

# Legal Alert

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## Simpler and more flexible law for BVs; what can we anticipate when drafting articles of association?

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### Introduction

On 31 May 2007, a draft bill was submitted to the Second Chamber of the Dutch Parliament, which aims to create a simpler and more flexible legal framework for private companies with limited liability ("**BV**'s). By submitting this bill, the legislature is responding to a need for greater freedom in structuring smaller businesses, joint ventures and corporate groups.

An **outline** of the main changes arising from the new BV law is attached. This Legal Alert discusses how the ramifications of the new BV law can be anticipated when drawing up a BV's articles of association.

Following Legal Alerts will deal with the new BV law on the basis of the different purposes for which a BV is often used, such as a 100% subsidiary as part of a group, a joint venture, a family business, and a BV as an investment company.

### What can we anticipate when drafting articles of association?

It is not yet clear when the new bill will become law, how much of it will be amended, and what the transitional provisions will look like. Nonetheless, when preparing articles of association now, under the

*existing* law, we can anticipate some of the ramifications of the new BV law and thus prevent the articles from being unnecessarily restrictive. Below, we discuss a few subjects to which this particularly applies.

### Contribution in kind

Together with the requirement of a minimum capital of EUR 18,000, the mandatory bank's statement at incorporation will also be abolished. The accountant's statement in the case of a contribution will also no longer be obligatory. The articles should therefore no longer prescribe such statement.

### Financial assistance

The current law provides that a BV may not provide security for the purpose of subscription of shares in its share capital and may only extend loans to the extent that its freely distributable reserves allow this. This prohibition against financial assistance will be abolished, and it should therefore no longer be included in the articles of association.

### Distributions

Distributions may only be made insofar as the shareholders' equity exceeds any reserves to be maintained pursuant to law or the articles of association. Under the new BV law, share capital may generally be distributed, provided that the managing board has given its consent. A distribution test will

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apply, in the sense that the company must be able to continue paying its payable debts after the distribution. The situation should be avoided in which the articles of association include provisions (e.g. that share capital may not be distributed) that will preclude distributions allowed under the new law.

### Repurchase of shares; capital reduction

The same rules as those for distributions will apply to repurchase of shares and capital reduction. In the case of capital reduction, the right of creditors to oppose the reduction is to be removed. For repurchase of shares, the prohibition against purchasing more than 50% of the issued share capital is to be abolished. Shares may be repurchased even if the purchase price is higher than the freely distributable reserves. Shares without profit-sharing rights may be issued. At least one share with voting rights will have to be held by a third party.

A situation should be avoided in which the articles would still provide for repurchase of shares to be limited to 50% of the issued share capital and for the purchase price not to exceed the freely distributable reserves.

It would also be preferable to stop referring in the articles to the creditors' right to oppose a capital reduction and to stop providing that the resolution to reduce the capital will only take effect after the two month opposition period has ended.

### Right to give instructions

The new BV law allows the general meeting or another corporate body to give *concrete* instructions to the managing board. The managing board must follow these instructions, unless this is against the company's interest. Under existing law the managing board may only be required by the articles to follow *general* policy guidelines.

Depending on the degree of influence a shareholder – for example, a parent company of a group – wishes to exercise over its subsidiaries, a provision could be included in the articles at this time that the managing board must follow concrete instructions in addition to instructions regarding general policy, unless these instructions are in violation of the law or against the company's interest.

### Appointment of managing and supervisory directors

The manner of appointing and dismissing managing and supervisory directors (of companies which are not subject to the "structure regime") will become much more flexible. The articles may provide that one of the shareholders can appoint, suspend and dismiss its "own" managing or supervisory director. Every shareholder with voting rights must be able to take part in the decision-making with regard to the appointment of at least one managing or, as the case may be, supervisory director.

Under existing law, this provision cannot be included in the articles. Shareholders often try to achieve a similar result by a system of binding nominations and a shareholders agreement.

Those articles which provide for binding nominations under existing law may provide, subject to the new BV law taking effect, that the person who has the right to make the binding nomination may appoint the managing director directly. Another provision to include in the articles at this point in time would be that, if and when the new law takes effect, the supervisory board will have the right not only to suspend managing directors – as the existing law provides – but also to dismiss them.

### Financing of the BV

Under the proposed law distributions of profits, repurchases of shares and capital reductions will require the managing board's consent, and the managing board will have to refuse its consent if the distribution test is not met or otherwise potentially be held liable. This may cause the managing board to be – perhaps unnecessarily - reluctant to give its consent. This may be a factor in considering financing a (group) BV by hybrid instruments, which may be based in provisions in the articles.

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