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Help, I'm a director! New rules coming for directors' and officers' liability

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Imagine...

You work at a company that is undergoing rapid international growth. One day headquarters asks for your help on expanding the Belgian activities. What is more, they ask you to accept a director's mandate in a new Belgian subsidiary.

You are honoured and respond enthusiastically. After this initial euphoria, however, you realise that you do not really know exactly what such a mandate entails. You also get somewhat concerned, because you recall reading about directors who were held *personally* liable in the aftermath of the financial crisis.

You decide to get information from the in-house lawyers about being a director in a Belgian company, and about the risks of such a director's mandate.

A brief clarification.

The rules on the tasks and the liability of directors of a Belgian BVBA/SPRL or NV/SA can be found in the Belgian Companies Code.

Directors are responsible vis-à-vis the company they manage for the proper fulfilment of their tasks, and personally liable for any shortcomings in their management. They are also personally liable for any harm that results from a violation of the provisions of the Companies Code or of the company's articles of association vis-à-vis both the company and third parties. Under the Companies Code, in principle the latter liability is joint and several, meaning that each member of the governing body can be sued for the *entirety* of the damage. Today the liability of directors is essentially unlimited, vis-à-vis both the company and third parties.

On 25 May 2018, the Belgian Council of Ministers approved a draft of a new “Code of Companies and Associations”. The new Code contains far-reaching reforms and seeks to modernise the Belgian company law through simplification, flexibilisation and adaptation to European evolutions and new trends.

The draft also contains a reform of directors' and officers' liability. The most striking innovation is that this liability is limited to a maximum amount, vis-à-vis both the company and third parties. That amount will vary depending on the size of the company. For example, the directors' and officers' liability in “small” companies would be limited to 250,000 euros, while the maximum liability in the largest companies would amount to 12,000,000 euros. Exceptions would apply to this limitation, e.g. for tax debts, social security debts and in the case of fraudulent intent and serious tax fraud.

The proposed reform is intended to ensure that Belgium does not miss out on talented directors in the international “*war for talent*”. The limitation should also facilitate the insurability of directors' and officers' liability.

The government is hoping for final approval of the new Code of Companies and Associations by the Parliament in the autumn of 2018.

The new rules for the directors' and officers' liability would then apply as of 1 January 2019.

Concretely:

- The draft of the new Code of Companies and Associations **changes the rules regarding the liability of directors and officers.**
- The draft provides for limitation of their liability to a **maximum amount** depending on the size of the

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company.

- The limitation applies **for liability vis-à-vis both the company and third parties**.
- This maximum amount is designed to ensure that the risk of directors' and officers' liability is **better insurable**.

Want to know more?

- The text of the approved draft of the new Code of Companies and Associations can be found via <http://www.dekamer.be/FLWB/PDF/54/3119/54K3119002.pdf>.
- The website of the Belgian Centre for Company Law (<http://www.bcv-cds.be/>) is following the developments on the new Code of Companies and Associations.
- We have written about the draft of the new Companies and Associations Code previously: see <https://www.contrast-law.be/en/publications/in-the-picture/final-countdown-towards-a-new-belgian-companies-and-associations-code-flash/>.
- Concerning the maximum amount of the directors' and officers' liability: see <https://corporatefinancelab.org/2017/11/14/kwantitatieve-aansprakelijkheidsbeperking-voor-bestuurders-in-delaware-en-belgie/> (only available in Dutch).