Private company law simpler and more flexible from 1 October 2012 – key changes explained

The Act on simpler and more flexible laws of private limited liability companies ("BVs") will come into force on 1 October 2012. The changes introduced by this Act will offer greater freedom in structuring BVs.

This Legal Alert summarises the key changes and possibilities introduced by the new law. It also addresses a few points relevant to existing BVs.

The annex contains a matrix with the key changes.

New possibilities

The new law offers a number of new possibilities when incorporating a BV or amending the articles of association of an existing BV. Some of these possibilities are summarised below.

Capital

The requirement of a EUR 18,000 minimum capital will be abolished, and also, as a consequence, various formalities, such as a bank’s statement for cash payment on shares and an auditor’s statement for contributions in kind.

Under the new law, the articles of association do not have to specify an authorised capital. As a result, the current requirement that 20% of the authorised capital be issued will no longer apply. Under the new law, the articles of association may provide for a par value of the shares in a currency other than euro.
Shares without voting rights and shares without entitlement to profits

The new law allows the articles of association to limit or exclude certain shares from sharing in the profits. Certain shares may also be excluded from voting.

This offers shareholders greater flexibility in structuring their mutual relationship and provides an alternative to issuing depositary receipts for shares, the current option for separating profit-sharing and voting rights.

Right to give instructions

The general meeting or another corporate body will be allowed under the new law to give specific instructions to the managing board. The managing board must follow these instructions unless this is not in the company's interest. Under the current law the managing board can only be required by the articles of association to follow general policy principles.

Obligations of shareholders under the articles of association

Under the new law, the articles of association may attach to share ownership certain contractual obligations towards the BV, other shareholders or third parties. The articles may also attach certain requirements to share ownership and provide that shareholders must offer or transfer all or part of their shares in certain situations.

In current practice, these types of obligations are regularly included in a shareholders' agreement. The advantage of including the obligations in the articles of association is that a provision can be added suspending a shareholder's voting rights, profit-sharing rights and/or meeting rights if the shareholder fails to meet its obligations.

Appointment of managing and supervisory directors

There will be greater flexibility in how to appoint and dismiss managing and supervisory directors of companies that are not qualified as 'large' and therefore not subject to the Dutch structure regime. Under the new law, the articles of association may allow a shareholder to appoint, suspend and dismiss its "own" managing or supervisory director. Every shareholder with voting rights should be able to take part in the decision-making about the appointment of at least one managing director and one supervisory director, respectively.

Under the current law, the articles of association may not contain this type of provision. Parties often try to achieve the same result via a combination of binding nominations and a shareholders' agreement.
Changes for existing BVs

The new law will offer new possibilities when incorporating a new BV or amending the articles of association of an existing BV. It also introduces changes that will be of immediate relevance to existing BVs as of 1 October 2012.

If and how these changes could affect a company will vary and depend partly on the wording of the company's existing articles of association. These may contain a reference to sections of the current law that will change or cease to apply under the new law. It depends on the wording and intent of the relevant provision in the articles whether it will continue to apply after the new law enters into force. We would therefore recommend assessing whether existing articles of association will be applied and interpreted differently as a result of the new law or seeking advice on this. The following key areas could play a role:

Distributions

Distributions may only be made insofar as the company's equity exceeds any reserves maintained by law or pursuant to the articles of association. In principle, distribution of share capital will be permitted under the new law. Under the new law a resolution of the general meeting to make a distribution will not have effect until the company's managing board has approved the resolution. The managing board will refuse to give its approval if the company is unable to continue paying its due debts after the distribution.

Shareholders resolutions to make a distribution adopted before 1 October 2012 will remain subject to the current law.

Repurchase, capital reduction

The same rules will apply to repurchase and capital reduction as those introduced for distributions. In the case of capital reduction, the possibility of creditors' opposition will no longer exist. This means that it will no longer be necessary to file a resolution to reduce the capital with the Trade Register and publish it in a national newspaper. A resolution to reduce the capital involving repayment to shareholders will not have effect until the managing board has approved the resolution. As in the case of distributions, the managing board will refuse approval if the company is unable to pay its due debts after the repurchase or capital reduction.

The prohibition of repurchasing more than 50% of the issued share capital will cease to exist after 1 October 2012. But a party other than the company or one of its subsidiaries will at all times have to hold at least one voting share. Under the new law, it will also be possible to
cancel certain shares only.

A shareholders' resolution to reduce capital adopted before 1 October 2012 will remain subject to the current BV rules.

**Prohibition on financial assistance**

The current law provides that a BV may not provide security for the acquisition of its own shares and may only extend loans insofar as the free reserves allow this. This financial assistance prohibition will cease to exist under the new law.

Existing companies have frequently included the financial assistance prohibition for information purposes in their articles of association. In such cases this restriction will generally no longer be in effect. Only in specific cases will such restriction remain in effect, provided that in principle this restriction will no longer be externally enforceable against third parties but can only be enforced internally.

**Depositary receipt holders with meeting rights**

BV's with depositary receipts issued with the company's cooperation before 1 October 2012 will have to attach meeting rights to such depositary receipts if they amend their articles of association after 1 October 2012.

If depositary receipts have been issued with the company's cooperation before 1 October 2012, the company must enter the details of the depositary receipt holders in its shareholders register before 1 October 2013.

If such details of these depositary receipt holders have not been entered in the shareholders register one month before the date of the first general meeting to be held after 1 October 2012, these depositary receipt holders will have to be called to the general meeting in the manner prescribed under the current BV rules.

**Managing and supervisory directors - vacancy or being prevented from acting**

Under the current law, the articles of a BV must provide for situations where there is a vacancy on the managing board or a managing director is prevented from acting. The new law also requires such provision for supervisory directors. Existing BVs will have to include the provision for supervisory directors if they amend their articles of association after 1 October 2012.

The new law will also allow provisions in the articles of association specifying when managing or supervisory directors are deemed 'prevented from acting'.
Convening general meetings

Under the current law, general meetings must be convened at least 15 days before the date of the meeting. This period is reduced to 8 days under the new law.

General meetings held after the new law takes effect may be convened applying the new shorter notice period. If the articles require a longer notice period, however, that longer period will have to be observed.

More information

To help you keep pace with the changes in the new law, you can access some tools on our website, including a sample articles of association for a 100% subsidiary under the new law, a guidebook for these articles of association and a compare text (in Dutch) with an overview of changes in Book 2 of the Dutch Civil Code resulting from the new law.

Contact

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