

NEW CODE OF COMPANIES AND ASSOCIATIONS

► IN A NUTSHELL ◀

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A new governance *toolkit*

The new Code of Companies and Associations will bring about substantial changes as regards governance, especially for the NV/SA.

Our current corporate laws on governance are sometimes unnecessarily strict. A classic example thereof is the absolute right of a NV/SA's general shareholders' meeting to dismiss directors at any time, without notice or compensation (*ad nutum*). In addition, there are some legislative gaps and inconsistencies regarding governance. For instance, a daily management body can only be installed in the NV/SA (and not in the BVBA/SPRL or CVBA/SCRL).

By contrast ...

The rules on governance are thoroughly revised in the new Code.

The most remarkable innovation is without a doubt the introduction of two new governance models for the NV/SA. However, the new Code also includes, more generally, a number of changes and interesting new tools that are also relevant for other company types.

Below you will find the most important new features.

- **Two new governance models for the NV/SA.** Apart from the “classic” one-tier governance model with a single board of directors being responsible for

the management of the company, the NV/SA may now also opt to install a full-fledged two-tier governance model, with a supervisory board (*raad van toezicht/conseil de surveillance*) and a management board (*directieraad/conseil de direction*). These two bodies, each composed of at least 3 members, have strictly separated powers and also a strictly separated composition (in contrast to the allocation between a board of directors and executive committee (*directiecomité/comité de direction*) under our current laws). Under the new Code, a member of the supervisory board may not be a member of the management board, and *vice versa*. In addition, the NV/SA may also opt to have a sole director, who can even be appointed in the articles of association and who may even choose to accept joint liability for the company's debts. As such, a NV/SA with this particular governance model may serve as a perfect substitute for the "abolished" Comm. VA/SCA.

- **Status quo of governance models for the BV/SRL and CV/SC.** For the BV/SRL and CV/SC, no material changes are introduced in terms of available governance models. These companies may be governed by a sole director or by multiple directors, acting individually or as a board. The new Code includes some technical changes and, for the BV/SRL, also the terminology is aligned with the other limited liability company forms. Henceforth, directors of a BV/SRL will be referred to as "*bestuurders*"/"*administrateurs*" instead of "*zaakvoerders*"/"*gérants*".
- **New rules for permanent representatives of legal-entity directors.** Under the new Code, legal entities can still be appointed as director of another legal entity, subject to the appointed legal-entity director designating a "permanent representative" for the exercise of the director mandate. The new Code now confirms that this permanent representative can only be a natural person. Such natural person may henceforth be freely chosen, and should no longer, as is the case today, be a shareholder, director or employee of the appointed legal-entity director. In addition, the new Code prohibits the designated permanent representative from being appointed in the same governing body in multiple capacities (*e.g.* both as a permanent representative of a legal-entity director and at the same time directly in his/her own name or as a permanent representative of another legal-entity director).
- **Daily management extended.** The new Code introduces an extension of the legal concept of "daily management" in two ways. From now on, not only the NV/SA will be able to install a daily management body, but this will also be possible for the BV/SRL and CV/SC. In addition, the new Code now also includes a definition of daily management, which extends this concept beyond the very narrow definition previously given thereof by Belgium's Court of Cassation. The notion of daily management will henceforth include all acts which either (i) do not exceed the needs of the daily operations of the company, or (ii) which, because of their minor importance or urgency do not justify the

intervention of the (board of) directors. This definition of course remains vague and a more specific delegation of special representation powers can therefore still be useful.

- **Written decision-making made more flexible.** In principle, unanimous written decision-making by the board of directors is only possible today in the NV/SA and in limited circumstances. Under current law, unanimous written decisions are only possible in exceptional situations, in the event that this is moreover required by urgency and in the interest of the company, and provided that written decision-making is explicitly allowed in the articles of association (and even then subject to certain exclusions). From now on, the board of directors of a NV/SA, BV/SRL and CV/SC will be able to adopt all decisions by means of unanimous written resolutions, regardless of the particular circumstances and subject matter of the decision, except if this is forbidden by the articles of association.
- **Rules on conflicts of interest strengthened.** Our current company laws include strict rules with respect to conflicts of interest. Today, however, a conflicted director (of a non-listed company) is nevertheless allowed to participate in the decision-making. This is changed in the new Code and from now on, conflicted directors must abstain from taking part in the deliberations and voting. In the event that all directors are conflicted, the decision should be referred to the general shareholders' meeting (or, in the event of a conflicted management board member in the two-tier model in the NV/SA, to the supervisory board).
- **Right to dismiss directors *ad nutum* in the NV/SA no longer mandatory law.** Pursuant to our current company laws, the right of the general shareholders' meeting in a NV/SA to dismiss a director is mandatorily *ad nutum*. In the BVBA/SPRL it is already possible to deviate from this principle in the articles of association. The new Code still provides that the general shareholders' meeting of a NV/SA has the right, in principle, to dismiss directors at any time, for any reason, without notice or compensation. However, the articles of association will be able to deviate from this principle and provide that directors can only be dismissed with prior notice or compensation.
- **Confirmation of self-employed status of directors.** The new Code now confirms that directors (or, in the two-tier model in the NV/SA, the members of the supervisory board and the management board) must, in that capacity, be self-employed.

The new Code provides companies with new tools for organizing their governance structure and also introduces more flexibility in terms of corporate housekeeping. In addition to the above innovations, also the duties of directors are now more clearly defined. These duties are furthermore linked to a new regime on director liability, which will be discussed in our next "In a Nutshell" newsletter.



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