New legislation: the Flex BV in the Netherlands (effective October 1, 2012)

On October 1, 2012 the long-awaited legislation regarding the simplification and flexibilization of the rules on Dutch private companies with limited liabilities (Wet vereenvoudiging en flexibilisering bv-recht : the “Flex BV Act”), will come in effect.

The Flex BV Act is applicable to all existing private companies with limited liability (besloten vennootschappen met beperkte aansprakelijkheid: the “BV”) in the Netherlands. The Flex BV Act is meant to simplify company rules for BVs. It will also make the rules more flexible, which will create new opportunities and attractive possibilities for creating a BV and for existing and new joint ventures in the Netherlands.

The most significant changes are:

• **Private Character of the BV**
  
  *CURRENT SITUATION:*
  - the Articles of a BV must provide for restrictions on the transferability of the shares;
  - these restrictions must require the transferor either to offer his shares to the other shareholder(s) or to obtain the prior consent of the general meeting of shareholders;
  
  *CHANGES:*
  - share transfer restrictions are no longer mandatory, so the private character of the BV will more or less disappear;
  - if the company does opt to include a blocking clause, more freedom to include arrangements about the price and how it is determined;
  - share transfers will be blockable for a certain 'lock-up' period.

• **Share Capital of the BV**
  
  *CURRENT SITUATION:*
  - under the current law a BV needs a minimum share capital of € 18,000, which must be paid in either in cash (with a bank statement) or in kind (with an auditor’s certificate and description) on the day of incorporation;
  - the articles of association must mention the authorized share capital of the BV, being the total nominal amount to which shares may be issued, without having to amend the articles of association (as at least 20% of the authorized share capital must be issued);
  
  *CHANGES:*
  - the articles of association may provide for shares with/without voting rights;
  - the articles of association may provide for shares with/without rights to profit;
  - certain classes may be created with different nominal values;
  - the nominal value may be in currencies other than the euro (for example, US dollars);
  - the Flex BV Act introduces the possibility of imposing contractual obligations on shareholders towards the BV or third parties or between shareholders. Currently, these kinds of obligations are often included in a shareholders agreement.

• **Rules on Capital Protection and Protection of Creditors:**
  
  *CURRENT SITUATION:*
- under the current law, quite strict rules apply in order to protect the capitalization of a BV or the position of creditors of a BV, for example:
  - undermining the financial position of a BV is currently prevented by auditor's statements for transactions between a shareholder and a BV within two years after its incorporation and for contributions in kind, and
  - the interests of creditors are protected by the possibility of opposition to for example a capital reduction;
  - a BV is not permitted to financially assist in the acquisition of shares in its own capital;

**CHANGES:**
- no minimum capital of at least €18,000 and no obligation to provide for an authorized capital in the articles of association;
- if nonetheless an authorized capital is provided for in the articles of association: it is no longer necessary to issue at least one-fifth of the authorized capital;
- the bank statement regarding payment in cash at incorporation will no longer be required;
- likewise, the auditor's statement regarding the value of payment on shares other than in cash and for transactions between a shareholder and a B.V. within two years after its incorporation is no longer necessary (however, a description is still required);
- the position of creditors to oppose to a capital reduction (by means of a reduction of the nominal value as well as the cancellation of certain shares) is eliminated;
- there will no longer be restrictions and prohibitions for a BV giving financial assistance in acquiring shares in its own capital (for example by granting loans, giving a price guarantee and furnishing security).

**Distributions of Profits and Reserves:**

**CURRENT SITUATION:**
- under the current law has each shareholder the right to receive dividends declared by the meeting of shareholders;
- dividends may only be distributed to shareholders out of profits and/or retained earnings if the shareholders' equity exceeds the BV's paid-up and called-up share capital plus its statutory non-distributional reserves, or the reserves pursuant to the articles of association;
- unless the articles of association provide otherwise, dividend must be distributed to shareholders in proportion to the nominal value of their shares;
- furthermore, a BV may not declare interim dividends unless its articles specifically permit it to do so;

**CHANGES:**
- whether a distribution of profit or reserve, a repayment on shares or repurchase and subsequent cancellation of shares: the shareholders' equity must still exceed the sum of the reserves that must be maintained under the law or the articles of association. Therefore, the amount of the paid and called up part of the capital is no longer part of the tied-up capital and reserves;
- the decision of a shareholder to make a distribution must be approved by the board of managing directors of the BV and only comes into effect upon this approval;
- the board must refuse to grant its approval if, at the time of the decision, it knew or reasonably should have foreseen that the BV is unable to pay its debts: in that case all
managing directors (and also effective policy-makers) are jointly and severally liable for the repayment of the deficit;
- therefore, the board must assess the recent and future financial position of the BV carefully: the so-called 'distribution test'. This assessment need not be done by an auditor;
- liability is not applicable where the managing directors can prove that they are not at fault and that they were not negligent in taking measures to avoid the effects of the distribution.

**Position of Managing Directors and their Liability:**

**CURRENT SITUATION:**
- the managing directors are collectively responsible for the management of the BV;
- the board and/or its individual members represent the BV towards third parties;
- the daily management includes (but is not limited to) policy-making and implementation, coordination, financial management, registration of relevant data at the Trade Register and (last but not least) the preparation and publication of the annual accounts;

**CHANGES:**
- the above remains unchanged, and in fact, under the more flexible rules on capital protection and their responsibility in relation to the process of distributions of dividend and reserves, the possible liability of the managing director(s) of a BV increases (see above);
- this also includes effective policy-makers;
- this might be a reason to consider a conversion of the BV into a company limited by shares, the NV *(naamloze vennootschap)*.

**Rules on Decision Making:**

**CURRENT SITUATION:**
- the general meeting of shareholders must be held once a year, but the articles of association may provide for extraordinary meetings to be held in specific cases;
- general meetings are held in the municipality in which the BV has its registered office. In a general meeting held elsewhere, legally valid resolutions may be passed only if the entire issued capital is represented;
- the articles of association may provide that resolutions of shareholders may be passed other than in a meeting. If the articles contain such a provision, resolutions may only be passed by unanimous vote and the votes may only be cast in writing.

**CHANGES:**
- shareholder meetings may be held outside the Netherlands;
- it will become possible to pass resolutions without a meeting, provided that all persons with meeting rights have given their consent, which consent may be given electronically or otherwise;
- specific voting rights may be allocated to different classes of shares, which gives a huge flexibility to the allocation of profits.

**Transitional law**
As per October 1, 2012, the Flex BV Act will have immediate effect on the Articles of Association of a BV. It will be relevant for all existing BV’s: part of the current Articles will remain in force; other parts of the Articles will lose their relevance with immediate effect and be replaced with the new rules.
What to do?
The Flex BV Act creates possibilities, but also has significant effect on existing BVs.
It is important to review the articles of existing BVs to determine if they contain references to current
law that will be changed or abolished under the Flex BV Act. It may be advisable to amend the
articles of association to use the more flexible system under the Flex BV Act and to make them more customized.

The Flex BV Act and the new rules are not applicable to the legal form of a NV. It is good to know that
the new rules of the personal liability for directors are not applicable to managing directors of NVs.
For this reason it could be advisable to consider whether an existing BV should not be converted in a NV.

Should you wish to know what the Flex BV Act means for the Dutch companies in your structure or
for your personal holding BV, we recommend seeking specialized advice of a Dutch civil-law notary.
We are more than happy to assess the possibilities for you with our "Quick Scan for the Flex BV".

Ton Lekkerkerker (civil-law notary) and Anne Claire Sillevis Smitt (candidate civil-law notary)