Column

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The Flex B.V.
What are the consequences for my Dutch holding company

Dutch law does not change as often as Polish law, but this autumn we can easily speak of a revolution in Dutch corporate law. On 1 October 2012, the so-called Flex BV Act came into force and the One-Tier Board Act will come into force as of 1 January 2013.

Both changes to Dutch corporate law were inspired by Anglo-Saxon corporate models and are aimed at making the Netherlands even more attractive to foreign investors. Many Polish companies have Dutch B.V.s as parent companies.

Before, in order to establish a Dutch B.V. (a limited liability company comparable to the Polish Sp. z o.o.), a minimum capital of EUR 18,000 was required. This requirement has now been abolished. The previous restrictions for the B.V. or its daughter companies to acquire shares in its own capital have been abolished, as well as the restriction on a company granting loans or providing security for the acquisition of its own shares. Contributions in-kind can be made without the previously required accountant's statement as to its value. This will be done solely on the basis of a description of the board. These amendments will make corporate restructurings and management buy-outs much easier.

Other important changes are mainly geared towards making joint ventures easier. Almost everything that could previously only be arranged in shareholders' agreements, can now be included in the company's articles of association. For example, shareholders' agreements often used to state that each joint venture partner was entitled to propose a candidate management board member, and the other shareholder agreed to vote accordingly.

Now it is possible to create different classes of shares, allowing each class to directly appoint its own management board member. Shares no longer have to be offered to the other shareholder first, unless the articles of association require this.

There is also complete liberty to issue different types of shares. For example voting rights and entitlement to dividends can be separated. This can be particularly useful in situations where there is a majority shareholder who is the main source of financing for the business, but is not necessarily involved in running it. The articles of association can also provide for a temporary prohibition to sell shares, a so-called lock-up provision – a very common clause in joint venture agreements. It will also be possible to include an obligation of a contractual nature in the articles of association, such as the obligation to provide loans or to deliver raw materials.

When entering into a joint venture, careful thought will have to be given to the question whether to deal with such issues in the company's articles of association (a publicly available document), or in the privacy of a shareholders' agreement. The protection that can be derived from the articles of association is more direct and therefore stronger. These changes, combined with the efficient Dutch court system, makes it even more attractive to structure your Polish joint venture through a Dutch B.V.

In this respect, it is also good to know that shares can be denominated in other currencies; that shareholders' meeting can be held outside of the Netherlands; and that shareholders' decisions can be made via email, even if not all the shareholders agree (as long as all agree upon the method of voting). Last but not least, it will be possible for shareholders to give direct instructions to the management to act or not to act. This will make it much easier to enforce group policy. The management board members do keep ultimate responsibility in determining whether a certain action is in the interest of the company.

It will also be easier to change the capital of a B.V. Quite simply, every distribution of money to the shareholders, e.g. profit or reserves, will be subject to a test by the management board, whereby they will have to decide whether the B.V., after the distribution, will be able to meet its obligations for the year to come. Should the company go bankrupt within a year, the management board members will have to prove that it was not their fault in order to avoid personal liability. Another novelty is that there will be a clawback from the recipient of the dividend (up to the amount of money received plus statutory interest) if he should have known that the distribution was irresponsible. The recipient will usually be a shareholder, but can also be a pledgee of the shares, e.g. a financing bank.

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As of 1 January 2013, it will be possible to have a one-tier board, i.e. a company board with both executive members (c.f. management board members) and non-executive members (c.f. supervisory board members in the traditional two-tier system). The advantage of the one-tier board, standard in most Anglo-Saxon jurisdictions, is the closer involvement of the supervisors in the day to day decision-making process.

The changes will apply to both existing and new B.V.s. In addition, it is not required to change the existing articles of association, however, it is wise to have a close look at them to see whether changes are desirable in order to take full advantage of the new flexible rules. ★