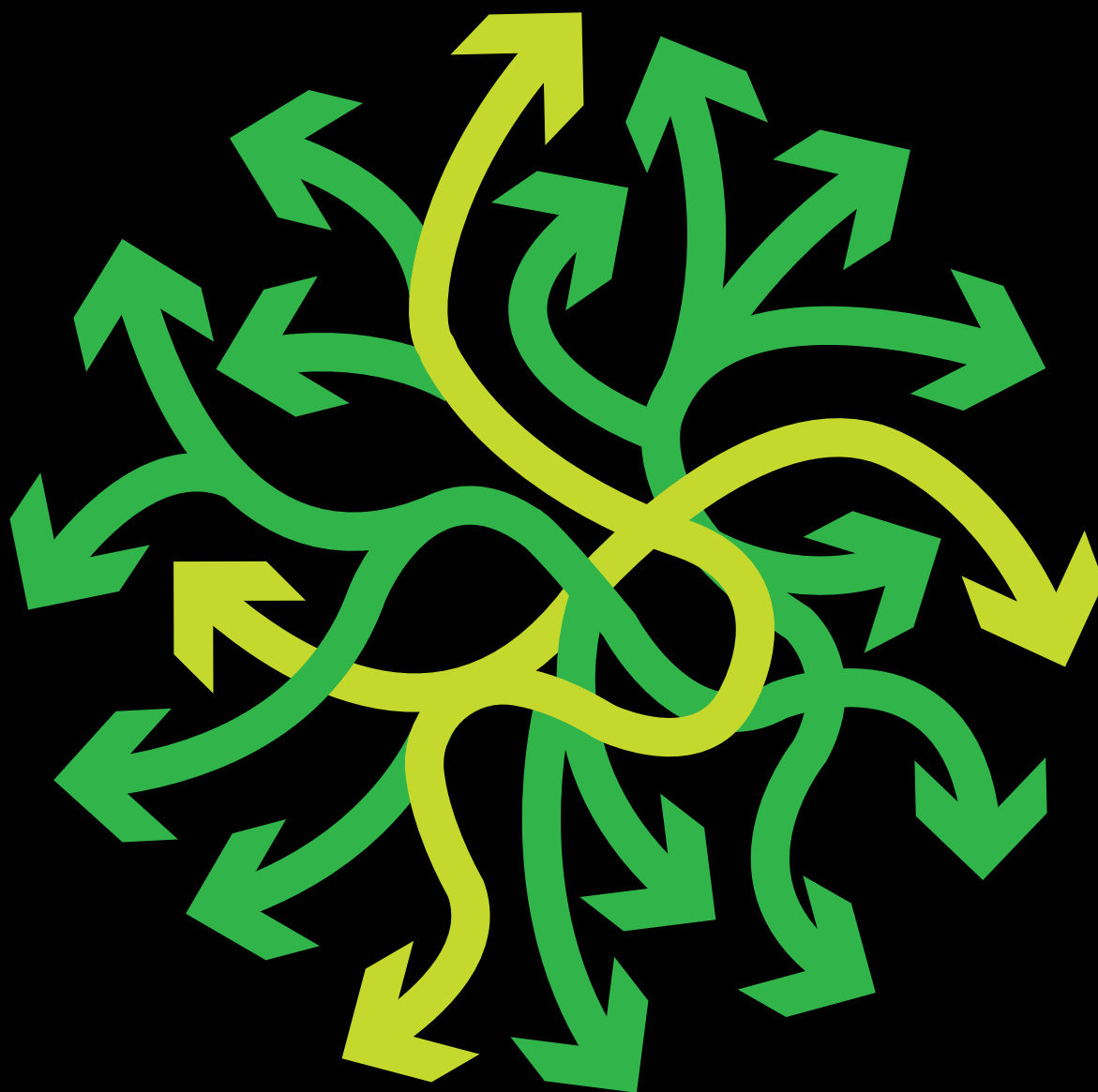


Deloitte.
Legal



**Did you know that under
the new Belgian Companies Code...**

Introduction

On 28 February 2019, the Parliament enacted a brand new Belgian Companies Code. This new code aims to make Belgium a more competitive and attractive place to establish a company and will have an impact on every company in Belgium. Changes include the reduction of the number of company forms, amendments to companies' managing bodies, and removing barriers to dissolution and liquidation.

The new code also addresses topics such as the cross-border transformation of a company.

The new rules will apply to new companies or in case of dispute resolution as from 1 May 2019. They will apply to existing companies as of the date on which they opt in voluntarily or, at the latest, 1 January 2020.

The new Belgian Companies Code will create many opportunities. However, the changes may also bring challenges that require organisations to reassess their governance structure.

With this guide, our team of experts wishes to provide some clarity on the new Belgian Companies Code, and contribute to informed decision-making.

The Deloitte Legal team

Structure and key concepts



Did you know that non-profit associations (VZW/ASBL) will be able to pursue profit making activities without limitation?

While having legal personality, non-profit associations (VZW/ASBL) have always been governed by legislation separate from company law. The new Belgian Companies Code integrates the law on non-profit associations and where possible seeks to introduce common rules applicable to all private law legal persons.

That integration comes together with a brand new definition of non-profit associations. The new Belgian Companies Code will allow non-profit associations to pursue profit making activities to the same extent and under the same conditions as companies. As such, non-profit associations will be put on an equal foot with companies to compete in the market, without the risk of being in an illegal situation.

The distinguishing factor between non-profit associations and companies will lay in the possibility to distribute realized profits. While the ultimate goal of companies is to distribute profits to their shareholders, there is an absolute prohibition for non-profit associations to do so. A non-profit association will be obliged to use its profits for the realization of its social purpose.



Did you know that the cooperative company (CV/SC) is reserved for companies that actually pursue cooperative ideas?

Under the current Belgian Companies Code, the cooperative company has lost its original identity, namely to pursue a cooperative idea. It has become an attractive company type for partnerships, given its flexible entry and exit possibilities, multiple voting shares, and the flexible governance rules.

The new Belgian Companies Code goes back to the roots of the cooperative company by reserving this corporate form for “true” cooperative companies inspired by a cooperative idea, which is to meet the needs of its shareholders and/or to stimulate its shareholders’ economic and social activities. The cooperative company will therefore also be the legal type for so-called “social enterprises”, which will no longer constitute a separate company form, but a modality adopted (only) by the cooperative company. Mere partnerships will in principle have to convert into private limited liability companies (BV/SRL) or another company form, albeit that the broad description of the “cooperative aim” in the legislation leaves room for interpretation.



Did you know that companies can move their headquarters abroad without losing their qualification as a Belgian Company?

Currently Belgian law applies the so called “real seat doctrine”, meaning that the location of the main establishment (and not that of the registered office) determines the applicable company law.

The new Belgian Companies Code reverses this, aligning with the rulings of the European Court of Justice. Going forward, the location of the registered office will be the only relevant factor to determine the applicable company law.

As a result, Belgian companies will have the flexibility to have their headquarters abroad, while still being considered as a Belgian company, governed by Belgian company law.



Did you know that the shareholder of a private limited liability company (BV/SRL) will have the possibility to have his shares redeemed by the company?

Under the current Belgian Companies Code, the withdrawal of a shareholder at the initiative of the shareholder itself and the corresponding redemption of the shares by the company is only possible in a cooperative company (coöperatieve vennootschap/société coopérative). This is one of the current advantages of such company form, which is often used by professional partnerships.

The new Belgian Companies Code will offer the possibility for shareholders' withdrawal for private limited liability companies (besloten vennootschap/société à responsabilité limitée) as well, provided that such system is foreseen in its articles of association.

By doing so, some of the appealing features of the cooperative company can be introduced in the private limited liability company. This reinforces the flexible character and attractiveness of the future private limited liability company.



Did you know that private limited liability companies (BV/SRL) can exclude shareholders and have the shares of the excluded shareholder redeemed by the company?

Currently, partnerships often opt for the cooperative corporate form, a.o. because shareholders can be excluded for serious grounds or reasons explicitly enumerated in the articles of association. The shares held by the excluded shareholder can be redeemed by the company through a reduction of the variable share capital.

Since the new Belgian Companies Code will reserve the cooperative company type for companies truly adhering to the initial cooperative idea, and since it will abolish the share capital concept in the private limited liability companies (BV/SRL), such private companies will be able to copy the current exclusion possibility in the articles of association. As such, expectedly professional partnerships under the form of a cooperative company will largely convert into a BV, in order to further enjoy this regime.

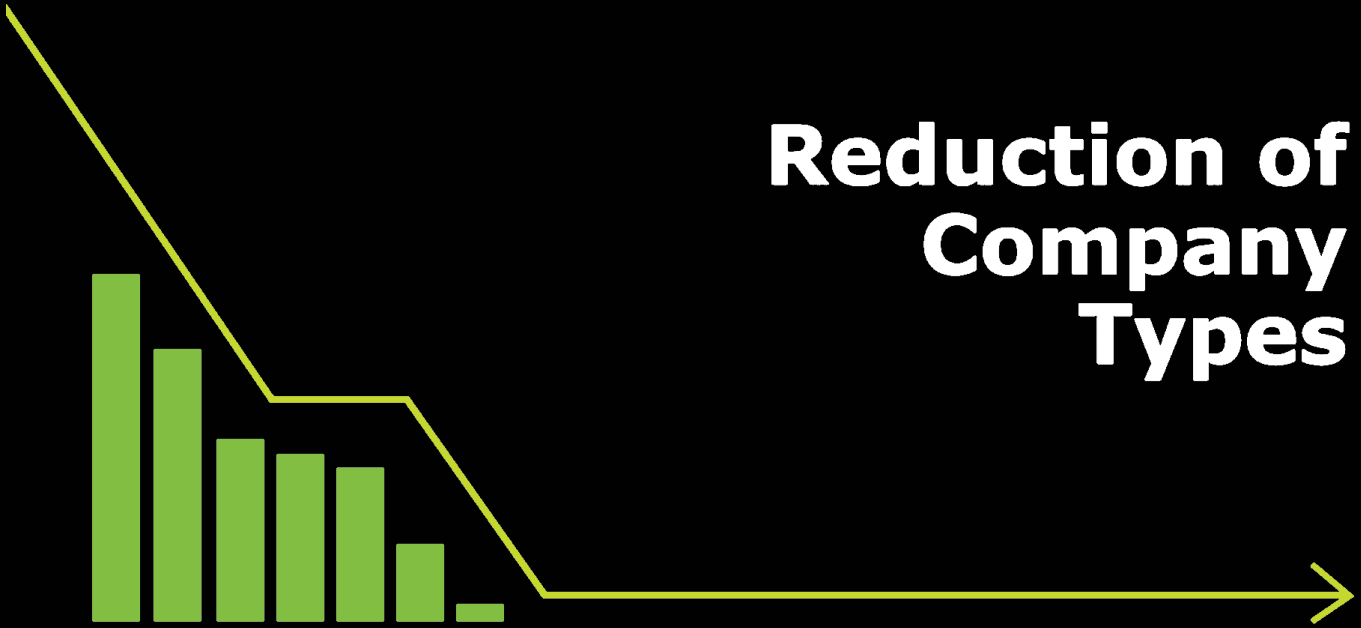


Did you know that it will be possible to simplify the shareholders' structure of companies groups?

Currently, public limited liability companies (NV/SA) must be incorporated by at least two persons. If later on, all shares are acquired by one single person, such person bears the risk of becoming liable for all company liabilities, if it remains the sole shareholder for more than one year. The same goes for private limited liability companies (BVBA/SPRL) incorporated and/or held by a single shareholder that is a legal person.

The new Belgian Companies Code departs from this regime by allowing private and public limited liability companies to be incorporated and/or held by only one shareholder. This fundamental change will especially allow to simplify the structure of company groups, by regrouping all shares of subsidiaries with the parent company. Such simplification will obviously facilitate the corporate housekeeping within such groups.

Reduction of Company Types



Limitation of company forms



Did you know that the Comm.VA/SCA will be abolished as a company form?

The Comm.VA/SCA is a company form frequently used by investment funds or for estate planning purposes. The company form combines in essence the elements of a public limited liability company (NV/SA) (capital requirements and protection, types of securities, etc.), with the particularity that the board of directors is replaced by a single director appointed in the articles of association (statulaire zaakvoerder/gérant statulaire). Such director must be a shareholder of the company and enjoys a veto right against decisions made by the general meeting of shareholders, amongst which his own dismissal. On the other hand he is held jointly and severally liable for all company liabilities.

The new Belgian Companies Code abolishes the Comm.VA/SCA as a separate company form. Much relates to the newly introduced possibility for public limited liability companies (NV/SA) to replace their board of directors by a sole director. While the new Code does not add provisions (in terms of capacity, veto rights or liability) governing the position of the sole director in the public limited liability companies (NV/SA), it will still be possible to adopt the current regime of the Comm.VA/SCA on a voluntary basis by including appropriate provisions in the articles of association.



Did you know that did you know that the single private limited liability company (E-BVBA/S-SPRL) will disappear as a company form?

Since the new Belgian Companies Code will no longer require a minimum capital amount for a private limited liability company (BV/SRL), and will introduce the possibility to incorporate such company with only one promotor, there is no further reason to maintain the special regime of the single private limited liability company (E-BVBA/S-SPRL). Hence, this also implies the deletion of any restriction on the number of single member companies a person can hold shares in.

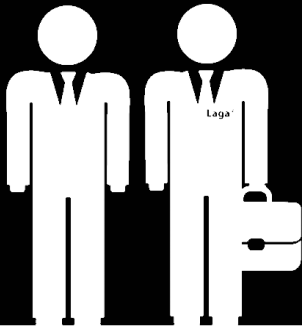


Did you know that the Economic Interest Grouping (ESV/GIE) will be abolished as a company form?

Given the limited number of incorporated Economic Interest Groupings (EIG's), the EIG will be abolished as a corporate form. The features of the EIG can perfectly be adopted under the future regime of the general partnership (*vennootschap onder firma / société en nom collectif*). Existing EIG's will have to convert into one of the suitable remaining corporate forms. Failing to do so by 1 January 2024, they will mandatorily convert into general partnerships (VOF/SNC).

How can Deloitte Legal help ?

By facilitating the transition process



The private limited liability company



Did you know that no minimum share capital requirements will apply to the private limited liability companies (BV/SRL)?

The current Belgian Companies Code requires a minimum share capital amount of EUR 18,550 in order to incorporate a BVBA/SPRL. The new Belgian Companies Code removes this requirement. The abolishment of the minimum share capital requirement does however not mean that shareholders no longer need to contribute to the company's equity (whether in cash or in kind). The adequacy of the financial means (in equity and in debt) must be established by the founders in a detailed financial plan, the content of which will have to be more elaborate than the current Belgian Companies Code (including eg. cash-flow projections). In case the private limited liability company would go bankrupt within three years after its incorporation due to insufficient funding, the founders can be held liable for any loss that third parties may incur.



Did you know that private limited liability companies (BV/SRL) will no longer have to form a legal reserve fund?

Under the current Belgian Companies Code the general shareholder's meeting has to set aside at least 5% of the annual net profits of the private limited liability company (BVBA/SPRL) to constitute a legal reserve fund until this reserve fund has reached an amount equal to 10% of the share capital. Going forward, the share capital protection rules (amongst which the obligation to constitute legal reserves) will be replaced for private limited liability companies (BV/SRL) by the prescribed solvency – and liquidity tests, which will be intended to provide the necessary safeguards.

As of the entry into force of the new Belgian Companies Code the legal reserve of existing private limited liability companies will automatically be converted into a statutory unavailable reserve.



Did you know that the private limited liability company (BV/SRL) will no longer have a share capital (from a company law perspective)?

The abolishment of the notion of 'share capital' for the private limited liability company (BV/SRL) is the most profound reform introduced by the new Belgian Companies Code, both practically and theoretically. It allows redefining many legal rules with a view to enhance flexibility and efficiency. The most important rules relate to distributions to shareholders, among others dividend payments, capital reductions and redemption of shares. Such distributions will be subject to both a solvency test and a liquidity test, which replace the so-called balance sheet test (comparison between the net assets and the share capital of the company) as currently foreseen in the Belgian Companies Code (which will remain applicable to public limited liability companies (NV/SA)).

The abolishment of the share capital also brings along great flexibility in terms of the allocation of shareholder rights in the company. There is no longer a mandatory link between the contributions made by the shareholders and the number of shares they receive in the company and there is no restriction on the types of shares a BV/SRL can create.



Did you know that the directors of the private limited liability company (BV/SRL) will have to document any decision to make distributions to shareholders on the basis of a liquidity test?

The new Belgian Companies Code abandons the concept of share capital for the private limited liability companies (BV/SRL). The (minimum) share capital requirements were often perceived as burdensome and a high entry barrier for the incorporation of new companies. There is also doubt whether those requirements contributed effectively to protecting creditors and other stakeholders of the company. Under the new Belgian Companies Code other protection mechanisms will come into place to protect the equity (and no longer the share capital) of the company. One of these new protection measures is the obligation of the company's directors to apply and document a liquidity test before making any distribution (whether decided by the board or by the general shareholders' meeting) to shareholders.

The liquidity test aims at preserving sufficient financial means to honor the company's debts towards third parties. Therefore, in order to prevent excessive distributions, the directors have the responsibility to verify whether a distribution can be paid out, after verification of the company's ability to reasonably pay its debts in the twelve

months' period following such distribution as they become due. As a consequence, the directors will have the power and duty to block a distribution even when decided by the shareholders, should the outcome of the liquidity test require so. It will be important for the directors to adequately document this verification exercise in a separate report.



Did you know that founders of both private and public limited liability companies will have to draft a more in-depth financial plan?

Belgium is one of the few countries that requires a financial plan for the incorporation of private limited liability companies (BVBA/SPRL) and public limited liability companies (NV/SA). The obligation to draft a financial plan for the company requires the founders to consider the future funding needs of their business to be set up. There is no control on the content of the financial plan, except in case of bankruptcy of the company within the first three years after its incorporation. In such instance, a judge may review the content of the financial plan and hold the company founders liable for the company debts if the financial plan shows a manifest underfunding of the company from the outset.

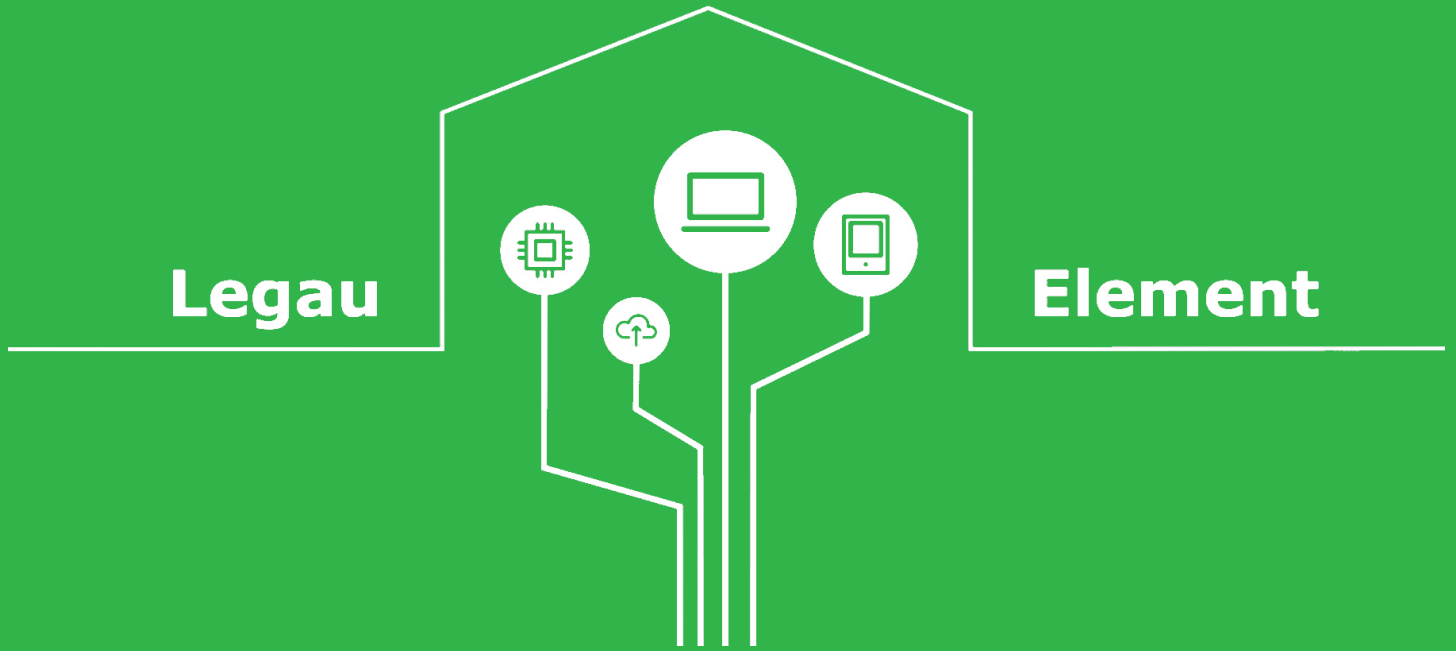
The new Belgian Companies Code maintains the current regime of the financial plan but sets higher standards for its required content and information. The new Code lists the minimum information the plan must contain. For example, a financial plan must contain a projection of the cash situation of the company after one and two years after its incorporation.



Did you know that it will be easier to distribute interim dividends for private and public limited liability companies?

The new Belgian Companies Code mitigates the current restrictions on the distribution of interim dividends by the board of directors. The main change is that no time limitations will apply for the payment of interim dividends. As such, interim dividends can be distributed during the whole financial year (under the current regime this is only possible during the second half of the financial year) and interim dividends can be distributed freely at multiple occasions during the financial year (whereas currently there must be a time period of at least 3 months between two interim dividend distributions). Such flexible regime for interim dividends as applicable on the public limited liability companies (NV/SA) will also be introduced for the private limited company (BV/SRL).

Our inhouse developed technology tools



Shares and other securities



Did you know that listed companies will be allowed to grant a double (loyalty) voting right to long term shareholders?

Inspired by the French system, the new Belgian Companies Code will give listed companies (having shares listed on a regulated market) the possibility to reward long term investors with a double voting right: shareholders holding shares in registered form for a period of (at least) two consecutive years will see such shares entitled to a double voting right. This system will not apply automatically: the articles of association must explicitly provide for the system. As soon as the shares are transferred to another person or legal entity, the shares will lose their double voting right until the transferee holds the shares (in registered form) for a new period of two years.

By introducing this system of a “loyalty” voting right, the Belgian legislator seeks to stimulate long term investment in Belgian companies.



Did you know that a private limited liability company (BV/SRL) can issue shares with multiple voting rights?

The current Belgian Companies Code imposes a mandatory “one share one vote” rule for private limited liability companies (BVBA/SPRL), save for the possibility to issue non-voting shares under certain strict conditions.

Under the new Belgian Companies Code the one share one vote principle will remain the default position, but the articles of association can freely deviate from that principle. This way, a private limited liability company (BV/SRL) can without any limitation create shares with one vote, shares with (various) multiple voting rights, and non-voting shares (with far less restrictions in the latter case). This flexibility is particularly useful to tailor agreements concluded between e.g. investors in private limited liability companies to their specific needs.



Did you know that the issuance of shares with multiple voting rights without any limitations will also be possible in non-listed public limited liability companies (NV/SA)?

Consistent with the new possibility to issue multiple voting shares in private limited liability companies (BV/SRL), the new Belgian Companies Code allows the issuance of shares with (various) multiple voting rights in non-listed public liability limited companies (NV/SA). Such possibility is not available for listed companies, which can only make use of the double (loyalty) voting right.



Did you know that private and public limited liability companies can issue non-voting shares without any limitation?

Under the current Belgian Companies Code, the issuance of non-voting shares is subject to numerous limitations, which explains the lack of attractiveness in practice.

The new Belgian Companies Code abandons most of the limitations applicable to non-voting shares, and implements a more flexible legal regime. A company can freely tailor the rights and obligations of non-voting shares in its articles of association. The only remaining mandatory rule is that holders of non-voting shares will be entitled to vote on changes to the rights attached to their shares, or on a fundamental restructuring of the company (such as a transformation, merger, de-merger or cross-border transfer of seat).



Did you know that private limited liability companies (BV/SRL) can issue convertible bonds and subscription rights?

Conceived as a “closed” type of company the private limited liability company (BVBA/SPRL) is currently prohibited from issuing profit certificates, subscription rights or convertible bonds. Under the new Belgian Companies Code, the private limited liability company (BV/SRL) will no longer be conceived as necessarily “closed” and it will be allowed to issue any kind of securities, including convertible bonds and subscription rights.



Did you know that ordinary bondholders will no longer have the right to attend the general shareholders’ meeting?

Under the current Belgian Companies Code, all bondholders have the right to attend the company’s general shareholders’ meeting. This includes holders of ordinary bonds as well as holders of convertible bonds. They cannot vote for or against decisions, but they have a right to take part in the deliberations.

The new Belgian Companies Code abolishes the right of ordinary bondholders to be present at the general shareholders’ meeting. By limiting the attendance right to holders of convertible bonds, who have an interest in the company as a possible future shareholder, the legislator wants to reduce red-tape and costs related to convening general meetings. Practice has shown that holders of ordinary bonds hardly participate in general shareholders’ meetings.



Did you know that rules regarding general meeting of bondholders can be largely deviated from?

The provisions of the new Belgian Companies Code regarding the general meeting of bondholders will mainly consist of default, non-binding, rules. The issuer will therefore be able to deviate to a large extent from those rules in the bonds’ terms and conditions. This will allow issuers to better align with international practice, where large bond issuances are often subject to foreign (UK or New York) law, providing for particular mechanisms to change the bonds’ terms and conditions. Issuers will, for instance, be able to replace the general meeting of bondholders by an agent who can make decisions on behalf of the bondholders.



Did you know that private limited liability companies (BV/SRL) can issue securities other than shares in dematerialized form?

Under the current Companies Code, all securities issued by a private limited liability company (BVBA/SPRL) must be in registered form.

The new Belgian Companies Code provides for the possibility for private limited liability companies (BV/SRL) to issue debt securities (e.g. bonds) in dematerialized form. The possibility to issue securities, other than shares, in dematerialized form, must be foreseen in the company’s articles of association.

In order to make it possible for private limited liability companies (BV/SRL) to have their shares listed, listed private limited liability companies will be allowed to issue shares in dematerialized form.



Did you know that private and public limited liability companies may purchase more than 20% of their own shares?

The current Belgian Companies Code imposes a limitation whereby private and public limited liability companies may only acquire a maximum of 20% of its own shares (taken into account the own shares already owned by it as well as its shares held by its direct subsidiaries).

The new Belgian Companies Code abolishes this limitation. Consequently, private and public limited liability companies will have the possibility to acquire more than 20% of their own shares. On the other hand, the limitation that such acquisition must only be made with amounts available for distribution will continue to apply.



Did you know that the rules regarding pledges over own shares of a private limited liability company (BV/SRL) will be abolished?

Article 330 of the current Companies Code sets out the rules governing pledges over the own shares of the private limited liability companies (BVBA/SPRL). Broadly speaking, such pledges are treated in a similar way as acquisitions of own shares by the company and are governed by the same principles.

The new Belgian Companies Code abolishes the aforementioned article 330 as it is deemed to be ineffective. Transactions that may lead to the acceptance as pledgee of own shares will however remain subject to the rules on conflicts of interest and financial assistance.



Did you know that shares of a private limited liability company (BV/SRL) can be listed on a regulated market?

Under the current Belgian Companies Code, a private limited liability company (BVBA/SPRL) cannot make a public offering of shares and, therefore, cannot list its shares on a regulated market. The new Belgian Companies Code explicitly allows private limited liability companies (BV/SRL) to proceed with a public offering and listing of shares on a regulated market. To this end, private limited liability companies opting to list their shares, will be allowed going forward to issue dematerialized shares.



Did you know that a private limited liability company (BV/SRL) must no longer be a "closed" company?

Under the current Belgian Companies Code strict rules apply as regards the transfer of shares of a private limited liability company (BVBA/SPRL). A transfer of shares to third parties requires prior consent of a specific majority of shareholders. The law only foresees in a few exceptions to such requirement, such as a share transfer to relatives in the straight line.

The new Belgian Companies Code maintains the same rules regarding share transfers in the private limited liability company (BV/SRL) as default rules. Contrary to the current legal regime, the articles of associations can deviate from these default rules, and for example opt for the free transferability of shares, in which case the private limited liability company will have an open character in the same way as public limited liability companies (NV/SA).



Did you know that contributions in kind in private limited liability companies (BV/SRL) can consist of services to be performed?

The current Belgian Companies Code explicitly forbids a contribution in kind of services to be performed (inbreng in nijverheid /apport en industrie) in private limited companies (BVBA/SPRL). The new Belgian Companies Code abolishes this restriction and therefore a contribution in kind of services will also be possible in the private limited liability company (BV/SRL), it being understood that the general reporting and audit requirements for contributions in kind must be complied with. This offers the possibility for e.g. start-up companies to remunerate the rendering of services in shares, rather than in cash.



Did you know that the enforceability of statutory restrictions on the transfer of shares is strengthened ?

Under the current Belgian Companies code, it is difficult to enforce restrictions on the transfer of shares towards third parties to the extent that such restrictions do not result from the law. Only in case the company (or its shareholders) can prove that the transferee of shares had actual knowledge of a breach of the restriction on the transfer of shares, the share transfer is null and void.

The new Belgian Companies Code foresees various mechanisms to protect the company and its shareholders against persons acquiring shares in violation of transfer restrictions contained in the articles of associations of the company. The most important one is that such share transfer will not be effective against the company and its shareholders, regardless of the good or bad faith of the acquirer of the shares, provided that the articles of associations have been validly published in the Annexes to the Belgian Official Journal.



Changes regarding companies' governance bodies



Did you know that the 'daily management' will have broader powers?

Public limited liability companies (NV/SA) can entrust one or more (legal) persons with the daily management of their business. Such person has the competence to make decisions and to bind the company in any matter that belongs to the 'daily management' of the company. The installation of a daily management body reduces red tape. It avoids the need to organize board meetings on operational matters of less importance. Until now however, the legal concept of daily management is defined quite restrictively. The concept of daily management obviously covered decisions and actions which are required for the conduct of day-to-day business of the company. Decisions and actions that are not part of the conduct of day-to-day business, can only be decided by the daily manager(s) if they are both of little impact and urgent. Under the new definition, daily management will be competent for the latter matters if they are either urgent or have little impact.

We note that the installation of a daily management has also been made available to the private limited company (BV/SRL), which could be of importance for in particular the larger companies organized in such company form.



Did you know that the formal management committee (directiecomité/ comité de direction) will be abrogated?

Currently, the board of directors of public limited liability companies (NV/SA) has the possibility, subject to an authorization in the articles of association, to delegate operational management to a formal management committee recognized by law as a corporate body. Given the fact that board members can also be members of the management committee and that the board of directors can revoke at any time the delegation of powers, this system is seen as a "quasi"-two-tier system.

The new Belgian Companies Code abolishes the management committee. Public limited liability companies will have to make a more fundamental choice between a common one-tier board and a pure two-tier system. The choice will not be made by the board of directors, but requires an amendment of the articles of association. In the two-tier system the management of the company is

entrusted to two separate corporate bodies: (i) a supervisory board (toezichtsraad/conseil de surveillance) responsible for the strategy of the company and supervision of the management board, as well as for all special powers reserved to it by the Companies Code (mostly in the context of corporate actions such as approval of accounts, special board reports etc.); and (ii) a management board (directieraad/conseil de direction) competent for all matters that are not entrusted to the supervisory board, mainly consisting of overall operational management.

The main difference between the current formal management committee (old system) and the two-tier system (new system) is that a strict division applies between both corporate bodies both in terms of powers and in terms of composition. Members of the supervisory board cannot be member of the management board (and vice versa).



Did you know that public limited liability companies (NV/SA) will have the possibility to appoint a single director?

Under the current Belgian Companies Code, a public limited liability company (NV/SA) must have a board of directors, consisting of at least three members. Only in case there are only two shareholders, the company can deviate from that rule and work with a board of directors consisting of only two members.

The new Belgian Companies Codes will foresee in the same principle but will introduce the possibility for a public limited liability company to opt in its articles of association to allow the general shareholders' meeting to appoint only one director. Such single director will have the same role, powers and responsibilities as a collegial board of directors.

By introducing that rule, public limited liability companies will be able to copy the governance system of a limited partnership with a share capital (Comm.VA/CSA), without having the disadvantages connected to it, such as the unlimited liability of that unique director. This will make the latter company form obsolete, and as a result the Comm.VA/SCA will be abolished as a separate corporate form.



Did you know that company directors will exercise their corporate office as self-employed persons?

Given the nature of their corporate office and services, including the related liability regime, both legal doctrine and jurisprudence consider that company directors of public limited liability companies have a self-employed status, and inversely cannot be considered employees of the company. The new Companies Code will codify this rule, and explicitly prohibit that company directors exercise their mandate under an employment contract. Furthermore, the scope of the self-employment regime will be broadened and will also apply to directors in private limited liability companies.

Where the old regime only instituted a rebuttable presumption of self-employment, the new regime makes the presumption non-rebuttable. This implies that the protective rules that apply to self-employed persons (e.g. protection of private home) shall now also apply to directors. On the other hand however, the recent changes in Belgian insolvency law (in particular the fact that bankruptcy also extends to self-employed individuals) create additional risks. Company directors should therefore make sure their (professional) liability is sufficiently covered by appropriate insurance policies.



Did you know that companies will be allowed to invite shareholders, directors and auditors to the general shareholders' meetings by e-mail?

On top of the existing convening methods, the new Belgian Companies Code makes it possible to convene shareholders, directors and auditors having agreed to this, to general shareholders' meetings by e-mail. Companies can voluntarily opt to include in their articles of associations an e-mail address, to which shareholders can officially send notifications, including their opt-in for receiving convocation e-mails.



Did you know that legal entities nominated as directors must directly appoint a physical person as their permanent representative?

While the current the Belgian Companies Code leaves room for interpretation, an established practice has developed to allow a legal entity which takes up the role as director in a company to appoint another legal entity as permanent representative, which in its turn appoints a physical person as permanent representative. This results in a cascade of permanent representatives, which does not favor transparency.

Under the new Belgian Companies Code, a legal entity which is appointed as director will only be able to appoint a physical person as its permanent representative. In other words, it will no longer be possible for such legal entity to appoint another legal entity as its permanent representative.



Did you know that the rules on permanent representation of legal entities nominated as directors will become flexible?

When a legal entity is appointed as a director, member of the management board or supervisory board, or member of the daily management of a company, it must appoint a permanent representative to carry out such mandate in the name and on behalf of the legal entity. Under the current legislation, such permanent representative must be appointed amongst the legal person's shareholders, directors or employees.

Under the new Belgian Companies Code, this capacity requirement will no longer apply. The legal entity – director thus will have more flexibility in terms of whom it appoints as its permanent representative, it being understood however that such permanent representative must be a natural person.



Did you know that the liability of directors will be capped?

The new Belgian Companies Code introduces a maximum liability for directors for any damages they cause due to mismanagement. The exact amount of the "cap" depends on the size of the company in which they are appointed as director: EUR 125,000 for the smallest companies and EUR 12,000,000 for the largest companies. The cap applies towards both the company and third parties, irrespective of the qualification of the alleged fault (excluding fraud and repetitive minor misconduct) or the number of plaintiffs. It does, however, not apply to directors' liability under the special

liability regimes relating to withholding tax and VAT or for social security contributions. The cap is not multiplied by the number of directors of the company concerned.



Did you know that companies can no longer exonerate or hold their directors harmless from directors' liability?

As a counterbalancing measure to the limitation of the liability of directors, the new Belgian Companies Code also introduces a prohibition for companies to exonerate their directors from directors' liability. So-called 'hold-harmless agreements' will no longer be valid.



Did you know that directors can only avoid joint and several liability for mismanagement when certain conditions are met?

Under the new Belgian Companies Code members of the board of directors will be liable jointly and severally. Currently this is only the case for violations of the Companies Code or the articles of association. Under the new joint and several liability regime, a board member will only be able to avoid liability if certain conditions are met: (i) the board member may not have taken part in the wrongful action (eg. he/she voted against the resolution by the board) and (ii) the board member must have notified the board of directors of his/her protest against the wrongful action. The notification to the board must be recorded in the minutes of the board meeting.



Did you know that a director can only participate in the board of directors in one single capacity?

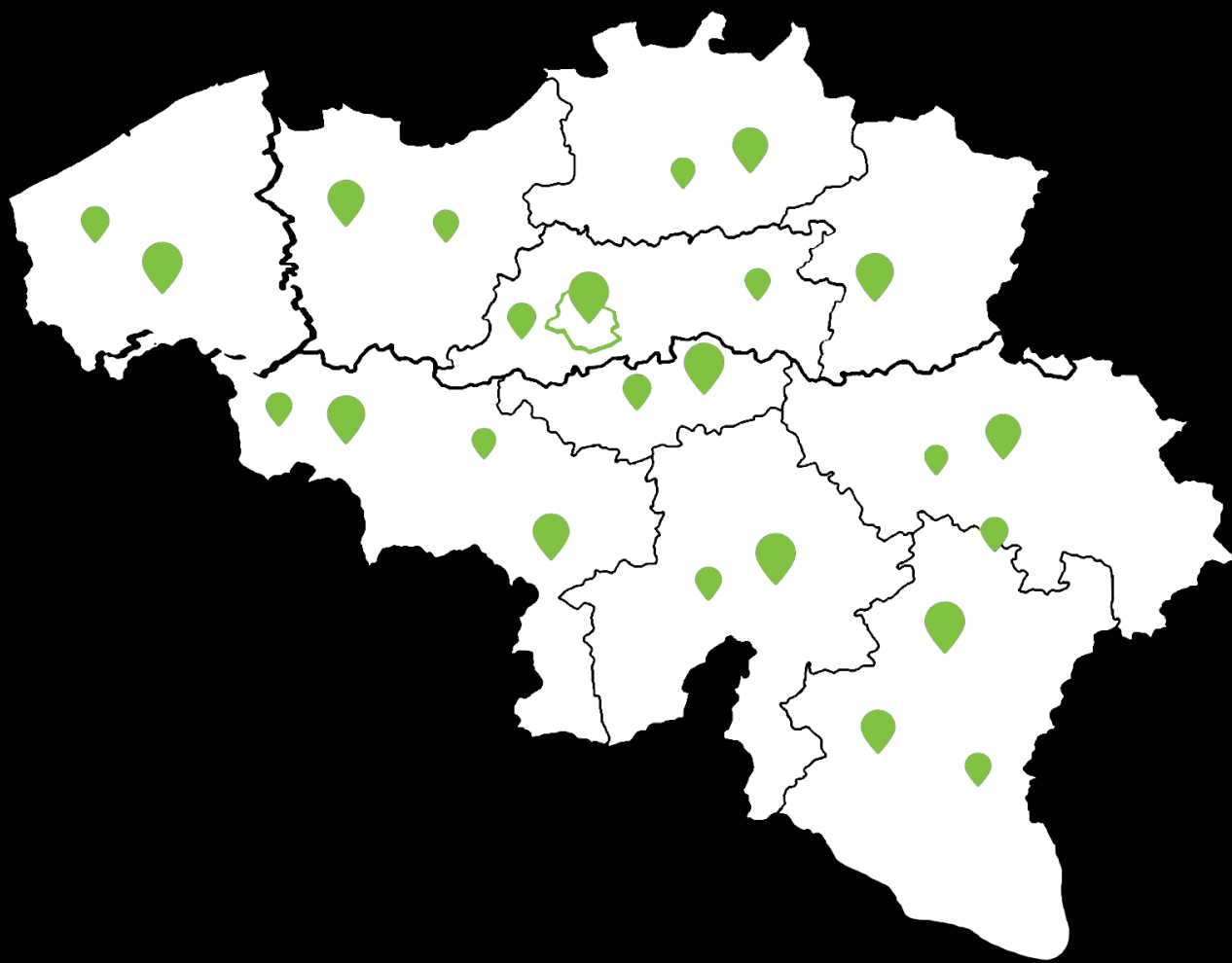
Under the current Belgian Companies Code it is largely accepted that a director can be a member of the board of directors in two different capacities: as a natural person on the one hand, and as permanent representative of one or more legal entity appointed as director of the company on the other hand.

Under the new Belgian Companies Code it will no longer be possible for a natural person to be a member of the board of directors in those different capacities. A natural person can in the future only be a member either as a natural person, or as a permanent representative of one single legal person.



Did you know that directors of public limited liability companies (NV/SA) can be protected against dismissal?

The new Belgian Companies Code will overrule current case law by the Belgian Supreme Court that directors of public limited liability companies (NV/SA) must be revocable "at nutum" by the general shareholders' meeting. Going forward, directors of public limited liability companies will be able to negotiate termination packages or severance periods for their office.



Changes relevant for associations and foundations



Did you know that a non-profit association (VZW/ASBL) is no longer restricted as to the number of directors it may appoint?

Currently non-profit associations may not have more directors than the number of members they have. For example: a non-profit association with five members cannot have a board consisting of more than four directors.

The new Belgian Companies Code abolishes this rule and sets no limitations. The change resolves a practical issue faced by associations who wanted all of its members to take up a board position.



Did you know that the foundation (stichting/fondation) will have the possibility to work with a single director?

Contrary to the current legal regime of foundations (stichtingen/fondations), under the new Belgian Companies Code it will be possible (not mandatory) for a foundation to limit its managing body to a single director. The possibility for a foundation to have a sole director will enhance the attractiveness of the foundation in the framework of private wealth management. If a foundation would however have two or more directors, they will have to act as a board.

Cross-border transformation of a company



Did you know that it will be possible to convert a Belgian company into a foreign company type?

The new Belgian Companies Code will contain a specific procedure allowing Belgian companies to convert into foreign company types: for example a Belgian public limited liability company (NV/SA) can be converted into a French SA or a German AG. Such cross-border conversion implies the cross-border transfer of the company's registered seat, which requires the approval of 80% of the votes cast at an extraordinary shareholders' meeting and the intervention of the notary public. Creditors will have the right to oppose the planned conversion, similar to the current creditors' protection right in case of a capital decrease or restructuring of the company.

provisions governing the company form opted for. It is only when these two requirements are met that the notary will confirm the transfer of the seat of the foreign company and its conversion into a Belgian company with continuation of its legal personality.

A number of new features will be introduced by the new Belgian Companies Code: (i) foreign companies involved in insolvency proceedings will not be allowed to transfer their seat to Belgium, (ii) a state of assets and liabilities will have to be filed by the newly converted company with the Belgian National Bank and (iii) the transfer and conversion of the foreign company into a Belgian company will only enter into effect as from the date of registration of the converted company in the Belgian legal entities register.



Did you know that a specific procedure will govern the international transfer of seat of foreign companies to Belgium?

The transfer by a foreign company of its seat to Belgium and the conversion of such company into a Belgian company is currently already a common practice in Belgium despite the absence of specific procedures governing such operation. This practice has been developed in Belgium essentially under the impulse of the case law of the European Court of Justice relating to the freedom of establishment, which obliges member states to allow companies to transfer their seat to another member state.

Under the new Belgian Companies Code, the transfer by a foreign company of its seat to Belgium and the conversion of such company into a Belgian company will be governed by a specific procedure. The procedure that will be introduced for such type of operation is fairly similar to the current Belgian practice. As it is the case today, the intervention of a Belgian notary public will be required. The Belgian notary public will verify the compliance by the foreign company of the foreign rules concerning the cross-border transfer and compliance of the amendments to the articles of association of the newly converted Belgian company with

Dissolution and liquidation



Did you know that the appointment of a liquidator must no longer be confirmed by the court in case of a solvent liquidation?

The current Belgian Companies Code provides that the appointment of a liquidator of a company always must in any case be confirmed/ratified by the president of the competent Commercial Court. Such confirmation/ratification will in the future only be required for insolvent liquidations. This will enhance the speed and efficiency of solvent liquidations in a considerable way.



Did you know that the “vereniging zonder winstoogmerk” (VZW) / “association sans but lucratif” (ASBL) will be subject to the insolvency regulation?

The non-profit associations (“vereniging zonder winstoogmerk” (VZW) / “association sans but lucratif” (ASBL)) will not only fall under the scope of the new Belgian Companies Code but will (as of 1 May 2018) also be subject to the insolvency rules of the new Book XX of the Belgian Economic Code since they will be considered as enterprises. This means that it will amongst others be possible for non-profit associations to be declared bankrupt.



Did you know that a company can apply the simplified dissolution procedure (dissolution and liquidation in one single deed) even when it has unpaid debts?

When making use of the simplified dissolution procedure, a company is dissolved and liquidated on the same day in one notarial deed. As no liquidation takes place, no liquidator needs to be appointed.

Under the current Companies Code, the company must have repaid all debts towards third parties, or must have deposited the necessary funds to repay those debts, in order to apply the simplified dissolution procedure. It is accepted, although not explicitly provided, that debts towards shareholders of the company do not prevent the application of the simplified dissolution procedure.

The new Belgian Companies Code provides for the possibility to extend the application of the simplified dissolution procedure to instances where not all debts of the company towards third parties have been repaid and no sufficient funds have been blocked to honor these debts, provided that the following conditions are fulfilled: (i) the debts must be included in the statement of assets and liabilities that are drawn up in the context of the dissolution procedure and (ii) the creditors of those debts must have provided their written consent with the application of the simplified dissolution procedure. This approval must eventually be included in the conclusions of the audit report concerning the statement of assets and liabilities.

Contacts

Want to know more?

Visit our Deloitte Legal - CCA webpage:

<https://www.deloittelegal.be/lg/en/pages/corporate-ma/articles/New-Belgian-Companies-Code.html>

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