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The envisaged reform of Belgian company law: making Belgium more attractive for entrepreneurs

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Let's not fool ourselves; company law is not at the top of the entrepreneur's list when he decides where he is going to establish his enterprise. From a legal perspective, such a decision is often tax driven. Nevertheless, having a good and practical set of company law rules is important for the attractiveness of a state or region, as is shown for instance by the state of Delaware in the United States. This reason alone should already be sufficient to plea for a modernization of domestic company law. However, there are others. First, the European legislator has largely remained silent in the domain of company law over the past decade; for obvious reasons, its focus shifted towards financial legislation. As a result, there is room for Member States to innovate their company laws themselves, bottom-up, ultimately increasing competition between Member States. Secondly, the case law of the European Court of Justice on the mobility of companies in the European Union opened a window for Member States to export their company laws throughout the European Union.1 These reasons explain why a number of Member States have already innovated their company laws in recent years, such as Germany, the Netherlands and Spain.

The current state of Belgian company law is based on late 19th century and early 20th century rules. In past decades, these rules were amended in accordance with European law: European directives harmonizing company law in the European Union on the one hand and European regulations introducing European company forms on the other. Although the European directives usually only targeted the Belgian public limited liability company NV/SA ("naamloze vennootschap"/"société anonyme"), the Belgian legislator chose to apply the European rules, which include the rules on maintenance and alteration of capital,2 to the Belgian private limited liability company BVBA/SPRL ("besloten vennootschap met beperkte aansprakelijkheid"/"société privée à responsabilité limitée") as well. This stood in sharp contrast to the approach some other countries took, especially the Netherlands. To escape the European rules for small and medium-sized enterprises, the Dutch introduced a new company form, the private limited liability BV ("besloten vennootschap"), to which the European rules did not apply, in addition to the existing public limited liability company NV ("naamloze vennootschap"). Another typically Belgian feature is the proliferation of company forms; Belgian law currently has no less than 15 company forms, most of which are outdated and superfluous, even excluding the European company forms.

Both things combined – the somewhat outdated state of Belgian company law and the European climate allowing for innovation – inspired Belgian scholars, combined in the so-called Belgian Centre for Company Law, to draw up a proposal for reform to make Belgian company law simpler, more flexible, more innovative and more coherent. The aim of the proposed reform is ultimately to convince both domestic and foreign entrepreneurs to choose a Belgian company form for their Belgian and cross-border activities (instead of, for example, a light vehicle from another Member State). The proposal is still in the drafting phase, but concrete texts are expected to be presented to the Belgian federal parliament somewhere in the summer of 2017. From then on, the proposal will undergo the parliamentary process. Spirits are high, not least because the proposal is supported by the Minister of Justice, Koen Geens, who is also a company law professor and a passionate advocate for reform.

1 CJEU 10 December 2015, Case C-594/14 (Kornhaas), CJEU 12 July 2012, Case C-378/10 (Vale), CJEU 16 December 2008, Case C-210/06 (Cartesio), CJEU 13 December 2005, Case C-411/03 (Sevic), CJEU 30 September 2003, Case C-167/01 (Inspire Art), CJEU 5 November 2002, Case C-208/00 (Überseering), CJEU 9 March 1999, Case C-212/97 (Centros), CJEU 27 September 1988, Case 81/87 (Daily Mail).
What are the highlights of the proposed reform? Without striving to be exhaustive, the first highlight is the reduction of the number of Belgian companies from 15 to 4. The survivors, renewed to some extent, are:

- a partnership with or without legal personality;
- the cooperative company;
- the private limited liability company BVBA/SPRL, which should become the standard form for small and medium-sized companies (whereas a lot of small and medium-sized companies are currently organized in the form of an NV/SA); and
- the public limited liability company NV/SA, which should become the standard form for large and/or listed companies.

Secondly, the current prohibition for shareholders to exclude their participation in the losses of the company will generally be abolished.

Thirdly, the BVBA/SPRL will be fundamentally revised. The rigid concept of capital will be abolished and replaced by more flexible and less complex creditor protective measures based on economic reality. As the European rules on maintenance and alteration of capital only relate to the NV/SA, as explained before, it is perfectly valid to do this. A concrete example of a new creditor protective measure is that distributions would be made subject to a double test: a solvency test under the supervision of the general meeting to make sure that a distribution does not result in the company having a negative net assets position, and a liquidity test by the board of directors, under supervision of the statutory auditor, to guarantee that a distribution will not stand in the way of the ability of the company to pay its debts. In addition to the abolishment of capital, a simple standard model will be introduced for the BVBA/SPRL, with a variety of options allowing an entrepreneur to tailor the company to his needs, eg, limited or free transfer of shares, governance consisting of one or more directors (whether acting collegiately or not), a system allowing a shareholder to return his shares to the company instead of having to find a buyer (increasing the liquidity of the shares in the BVBA/SPRL), etc. The ultimate goal is to make the BVBA/SPRL so attractive that it can compete with existing flexible company forms, such as the Dutch BV or the German Gesellschaft mit beschränkter Haftung.

In the NV/SA – where there is less flexibility for reform as the NV/SA is the primary target of European harmonization – it will become possible to appoint one unique director (instead of at least three) and to arrange for protection for directors against dismissal (this is not possible in the current regime). It will also become possible to choose between a monistic governance model (one board) or a more developed dual governance model (a board composed of a management body and a supervisory body). Furthermore, it is intended to introduce a facultative multiple voting right for shares in a listed NV/SA, rewarding shareholders who hold on to their shares for a certain period of time (12 or 24 months). The current requirement for an NV/SA, that it should be established by at least two founders, will disappear (it was already abolished in the BVBA/SPRL), allowing the single member NV and a simplification of group structures.

Fifthly, as a corner stone, the real seat doctrine will be replaced by the statutory seat doctrine as the connecting factor for private international law. In addition, a procedure for cross-border transfer of seat will be introduced into Belgian law. The implementation of the statutory seat doctrine addresses the issue that a Belgian company loses its nationality when it moves its headquarters abroad (the European Court of Justice allows a Member State to make its nationality subject to maintaining a real

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seat in that Member State), whereas a foreign company that moves its headquarters to Belgium can retain its original nationality (the European Court of Justice prohibits Belgium from imposing Belgian nationality on these companies). Furthermore, the statutory seat doctrine allows for the export of Belgian company law throughout the European Union.

Challenging, but promising times lie ahead for Belgian company law.