

CLIENT MEMORANDUM

The Belgian Company Law Reform Is on Its Way – Update

February 2, 2017

AUTHORS

Xavier Dieux | Didier Willermain | Zoé Janssen

Under the current government, an extensive legislative reform of the Belgian company law has been launched. In December 2016, Koen Geens, Belgian Minister of Justice, published an overview and update of the proposed legislative reform, in which the key points of such reform are outlined. This reform of company law is part of a broader modernization of Belgian fundamental legislation, such as the civil code and the penal code.

Main objectives of the proposed reform of company law

This reform aims to make Belgian company law more modern, straightforward and coherent to make Belgium a more attractive place of incorporation for national and foreign companies and associations, as well as for investments.

Indeed, the Belgian company law has not undergone substantive reform since the introduction of the Companies Code in 1999, and even then, it was more of a restatement work than an actual reform. Furthermore, since 1999, more than 50 modifications, substantial or not, have been made to the Companies Code, of which around 25% were EU requirements.

In addition, the Court of Justice of the European Union (CJUE) case law on the cross-border transfer of the company seat allows a company to select the Member State in which it wants to be incorporated (even if different from the company's main place of business) and, under certain conditions, to transfer its centre of administration from the Member State in which it is incorporated to another while continuing to be ruled by the law of its place of incorporation. Company law has

The Belgian Company Law Reform Is on Its Way – Update

Continued

thus become “exportable.” The decision of where to incorporate a company could henceforth be grounded on suitability considerations concerning each Member State company law standards. Consequently, every Member State is challenged to make its company law more competitive, which is what the proposed reform strives to achieve. Other countries, such as France, the Netherlands, Spain and Denmark have already modernized their company law in order to make it more “attractive” for foreign investors.

Simultaneously with the reform of company law, the rules relating to nonprofit organizations (such as the “*Association Sans But Lucratif (ASBL)/Vereniging Zonder Winstoogmerk (VZW)*”) will also be modernized and integrated into a single code of companies and nonprofit organizations. The possibility of distributing profits will be the sole criteria for distinguishing between companies and nonprofit organizations.

Outlines of the proposed reform

A. Forms of companies

Besides the European forms of companies, only four types of company will be maintained:

- (i) the simple partnership (*Société Simple/Maatschap*) without or with legal personality (in which case the partnership becomes either a “*Société en Commandite Simple (SCS)/Gewone Commanditaire Vennootschap (GCV)*” or a “*Société en Nom Collectif (SNC)/Vennootschap Onder Firma (VOF)*”);
- (ii) the private limited liability company (*Société Privée à Responsabilité Limitée (SPRL)/Besloten Vennootschap met Beperkte Aansprakelijkheid (BVBA)*);
- (iii) the limited liability cooperative company (*Société Cooperative à Responsabilité Limitée (SCRL)/Coöperatieve Vennootschap met Beperkte Aansprakelijkheid (CVBA)*) but only for “true” cooperatives; and
- (iv) the public company limited by shares (*Société Anonyme(SA)/Naamloze Vennootschap (NV)*).

Currently, Belgium has up to 15 different types of companies. The main form of company that will be suppressed by the proposed reform is the partnership limited by shares (*Société en Commandite par Actions (SCA)/Commanditaire Vennootschap op Aandelen (CVA)*). However, the new rules regarding the governance of the SA/NV will provide for the possibility of appointing a sole director who can be protected against revocation, making the SCA/CVA superfluous.

B. Private limited liability company (SPRL/BVBA)

The intention is to make the SPRL/BVBA significantly more flexible. The default rules applicable to the SPRL/BVBA will be, for the most part, similar to the existing rules; however, there will be the possibility for shareholders to deviate from those and to opt for certain rules existing in the SA/NV, such as, for example, a free transfer of shares system or a one-tier board.

The Belgian Company Law Reform Is on Its Way – Update

Continued

The system existing in the cooperative companies according to which a shareholder may resign from the company or be excluded by the other shareholders will be applicable to SPRL/BVBA.

The minimum capital requirements will be abolished, so that the SPRL-S/SBVBA (i.e. a private limited liability company with a starting capital of one euro) will become redundant. A liquidity and net-asset test will be introduced to protect creditors.

Multiple voting shares will be authorized if provided in the articles of association of the company.

C. Public company limited by shares (SA/NV)

Due to the mandatory EU legislation, there are fewer possibilities to modify the legislation applicable to the SA/NV. Nonetheless, the proposed reform intends to make the SA/NV more flexible where possible.

First of all, the SA/NV will be allowed to have only one shareholder. The requirement to have at least two shareholders will thus be deleted.

Secondly, multiple voting shares will be authorized if provided in the articles of association of the company. For listed companies, the articles of association may stipulate at most double voting rights for loyal shareholders.

Finally, as mentioned above, the revocation *at nutum* of the directors, i.e., the possibility to revoke them without notice or indemnity, becomes a suppletive rule from which the articles of association may diverge. In addition, it will be possible for a SA/NV to be administered by a sole director. An optional two-tier board system (dual system of management with a management board and a supervisory board) will also be introduced.

D. Listed companies

The concept of “public companies” (*société faisant ou ayant fait publiquement appel à l'épargne/vennootschap die een publiek beroep op het spaarwezen doet of gedaan heeft*) will be abolished, but the rules currently applicable to these companies will be maintained and applied to all listed companies.

The concept of “listed company” (*société cotée/genoteerde vennootschap*) will be defined as a company whose shares or related certificates are admitted to trading on a regulated market. The listing of other securities will not result in being considered a listed company anymore.

E. Private international law

The real-seat theory will be abandoned in favor of the seat of incorporation with the possibility of cross-border transfers, which means that the applicable company law will be determined by reference to the country in which the company was incorporated (and registered) and not anymore by reference to the state in which the central administration is located.

The Belgian Company Law Reform Is on Its Way – Update

Continued

This flexibility will allow foreign companies to establish themselves in Belgium, even though their central administration may be located elsewhere.

F. Other modifications

Other modifications include (i) the suppression of the rule prohibiting shareholders from being exempted from losses, known as the prohibition of leonine clauses (*clauses léonines/leonine clauses*), (ii) the review of the rules on conflicts settlement between shareholders of (non-listed) public companies limited by shares (*SA/NV*) and private limited liability companies (*SPRL/BVBA*) (action in withdrawal and action in exclusion), (iii) the modernization of the rules on bond issues and (iv) the fine-tuning of merger, de-merger and other restructuring operations.

Timeline of the proposed reform

The first parts of the bill are substantially complete but the final bill of this proposed extensive reform of Belgian company law will not be submitted to Parliament until the spring of 2017.

The document entitled “a leap toward the law of tomorrow” (*le saut vers le droit de demain/de sprong naar het recht voor morgen*) can be found on Minister Geens’ website: <http://www.koengeens.be>.

If you have any questions regarding this memorandum, please contact Xavier Dieux (+32 2 290 18 20, xdieux@willkie.com), Didier Willermain (+32 2 290 18 20, dwillermain@willkie.com), Zoé Janssen (+32 2 290 18 20, zjanssen@willkie.com) or the Willkie attorney with whom you regularly work.

Willkie Farr & Gallagher LLP is an international law firm with offices in New York, Washington, Houston, Paris, London, Frankfurt, Brussels, Milan and Rome. The firm is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our fax number is (212) 728-8111. Our website is located at www.willkie.com.

February 2, 2017

Copyright © 2017 Willkie Farr & Gallagher LLP.

This memorandum is provided by Willkie Farr & Gallagher LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum may be considered advertising under applicable state laws.

WILLKIE FARR & GALLAGHER_{LLP}