

New Dutch corporate legislation re private limited liability companies

Introduction

Dutch law offers various legal entities to conduct business activities, among them the private limited liability company (or “BV”).

In order to compete with more competitive foreign entities, especially the UK limited, the Netherlands recently introduced new legislation regarding this BV. This legislation entered into force on 1 October 2012.

The new legislation aims at simplifying and extending the flexibility of the rules applicable to BV’s and offers greater freedom for structuring the company. It also comprises a new system of creditor protection.

The most significant changes of our legislation are set out below.

Abolition of minimum share capital

The former mandatory minimum share capital of EUR 18,000 is abolished. At least one share with voting rights is to be held by a person other than the BV itself. 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 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 is also abolished.

Denomination of share capital

It is possible to denominate the issued share capital and the paid-up part of the issued share capital, as well as the nominal value of the shares in another currency than euro. One is free to choose any currency.

New Dutch corporate legislation re private limited companies

Postponement of the obligation to pay

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 in by the BV.

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 is abolished. The requirement for an auditors certificate in case of a contribution *in natura* upon incorporation is also be abolished. The same applies to the auditors certificate in case of a contribution *in natura* on shares issued after incorporation of a BV.

The requirement for a description of the assets to be contributed in case of a contribution *in natura* remains in force. What has altered is that the description may refer to a date which lies ultimately six months prior to the incorporation or the issue of new shares (was five months).

Abolition of the *nachgründung* rule

The *nachgründung* rule imposed certain formalities in respect of transactions between the BV and its incorporators or shareholders within the first two years after incorporation. This rule is abolished.

Abolition of the prohibition on financial assistance

In order to get rid of a serious acquisition obstacle, the former prohibition on financial assistance is abolished entirely. Subject to the local rules in the jurisdictions of the foreign subsidiaries of the BV, this abolishment makes the Dutch BV a perfect vehicle in international share purchase transactions.

New Dutch corporate legislation re private limited companies

Imposing obligations on shareholders

The possibility to impose obligations on shareholders in the articles is extended. Obligations formerly contained in a shareholders agreement can nowadays be included in the articles. Since the articles are in the public domain, sensitive agreements can and will however still be included in separate shareholders agreements.

Abolition of mandatory share transfer restrictions

The formerly mandatory share transfer restrictions are abolished. The articles of association may even determine that no restrictions on the transfer of shares will apply. One is also free to include specifically designed share transfer restrictions in the articles, e.g. regarding the determination of transfer prices or regarding a lockup period.

Adoption of annual accounts

In case shareholders are also managing directors, the execution of the annual accounts by all managing directors and supervisory directors also constitutes the approval of the annual accounts by the general meeting and the discharge of the directors, provided that no other stakeholders with meeting rights are present (or – when such stakeholders exist – have had the opportunity to review a draft of the annual accounts and agreed with this approval procedure.

Depository receipts for shares

As this was previously unclear, now the articles determine whether or not meeting rights belong to depository receipts for shares. When such rights are attached to depository receipt, transfers thereof are to be acknowledged by or served upon the BV.

New types of shares - shares without profit rights of without voting rights

The articles may constitute shares of a certain class or specification not sharing in the profits, thus creating shares to which only voting rights are attached, e.g. priority shares. With the restriction

New Dutch corporate legislation re private limited companies

that at least one issued share will have voting rights, the articles can also constitute shares without voting rights or shares with multiple voting rights. Shares should however have either profit rights or voting rights or both.

Appointment, suspension and dismissal of directors

The articles may specify that one or more (but not all) board members or supervisory directors are appointed, suspended and dismissed by a meeting of holders of shares of a particular class or specification.

At least one board member and supervisory director has to be appointed, suspended and dismissed by the general meeting.

Specific instruction rights

New is that the articles may provide for instruction rights of certain bodies of the BV regarding the board. The board will have to comply with these instructions unless these instructions violate the interests of the BV and its business.

Resolutions without convening a meeting

Formerly these resolutions needed a vote in writing in favour of the resolution of all shareholders. New is that these resolutions can be adopted by a majority vote, provided all shareholders cast their vote in writing (including e-mail). A further condition is that all persons with meeting rights approve with this way of adopting resolutions and that the directors have been able to render their advice regarding the specific resolution.

Adoption of resolutions outside the Netherlands

The articles can prescribe that the general meeting has to be held in a place outside the Netherlands.

New Dutch corporate legislation re private limited companies

Protection of creditors – the distribution test

For all forms of distributions on shares a so-called distribution test is introduced. This involves distributions upon capital reduction, acquisitions of own shares as well as distributions of profits or profit reserves. The test has to be performed by the board. The board is only entitled to withhold its approval if it finds that the BV, as a result of the distribution, is not able anymore to pay its payable debts. The legislation history mentions the necessity for the board to forecast the BV's financial situation for at least a year.

The members of the board are liable if an approval for a distribution is given while they knew or reasonably should have known that the BV, after the distribution, would not be able anymore to pay its payable debts.

If the recipient of such a distribution knew or reasonably should have known that the distribution would cause the BV not being able to pay its payable debts, the BV can claim the repayment of the amount paid to this recipient. If the board members have paid this claim, due to the aforementioned liability, the repayments has to be made to the board members.

In connection with the distribution test, a balance sheet test is still necessary, but this test has been modified. Distribution of profits or profit reserves is only allowed if and to the extent the equity of the BV exceeds the aggregate amount of the reserves to be maintained pursuant to law and the articles of the BV. Note that the issued share capital does not play any role anymore in BV balance sheet tests.

Acquisition of shares in own share capital

The former restrictions on acquisition by the BV of shares in its own share capital are abolished, provided that the acquired shares are fully paid up and the acquisition passes the distribution and balance sheet tests.

New Dutch corporate legislation re private limited companies

Capital reduction

Decisions regarding the reduction of share capital are also subject to the distribution and balance sheet test. The former possibility for creditors to oppose such reductions and the former obligation to publish an intended reduction are abolished.

Bierman Advocaten LLP

Theo Teeuwen

October 2012

Bierman Advocaten LLP

PO Box 124

NL 4000 AC Tiel

Tel + 31 344 677 188

teeuwen@bierman.nl