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Belgium: company law - directors' liability

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I.C.C.L.R. N-103 Belgian law is currently undergoing many changes. The Belgian Minister of Justice has made it a priority to fundamentally reform various legal domains. Among the reformed domains are penal law, property law, family law, inheritance law, the law of obligations, tort law, the law of associations, enterprise law and company law. Some of the reforms are already in force, such as the reform of enterprise law; others have already been approved by the Council of Ministers but still have to undergo the parliamentary process, such as the reform of company law. Regarding the latter reform, the expectation is that it will be approved by Parliament in the autumn.

I will elaborate on these reforms in more detail in upcoming news items, insofar as they affect businesses. In this short piece, I will shed some light on an important, but controversial, point in the envisaged reform of company law[1]: the statutory limitation of directors' liability (also referred to as the "cap").

The statutory cap on directors' liability is a first. None of **Belgium**'s neighbouring or surrounding countries has a similar system of safeguarding directors from liability. The cap is introduced for various reasons but, basically, it is an attempt to attract top-quality directors to Belgian companies.

The exact amount of the cap depends on the size of the company concerned and is, as a rule, determined on average over a reference period of three years. The number of employees is not relevant. Concretely, the cap is fixed as follows:

- €250,000 in companies with a turnover, exclusive of VAT, less than €700,000 and a balance sheet total not exceeding €350,000 (small companies);
- €1 million in companies that are not small companies and that do not exceed more than one of the following thresholds: a turnover, exclusive of VAT, of €9 million and a balance sheet total of €4,500,000 (mid-size companies);
- €3 million in companies that are not small or mid-size companies and that have a turnover, exclusive of VAT, exceeding €9 million and a balance sheet total exceeding €4,500,000, but that do not equal or exceed any of the thresholds applicable to the largest companies (large companies); and***I.C.C.L.R. N-104***
- €12,000,000 in so-called public interest organisations (such as listed companies, banks and insurance companies) and companies that are not small, mid-size or large companies and that exceed at least one of the following thresholds: a turnover, exclusive of VAT, of €50 million and a balance sheet total of €43 million (largest companies).

The cap on directors' liability is applicable vis-à-vis the company and vis-à-vis third parties. It applies to both contractual and tortious liability. The cap applies regardless of the nature of the fault: regular faults, gross faults, manifest gross faults etc. It can even apply to civil claims resulting from criminal offences.

The cap applies per fact or set of facts leading to liability, regardless of the number of claimants or claims. Hence, if multiple claimants file a claim together or separately on the basis of one and the same fact or set of facts, the cap is not multiplied by the number of claimants. The cap is also not multiplied when a set of facts can technically lead to directors' liability on more than one legal ground, e.g. an infraction of the companies' code, a manifest gross fault resulting in insolvency of the company, a tort etc. In the event that multiple directors are held liable for one and the same fact, the cap does not apply per director held liable but to all directors held liable together.

There are exceptions to the cap. Most important is that the cap is not applicable when a director acts with fraudulent intent. In addition, the cap is not applicable to liability as a consequence of unpaid payroll taxes or VAT, serious tax fraud and certain social security liabilities. Moreover, the cap is without prejudice to founders' liability. Therefore, a director of a company who is also a founder of that company can be held liable in the latter capacity without the cap being applicable. Founders' liability is relevant when the company goes bankrupt within three years of its establishment and when it was manifestly undercapitalised to conduct its intended business over a period of at least two years.

The flip-side of the "cap coin" is that further limitations to the liability of directors are prohibited. Therefore, all legal mechanisms, on the basis of which a company, its subsidiaries or entities controlled by it, hold its directors harmless or exempt its directors from liability beforehand are prohibited. Holding harmless clauses granted by parent companies, controlling entities or shareholders is, however, allowed. Hence, a parent company can still hold harmless the person delegated by it to be a director in a subsidiary. It is also not prohibited for a company to insure its directors against directors' liability (via a so-called D&O (directors and officers) policy). A D&O policy is, however, not mandatory.

The proof of the pudding is in the eating. Let us see whether the envisaged statutory cap on directors' liability succeeds in achieving what it fundamentally wants to do: to attract top-quality directors to Belgian companies. And, more importantly, let us see whether the cap is actually justified from a broader societal perspective and is not too detrimental to the rights of creditors and/or other stakeholders of companies.

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