The Dutch Private Company: Successfully Relaunched?

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This Chapter in a comparative book on private limited liability companies starts with an illustration of the former success of the Dutch limited liability company (BV). Next it addresses the competitive European legal environment within which the Dutch BV has to operate. The study shows how the Dutch legal environment lost a large part of its competitiveness. Third, we sketch the flexibility of the new Dutch system and investigate whether the legal reform can meet the needs and requirements of modern business in the 21st century. We do not identify a successful restart and provide a number of suggestions to turn the tide.

Keywords: Private Limited Liability Company, The Netherlands, Flex BV, Competitiveness, Regulatory Competition

JEL Classifications: G38, K22

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Introduction

Competitive corporate lawmaking for (smaller) businesses has drawn the attention from Dutch corporate law experts long before the Dutch legislator has put the item on the agenda. In 1971 the Dutch legislator introduced the legal framework for the private limited liability company (Besloten Vennootschap or BV) which came into force in 1972, more than one century after the introduction of the public limited liability company in 1867.[1] The legislator copied to a large extent the framework for the public company with limited liability including many mandatory requirements like a minimum capital requirement, formal bank confirmation, restrictions on share buy backs, prohibition to finance the acquisition of own shares, etc. The private company with limited liability was considered a 'clone' of the public company with limited liability (Naamloze Vennootschap or NV) and a specific and separate framework for the former was not even considered.[2] Notwithstanding the significant regulatory burdens for establishing and operating the private company with limited liability in the Netherlands, this company form turned out to be an enormous success.

This Chapter starts with an illustration of the success of the Dutch limited liability company. The second section addresses the competitive European legal environment within which the Dutch BV has to operate. In the third section we provide new insights into the awakening of the Dutch government to modernize the legal private limited liability framework. The flexibility of the new Dutch system is sketched in section 4. In section 5 we question whether the legal reform can meet the needs and requirements of modern business in the 21st century.

1. The Dutch legal entities' landscape

In April 2013, there were more than 700.000 BVs (Table 1), which makes it the most important business form in the Netherlands (Figure 1). This position grew steadily as in 2005

[1] The Netherlands was already familiar with the public limited liability company during the era of Napoleon.
[2] EXPERTGROEP INGESTELD DOOR DE MINISTER VAN JUSTITIE EN DE STAATSSECRETARIS VAN ECONOMISCHE ZAKEN, *Vereenvoudiging en flexibilisering van het Nederlandse BV-recht*, The Hague, 6 May 2004, 136 p. (last consulted at http://www.rijksoverheid.nl/onderwerpen/flexibele-bv/documenten-en-publicaties/rapporten/2004/05/06/vereenvoudiging-en-flexibilisering-van-het-nederlandse-bv-recht.html, on 10 April 2013).

the number of sole traders was still relatively more important than the number of BVs. In 2013 almost 40 per cent of all legal entities operated as a private limited liability company (in 2005, 30 per cent), compared to 35 per cent as sole traders (2005: 41 per cent). Other important legal entities are foundations (8.5 per cent; in 2005: 10.1 per cent), associations (7.6 per cent, in 2005: 7.3 per cent) and general partnerships (7.2 per cent, in 2005: 10.2 per cent).

Table 1: Number of business entities in 2005 and 2013

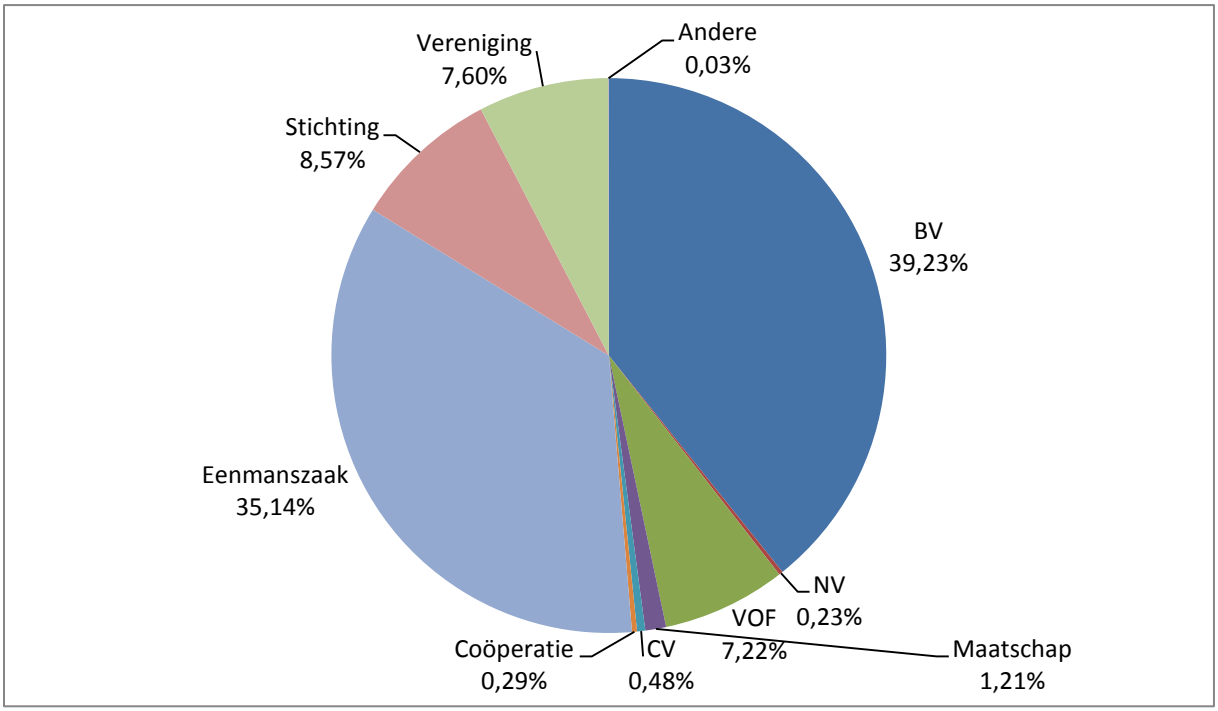
	April 2013	2005
Private limited liability company (BV)	722056	445030
Public limited liability company (NV)	4228	4726
General Partnership (VOF)	132931	153972
Partnership for certain professions (Maatschap)	22306	N.A.
Limited Partnership (CV)	8750	9439
Cooperative (Coöperatie)	5365	5745
Sole trader (Eenmanszaak)	646730	607827
Foundation (Stichting)	157642	150482
Association (Vereniging)	139844	108860
Other entities (Rederij, SE, EEIG, etc.)	508	779

Source: 2013: own research based on the database of the Dutch Chamber of Commerce, 2005: Slagter.

The number of public limited liability companies is relatively small in the Netherlands compared to some other European member states like France or Belgium. At the end of 2011 over 90.000 public limited liability companies and 266.000 private limited liability companies were active in Belgium.[3]

[3] Data derived from the deposited annual accounts with the Belgium National Bank.

Figure 1: Relative importance of different business and other entities (2013)



Source: 2013: own research based on the database of the Dutch Chamber of Commerce, 2005: SLAGTER

2. The competitive market of legal forms

The success of the BV resulted in limited interest of the Dutch legislator improving the regulatory framework of the private limited liability company (as well as the other company types).[4] In the meantime many corporate law experts expressed their concern that the Netherlands would lose its leadership in attracting new ventures and investments.[5] Legal scholars illustrated that many countries facilitated the incorporation of a limited liability corporate and/or partnership form without cumbersome procedures and almost with a blink of an eye. These development can be summarized as follows. In the United States the state Wyoming already introduced the Limited Liability Company in 1977.[6] Wyoming provided in a legal form with limited liability and fiscal transparency which was only explicitly accepted

[4] E. VERMEULEN and J. MCCAHERY, «Is de "nieuwe" BV aantrekkelijk in internationaal verband?», *Tijdschrift voor de Ondernemingsrechtpraktijk*, 2007, nr. 2, 264.
[5] E. VERMEULEN, «De Plaats en de Inrichting van een Nieuw BV-Recht in een Innovatieve Economie», in *De vereenvoudigde BV*, VEREENIGING HANDELSRECHT (ed.). Kluwer, Deventer 2006, pp. 113-180.
[6] E. VERMEULEN, «De Plaats en de Inrichting van een Nieuw BV-Recht in een Innovatieve Economie», in *De vereenvoudigde BV*, VEREENIGING HANDELSRECHT (ed.). Kluwer, Deventer 2006,, pp. 126-131; B. FERNANDEZ and M. VAN OLFFEN, *Rechtsvorm en gebruik van LLP's en LLC's*, Deventer, Kluwer 2007, pp. 47-70.

by the American tax authority, the Internal Revenue Service, in the 1990s, boosting the use of the LLC. Later the LLC was provided the choice between the application of the fiscal transparency, making the LLC even more alluring. The LLC must register in a public register but the details provided in the operating agreement must not be disclosed. The limited liability partnership (LLP) was introduced in Texas in 1991. The LLP facilitated professionals in the legal and accounting industry with a limited liability vehicle which provided the partners protection against liability claims for tort or breach of contract of the fellow partners. The conversion from a general partnership, the common form used by accountants and lawyers, into a LLP was relatively easy.[7] Also in Asia, and in particularly Japan the legislator modernized the corporate legal market.[8]

In the UK's Limited Liability Partnership Act of 2000 the establishment of a partnership with limited liability and providing contractual freedom to the members was provided. The UK LLP was enacted to keep the accountancy firms from relocating to Jersey that introduced the LLP in 1996.[9] The Act was added with LLP regulations that "borrowed" heavily from the Companies Act 1985, The Insolvency Act 1986 and The Financial Services and Markets Act 2000 and referred to the Companies Act 1985 for supplementary provisions.[10]

In the meantime France had introduced its simplified public limited liability company, the *société par actions simplifiée* (SAS).[11] The SAS is a specific simplified form of the public limited liability company and can be established by one individual or legal entity. The shareholders are free to choose the structure of the internal organization of the company as well as the division of powers but they have to elect a chairman. At its start it was created for joint ventures – at least two companies must establish the SAS - of (large international) groups as the minimum equity requirement of 225.000 euro could not be underestimated. Although relatively successful with approximately 1000 new SAS companies incorporated

[7] E. VERMEULEN, «De Plaats en de Inrichting van een Nieuw BV-Recht in een Innovatieve Economie», in *De vereenvoudigde BV*, VEREENIGING HANDELSRECHT (ed.). Kluwer, Deventer 2006, p. 129.
[8] See for an analysis E. VERMEULEN and J. MCCAHERY, «Current Trends and likely Developments in Private Company Law», in *Met Recht*, P. ESSERS, G. RAAIJMAKERS, G. VAN DER SANGEN, A. VERDAM AND E. VERMEULEN (eds.), Deventer, Kluwer, 2009, pp. 313-318.
[9] E. VERMEULEN and J. MCCAHERY, «Current Trends and likely Developments in Private Company Law», in *Met Recht*, P. ESSERS, G. RAAIJMAKERS, G. VAN DER SANGEN, A. VERDAM AND E. VERMEULEN (eds.), Deventer, Kluwer, 2009, p. 308.
[10] E. VERMEULEN, «De Plaats en de Inrichting van een Nieuw BV-Recht in een Innovatieve Economie», in *De vereenvoudigde BV*, VEREENIGING HANDELSRECHT (ed.). Kluwer, Deventer 2006, p. 143-144.
[11] Law no. 94-1 of 3 January 1994 establishing the société par actions simplifiée, *French Official Journal* no. 2 of 4 January 1994.

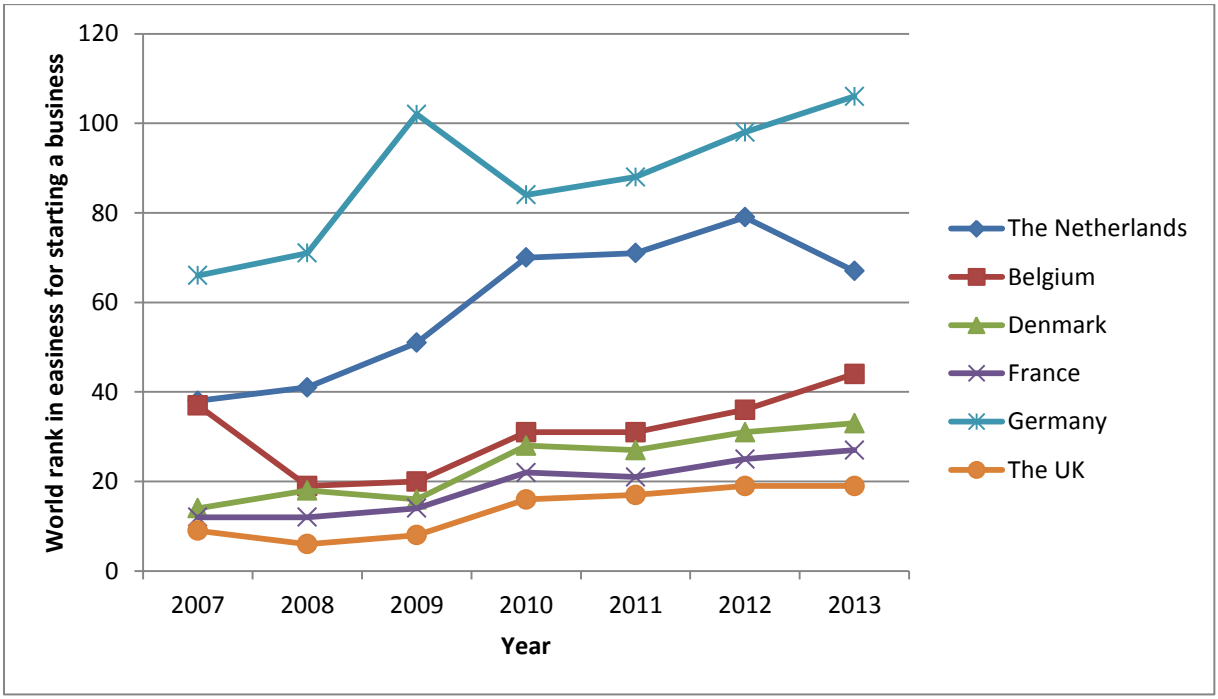
every year[12], the French legislator relaxed the capital requirements attracting smaller ventures being established as a SAS. The legislator also abolished the requirement that only companies could establish an SAS in 1999.[13] In 2009 the capital requirements were completely removed although it is necessary to define the amount of capital that is sufficient for the long-term survival of the company in the articles of association.[14] The development of a "simplified" public limited liability company was accompanied with the modernization of the private limited liability company, the SARL. In 2003 the share capital of this company type was reduced to 1 euro.[15] In 2008 the French Parliament facilitated the start-up of a business as an individual trader for which the rules on value added taxes are not applicable and it has not to be registered in the Commercial Register.[16] With a notary deed the trader can prevent that individual assets can be seized by the creditor of the trader. Finally in 2010 the French government issued the Decree that defined the legal statute of the individual trader with limited liability.[17] These facilities boosted the establishment of new entities from 332.000 in 2008 to over 600.000 in 2010 but is also reduced the number of companies that have been established.[18]

All these developments made a modernization of the Dutch corporate law framework imminent. The yearly Doing Business reports of the Worldbank illustrate that the legal experts' concerns are justified. Figure 2 illustrates the development of the ranking of the easiness to set up a private limited liability company in Netherlands compared to some of its neighboring countries. Between 2007 and 2012 the Dutch position dropped over 40 spots, resulting in an unenviable 79th position. While all other European member states gradually lost positions over the years as a result of major improvements to facilitate entrepreneurship in many areas around the world and a relative standstill in many European countries, in none of the other European member states the downfall was as severe as in the Netherlands. The

[12] E. VERMEULEN, «De Plaats en de Inrichting van een Nieuw BV-Recht in een Innovatieve Economie», in *De vereenvoudigde BV*, VEREENIGING HANDELSRECHT (ed.). Kluwer, Deventer 2006, p. 146.
[13] Law no. 99-587 of 12 July 1999 on innovation and research, *French Official Journal* no. 160 of 13 July 1999.
[14] For a comparison between the SARL, the SA and the SAS see INVESTIFRANCE, *Doing business in France*, Paris, IFA, October 2012, p. 14-16.
[15] Law no. 2003-721 of 1 August 2003 for the economic initiative, *French Official Journal* no. 179 of 5 August 2003.
[16] Law no. 2008-776 of 4 August 2008 modernizing the economy, *French Official Journal* no. 181 of 5 August 2008.
[17] Decree no. 2010-1706 of 29 December 2010 related to the individual trader with limited liability, *French Official Journal* no. 303 of 31 December 2010.
[18] For an overview of the latest developments see O. FILATRIAU and V. BATTO, «En 2012, plus d'immatriculations d'auto-entreprises, moins de créations de sociétés», *Insée Première*, January 2013, no. 1433, p. 1-4.

Netherlands only leaves Germany behind. However, in 2013 the Netherlands was the only country that experienced a significant improvement of its position. This is due to the elimination of the requirement for a declaration of non-objection before incorporation with an estimated cut in procedures by one, a time improvement to establish a company by 3 days and a cost reduction of €91. The significant improvements of the rules for establishing a private limited liability company are not yet included as the new law only entered into force in October 2012 while the Doing Business report 2013 was published in September 2012. It can be expected that the Netherlands will make a jump in the Doing Business report 2014.

Figure 2: Evolution of the Dutch world rank in easiness for starting a business in comparison with neighboring economies



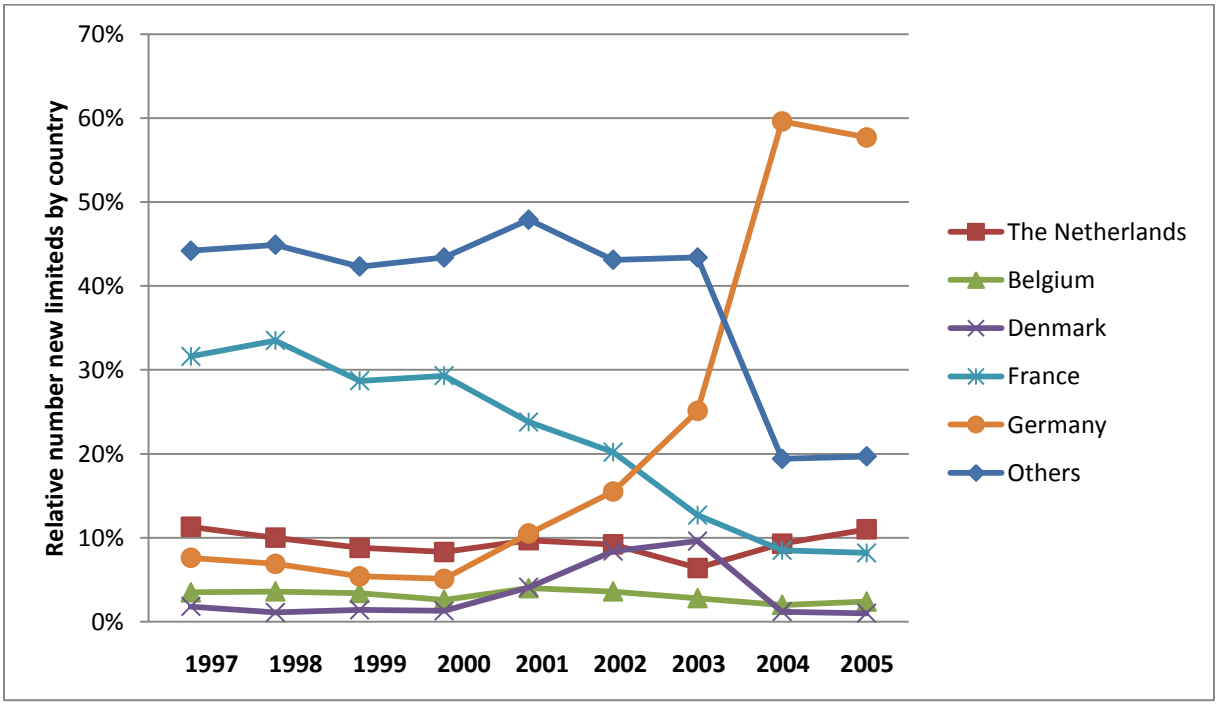
Source: WORLD BANK, *Doing Business Reports*, different years.

Next, corporate lawyers showed that the liberalization of the companies market in Europe, started to move the business of establishing companies to the UK. While in 1997 slightly more than 3.000 limiteds were incorporated with a majority of board members from other European member states, this number increased to 5.000 in 2001, 10.000 in 2003, 16.000 in 2004 and almost 20.000 in 2005.[19] It is obvious that the growth of the economy could not

[19] These numbers are derived from table 3 of M. BECHT, C. MAYER and H. WAGNER, *Corporate Mobility and the Cost of Regulation*, ECGI Law working paper nr. 70/2006, May 2006, p.36.

explain this increase. The bulk share of this increase comes from Germany (Figure 3) where the number of "German" Limiteds exploded from less than 300 each year up to the year 2000 to more than 11.000 in the year 2005. Next to Germany, the Netherlands experienced a dramatic growth rate in the absolute number of "Dutch" limiteds from less than 400 in 1997 to more than 2.000 in 2005. The relative growth rates of the number of "national" limiteds are illustrated in figure 3. While the total market of limiteds in the 24 Member States quadrupled in number, the relative number of "Dutch" limiteds remained the same at about 11 per cent of the total market indicating a large increase in absolute numbers, after a drop to approximately 6.5 per cent in 2003. The absolute number of French "limiteds" remained stable while the relative number shriveled from over 30 per cent to close to 8 per cent. Finally, Denmark experienced a short upswing. Overall, more than 80 per cent of the 24 Member States limiteds come from one of the 5 countries in 2005. This happened to be less than 50 per cent at the turn of the millennium.

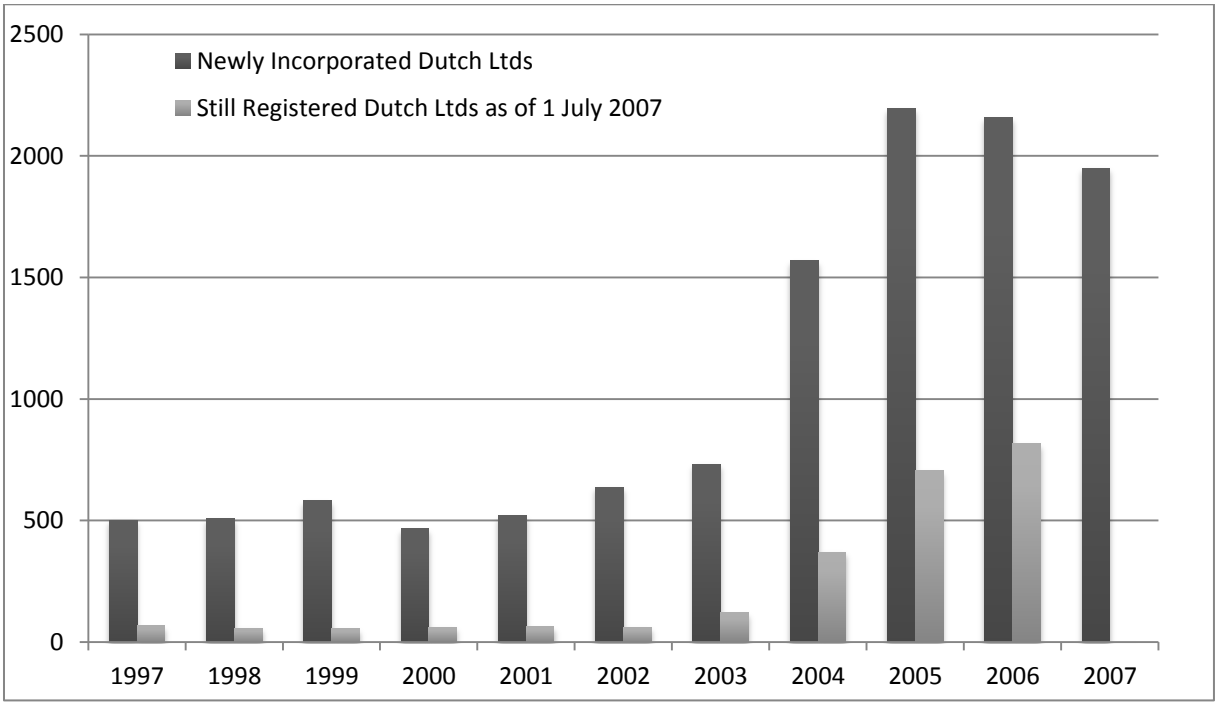
Figure 3: Relative number of new limiteds with majority board from specific Member State



Source: adaptation of table 3 of M. BECHT, C. MAYER and H. WAGNER, *Corporate Mobility and the Cost of Regulation*, ECGI Law working paper nr. 70/2006, May 2006, p.36.

Bratton, Vermeulen and McCahery not only studied the number of limiteds that Dutch citizens established in the UK but also studied the survival rate of companies.[20] Their analysis was based on the data provided by the Dutch Chamber of Commerce. Figure 4 distinguishes between the total number of new limiteds incorporated and the number of surviving limiteds. The figure illustrates the low survival rates to these companies. Bratton a.o. found that of the more than 6.000 "Dutch" limiteds registered only 2000 remained registered in 2007. Next, the "active" limiteds are very small. In an accompanying study Vermeulen and McCahery found that approximately 30 per cent of the Dutch limiteds survive the first year (i.e. are still registered in the Chambers of Commerce Registry), 20 per cent the second year and around 15 per cent the third year. Even if only data for 2006 and the first half of 2007 are taken into account, almost 40 per cent of the Dutch limiteds were not active, i.e. that the company does not employ at least one person that works for more than 15 hours per week for the company.[21]

Figure 4: Registered Limiteds in the Netherlands established in 1997-2007 and still registered in July 2007.



Source: W. BRATTON, J. MCCAHERY and E. VERMEULEN, «How does corporate mobility affect lawmaking: A comparative analysis», *The American Journal of Comparative Law*, 2009, *57*(2), figure 3.

[20] W. BRATTON, J. MCCAHERY and E. VERMEULEN, «How does corporate mobility affect lawmaking: A comparative analysis», *The American Journal of Comparative Law*, 2009, *57*(2), 501-549.
[21] E. VERMEULEN and J. MCCAHERY, «Is de "nieuwe" BV aantrekkelijk in internationaal verband?», *Tijdschrift voor de Ondernemingsrechtpraktijk*, 2007, nr. 2, 268.

The findings of Vermeulen and McCahery, together with the finding that appropriate national measures reducing the burdens to establish a private limited liability company - like it was the case in Denmark in 2003 - can significantly reduce the interests of citizens to look for foreign alternatives, result in the conclusion that the development of the international market for companies is reversible if adequate measures are taken. Also the growth in numbers of "national" limiteds does not provide any indication of the quality of the newly established entities.

3. The Dutch awakening

The concern of the slow pace of modernization of Dutch company law was finally shared by the government[22] in the aftermath of the European Court Decisions *Centros, Überseering* and *Inspire Art*[23], facilitating the freedom of incorporation, a prerequisite for corporate mobility and corporate charter competition.

First it was acknowledged that the procedures to establish a Dutch private limited liability company were very cumbersome and more flexibility - hence the nickname "flex-BV" - must be provided. In short, in the previous system the founders of a private company had to contact a bank for the creation of a share capital account. Dutch banks require the founders to provide all identification information for both individuals as legal entities and often the bank request for the draft articles of association and the registration number of the private limited liability company in formation. Foreign legal entities that acted as founders had to provide documents that show their true beneficiaries. The process was time consuming. The founder(s) of the company had to deposit their share in the capital of the company. It was mandatory to deposit at least €18.000. Alternatively, the founders could provide in contributions in kind. In that case the notary provided in a deed of contribution with a description of the contributions which would allow an accountant to provide in an economic assessment whether the value of

[22] In the report of the Expertgroep it was explicitly acknowledged that the modernization was required in light of the European court cases and the modernization of the company laws in many other European Member States (EXPERTGROEP INGESTELD DOOR DE MINISTER VAN JUSTITIE EN DE STAATSSECRETARIS VAN ECONOMISCHE ZAKEN, *Vereenvoudiging en flexibilisering van het Nederlandse BV-recht*, The Hague, 6 May 2004, p. 6-7).

[23] Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstryelsen* (1999), ECR I-1459; Case C-208/00 *Überseering BV v Nordic Construction Co Baumanagement GmbH (2002) ECR I-9919; Case C-167/01 Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd (2003) ECR I-10155.*

the contributions resembles the minimum capital which had to be provided.[24] Similar protective mechanisms were provided in case the founders entered in contractual relationships with the company for the acquisition of assets of the founder in the period up to two years after the establishment of the company.[25]

Next, until 30 June 2011 the Netherlands applied a system of preventive supervision.[26] When incorporating a private limited liability company, as well as any other company type with limited liability or a conversion of the company, the notary had to request, after the founders had agreed on the articles of association, from the Ministry of Security and Justice a "declaration of no objection" at a cost of €91.[27] Together with the deed of the notary the declaration of no objection is considered one of the constitutional elements for the establishment of a private limited liability company.[28] The declaration will only be provided after an investigation was performed by the "Justis" Service in name and on behalf of the Minister. The investigation relates to the intentions as well as the criminal and financial antecedents of the policy making persons of the company. However, the declaration of no objection could only be refused in case the company would have been established for illegal goals or the activities of the company would be detrimental for the creditors.[29]

The system of preventive supervision is replaced by a new system of continuous screening of companies.[30] The monitoring agency, Scrutiny, Integrity and Screening Agency of the Ministry of Security and Justice, developed a number of risk profiles in a risk alert system. If necessary, the public prosecution will be used to intervene, inter alia by banning directors of the company. The abolishment of the preventive supervision system reduced the number of

[24] Old article 2:191b Dutch Civil Code.
[25] In the Netherlands identified as the "Nachgründungsregeling." For an in depth analysis of the system for the contribution in kind and Nachgründung, see Nederlandse Orde van Accountants-Administratieconsulenten, *Leidraad 7: Storting op aandelen anders dan in geld (inbreng in natura)*, Amsterdam, 100 p. (, last consulted 15 April 2013).
[26] Decree of 21 April 2011, *Dutch Official Journal* nr. 180, 2011.
[27] Old article 2:175, §2 Dutch Civil Code. The amount was provided in the old article 2:179, §1 Dutch Civil Code.
[2828] C. ASSER, J.M.M. MAEIJER, G. VAN SOLINGE and M.P. NIEUWE WEME, *Rechtspersonenrecht 2-II**, Kluwer, Deventer, 2009, p. 66-67, nr. 53.
[29] Old article 2:179, §2 Dutch Civil Code.
[30] The law of 7 July 2010 changing Book 2 Civil Code and the Law on Documenting Companies related to the abolishment of the the declaration of no objection and the improvement and expansion of the control of legal entities in light of the preventing and combating the abuse of legal entities (Wet van 7 juli 2010 tot wijziging van onder meer Boek 2 van het Burgerlijk Wetboek en de Wet documentatie vennootschappen in verband met het vervallen van de verklaring van geen bezwaar en het verbeteren en uitbreiden van de controle op rechtspersonen met het oog op de voorkoming en bestrijding van misbruik van rechtspersonen), *Dutch Official Journal* nr. 280, 2010.

steps and time in the establishment of private limited liability companies and provided in an upsweep from the 79th to the 67th position in the Doing Business guide of the Worldbank.[31]

Further, the incorporation of the company must be accomplished in front of a public notary. He requires the founders to sign the incorporation documents, including the articles of association which will form part of the notarial deed. The founders should be either present in person, either represented via a power of attorney.

The notary also provided in a register of shareholders. The register must be kept in the offices of the company for which the board of directors is responsible.[32] Most often the founders of the company will enter into a shareholders agreement, next to the articles of association to further settle their rights. In shareholder agreements the following list of topics could often be found:

- List of decisions of the board of directors which require the approval of the shareholders;
- Dividend policy;
- Tag along and drag along rights;
- Confidentiality requirement;
- Non-compete requirements.[33]

Finally the company must be registered in the Chambers of Commerce Registry and a Dutch tax identification number must be obtained. The private limited liability company had to file its annual accounts yearly.

The Minister of Justice and the Secretary of State for Economic Affairs established in November 2003 an expert Commission chaired by prof. De Kluiver to provide in recommendations regarding the bottlenecks and the gaps regarding the private limited liability company as signaled in the literature and in practice. The Commission presented its final report in May 2004. The commission identified eight targets to be considered in the modernization of the private limited liability company: a) less mandatory rules, more default rules; b) more freedom to internally organize the company; c) abolishment of non-effective rules; d) less red tape; e) balanced protection of creditors; f) limitation and prevention of any

[31] See above section 2.
[32] Article 2:194 Dutch Civil Code.
[33] See http://www.tto.vu.nl/en/Images/Draaiboek%20oprichting%20BV%202009-12-01_tcm106-137746.pdf (last consulted 12 April 2013).

kind of legal uncertainty; g) meeting the needs of contemporary practices and h) joining the developments in the neighboring countries.[34] The Commission sustained the view that only the existing legislative framework of the private limited liability company needed to be modernized instead of developing a new legal corporate form. Further the Commission was of the opinion that the legislator must provide flexibility to draft the articles of association in accordance with the needs and the requirements of the incumbent parties and less through the "incorporation by reference", meaning that articles of association refer to shareholder agreements. The latter system creates more legal uncertainty as the former due to the indistinctness of the order of the two documents. The content of the articles of association will be left to the parties and for the sake of flexibility the Commission suggested not to provide in a model of articles, like in the UK. Further, the Commission supported reforms to facilitate mergers and divisions with foreign companies as well as conversions into a foreign company or moving its statutory seat abroad. Two areas, of major importance for the advancement of the corporate environment, the structured regime rules for large companies which is also applicable on private limited liability companies and the dispute resolution system were left out from the analysis.

The Commission's proposals were aiming at a reform of four broad areas. First the internal structure of the company must provide in more options for the founders of the company regarding the election and dismissal of board members. It must be facilitated that the shareholders can give instructions to the board of directors. Each shareholder must have the right to call the general meeting. Next, the private limited liability company must be provided with more options to issue different kinds of shares and share options and more flexibility for the transfer of the shares. Third the mandatory capital must be overhauled and the distribution to the shareholders should become more the responsibility of the board of directors. Finally the rules on conflicts of interests should be reformed from a representation rule into a decision taking arrangement and the role of the general meeting of shareholders must be emphasized.

[34] EXPERTGROEP INGESTELD DOOR DE MINISTER VAN JUSTITIE EN DE STAATSSECRETARIS VAN ECONOMISCHE ZAKEN, *Vereenvoudiging en flexibilisering van het Nederlandse BV-recht,* The Hague, 6 May 2004, p. 1-2. Some commentators argued that it was impossible to meet all these goals as some are contradictory: more freedom to organize the company and softening the rules to protect creditors is difficult to align with an appropriate protection of the creditors and the enhancement of legal certainty (G. VAN DER SANGEN and T. RAAIJMAKERS, «Modernisering van het BV-recht en crediteurenbescherming», *Tijdschrift voor Ondernemingsbestuur* 2004, 248).

The report of the Commission De Kluiver was the basis of a consultation process that both the Ministries of Justice and Economic Affairs launched. The consultation[35] was split in three themes: the first related to the internal structure of the company and the shares (launched 10 February 2005), the second theme related on the closed nature of the company and the dispute rules (launched 20 July 2005), while the third theme related on capital protection and some miscellaneous issues (launched 4 April 2006).[36] The consultations resulted in May 2007 in a bill to modernize the private limited liability company.[37] The bill was debated and commented for several years and many amendments have been proposed and suggested: the website of the House of Representatives provides 77 documents that relate to this process of modernizing the private limited liability company. Finally in June 2012 the bill was approved and accompanied with a second law making some final (harmonizational) improvements and introducing the new legislation.[38] The new rules entered into force from the 1st of October 2012. It should be noted that next to this modernization, the Parliament also enacted the One-tier board act.[39] This new law facilitates companies to opt for a one-tier board structure or two-tier board structure. Previously companies that exceeded a number of size thresholds had to provide in a two-tier board structure with a management board and supervisory board. This legislation was also applicable on private limited liability companies, making the Dutch system very rigid. This new law entered into force on the 1st of January 2013.

4. The Flexible private limited liability company

[35] The consultation is identified in the Dutch legal system as "Ambtelijke Voorontwerpen". These documents have been published in F. VAN DEN INGH and R. NOWAK, *Vereenvoudiging en flexibilisering BV-recht deel I De pre-parlementaire geschiedenis*, Kluwer, Deventer 2006, pp. 3-170. Each of these consultations received considerable comments. For an overview of the (long list of) comments see for example: H. ALBICHER and J. VAN MIERLO, «Eerste tranche ambtelijk voorontwerp nieuw BV-recht: inventarisatie naar aanleiding van de consultatieronde», *Tijdschrift voor Ondernemingsbestuur* 2005, nr. 4, 122-128; H. ALBICHER and J. VAN MIERLO, «Tweede tranche ambtelijk voorontwerp nieuw BV-recht: inventarisatie naar aanleiding van de consultatieronde», *Tijdschrift voor Ondernemingsbestuur* 2006, nr. 2, 43-49; D. HOORN, «Verkrijging van eigen aandelen door de besloten vennootschap nader bezien in het licht van de derde tranche», *Vennootschap en Onderneming* 2006, 86-90.

[36] E. VERMEULEN, «De Plaats en de Inrichting van een Nieuw BV-Recht in een Innovatieve Economie», in *De vereenvoudigde BV*, VEREENIGING HANDELSRECHT (ed.). Kluwer, Deventer 2006, p. 120.

[37] Proposal to change Book 2 of the Civil Code related to the change of the rules for private limited liability company (Wijziging van Beok 2 van het Burgerlijk Wetboek in verband met de aanpassing van de regeling voor besloten vennootschappen met beperkte aansprakelijkheid), *Kamerstukken II* 2006/07, nr. 31 058, nr. 2, 27 p.

[38] Wet van 18 juni 2012 tot wijziging van Boek 2 van het Burgerlijk Wetboek in verband met de aanpassing van de regeling voor besloten vennootschappen met beperkte aansprakelijkheid, *Staatsblad* 2012, 299; Wet van 18 juni 2012 tot aanpassing van de wetgeving aan en invoering van de Wet vereenvoudiging en flexibilisering bv-recht, *Staatsblad* 2012, 300.

[39] Wet van 6juni 2011 tot wijziging van Boek 2 van het Burgerlijk Wetboek in verband met de aanpassing van regels over bestuur en toezicht in naamloze en besloten vennootschappen, *Staatsblad* 2011, 275

The modernization can be divided in five sub-items: flexible capital rules, the ability to issue shares (and share certificates) with different kinds of rights, less red tape for organizing the general meeting of shareholders, facilitating rules for transferring the shares and conflict mediation, and distribution of the profits.[40] Each item will be discussed next.

4.1.Flexible Capital Rules

First the requirement for the founders to provide in a minimum capital of 18,000 is abolished.[41] The only requirement that remains is the issuance of at least one share which is not held by or on behalf of the company or a subsidiary of the company. The share must have a nominal value of any amount – for example €0.01 - and it can be issued in any kind of currency the founder(s) prefer(s) (for example $0.01). In case the company had been established before 2002 it is still allowed to mention the capital in guilders. The commitment to subscribe for the capital can be delayed. The abolishment of the minimum capital requirement made the bank declaration of the depositing of this amount redundant. Further, and related to this abolishment is the lapse of the requirement having an issued share capital of at least 20 per cent of the capital (above the minimum capital). The shareholders are no longer liable if this threshold of 20 per cent is not reached.

For contributions in kind, the provision that the accountant must provide in a statement on the value of the assets is no longer required although the assets must be described either by the founders or – in case the contribution takes place after the incorporation – by the directors. A notary deed is still required for the contribution in kind – as well as for the establishment of the company - although it became a mere formality as there is no formal control if the description of the assets is accurate and meets the payment requirements of the shares to be issued. The rules regarding the system of "Nachgründung", a contractual relationship with the founders in the aftermath of the establishment of the company are abolished.[42]

[40] For an analysis of some other new rules see for example C. SCHWARZ, *Inleiding tot het nieuwe bv-recht*, Zutphen, Uitgeverij Paris 2012, 137 p.
[41] Article 2:178 Dutch Civil Code.
[42] See for further information related to this rule, note 25.

Share buy backs are allowed without any specific restriction as regards the buyback itself as long as one share with voting right(s) remains in the hands of a third party.[43] However, the protection of the creditors resulted in an alternative requirements which the management board of the company performing the buyback must take into account.[44] If consideration is paid for the acquisition of the shares the company's equity must exceed the mandatory reserves of the company by an amount of more than the consideration that is paid to acquire the shares. The mandatory reserves of the company are the reserves that the company must maintain due to statutory requirements or regulatory requirements in the articles of association.[45] Next, and probably more important, the board of directors of the company must assure that the share buyback will not cause the company to be incapable of paying its due debts for which it shall proceed in a proper distribution test.[46]

Financial assistance for the acquisition of the shares of the company was only allowed under very strict conditions in the past, and some other techniques like the provision of a guarantee for third parties to acquire the shares of the company were forbidden.[47] In the new system the company has the right to finance the acquisition of its own shares but the board of directors must appropriately assess that the company will continue to be capable to pay its due debts.[48]

Similarly capital reduction should no longer be announced and the creditors cannot oppose the reduction. However, like for share buybacks, the board of directors must take into account the capacity of the company to pay its due debts as well the interest of the company in this transaction.

4.2. Shares and their rights

[43] Under the old requirement the company could only buy back 50 per cent of the shares.
[44] Cf. infra section 4.5.
[45] The former requirements can be found in the rules on the annual accounts and consist of:
"a. the revaluation reserve;
b. the reserve relating to incorporation, share issuance, research and development costs;
c. the participation reserve;
d. the exchange rate fluctuation reserve relating to subsidiaries and hedges in relation thereto; and
e. two types of stock exchange fluctuation reserves (relevant only for regulated investment companies and banks)." (NAUTADUTILH, *Flex BV Act and One Tier Board Act Practical Guidelines*, Amsterdam, 2012, p. 12).
[46] See section 4.5.
[47] Old article 2:207c Dutch Civil Code.
[48] Cf. infra 4.5.

Second, the private limited liability company is allowed to issue different types of shares but shares that belong to the same class of shares should provide the shareholders the same rights. In short, the company can issue shares with both voting rights and rights to share in the profit of the company as well as shares that lack either voting rights or rights to share in the profit of the company. First it is possible to issue shares without voting rights, as long as one share with at least one voting right is issued. It overcomes the former formal use of certification of shares for depriving some of the holders the right to vote. However there remain differences between the issuance of certificates of shares and shares without voting rights. The latter kind of instruments provides the shareholder with the right to participate in the general meeting of shareholders. Shareholder cannot be deprived of this right. Holders of certificates of shares only have the right to participate in the general meeting of shareholders if the articles of association provide this right.[49] Conversely, shares can have multiple voting rights and it is also possible to provide in the articles of association in shares with a progressive or a decreasing number of voting rights[50].

Next, it is also allowed to issue shares without the right to share in the profit. However, the instrument cannot be considered a share if it lacks both the voting right as well as the right to share in the profit.[51] Minority shareholders of companies that have been established before the law came into force are protected against decisions that will be taken that will limit their original rights, either through the requirement of an unanimous vote or through the requirement that the changes in the articles of association cannot be opposed, either through conflict resolution or an exit right.[52]

4.3. General meeting of shareholders

The role and structure of the meeting of shareholders has significantly changed. Formally, calling a meeting is now possible with a term of 8 days instead of 15 days and the meeting must not necessarily take place in the Netherlands. Next shareholders with one per cent of the shares have the right to oblige the board of directors (and the supervisory board) to call a general meeting within four weeks. The shareholders must provide in a detailed agenda. In case the board does not take appropriate action the shareholders can be empowered by the

[49] New article 2:227 Dutch Civil Code.
[50] Article 2:228 section 2 to 4 Dutch Civil Code.
[51] New article 2:190 Dutch Civil Code.
[52] KPMG, *De wet vereenvoudiging en flexibilisering bv-recht (Flex-bv wet)*, October 2012, p. 3

court to call the meeting.[53] It is no longer mandatory to call a meeting every year if all persons entitled to participate in the meeting agree, the participants vote in writing or electronically and the financial statements are adopted. In case all shareholders are directors of the company and agree, the adoption of the accounts implies that the directors (and supervisory board members) are discharged of their duties.[54]

Next the articles of association can provide that a corporate body gives instructions to the board of directors.[55] Previously the instructions were limited to the general policy of the company. The corporate bodies are the general meeting of shareholders as well as the meeting of a specific kind of shares or designation, the board of directors, the supervisory board and the common meeting of the board of directors and the supervisory board.[56] The board must follow the instruction unless they are contrary to the interests of the company.

The new law also provides in more flexibility to elect and dismiss directors of the company. While the general rule that the power to appoint and dismiss directors is vested in the general meeting the articles of association can deviate in different ways. All or a number of directors can be appointed by the meeting of a specific kind of shares or designation provided that (other) shareholders with voting rights have the right to appoint at least one director.[57] The body that is authorized to appoint the director has the power to suspend and dismiss the director.[58] For companies that apply the structure regime, the flexibility is more restricted. Previously for each vacancy at least two candidates had to be provided. As a consequence of this rule the desired candidate was accompanied by a "puppet" candidate. This technique will become superfluous.

4.4. Transfer of the shares

One of the most important differences between the public limited liability and the private limited liability company is the limitations on transferring the shares to third parties in the latter type of company. This rule has been significantly modified for the Dutch private limited liability company. If no provision in the articles of association is provided the shares must first be offered to the other shareholders pro rata. The shareholder is free to sell the shares to

[53] New article 2:220 Dutch Civil Code.
[54] New article 2:238 Dutch Civil Code
[55] Article 2:239 Dutch Civil Code.
[56] Articel 2:189a Dutch Civil Code.
[57] Article 2:242 Dutch Civil Code.
[58] Article 2:244 Dutch Civil Code.

third parties if the other shareholders do not acquire and pay the shares within three months.[59] However it is more than likely that the founders of the company or the shareholders provide in an alternative system for the transfer of the shares in the articles of association.

First the articles can provide that the shares are freely transferable. Second, shareholders can provide in a lock-up period. While previous lock-up periods were provided in contractual arrangements between shareholders, they now can be provided in the articles of association which can be opposed to all shareholders. Transferring the shares in disregard of this provision is invalid. The articles must provide in a term but the law has not provided in a minimum or a maximum term. Whether a term is unreasonable will be assessed by the court applying the principles of fairness and reasonabless.
The old provision in the Civil Code that allowed to provide in tag- and drag-along rights in the articles of association is maintained.[60] In these cases that the shareholder has to transfer her shares, she must be provided with the price that equals the value of the shares as set by one or more independent experts. The articles of association can provide in an alternative price mechanism which the shareholder must have agreed. Good leaver and bad leaver arrangement can be provided in the articles of association.

New is however that the shares or the shareholders can be statutory burdened with additional requirements[61] like the duty to provide in new capital in certain conditions or the duty to acquire new shares, the requirement to provide in loans, to buy or sell goods of or services to the company and the requirement not to compete with the company.[62] If the company opts to change the articles of association of an existing private limited liability company, these requirements cannot be opposed to the shareholders that voted against these new requirements. Next if an opposing shareholder is willing to transfer her shares but she is unable to identify interested third parties due to the manner in which the shares will be burdened after the transfer, she can require the company to find third parties willing to acquire the shares for which the new requirements will be applicable. In case the company fails to do so within three months, the shareholder can transfer the shares within six months to third parties who do not have to take into account these requirements that were included after the

[59] Article 2:195 Dutch Civil Code.
[60] Although it is relocated from article 2:195a to 2:192, §1 Dutch Civil Code. It should be noted that the drag along whereby the minority shareholder is forced to transfer the shares explicitly is provided in article 2:192, §1, c Dutch Civil Code, whereas the articles of association should define the tag along accordingly.
[61] Article 2:192, §1, a and b Dutch Civil Code
[62] HOLLAND VAN GIJZEN, *De Flex BV: Juridisch, Financieel en Fiscaal*, September 2012, p.17.

change of the articles of association. It cannot be denied that this procedure is cumbersome; flexibility comes at a price.

Disputes between shareholders do occur. Whereas the old law provides in a system to end the discussion through the transfer of the shares of one shareholder to another, the new law adds that disputes can also be ended through the transfer of the shares to the company itself. The claim can be based on the unreasonableness to continue the ownership. The procedure is in many details prescribed in the law.[63]

4.5. Distribution of profits

The general meeting can decide to distribute the profit of the company. The law allows providing this power to another organ of the company and the articles of association can further limit the competences of the general meeting.[64] However, the flexibility which has been provided to private limited liability companies is countered in the distribution rules. Distribution of profit, share buy backs as well as refunding of shares is submitted to two new requirements. Next to the balance test which was the only requirement for the distribution according to the former companies law, the new companies act requires a liquidity test and the approval of the board of directors for the distribution of the profit. The previous balance test is maintained. Mandatory reserves cannot be distributed. The mandatory reserves of the company are the reserves that the company must maintain due to statutory requirements or regulatory requirements in the articles of association.[65] Next the board must provide in a liquidity or distribution test and approve the distribution. Hence, the autonomy of the general meeting of shareholders to take the decision to distribute profit is reduced. However the board of directors cannot refuse the distribution without cause. The directors must assess if the company can be reasonably expected to remain capable of paying its due and payable debt after the distribution. If the board has reasonable doubt that the company will have difficulties in paying its debt, it will have to refuse the distribution. As a consequence there can be a reasonable period of time between the decision of the general meeting and the consent of the board of directors.[66] In case the board of directors consents to the distribution and it is found

[63] See the articles 2:343, 2:343a, 2:343b and 2:343c Dutch Civil Code.
[64] Article 2:216, §1, Dutch Civil Code.
[65] Cf. supra note 43.
[66] It can be expected that the board of directors already prepared the tests before the meeting of the shareholders and/or modify the agenda of the general meeting accordingly. However, the liability of the board of directors is assessed at the moment the board agrees to distribute the dividend. Hence, if between the preparation of the

that a reasonable board of directors would not have provided in this consent, the board of directors will be liable and will have to compensate the company's resulting payment deficit, increased with statutory interest. However, a director can be exonerated if he can demonstrate that he did not take part in the decision consenting with the distribution and he took measures to avert the negative consequences of the distribution.[67] Further, shareholders that know or should have known that the distribution would cause the company's financial difficulties related to the due and payable debts, will be liable for a maximum of the distributed amounts increased with the statutory interest from the day of the distribution.

The law does not provide in a framework or guidance for the board with regard to the test that the board of directors must/can perform upon which the decision to consent with the distribution can be based. Legal practice provided in a number of models that the board can use to prepare its decision to consent. It is based on the Parliamentary discussion:

- The period for which the assessment must be made is generally one year although specific conditions must be taken into account (like a longer investment plan) for which an extension of this period must be made;
- Depending on specific circumstances the board must take into account the liquidity, the solvability and the profitability of the company;
- The consent must take into account the position of the company at that time (and not at the time of the general meeting or the drafting of the annual accounts);
- Sufficient amount of equity provides a strong indication that the liquidity test is met, unless specific circumstances after the approval of the annual accounts have influenced the financial position of the company;
- In most cases the distribution will not have an impact on the liquidity of the company and hence the test can be simple and straightforward. The use of the external experts is not required;
- There is no requirement to document the distribution test. However documentation can deliver proof of the testing.
- In case the board of directors is composed of an individual director the consent can indirectly be proven by the behavior of the board, like the payment of the dividend.

agenda and the moment of consent new developments have occurred that deteriorates the financial position of the company – like the bankruptcy of a major customer – the board must reassess the financial position of the company before it gives its consent.

[67] Article 216, §3, Dutch Civil Code.

- The test must provide both a qualitative and quantitative aspect: are there financial threats related to the continuity of the business (qualitative) and what is the maximum amount that can be distributed (quantitative). For the latter the quick ratio[68] and the operational cash flow are of use.

Developing a liquidity forecast upon which the decision of the board can be based, can comply with the legislative requirement.[69] It will be a business decision of the board how often this forecast will be provided.

4.6. Transition measures

As the government wanted to reduce the red tape, it explicitly acknowledged that the existing private limited liability companies do not have to take any steps to comply with the new system. In case an article of association conflicts with the new legislative requirements, it will be considered as unwritten. References in the articles of association to legislative provisions that have been amended, are retained and the new provisions are applicable. There are some exceptions. It is required that the articles of association provide in a mechanism to address the absence of members of the supervisory board.[70] Similarly the articles must provide if the holders of certificates of shares have the right to participate in the general meeting.[71]

However, it is recommended to screen the articles of association and amend the articles accordingly.[72] Often articles of association contain the provision that in case of a new issuance of shares at least a quarter of the nominal value must be paid up at the time of subscription as well as the procedure for binding nominations of the board members. These requirements can be abolished. Other requirements became too restrictive and can be amended. Many articles of association provide in too strict a provision regarding the acquisition of own shares as well as the financing of the own shares. Next, many articles provide in the meeting venue of the general meeting. Under the new law the meeting must no

[68] The current assets less the stocks, divided by the current debt.
[69] A developed liquidity forecast example can be found in HOLLAND VAN GIJZEN, *De Flex BV: Juridisch, Financieel en Fiscaal*, September 2012, p.23.
[70] Article 252, §4, Dutch Civil Code.
[71] Article 194, §5, Dutch Civil Code.
[72] M. CREMERS, «Hoe flexibiliseer je een BV? », *Ondernemingsrecht* 2012, 603-613; C. STOKKERMANS and G. RENSEN, «Invoering flex-BV», *Tijdschrift voor Ondernemingsrechtpraktijk*, 2012, nr. 2, 68-72.

longer take place in the Netherlands and the notice can be shortened while resolutions can be taken without the actual meeting of the shareholders.

5. Successful start of the Flex BV?

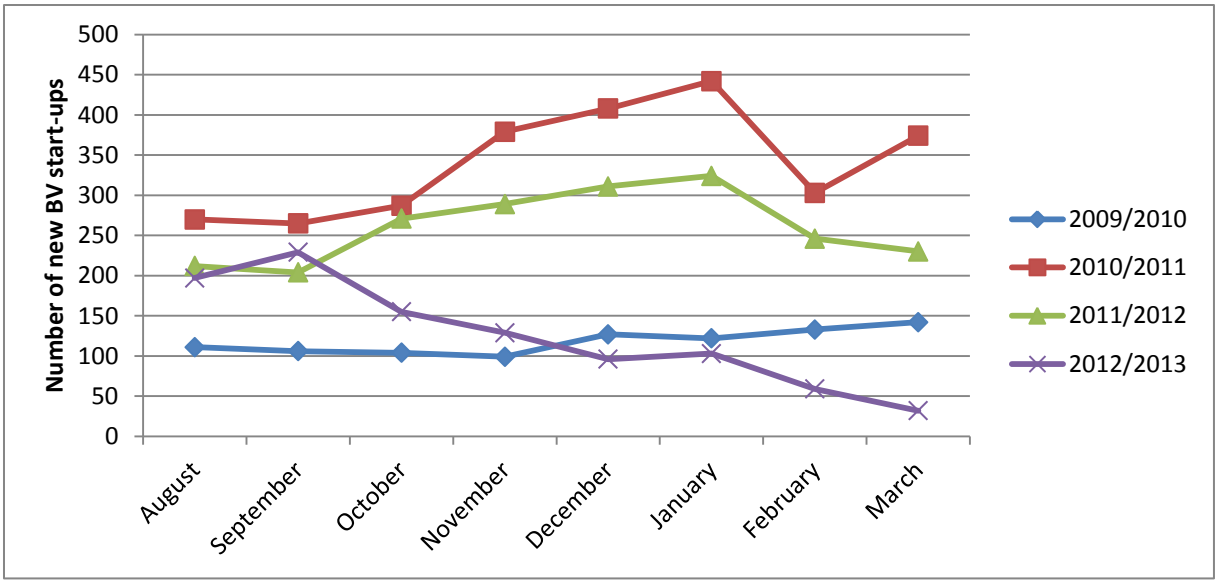
It was expected that the modernization of the legal framework for the Dutch limited liability would become a major success. The Flex BV offers a default system that can be tailored to the needs of the corporate parties while offering protection to creditors. However does it meet the needs and requirements of the modern business community?

The first evidence of the number of new companies is hardly encouraging. Figure 5 presents the recent evolution of the number of start up's of private limited liability companies registered as "starters" in the registers of the Dutch Chamber of Commerce.[73] The new law entered into force in October 2012. To find out if starters would have delayed the establishment of the private limited liability company as to benefit from the new legal facilities, we have started collecting the data from August 2012, two months before the law came into force. In a next step we have compared the yearly trend of establishing new BV's since the entry into force in October 2012 up to and including March 2013 with the establishment of BV's in each of the same three previous periods.

First, there are no signs that starters delayed the incorporation of their company. Since October 2012 the number of new starters dropped every month to less than 100 in January 2013 and even less than 50 in March 2013. Second, the number of new start-ups in the legal form of a private limited liability company decreased since December 2012 to the lowest levels since 2009, probably due to the recession. If any, the legal reform have not attracted or encouraged the incorporation of new starter-companies.

Figure 5: Evolution of the number of BV start ups (August to March from 2009 to 2013)

[73] There are two types of such registrations: companies that are registered as "regular" BV's and companies that are – according to their articles of association – registered as "structured" BV's.



Source: Own research of the data in the registers of the Dutch Chamber of Commerce

One of the authors made an in-depth analysis of the consultation that was launched in 2005 and of which many proposals remained unchanged in the legislative reform.[74] We agree that many reforms significantly improved the legal framework of the BV. However a large number of suggestions and considered improvements in this previous work has not been implemented. First, the starting point of the reform was not to consider any kind of new legal form. As a result, it remains to be seen whether all the different schemes – the start-up, the family business, the complicated joint venture, etc. - that the Dutch private limited liability company must serve, can be served by a one-size-fits-all legal business form. A major advantage of different forms is the disclosure of the main ambit of the founders through the use of a particular legal form. In combination with the fact that it was decided not to provide in any kind or any different kind of regulatory model articles of association requires much more diligence of third parties and in particular the courts identifying the goals of the incumbent parties using the private limited liability company. In particular the regulatory models provide in "network" advantages.

Next, besides some tax requirements, establishing a private limited liability company still requires two agencies to provide specific services: (1) the notary and (2) the Dutch Chamber of Commerce. It can be questioned why there is a need to maintain these two "agencies", in

[74] E. VERMEULEN, «De Plaats en de Inrichting van een Nieuw BV-Recht in een Innovatieve Economie`, in *De vereenvoudigde BV*, VEREENIGING HANDELSRECHT (ed.). Kluwer, Deventer 2006, pp. 154-178. QUIST discusses the differences between the proposals and the law, P. QUIST, «Topmodel met alle opties», *Tijdschrift voor Ondernemingsrechtpraktijk*, 2012, nr. 1, 37-45.

particular as one of the incumbents even grumbles that their instruments do not or only partially allow the detection of fraudulent use of the corporate form.[75]

Third, the rules to govern the conflicts between shareholders are very complicated and it remains to be seen if the rules on transfer of the shares match in all circumstances with the requirements of contractual joint venture exit mechanisms. The abolishment of the minimum capital and facilities in distribution dividends are countered with an increased liability for the board of directors. Board members are often inefficient risk takers. Besides, board members can be instructed and have to meet the demands of shareholders that can be eager to pocket higher dividends. All of this is combined with increased liability. It remains an open question if the exemption rule for directors and refund rule of "knowing" shareholders will be sufficient to overcome this conflict.

Finally, the one tier board structure is – through another legal reform – introduced in the Dutch legal system. However the legislator added that in a one tier board the identity of executive and non-executive board members must be disclosed. For a private limited liability company that has to solve so many different collaborative arrangements, it is hard to see how this separation within the board can be integrated.

It could therefore be concluded that the new framework has modernized the classic structure of the limited liability company, but the Dutch legislature clearly avoided to engage too much in 'out of the box' thinking. We are of the opinion that the reform that has been provided is a major step forward but cannot be viewed as the final step to re-launch and speed up the Dutch economy in the globalized competition of entrepreneurship.

This brings us to another question: What will be the next step in the development of Dutch company law? It could be argued that the modernized and more flexible limited liability company form has at least opened up opportunities for corporate lawyers in the Netherlands to provide legal services that better match the changing national and global needs of the business community in the 21st century. This leads to a related question: Will corporate lawyers recommend the Dutch 'flex-BV' to their clients despite the discussed drawbacks? A quick check of the websites of the top 5 of the Dutch Top 50 ranking of the largest law firms

[75] L. VAN ALMELO, «Faillissementsfraudebestrijding», *Notariaat Magazine*, 2013, nr. 2, pp. 8-10.

(by firm size) provides a preliminary answer.[76] It appears that corporate lawyers have already taken steps to avoid the most costly aspects of the modernized company law act by providing online guidance on their websites regarding how to use the 'new' legal business form. For instance, De Brauw Blackstone Westbroek, a top-tier international law firm (with a high level of expertise and experience in the area corporate law) in the Netherlands, features the modernized company law form prominently on the homepage of their website.[77] Just one click on the 'Flex-BV' button offers (potential) clients an array of information in both Dutch and English. For instance, the website does not only show the legal provisions of the modernized company law act, but it also contains a Guidebook and (even more surprisingly) model articles of association. Interestingly, we see similar 'services' on the websites of four of the five top 5 law firms in the Netherlands (see Table 2). If we take these trends and developments one step further we could argue that the role of lawyers, law firms and other legal practitioners – rather than legislatures – will play a pivotal role in driving the success of 'new' and more flexible legal business forms in the future.

Table 2: Number of business entities in 2005 and 2013

Law Firm	Number of Lawyers	Flex-BV on homepage	Guidance/Model Articles of Association
De Brauw Blackstone Westbroek N.V.	307	Yes	Yes
NautaDutilh N.V.	289	Yes	Yes
Houthoff Buruma	284	Yes	Yes (eBook)
Loyens & Loeff N.V.	252	Yes	No
AKD	206	No	No

[76] See www.legal50.nl
[77] See http://www.debrauw.com (last accessed on 12 May 2013).

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