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What has changed and who is impacted?

The Belgian corporate landscape will get revamped with changes set to impact the legal, tax and accounting aspects of your organization. The objective of the new Belgian Company Code is clear: revise the Belgian enterprise law in terms of simplicity, flexibility and alignment with progress made at a European level.

Given the far-reaching changes, it is important that you and your organization know exactly what is envisaged so that you can start preparing and making the necessary adjustments.

To help you stay ahead of the game, below we've prepared an overview of the key modifications:

1. Simplification

• Integration of the company and association law and extension of scope of activities of associations

A first step in simplification is the consolidation of the company law and association law into one code. This means that all provisions relating to legal entities in Belgium are now integrated into one code, making it much easier to find the relevant provisions. In addition, the contemplated reform will also allow associations to carry out commercial activities without limitation, insofar as the proceeds are used to the benefit of its social purpose provided the articles of association are modified to permit these activities. On the other hand, companies will continue to be allowed to have a social purpose in addition to making profit. Consequently, the main difference between a company and an association will be the distribution of profits. For a company, this means the distribution of proceeds (at least partially) amongst the shareholders, whereas such distribution is not permitted for associations.

• Reduction in the types of companies

One of the most important simplifications will be the reduction of the number of company forms. Under the new Code, only the following forms will remain:

- The ordinary partnership (*de maatschap / la société simple*);
- The general partnership (*de vereniging onder firma (VOF) / la société en nom collectif (SNC)*);
- The limited partnership (*de commanditaire vennootschap (Comm.V.) / la société en commandite (S.Comm.)*);
- The private limited liability company (*de besloten vennootschap (BV) / la société à responsabilité limitée (SRL)*);
- The cooperative company (*de coöperatieve vennootschap (CV) / la société coopérative (SC)*);
- The public limited liability company (*de naamloze vennootschap (NV) / la société anonyme (SA)*);
- The European company (*de Europese vennootschap / la société Européenne (SE)*);
- The European cooperative company (*de Europese coöperatieve vennootschap / la société coopérative Européenne (SCE)*).

To put it simply, the silent partnership (*de stille handelsvennootschap / la société interne*) and the temporary partnership (*de tijdelijke handelsvennootschap / la société momentanée*) will no longer be separate company forms, but will become modalities of the ordinary partnership. Furthermore, the cooperative unlimited liability company (*de coöperatieve vennootschap met onbeperkte aansprakelijkheid (CVOA) / la société coopérative à responsabilité illimitée (SCRI)*), the partnership limited by shares (de commanditaire vennootschap op aandelen (*Comm.VA) / la société en commandite par actions (SCA)*), the agricultural company (*de landbouwvennootschap (LV) / la société agricole (S. Agr.)*) and the economic interest grouping (*het economisch samenwerkingsverband (ESV) / le groupement d'intérêt économique (GIE)*) will be abolished. The European economic interest grouping (*het Europees economisch samenwerkingsverband (EESV) / le groupement Européen d'intérêt économique (GEIE)*) will however continue to exist, since this is a European type of legal entity.

• Public companies

The current Belgian Company Code makes a distinction between companies soliciting public savings and listed companies, whereby the first category comprises the second category (but not the other way around). As the rules applicable to companies soliciting public savings are limited and, in practice, mainly apply to listed companies, the Belgian Legislator deemed it appropriate to abolish the concept of 'company soliciting public savings'. Therefore, the rules applicable to listed companies, as well as the definition thereof, will be slightly amended. This means that only companies of which the shares, profit sharing certificates or certificates relating to these shares are listed on a regulated market are deemed 'listed companies'. It follows that companies of which only the bonds are listed, are in principle no longer 'listed companies' under the new Company Code.

- **Limitation of criminal sanctions**

  The Belgian Legislator has opted to limit the amount of criminal sanctions under the new Company Code due to the inefficiency in the application of these sanctions. Other (more efficient) sanctions for breaches, however, do exist (such as Director's liability or nullity).

2. Flexibility

The second objective of the reform aims to make Belgian company and association law much more flexible and, as a result, tailored to the specific needs of companies, while upholding the protection of third parties such as creditors of the companies.

- **Plurality of shareholders**

  A significant improvement is the fact that the plurality of shareholders is no longer a (basic) requirement. With the exception of the ordinary partnership, the general partnership, the limited partnership and the cooperative company, every company can be incorporated / exist with only one shareholder (exception is made for the European inspired company forms: the European company and the European cooperative company).

- **Default rules**

  The draft bill provides a large degree of contractual freedom or freedom for the company to make their own arrangements in the articles of association. Nevertheless, specific and clear default rules are included in the draft bill, should this freedom not be exercised.

- **The private limited liability company**

  The concept of "share capital" will be abolished for the private limited liability company. The Legislator states that this concept is outdated and does not provide the expected creditor protection. The removal of the concept "share capital" does not affect the requirement for the founding partners to draw up a detailed budget forecast justifying the amount of the 'initial equity' (*aanvangsvermogen/ patrimoine initial*). This initial equity must be sufficient for the normal execution of the intended activities. Moreover, a different ruleset for the distribution of profits is introduced: the net assets test (*nettoactieftest/ test d'actif net*) and the liquidity test (*liquiditeitstest/test de liquidité*).

  - The net assets test: the general meeting of partners must establish that the distribution of net assets will not result in negative net assets for the company;
  - The liquidity test: the management body must consequently establish that the actual distribution of net assets will not lead to the situation whereby the company would no longer be able to pay the debts as they become due for a period of at least twelve months.

  Furthermore, the possibility to distribute an interim dividend (i.e. a distribution of the profit of the current financial year) is introduced for the private limited liability company.

The abolishment of the concept 'share capital' also impacts other matters. The share capital will no longer be the allocation key for the rights of partners, making contractual arrangements (e.g. issue shares with different voting rights, irrespective of the contribution made) possible. Other provisions need to be modified in light of the abolishment of the concept "share capital", such as provisions on the alarm bell procedure, acquisition of own shares, financial assistance etc.

Contrary to the current Belgian Company Code, the private limited liability company will be able to make shares freely transferable. The possibility to further restrict the transferability of the shares remain. The prohibition to issue convertible bonds or warrants ('subscription rights') will be abolished under the new Company Code, since the prohibition was initially introduced as a result of the private nature of the private limited liability company. As the private nature is now supplementary, this prohibition is no longer considered relevant.

Finally, with respect to the management of the private limited liability company (other than a modification of terminology: the private limited liability company will henceforth be managed by a (board of) director(s)), it will become possible to appoint a daily manager.

- **The public limited liability company.**

  Although the modifications to the public limited liability company are less extensive than those of the private limited liability company (given the applicable European provisions), several modifications are noteworthy in terms of the management of such companies.

  The current mandatory provision of the *ad nutum* revocability of the directors becomes supplementary, making it possible to appoint a 'statutory' director or impose other restrictions to the revocability of the mandate of a director. In addition to the (existing) possibility to appoint a board of directors, in the future it will also be possible to appoint a single director.

  Moreover, a (supplementary) dual management regime is introduced, dividing the management of the public limited liability company into two bodies: a supervisory board (*raad van toezicht/conseil de surveillance*) and an executive council (*directieraad/conseil de direction*). With distinct powers and different members, the executive council will be responsible for the operational matters, whereas the supervisory body will be responsible for (amongst others) determining the strategic policy of the company and supervising the executive council.

  As is the case for the private limited liability company, it will also be possible for public limited liability companies to issue shares with multiple voting rights. For listed companies, a loyalty share scheme can be implemented whereby a share may be entitled to two votes if the shareholder is on board for two or more years.

3. Aligning with European progress

- **Statutory seat theory**

At the moment, Belgium still applies the "real seat theory" meaning that the applicable company law is determined by the actual (real) center of management. Following European evolutions in this respect, i.e. the freedom of establishment, the Belgian Legislator considered it necessary to implement the statutory seat theory, meaning that the applicable company law will be determined by the statutory seat of the company. In other words, a Belgian company will be able to move its activities abroad, but still remain subject to Belgian law. The reverse will also be permitted - a foreign company may move its real seat to Belgium and remain subject to its own national law.

In addition to this modification, the new Company Code introduces a specific procedure for the cross border transfer of the registered office (the "cross border conversion"), applicable to both inbound (a foreign company transferring its registered office to Belgium) and outbound (a Belgian company transferring its registered office abroad) scenarios.

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