

A flexible form of private company

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TeekensKarstens

- TeekensKarstens came into existence in 2001 as a result of a merger of the Leiden offices of Teekens solicitors and Karstens notaries. The two offices had been around since 1939 and 1955 respectively and were firmly rooted in Leiden society.
- A transparent firm, easily reachable, devoted and with a no-nonsense character, a high degree of personal commitment.
- TK's growth in the Randstad area is going from strength to strength. TK regularly competes with the offices of the Amsterdam South axis particularly in the commercial market.
- Many young partners and staff represent their own expertise and experience within close-knit teams organised around spheres of activity and market specialism. All specialisms are represented.
- TeekensKarstens capitalises on new developments.

Current situation Dutch private company

- Arranged in Book 2 of the Dutch Civil Code, mandatory rules for legal entities;
- Capital protection and protection of creditors (minimum capital € 18.000,00 (bank statement), 25 % must be paid up at incorporation, requirement for an auditor's report in the event of a non-cash contribution to shares);
- Mandatory restrictions (blocking clause) on share transfer are fundamental (private character).

CONCLUSION: current law lacks flexibility, is an unnecessary burden and is not effective in achieving the desired objective. More flexibility is seen as an important step to ensuring the Netherlands remains an appealing place in which to do business.

Shareholders' agreements

Practice has shown a need for further contractual arrangements between shareholders, such as shareholders' agreements, voting agreements or joint-venture agreements (i.e. a separate type of shareholders' agreement).

- agreements are not public, whereas the articles of association are public.
- all the parties (and therefore all the shareholders) need to agree to an amendment.
- agreements have no set form.
- arrangements may be included that cannot be included in the articles of association, such as a voting agreement, a specific exit arrangement for shareholders, penalty clauses in the event of violations, non-competition clauses and arbitration arrangements.

Shareholders' agreement

- arrangements can also be included that are not suitable for articles of association, such as alternative profit appropriations or arrangements that conflict with mandatory rules of law. Note however that non-fulfillment of an arrangement that conflicts with mandatory rules of law could constitute breach of contract, notwithstanding the fact that it is in conflict with mandatory law.

shareholders are not the only potential parties to shareholders' agreements. Other possibilities include the company itself, individuals involved with shareholders, or a company higher in a group that co-signs as a guarantor.

A flexible form of a private company

- Book 2 of the Dutch Civil Code is about to be amended through the Act of the Simplification and Flexibilisation of the BV law (“Flex Act”);
- In 2007 a draft bill was submitted; it is unclear at this stage when the Flex Act will come into force, but it is expected in due course this year;
- The Flex Act intends to increase the freedom in how to structure B.V.’s while at the same time ensuring creditors are protected;
- The Flex Act will affect the contents of the articles of association of a B.V. as well as additional arrangements between shareholders (shareholders’ agreements).

The most important changes of the Flex Act (1)

- Minimum capital of € 18.000,00 will no longer be mandatory;
- An auditor's report in the event of a non-cash contribution will no longer be mandatory;
- The articles may exclude certain shares from profit sharing or voting rights;
- The share transfer restrictions will no longer be mandatory;
- Transferability may be entirely excluded in the articles of association for a specific period of time;
- The rules on B.V. decision-making will be fundamentally changed to make them more flexible, and it will become possible to allocate rights to specific classes of shares
- It will become possible that certain contractual obligations are attached to the shares; a new shareholder will be automatically bound by these obligations;

The most important changes of the Flex Act (2)

- The rules for making a dividend payment or a distribution from a reserve will be fundamentally changed: distributions will be allowed provided that the B.V. will, following the distribution, continue to be able to pay its due and payable debts.
 - If this is not the case, the managing directors who knew this or should reasonably have anticipated it will be jointly and severally liable for the shortfall;
 - The party receiving the distribution who knew this is not the case or should reasonably have anticipated that the B.V. would not be able to continue paying will be liable to the B.V. to compensate the shortfall resulting from the distribution.

The Flex Act will affect arrangements

The Flex Act will affect the contents of the articles of association as well as additional arrangements

- increase possibilities for both contracts and articles of association, because there will be less mandatory law and more regulatory law. This will mean that the more specific wishes of the shareholders can be recorded in the articles of association, which will make them enforceable.

Especially in joint-venture structures, there will still be a need for a separate (detailed) shareholders' agreement in addition to the articles of association

- reasons: a shareholders' agreement is not public, it has no set form, and it can contain arrangements that are unsuitable for articles of association).

Questions/discussion

- To which extent a flexible form of private company has already been introduced in your country? What are the statutory provisions on these topics in your country?
- What is practice in your country (in general and in joint-venture structures): to include shareholders arrangements in the articles of association, or is there a need for further contractual arrangements between shareholders?
- What is your experience in setting up a private company in the Netherlands for your clients?



Should you have any questions on this subject, please do not hesitate to contact:

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