

**AXON**  
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**ONE TIER BOARD  
AND  
CONFLICT OF INTEREST**

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health  
food  
technology

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**Content**

Act on Management and Supervision (*Wet Bestuur en Toezicht*) contains 3 subjects:

- One tier board**  
one tier board versus two tier board  
liability
- Conflict of Interest**
- Rules for large companies** (assets >17,5M / turn-over >35M / >250 employees)
  - equal participation women (1/3 male / 1/3 female);  
*apply or explain*
  - breaking old boys network / increasing governance  
by limiting number of positions

**Corporate Governance**

Two-Tier Board Model	One-Tier Board Model
<b>The Supervisory Board</b> In charge of decision control	<b>The Board of Directors</b> In charge of decision management and decision control
<b>The Management Board</b> In charge of decision management	

One tier board: both executives and non-executives

Two tier board: management board: executives  
supervisory board: non-executives

**Overview European Corporate Governance:**

- The Netherlands:** only two-tier board (until January 1, 2013)
  - Optional
  - But: mandatory for so called *structuurvennootschappen* (>16M balans total / >100 employees)
  - A one tier board was not forbidden (Fortis, Unilever)
- Belgium:** one tier board (with delegation to management committee)
- Germany:** two tier board
  - Optional
  - mandatory for companies > 500 employees
- France:** optional one tier board or two tier board
- United Kingdom (and USA):** one tier board

## Advantages and Draw-backs

One Tier Board	Two Tier Board
NEDs have better and faster access to information	SB members only receive limited information and at a later stage
NEDs spend more time and are more involved in decision making process	SB members spend little time (in early days: 4 meetings per year) and often only control "in hindsight"
Decision making process is more efficient and faster	Decision making process is delayed due to lower frequency SB meetings
NEDs could align too much with Eds (less "independent")	SB members are more independent
Larger liability for NEDS	Liability better defined in view of separation of tasks/responsibilities



## In practice:

- Not much difference between a one tier board and two tier board anymore:

Prior approval rights SB

SB members are much more active and spend much more time than in the old days

Chair of SB is in frequent contact with management board



## In practice (II)

Professional level of SB has increased

Liability of NEDs in one-tier board is so far judged on the basis of a two-tier system (Fortis case)



## New Dutch legislation

- Act on Management and Supervision. In force since January 1, 2013
- Reason: make BV and NV more flexible / attractive vehicles
- Both NV's and BV's can opt for:
  - Only management board; or
  - One tier board; or
  - Two tier board
- *Structuurvennootschappen* can opt for one tier board or two tier board
- NEDs and SB members must be **natural** persons

## Liability (I)

- General principle: **joint liability** of the board for mismanagement (2:9 DCC).
- A director is only liable for mismanagement in the case of **gross negligence or willful misconduct** (*ernstig en persoonlijk verwijtbaar handelen of nalaten*) (Van de Ven/Staerman, HR 10/11/1997).
- Acting in violation of **articles of association or shareholders agreement** is gross negligence! (Schwandi/Berghuizer Papierfabriek, HR 28/11/2002 / NOM/Beheer HR 7/11/2008)
- Side step: other grounds for liability of director
  - Towards individual creditor (6:162 DCC, Beklamel criterion)
  - Towards liquidator (*curator*) (6: 248 / 6:259 DCC)

## Liability (II)

A director can **disculpate** himself if:

- he has not acted grossly negligent in view of the allocation of tasks; **and**
- he has not been (grossly) negligent in **taking measures** to address the **consequences** of mismanagement.



## Liability (III)

- Reduction of liability risk by: **clear allocation of tasks** between EDs and NEDs
  - In **articles** (2:239a(1) DCC); or
  - In **board regulations** (must have basis in articles)
- Some tasks can **only** be assigned to NEDs:
  - Control and supervision
  - Chair of the board
  - Nominations for appointment of directors
  - Remuneration of executive directors

### Liability (IV)

- No case law on liability of NEDs in one tier board under new legislation yet.
- Under "old" law: District Court Utrecht 15/2/2012 (Fortis)
  - Executive director/CEO (Votron) was held personally liable for not publishing information;
  - Chair (Lippens) was **not** held personally liable:
    - Task of Lippens was merely **supervision** (even though the tasks were not clearly indicated in writing)
    - Lippens was **not** involved in day-to-day management
    - Lippens had **less information** and could reasonably have thought that Fortis was in better state than it actually was

### Conflict of interest

A conflict of interest (Col) is a **personal** interest that conflicts with the interest of the company

Direct or indirect



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### Conflict of interest old vs new

Old	New (since January 1, 2013)
Col had <b>external effect</b>	In principal only <b>internal effect</b>
Agreement executed by person affected by Col could be <b>nullified</b> by company (liquidator!)	Director with Col can be held liable for act of tort
Only rules regarding <b>representation</b> , not about decision making process	Only rules regarding <b>decision making process</b> : director with Col must abstain from deliberations and decision making process <b>But: can represent the company!</b>
Not applicable when only <b>qualitative</b> (functional) Col ( f.e: director of Holding is also director of subsidiary). HR 29/6/2007, Bruil)	Same
No Col rules at SB level	Also Col rules at SB level

### Conflict of Interest New system

- A director with Col **MUST** abstain from deliberations and decision making process (2: 239(6) DCC).
  - Mandatory (no deviation possible)
- If due to Col no decision can be made by the board, the decision is made by the supervisory board. **Mandatory**
  - That is only the case when **ALL** executive directors have a Col
  - If only one or two have a Col, the other executive directors can take the decision!
- In absence of supervisory board (f.e. in one tier board), decision is made by general meeting of shareholders unless the articles stipulate otherwise
  - f.e. priority shareholders or certain class of shareholders
- Col provisions apply to EDs and NEDs in one tier board

## Conflict of Interest New System (II)

- If a **supervisory board** member is subject to a CoI, he **MUST** abstain from deliberations and decision making process (2: 250(5) DCC)
- If due to CoI, no decision can be made by the SB, the decision is made by the general meeting of shareholders unless the articles provide otherwise
  - if only one or more SB members are affected by CoI, the other SB members can make a valid decision.
  - could create an **unwanted situation** now that "dependent" SB members often have a CoI.
- **Solution:** deviation in articles:
  - in the event of CoI of one or more SB members, decisions shall require approval by the shareholders)
  - Decisions will require approval by certain class of shareholders

## Conflict of Interest New System (III)

- There are no rules regarding shareholders with a conflict of interest
  - But: shareholders have to act towards each others according to principles of equity (2:8 DCC)

## Discussion points

Would you opt for a one tier board or a two tier board?

Would you opt for a BV (new style) or an NV?

Has a director, that is also a shareholder, a CoI when approving a resolution for dividend?



THANK YOU FOR YOUR ATTENTION



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