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Practice area	Corporate law
Interesting for	In-house lawyers, directors, supervisory directors
Branche	No specific sector
Titel article	One-Tier Board Enacted as of 1 January 2012

Teaser:

On 1 January 2012 we will see the introduction of the one-tier management model, which makes it possible to have executive and non-executive directors in one management body. This system, which is common in Anglo-American countries, can be used as an alternative to the Dutch common model of separate management supervised by supervisory directors. The government hopes that this change will make the Netherlands more attractive for international parties.

ARTICLE:

On 31 May 2011, the Dutch Senate agreed to the bill about the one-tier board. The new act will enter into force on 1 January 2012 and provides for a form of administration copied from the Anglo-American practice, in which the management body consists of both executive and non-executive (or supervisory) directors. This body in a way combines the structure that is more common in the Netherlands, of having a board of directors and a supervisory board as two separate bodies (two-tier), and – according to the Cabinet – its main purpose is to make the Netherlands more attractive for international parties.

One-Tier Board

Although the one-tier board, also known as the monistic system, had not yet been regulated in Dutch company law, it was not contrary to Dutch company law either (except in the case of a two-tier board company, where a supervisory board was mandatory). Big corporations like Unilever and Fortis were therefore already using a monistic management system. Under the current statutory regime, in this system parts of the (executive) management tasks were being delegated within the board to a number of directors (the Executive Committee). The general management then had the duty to supervise the Executive Committee.

One of the reasons to enshrine the monistic management system in law was the uncertainty in the current situation about the division of tasks within the board and the liability of the non-executive directors.

Division of Tasks

The new act creates the option for BV's (private companies) and NV's (public companies) to choose a board consisting of executive and non-executive directors, rather than a board and a separate supervisory board. The tasks of the board may then be divided over the various kinds of

directors, on the understanding that the supervisory tasks, the chairmanship and the determination of the remuneration of directors – tasks that are normally carried out by the directors – should in any case be assigned to the non-executive directors. In addition, non-executive directors (again, equal to supervisory board members) may only be natural persons. The big advantage of the one-tier board compared to the separate supervisory board is the closer involvement of the non-executive directors. They will receive more information, and sooner, than supervisory directors do. It appears from the latest National Supervisory Directors Examination 2009, which is performed each year by the Erasmus Institute for Supervision & Compliance, that many supervisory directors sometimes doubt the correctness of their decisions, especially because of the lack of information. The one-tier model could be a solution to this problem.

An often-mentioned disadvantage of the one-tier board is especially the lesser degree of independence, which could lead to a less critical attitude vis-à-vis the executive directors.

Other Adaptations to Company Law

Along with the introduction of the one-tier model, several other rules will be adapted as well. For example, the regime for directors' liability due to improper performance of duties will be changed, most likely making it easier for (especially non-executive) directors to exculpate themselves from liability if the mismanagement did not concern activities belonging to their tasks, and if they can prove that they have not been negligent in taking measures to prevent mismanagement.

Besides, the conflict of interests regime will be toned down. At the moment, if a director has an interest that conflicts with the interest of the company, this may still have an external effect. This means that, for example, if a director, despite having a conflict of interests, enters into a contract with a third party on behalf of the company, this contract may be nullified under circumstances. This external effect, which had been regarded as undesirable for quite some time already, will no longer exist under the new regime. Instead, a regime will be introduced in which a conflicting interest is dealt with in the decision-making process. A managing director who has a conflicting interest will not be allowed to participate in the deliberations and the decision-making process. Thus, if a director fails to observe the new rules, this may give rise to internal liability, but no longer a legal act performed by the director being affected.

Finally, some restrictions will be imposed on large corporations. For example, directors may not be persons who are either a supervisory director or a non-executive director in at least two other legal entities, and supervisory directors/non-executive directors may hold five similar positions as a maximum. Besides, there will be a new regime to achieve a well-balanced division between men and women. The requirement is introduced that when appointments, nominations and profiles for boards and supervisory board are made, it should be strived for as much as possible to have the board and the supervisory board consist of at least 30% men and at least 30% women.