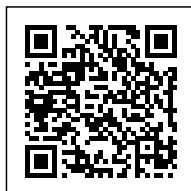


NEW RULES ON BVS - AKD

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Category: [Corporate](#)



The Netherlands has a long-standing reputation as a holding company jurisdiction for multinationals, including for a great number of internationally operating Spanish and Portuguese companies. As is generally known, the primary reasons for having a holding company established in the Netherlands are tax-driven-including the participation exemption in

conjunction with the extensive network of over 90 tax treaties providing for low withholding rates. The most commonly used legal form for a Dutch holding company is the private company with limited liability (BV).

With the entry into force of the Dutch Private Company Law (Simplification and Flexibilisation) Act (Flex BV Act) on October 1st, 2012, and the new Act on Management and Supervision on January 1st, 2013, the Dutch company law rules applicable to BVs have recently had a material overhaul.

In essence, both acts are meant to substantially simplify the corporate laws applicable on Dutch private companies and to offer shareholders more freedom and flexibility in structuring a BV, in an effort to boost economic activity levels and to increase the investment potential of the Netherlands.

The new company rules will provide new choices and new possibilities for structuring BVs in group holding structures, for the way BVs are used as joint venture vehicles or as special purpose vehicles in transactions, for the position of board members of BVs and they are likely to have an impact on the way BVs are used in (acquisition) finance.

Without purporting to be exhaustive, key changes introduced by the new company rules include the following.

Incorporation requirements

The incorporation and structuring of BVs have become more flexible, as several requirements have been abolished under the new legislation, including the following.

No minimum capital: The requirement for a BV to have a capital of at least €18,000 has been abolished. In practice, this means that the company may have an issued capital of €0.01.

No bank statement: The requirement of a bank statement evidencing the required payment on shares at the BVs incorporation has been abolished.

No auditor's statement: The requirement of an auditor's statement in the event of a non-cash contribution on shares has been abolished.

No 'nachgründung': The specific requirements in respect of transactions entered into by a BV with its founders or shareholders within two years of its initial registration in the trade register, known in Dutch corporate law by the German term 'Nachgründung', have been abolished. It is now left to the board to determine if, and if so, against which conditions such acquisitions will take place.

The changes described above allow for a faster, more streamlined incorporation process and entail that the incorporation of a new BV has become significantly easier. In principle, all that is now required to incorporate a BV is a notarial deed and powers of attorney for the incorporator(s). This also means that it will no longer be necessary to resort to – quite expensive – ready-made ('shelf') companies in order to save time and to avoid post-incorporation constraints.

One-tier board system

The new company rules provide a legal basis for the 'one-tier board system', comprising both executive and non-executive members, as an alternative to the two-tier board system. Dutch companies usually operated under the two-tier board system, 'id est' a board of managing directors, supervised by a supervisory board. The new rules allow for one board, comprised of both executive

and non-executive members. This is expected to particularly resonate with – for instance – Spanish multinationals that are more familiar with this corporate governance system.

Authority to give specific and binding instructions to the management board

It is now possible to include a provision in the articles of association of BVs requiring the management board to follow specific instructions of, for instance, the general meeting of shareholders. Pursuant to former legislation, there was only a power to issue general instructions about general policies. The inclusion in the articles of a specific power to issue instructions gives the group management an additional legal basis for pursuing group policy.

Non-voting shares, multiple-voting shares and shares without profit rights

The new rules allow for the creation of non-voting shares, shares carrying multiple votes and for certain shares to be excluded from sharing in the profits. This offers shareholders greater flexibility in structuring their mutual relationship and is expected to facilitate specific needs in, for instance, joint ventures.

Substantially more flexibility to tailor the articles and to structure the BV

It has now become possible to include numerous arrangements in the articles of association, which were previously only allowed in a shareholders or joint venture agreement. A few examples are: the direct appointment of management board members by holders of a given class of shares, a lock-up, tag along and drag along rights, etc. It may be very advantageous to include these provisions in the articles, as a breach of such an obligation will then simply be null and void.

Financial assistance rules

The complex restrictions and prohibitions that were applicable on BVs with regard to granting loans and providing security for the acquisition by a third party of shares in the BV's capital have been abolished.

Capital maintenance rules

The statutory system of capital maintenance and capital protection has been replaced by a system in which board members and shareholders may be liable if their acts prejudice the rights of creditors of the BV. In essence, a simpler procedure is introduced, but simultaneously a greater responsibility for management board members as well. The changes are reflected, above all, in the new rules on distributions as follows:

Margin for distributions broadened: The paid and called-up part of the BVs capital no longer forms part of the company's restrained capital and may consequently be distributed. New, more lenient limitations apply to distributions, and then only in specific cases. A distribution may now even lead to a negative equity. This applies to profit distributions, distribution of reserves and redemption of shares and cancellation of shares with repayment.

Assessment and approval by the management board: The new rules introduce a 'distribution test' entailing that the approval of the management board is required for every distribution resolution of the general meeting of shareholders (profit, reserves, etc), which may be refused if the board knows

or should reasonably foresee that the BV will be unable to pay its due and payable debts after making the distribution.

The new company rules apply to both existing and new BVs. The articles of association of existing BVs generally need not to be amended pursuant to the new legislation. Only in specific circumstances will it be required to amend the articles, for instance if an existing BV has a supervisory board then certain provisions should be made when the articles are next amended.

It could nonetheless be very advisable to make other changes to the articles, particularly for BVs within a group structure, for instance to include the right to give specific and binding instructions to the management board. In addition, one should bear in mind that the articles of many existing BVs include provisions that are derived from statutory rules that have now been abolished. If certain (old) statutory rules have also been included in the articles, they may still be applicable on the company. If one wishes to be able to make use of the new company rules, the current articles will have to be amended.

The new Dutch company law rules have been long-awaited and they are widely regarded as pieces of pro-business legislation. They have been broadly welcomed throughout the legal and business communities.

Expectations are that the new possibilities will be often used, for instance, for structuring a BV as if it were an English limited company, a Delaware LLC or a Spanish SL. The Netherlands has traditionally been famed for its cooperative tax regime, but can now also boast of having new company rules that provide flexibility and substantial advantages for having a Dutch BV in place.

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