointment but provides that a managing director of a Large

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Company can not hold supervisory positions with more than 2 Large Companies.

Q: What is the relevant date to determine whether a company qualifies as a Large Company?

A: The bill does not provide a clear answer, but it can be assumed that the Relevant Criteria should be calculated on the basis of the situation as per the end of the most recent financial year of the legal entity concerned.

Q: Should the Relevant Criteria be calculated on a stand alone basis of the legal entity concerned, or on a consolidated basis?

A: The bill refers specifically to section 2:397 subsection 1 Dutch Civil Code and not to subsection 2, which provides that it should be viewed on a consolidated basis. It should be assumed that consolidated basis will be the point of departure.

Q: My management BV is a managing director of a number of Large Companies and I personally am also a supervisory director for 4 companies qualifying as Large Companies. The re-appointment of the management BV is on the agenda at one of the companies. Do the rules have an impact on me?

A: No, the legal rules apply, at this time, solely to natural persons.

Q: Does an advisory body established by the articles of association qualify as a supervisory body that is equal to a supervisory board?

A: The bill is not clear about this and the explanation lacks any mention of this. It should be assumed that to the extent a body has approval or veto rights in respect of management decisions, it will have equality of status.

Q: I am a supervisory director at 4 group companies qualifying as Large Companies. I intend to accept the position of managing director of an NV that qualifies as a Large Company. Is that possible?

A: No, the supervisory positions count as 4 positions. Only supervisory positions with companies that are part of the group of the NV itself will be disregarded.

No employment agreement (Weekers and Van Vroonhoven-Kok Amendment)

10. A double legal relationship usually exists under current law between the director and the (listed) company; a company law relationship and an employment agreement with the (listed) company. According to the bill, the legal relationship between a director and the listed company will no longer be considered as an employment agreement.

11. This applies only to new situations, existing employment agreements are grandfathered.

12. The current, double legal relationship has, according to the explanation, an important disadvantage in that the norm, as included in the Tabaksblat Code, that a director of a listed company at the time he steps down, may not receive compensation higher than one year's salary, may be at odds with the existence of an employment agreement. The employment agreement sometimes commits to a higher compensation. In addition, the director, if dismissed, may request higher compensation before a court, on the basis of apparently unreasonable dismissal or the Cantonal Court formula.

Questions and answers concerning the Weekers and Van Vroonhoven-Kok Amendment

Q: Imagine a director no longer has an employment agreement with the listed company. Does this mean that only a company law relationship exists?

A: No, an agreement will also need to be concluded under the new act. What the nature of this agreement will be does not yet follow from the amendment or the explanation. There are various scenarios imaginable, one of which is an agreement "sui generis", or an agreement of assignment.

Q: What does the bill state concerning protection against dismissal of a director?

A: The bill does not address this issue, but a continuing performance agreement can, in principle, be terminated simply, with observance of a reasonable notice period. A previous legal test is not required.

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Q: Under the new act, is concluding an employment agreement with another company of the group also not permitted?

A: The act does not exclude this. The act states that an employment agreement may still be concluded with a group company.

Q: What are the consequences of the lack of an employment agreement between the director and the listed company for employment conditions, such as pensions, disability, social insurances, etc.?

A: The bill also does not address these issues. Similar employment conditions might be arranged in an employment agreement with a group company. Another possibility might be an employment agreement between the director and his management BV, which BV then enters into an agreement, or an agreement of assignment, with the listed company.

Q: Is one of the consequences of this bill that mention can no longer be made of one of the deviating rules of the Tabaksblat Code when a director leaves a company?

A: The present rules that permit deviation, provided it is explained, remain in existence. But it will be more difficult for a director who does not have an employment agreement with a group company to argue that he is entitled to higher or supplementary compensation. The Cantonal Court formula and the compensation deriving from apparently unreasonable dismissal will no longer be applicable to termination of an agreement of assignment, whether or not concluded with the management BV.

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