

A NEW ERA FOR COMPANIES AND ASSOCIATIONS

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The new Belgian Companies and Associations Code, which envisions a more efficient, flexible, and attractive framework for businesses and (foreign) investors, has been approved by the Belgian parliament on February 28, 2019, and will enter into force on May 1, 2019. Companies, associations, and foundations incorporated as of this date will need to comply immediately with the new regime.

Existing companies, associations, and foundations can voluntarily opt-in and take advantage of the novelties provided by the new code as of May 1, 2019. As of January 1, 2020, the mandatory provisions of the new legislation will enter into force for all existing companies, associations, and foundations.

WHAT ARE THE MAJOR KEY POINTS?

1. The limitation of company types

The new company code only retains a limited number of company types. The company types that cease to exist, namely the partnership limited by shares (Comm. VA/SCA), the cooperative company with unlimited liability (CVOA/SCRI), the economic association (ESV/GIE), and the agricultural company (landbouwenootschap/société agricole) have until December 31, 2023, to convert to another company form. The company form of the cooperative company with limited liability (CV(BA)/S(C)RL) is maintained, but it will be reserved for companies pursuing a cooperative purpose. The remaining company types will be rendered more flexible.

2. The BV/SRL as the new "default" company type

Whereas the current private limited liability company (BVBA/SPRL) was always intended to be used as the "default" company type for small- and medium-sized enterprises, its formalism and lack of flexibility — for example the restrictions on transferring shares without the consent of the other shareholders — prevented it from being as widely used as similar foreign company forms, such as the Netherlands' private company or the United Kingdom's limited company.

The new limited liability company (BV/SRL) is supposed to remedy this situation. It replaces and modernizes the former private limited liability company and is designed to be more easily incorporated, as well as to remain more flexible over the course of its existence.

One of the main innovations is that limited liability companies will no longer have any corporate capital. The capital of the existing private limited liability companies will automatically be converted to a reserve as of January 1, 2020. The disappearing of the minimum capital requirement, traditionally considered as a financial buffer for the company's creditors, but which has proved to be largely insufficient in practice, will be compensated by new obligations, for example:

- the company's management will have to demonstrate a sufficient level of liquidity before the shareholders can decide about any dividend distribution;
- in certain cases of lacking solvability or liquidity, the company will have to justify the decision to continue her activities in going concern (revised alarm bell procedure); and
- a more extended financial plan needs to be drafted at the moment of incorporation, justifying that the company has the necessary means to carry on its intended activities during the first years of business.

The stringent rules currently governing shares and other titles in private limited liability companies will become substantially more flexible, allowing for shares to be transferred freely, for different rights to be attached to shares (for example different voting rights or different rights to financial compensation), and for convertible bonds or warrants to be issued in limited liability companies. Moreover, it will still be possible for the limited liability company to have only one shareholder, which can equally be a holding company from now on.

3. The flexible management structure of the NV/SA

The public limited company (NV/SA), initially conceived to serve larger enterprises, undoubtedly owes a lot of its popularity to the flexibility of its company form, which the private limited company (BVBA/SPRL) could not offer Belgian business owners and investors until now.

The new company code maintains the current flexibility of this company form and further extends it in the following ways:

- Public limited companies will be allowed to have only one shareholder. The current requirement of having at least two shareholders (which for many companies resulted in the allocation of one share to a related company) is dropped by the new company code.
- The company's management can be organized in different ways. Instead of the classic board of directors, which can still be maintained as it currently exists, a public limited company can now also choose to appoint a single director. Another possibility is to opt for a two-tier system, whereby the company is managed by a management board (directieraad/conseil de direction) and a supervisory board (raad van toezicht/conseil de surveillance), which each have their own, strictly separated, powers. Do note, however, that management committees, as governed by the current company code, will cease to exist under the new legislation and will disappear by December 31, 2023, at the latest.
- The *ad nutum* revocability of the directors now becomes the default regime, which can be deviated from in the articles of association. Consequently, it will be possible to provide for notice periods and/or notice payments in case of termination of a director's mandate.

Unlike the limited liability companies (BVBA/SPRL), the public limited companies will still have a minimum corporate capital of €61,500.

4. The capped director's liability

The new company code introduces a common capped joint liability by default regime for all types of companies and associations. The director's liability is now capped vis-à-vis the company and third parties in amounts varying between €125,000 and €12 million, depending on the size and activities of the company.

However, due to a last-minute amendment of the code, this liability cap now solely applies in case of simple minor fault (lichte fout die toevallig voorkomt/faute légère accidentelle). In any other case of director's liability (including simple but usual minor faults) the limitation of liability does not apply. Consequently, this limitation of liability is already widely criticized even before the entry into force of the new legislation, and it is unlikely to have many practical implications. Insurance premiums for director's liability are expected to remain at the same level.

5. The integration of nonprofit organizations and foundations

The Act of 27 June 1921 currently governing associations and foundations will be modernized and integrated into the Belgian Companies and Associations Code. The most noticeable change is that nonprofit organizations will have complete freedom to conduct commercial or industrial operations without restriction, whether they are ancillary or not. Any profit distribution, however, remains strictly prohibited.

It is expected that the new code will be amended even before its entry into force, introducing a general obligation for all associations and foundations to file their annual accounts with the Belgian National Bank, as well as an obligation to register incoming and outgoing donations.

If you have any questions about what these changes can mean for your business, feel free to contact our K&L Gates Brussels corporate team, who will be able to assist you.

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