Introduktion

With immediate effect as from 1 January 2013, the rules on management and supervision of Dutch companies (private limited liability companies (BVs) and Dutch public companies (NVs)) have been changed, among other things providing for:

- new rules dealing with conflicts of interest;
- a statutory basis for the creation of a one-tier board;
- statutory restrictions on the number of supervisory positions (also applicable to Dutch foundations);
- ‘comply or explain’ type provisions to ensure a balanced composition of management boards and supervisory boards in terms of participation by men and women;
- the relationship between a managing director and a listed company no longer qualifying as an employment agreement; and
- amendment of the rules on binding nominations for appointment of managing directors and supervisory directors.

The key amendments are set out in more detail below.

Conflicts of interest

Before 1 January 2013

Before 1 January 2013, the management board and its individual managing directors were no longer authorised to represent a company in the event of a conflict of interest between a company and one or more of its managing directors. Instead, the supervisory board (if any) was authorised to represent the company, unless the articles of association provided otherwise. Regardless of what the articles of association provided, in the event of a conflict of interest, the general meeting was always authorised to designate one or more other persons to represent the company in the case at hand or in general in the event of such a conflict.
If a managing director acted on behalf of a company in violation of the rules on conflicts of interest, the company or receiver in bankruptcy could claim not to be bound by the legal act thus performed.

After 1 January 2013

Under the new rules, a conflict of interest will in principle only affect a company’s internal decision-making. The authority of the management board and its managing directors to represent the company will remain unaffected.

A managing director shall not take part in the discussions and decision-making by the management board if he has a direct or indirect personal interest therein that conflicts with the interests of the company or the business connected with it. If, as a result, no resolution can be adopted, the resolution shall be adopted by the supervisory board (if any). If there is no supervisory board, the resolution shall be adopted by the general meeting, unless the company’s articles of association provide otherwise.

A similar rule will apply to decision-making by the supervisory board.

Any decision adopted in violation of these rules can be nullified. However, any legal act performed in execution of such decision will, as a general rule, remain unaffected. A company can only in very specific circumstances nullify such legal act or claim damages if its counterparty misuses the situation knowing there is a conflict of interest.

For ease of reference a flow chart is attached hereto, setting out how to apply the rules on decision-making in the case of a conflict of interest (Appendix 1).

Transitional law

Transactions entered into before 1 January 2013

Transactions entered into before 1 January 2013 will, even after that date, be assessed under the rules on conflict of interest in force before that date. If such transactions were entered into by one or more managing directors in violation of the rules on conflicts of interest, they will remain subject to a claim of nullity. Such acts can, however, be ratified by the company’s general meeting appointing the relevant managing directors as representatives for that specific legal act.

Articles of association

Existing provisions in articles of association that limit the power of the management board or its managing directors are no longer applicable by operation of law. However, it is advisable that such provisions be removed from the articles of association. In addition, it is advisable to review the relevant provisions on conflicts of interest and decision-making in existing by-laws.

One-tier board

Traditionally, the organisation of a Dutch company where there is a need for a supervisory body is based on the two-tier system: a management board entrusted with the management of the company and a separate supervisory
board supervising the management of the management board and assisting the management board by giving advice.

Another possible system is the one-tier system: one board only, consisting of executive directors and non-executive directors. Before the new rules entered into force, a company could already opt for the one-tier system, even though an explicit statutory basis for the creation of a one-tier board did not exist. The new rules introduce such a statutory basis. In the one-tier system, the executive directors will be responsible for the day-to-day management of the company and the non-executive directors will at least be responsible for the supervision of the management of the board as a whole. The principle of collective responsibility will, however, continue to apply: each director, whether executive or non-executive, will remain responsible for the performance of the board’s duties and can in principle be held liable for mismanagement if those duties are not fulfilled properly.

Further specifics

> **Articles of association.** The articles of association must specifically provide that the company has a one-tier board, consisting of executive and non-executive directors.

> **Appointment.** Unless the company is fully subject to the so-called ‘large company regime’, the corporate body authorised to appoint directors (for an NV, this will always be the general meeting; for a BV, this can be the general meeting or the meeting of holders of shares of a certain class or specification) shall determine if a director to be newly appointed will be an executive director or a non-executive director. Non-executive directors must always be individuals.

> **Dismissal and suspension.** Unless the company is fully subject to the so-called ‘large company regime’, the corporate body authorised to appoint directors (see previous bullet) shall be authorised to dismiss or suspend a director. The board shall at all times be authorised to suspend executive directors.

> **Allocation of tasks.** Certain tasks may, pursuant to the law, only be performed by non-executive directors: supervision of the management of the company, making nominations for the appointment of directors and determining the remuneration of executive directors. Also, the chairman of the board must be a non-executive director. Taking into account the foregoing limitations, a company is otherwise free to make an allocation of tasks. An allocation of tasks need not be included in the articles of association; it may also be laid down in by-laws or a board resolution.

> **Decision-making.** It is possible to provide – in the articles of association or otherwise in writing, for example in by-laws – that one or more directors are authorised to adopt resolutions on topics that relate to the tasks allocated to them. Such resolutions will then be regarded as a resolution adopted by the entire board.
> **Representation.** As a general rule, the full board, as well as each director severally, will be authorised to represent the company. This means that non-executive directors will also be authorised to represent the company, unless provided otherwise in the articles of association.

> **Conflicts of interest.** Executive directors shall not take part in the discussions and decision-making on the remuneration of executive directors. In addition, the general rules on conflicts of interest of managing directors will apply; see above under ‘Conflicts of interest’.

> **‘Large company regime’.** The possibility to install a one-tier board is also introduced for companies fully subject to the so-called ‘large company regime’. Statutory provisions related to the ‘large company regime’ that are dealing with supervisory directors shall then equally apply to non-executive directors and management board resolutions that by law require supervisory board approval, shall require the approval of the majority of the non-executive directors.

### Restrictions on the number of supervisory positions

The new rules provide that:

> a person cannot be appointed as a managing director or executive director of a ‘large’ (for definition, see below in this paragraph) company or Dutch foundation if he already holds more than two supervisory positions at another ‘large’ company or Dutch foundation or if he is the chairman of the supervisory board or one-tier board of another ‘large’ company or Dutch foundation; and

> a person cannot be appointed as a supervisory director or non-executive director of a ‘large’ company or Dutch foundation if he already holds more than four supervisory positions at another ‘large’ company or Dutch foundation, whereby the position of chairman of the supervisory board or one-tier board of another ‘large’ company or Dutch foundation is counted twice.

An appointment in violation of these restrictions will result in that last appointment being void (earlier appointments at other entities are not affected). The fact that an appointment is thus void does not affect the validity of decision-making.

For the purpose of the rules on restrictions on the number of supervisory positions, a company or Dutch foundation qualifies as ‘large’ if on two consecutive balance sheet dates at least two of the following three criteria have been met:

> the value of its assets according to the balance sheet with explanatory notes, based on the acquisition and manufacturing price, exceeds EUR 17,500,000;

> the net turnover (for a company) or the total operating income or total income (for a Dutch foundation) for the relevant financial year exceeds EUR 35,000,000;
> the average number of employees in the relevant financial year is at least 250.

The rules on restrictions on the number of supervisory positions no longer apply if a company or Dutch foundation no longer qualifies as ‘large’ on two consecutive balance sheet dates.

**Further specifics**

> **Consolidated accounts.** If there are consolidated accounts, these should be used to determine whether any of the above criteria have been met.

> **Foundations.** In respect of a ‘large’ foundation, the rules on restrictions on supervisory positions only apply if the relevant foundation has a statutory obligation to draw up annual accounts or a similar financial document.

> **Supervisory position.** For the purpose of the new rules, a person holding a supervisory position is a supervisory director, a non-executive director or a member of another supervisory body established by or pursuant to the relevant legal entity’s articles of association. A position as an advisor is not considered to be a supervisory position.

> **Exempted positions.** Supervisory positions at more than one legal entity within the same group shall be regarded as one position only. Supervisory positions at foreign entities, Dutch cooperatives, Dutch associations or Dutch mutuals, or pursuant to a temporary appointment by the Commercial Division of the Amsterdam Court of Appeal in connection with corporate inquiry proceedings shall not be taken into account.

For ease of reference a flow chart is attached hereto, setting out if the rules on restrictions on the number of supervisory positions are applicable in the case of an intended (re)appointment of a director (Appendix 2).

**Transitional law**

The new rules do not affect appointments made before 1 January 2013. However, ‘old’ positions will be taken into account when determining if a (re)appointment after 1 January 2013 can be validly made.

**Gender diversity**

The new rules provide that the composition of a management board – in so far as it consists of individuals also – and of a supervisory board in terms of gender diversity shall be considered well-balanced if a board consists of at least 30% women and at least 30% men.

‘Large’ companies (‘large’ to be defined as described above under ‘Restrictions on the number of supervisory positions’) are supposed to take this into account:

> upon appointment and, where applicable, recommendation for nomination or nomination for appointment of directors; and
when drawing up the profile for the size and composition of the supervisory board or for non-executive directors.

The above equally applies to the composition of the management board and supervisory board of:

> a company ("managing director company") that is a managing director of a ‘large’ company; and

> a company that is in turn managing director of such managing director company, and so on.

The statutory provisions on gender diversity are of a ‘comply or explain’ nature. If a ‘large’ company does not comply with these provisions, it must in its annual report explain the reasons for not complying and state how it has tried to achieve a well-balanced composition and what it intends to do to achieve a well-balanced composition in the future.

The statutory provisions on gender diversity will cease to apply as per 1 January 2016.

It should be noted that the European Commission has also announced proposals for improving gender balance in Europe’s board rooms, with a target of 40% of non-executives by 2020. For further information on these proposals, please see our recent newsletter on this topic.

**No employment agreement**

Under the new rules, the legal relationship between a managing director and a listed company will no longer be regarded as an employment agreement. Under the new rules, the relationship will be structured as a management agreement. The new rules do allow a managing director to enter into an employment agreement with a subsidiary of the listed company.

Under a management agreement, managing directors of listed companies will no longer benefit from protection provided by Dutch employment law, in particular damages in the case of termination. However, an entitlement to a contractual severance may be agreed upon in the management agreement.

The new rules will not result in changes from a tax perspective (the relationship will be considered to be fictitious employment), nor from a social security perspective (as long as services are performed in person at least twice a week). The managing director can also continue to participate in the listed company’s pension scheme.

**Transitional law**

The new rules do not apply to employment agreements entered into before 1 January 2013.

**Binding nomination**

Under the old rules, a binding nomination for the appointment of a managing or supervisory director should consist of two or more candidates per vacant
Changes to rules on management and supervision of Dutch BVs and Dutch NVs

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Appendix 1
Flow chart: Conflicts of interest

1. A possible provision could be that conflicted managing directors are authorised to take part in the discussions and decision-making regardless of them all being conflicted, thus enabling the management board to validly adopt resolution anyway, provided that the relevant requirements are observed.

2. Flow chart from here on also applicable to “own” resolutions of the supervisory board (based on own authority and not related to conflicts of interest of managing directors).

3. A possible provision could be (i) in case of a management board resolution that must be adopted by the supervisory board due to all managing directors being conflicted: management board authorised to adopt resolution anyway; and (ii) in other cases where supervisory board has to adopt a resolution: conflicted supervisory directors are authorised to take part in the discussions and decision-making regardless of them all being conflicted, thus enabling the supervisory board to validly adopt resolution anyway, provided that the relevant requirements are observed.

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Appendix 2

Flow chart: Restrictions on the number of supervisory positions

Does relevant BV, NV or foundation meet at least two of the following criteria?  
1 The value of its assets according to the balance sheet with explanatory notes, based on the acquisition and manufacturing price, exceeds EUR 17,500,000.  
2 The net turnover (for a BV or NV) or the total operating income or total income (for a foundation) for the relevant financial year exceeds EUR 35,000,000.  
3 The average number of employees in the relevant financial year is at least 250.  
And in addition, in respect of a foundation: does the relevant foundation have a statutory obligation to draw up annual accounts or a similar financial document?

Yes

No

Rules not applicable.

Did the relevant BV, NV or stichting meet at least two of the abovementioned criteria on two consecutive balance sheet dates?

Yes

No

Rules not applicable.

Did the relevant BV, NV or stichting after that no longer meet at least two of the abovementioned criteria on two consecutive balance sheet dates?

Yes

No

Rules not applicable.

BV, NV or stichting qualifies as ‘large’ legal entity.  
Rules are applicable in respect of intended appointment:

If appointment as managing/executive director:  
1 does relevant person already hold more than two supervisory positions at another ‘large’ legal entity; or  
2 is the relevant person already chairman of the supervisory board or one-tier board of another ‘large’ legal entity?

Yes

No

Person cannot be appointed.

Person can be appointed.

If appointment as supervisory/non-executive director:  
1 does the relevant person already hold more than four supervisory positions at another ‘large’ legal entity (whereby the position of chairman of the supervisory board or one-tier board of another ‘large’ legal entity is counted twice)?

Yes

No

Person cannot be appointed.

Person can be appointed.

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1 If there are consolidated accounts, these should be used to determine whether any of the above criteria have been met.

2 Supervisory positions at more than one legal entity within the same group shall be regarded as one position only. Supervisory positions at foreign entities, Dutch cooperatives, Dutch associations or Dutch mutuals, or pursuant to a temporary appointment by the Commercial Division of the Amsterdam Court of Appeal in connection with corporate inquiry proceedings shall not be taken into account.

3 For the purpose of the new rules, a person holding a supervisory position is a supervisory director, a non-executive director or a member of another supervisory body established by or pursuant to the relevant legal entity’s articles of association. A position as an advisor is not considered to be a supervisory position.

4 See footnote 2.

5 See footnote 3.

6 An appointment in violation of these restrictions will result in that last appointment being void (earlier appointments at other entities are not affected). The fact that an appointment is thus void does not affect the validity of decision-making.

7 See footnote 6.

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