New management and supervision law to take effect

The Bill on management and supervision was adopted by the Dutch Parliament in May 2011. But the effective date of the Bill was postponed because a number of provisions needed to be clarified in a further remedial bill. This remedial bill will now be adopted by the First Chamber without further debate on 25 September 2012. The new provisions will take effect on 1 January 2013.

The new legislation will lead to changes in company law. These changes relate to managing and supervisory directors of legal entities. The majority of provisions will apply to both NVs and BVs. The most sweeping changes also apply to foundations. A few provisions only relate to listed companies.

We will discuss the main elements of the new provisions in this Legal Alert and mention the type of entities that they apply to. A special flow chart will outline the new restrictions on the number of supervisory positions.

One-tier board

(NV and BV)

A statutory basis is introduced for the creation of a one-tier board. Companies – including those governed by the 'structure regime' - will be able to choose between a one-tier or two-tier board. Traditionally, management of Dutch companies has been based on a two-tier system, with a managing board and a separate supervisory board. The new one-tier board consists of both executive and non-executive directors. To create a one-tier board, the articles must be amended to provide that the management tasks are divided among one or more executive directors and one or more non-executive directors. The choice between a one-tier board and a
two-tier board is not expected to make a significant difference in practice.

**Restrictions on number of supervisory positions**

(large NV, BV and foundation)

New provisions are introduced limiting the number of supervisory positions that managing and supervisory directors of certain entities may hold.

**Restrictions**

If a legal entity meets the criteria set out below, the appointment of executive or non-executive directors, managing directors, supervisory directors or members of a supervisory body is subject to the following restrictions:

- A person may only be appointed as a managing/executive director if he/she holds no more than two supervisory positions at other entities which are governed by the same restrictions and does not hold the position of chairman of the supervisory board or one-tier board at such other entity.
- A person may only be appointed as supervisory director, non-executive director or member of a supervisory body if he/she holds no more than four supervisory positions at other entities which are governed by the same restrictions. In this connection, the position of chairman equals two positions.
- The term supervisory position means the position of supervisory director, non-executive director or member of a supervisory board that has been set up pursuant to the articles of association.
- Supervisory positions at several entities belonging to the same group constitute one position.
- Supervisory positions at foreign entities are not taken into account.
- An appointment by the Enterprise Chamber as part of corporate inquiry proceedings is not taken into account.

**Criteria for applicability of restrictions**

The restrictions concerning the number of supervisory positions held apply to NVs, BVs and foundations which qualify as 'large' entities and meet the 'entry transition' criteria.
What is a 'large' entity?

An NV, BV or foundation qualifies as a 'large' entity if at least two of the following three criteria are met:

- The value of the assets according to the balance sheet with explanatory notes exceeds EUR 20,000,000
- The net turnover for the financial year exceeds EUR 40,000,000
- There are, on average, 250 or more employees during the financial year

The reference date for qualifying as 'large' is the date of the balance sheet. If there are consolidated accounts, these will be used as a basis.

Entry and exit transition

The restrictions on the number of supervisory positions apply when an NV, BV or foundation qualifies as 'large' on two consecutive balance sheet dates ("entry transition"). Thus, if an entity's financial year is the same as the calendar year and the entity qualifies as 'large' on 31 December 2013 and on 31 December 2014, the restrictions apply from 31 December 2014.

This is how the Minister of Security and Justice explains the new statutory provisions. The wording of the provisions could lead to a different interpretation, but in this Legal Alert we follow the Minister's explanation.

If an NV, BV or foundation no longer qualifies as large on two consecutive balance sheet dates, the restrictions on the number of supervisory positions cease to apply ("exit transition"). Accordingly, should the legal entity no longer qualify as large on 31 December 2015 and 31 December 2016, the restrictions cease to apply from 31 December 2016.

Which large foundations?

The restrictions on the number of supervisory positions only apply to a large foundation if it has a statutory obligation to draw up annual accounts or a similar document. Large charitable, cultural, academic and religious foundations do not have to comply with the restrictions provided that they do not engage in commercial activities and do not have to draw up annual accounts. Large non-profit organisations such as care providers and housing organisations are subject to the restrictions because specific legislation requires them to draw up annual accounts. If a foundation voluntarily draws up annual accounts as part of an application for a subsidy, this does not cause the restrictions to apply, according to the Minister.
Appointment null and void

If an appointment causes a managing/executive director or a supervisory/non-executive director to hold more than the maximum number of supervisory positions, that appointment is null and void. This, however, does not affect the validity of decisions taken by the director in question.

Immediate effect

The Minister has indicated that when the new restrictions on the number of supervisory positions take effect, they will apply immediately. This means that as from the effective date 'large' NVs, BVs and foundations which have met at least two of the three criteria above on the two preceding balance sheet dates will be subject to the new restrictions.

Flow chart

This Legal Alert comes with a flow chart to help you assess whether the restrictions on the number of supervisory positions apply to you or your organisation.

Conflict of interest

Under the existing rules, a conflict of interest may affect the managing board's power to represent the company. But the new provisions are based on a different approach. If an executive/managing director has a conflict of interest, he/she may not participate in the discussion and decision-making of the board about the conflicted subject. These rules will also apply to conflicted supervisory/non-executive directors. If the director breaches this rule, the decision can be nullified. These new statutory provisions are of a mandatory nature and may not be deviated from.

Transitional provisions for conflict of interest

When the new law enters into force, the new conflict of interest provisions will apply immediately. Any action taken before this date is subject to the old law. Conflicted transactions entered into under the old law can be ratified by the general meeting. Any provisions in existing articles that limit the power of directors to represent the company will no longer have any effect when the new law enters into force. We would recommend removing such provisions from the articles to avoid any mistakes made in the representation of the company.
No employment contract

(only listed companies)

Under the new law, the relationship between a managing/executive director and a listed company can no longer be treated as an employment contract. But the new law does not specify the nature of the relationship. In practice, it will be treated as a mandate agreement ("overeenkomst van opdracht").

Transitional provisions

Existing employment contracts between managing directors and listed companies will remain in effect.

Binding nomination

(NV) (BV under Flex BV law)

A binding nomination for the appointment of a managing or supervisory director of an NV must currently contain two candidates for the position. This requirement no longer exists in the new law: a binding nomination may be limited to one candidate.

A similar change will be made to the binding nomination rules for BVs when the new Flex BV provisions enter into force on 1 October 2012.

Gender balance

(large NV/BV)

Statutory provisions are introduced to ensure a balanced participation by men and women in the management and supervision of 'large' NVs and BVs, including those governed by the structure regime. We mentioned the criteria for qualifying as 'large' above under the new restrictions on the number of supervisory positions. It is unclear from the wording of the new law whether the above entry and exit transition periods also apply in respect of these requirements on gender balance. We do consider this plausible: where an NV or BV is subject to the restrictions on number of supervisory positions, it will also have to comply with the rules on gender balance.

Where seats on a managing, supervisory or one-tier board are to be divided among individuals, balanced participation is deemed to exist if at least 30% of the seats are taken by
men and at least 30% by women. These requirements also apply to an NV or BV which carries out the management of:

- a 'large' NV or BV, or
- an NV or BV which in turn conducts the management of a 'large' NV or BV.

These are 'explain or comply' provisions, which means that if an NV or BV does not achieve the requisite gender balance, it will have to explain this in its annual report.

The provisions on gender balance will expire on 1 January 2016.

**Evaluation of the new law**

The Minister has promised that the new management and supervision provisions will be evaluated three years after they take effect.

**Q & A**

Below, we address a number of situations that may arise under the new restrictions on number of supervisory positions:

**X holds supervisory positions at A (a BV), B (a BV), C (an NV) and D (a foundation). All of these entities are subject to the restrictions. In addition, X is a supervisory director of a cooperative. X is now offered a supervisory position at E, an NV to which the restrictions also apply.**

**Can X be appointed to the supervisory position at E?**

Yes. At the time of this appointment X holds no more than four supervisory positions at other entities that are governed by the restrictions. The supervisory directorship at the cooperative does not need to be taken into account as the restrictions do not apply to cooperatives.

**X is managing director of an NV which falls under the restrictions and on the effective date of the new law, X holds six supervisory positions at other entities that also fall under the restrictions.**

**Does X have to resign from four supervisory positions?**

X does not have to take any action. He/she may continue the managing directorship and keep the supervisory positions. The restrictions are only relevant at the time of an appointment. As long as there is no question of a new appointment or a re-appointment, X's situation is valid. If
X wishes to be re-appointed as managing director of X, he/she will need to limit the number of supervisory positions at other entities that are governed by the restrictions to no more than two and he/she may not hold the position of chairman.

X is a managing/executive director at a BV to which the restrictions do not apply. In addition, X has three supervisory positions at NVs to which the restrictions do apply. The BV becomes subject to the restrictions at a later date.

How does this impact on X's managing/executive directorship at the BV?

X remains managing/executive director of the BV even after it becomes subject to the restrictions, and he/she may continue the supervisory positions at the NVs. Only when a new appointment or re-appointment takes place will the restrictions become applicable.

X is a supervisory/non-executive director at five NVs which are subject to the restrictions. X is then ‘appointed’ chairman of the supervisory board or non-executive chairman of the one-tier board.

What is the impact of X accepting the role of chairman?

Taking on the role of chairman during his/her term as supervisory or non-executive director is not an appointment within the meaning of the statutory provisions. Accordingly, the restrictions do not apply to X's appointment as chairman.

However, under the new restrictions chairmanship equals two supervisory positions and this means that the number of X's supervisory positions has increased to six. At the moment that X is re-appointed or accepts a new appointment, the restrictions will then apply and he/she will have to either resign from the position as chairman or from one of the supervisory/non-executive positions.
Contact

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