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UPCOMING INNOVATIONS IN THE RULES GOVERNING ASSOCIATIONS

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Associations and foundations are not immune to the upcoming reforms: the Code of Economic Law has already made enterprises liable to be declared bankrupt, and it is now a question of endowing them with a new set of rules, partly common to companies.

What are the changes to expect from the new Companies' and Associations' Code, currently discussed at the Parliament?

- A new distinctive criterion of the legal speciality of associations and foundations allowing them to carry on an economic activity as long as they do not share any profits with their members, founders or managers.
- A new form of non-profit organisation (ASBL) certified as a "social enterprise" or as "professional unions" to replace enterprises with a social purpose and existing professional unions.
- New operating procedures for bodies more in line with the regime applicable to companies.
- New standards for directors' liability.
- Substantial reorganisation of the dissolution/liquidation regime with new restructuring possibilities.

Introduction

After a first step taken by the Code of Economic Law which makes of associations enterprises likely to be declared bankrupt (new Book XX entered into force on May 1, 2018), it is currently planned to endow associations and foundations with a new set of rules, partly similar to the one applicable to companies.

What can associations expect from the draft Companies' and Associations' Code, currently under discussion at the Parliament and intended to replace the law of 27 June 1921 governing associations and foundations?

Here is, without being exhaustive, the main changes on the agenda.

New criterion allowing the exercise of an economic activity

Quite innovatively, the draft Code redefines the distinctive criterion between companies and associations or foundations: the notion of "not for profit" or absence of profit as the legal speciality of these entities gives way to the notion of "direct or indirect distribution of profits" to the members of these structures.

The idea is to allow associations or foundations, which remain characterised by a disinterested purpose, to pursue, without restriction, economic activities (including those formerly qualified as "commercial"), and as far as they do not distribute - unlike companies - any of their profits to their members, founders or managers.

The distribution ban is widely understood.

It targets both direct (similar to dividends of a company) and indirect distributions, i.e. all transfers of value between the association or foundation, its members, founders or managers in the framework of operations which are not realised under market conditions. The preparatory works mention, as examples, lease agreements granted by members or managers of the association at excessive amounts or remuneration for services exceeding by far a reasonable salary.

The distribution ban would obviously not prevent the association or the foundation from using its own assets, nor from using its profits for its altruistic purpose by making donations or gifts. Nor does it prevent the members of an association from benefiting of services free of charge, provided that these benefits are within the limits of a normal achievement of the object and purpose of the association.

This new criterion would allow putting an end to the controversy regarding the extent to which an association can carry out, albeit incidentally, "industrial" and "commercial" activities to generate resources to serve its non-profit purpose. It would also clarify the issue of indirect benefits, which may or may not be available to members of associations and foundations. However, an uncertainty pointed out by the Council of State remains regarding the tax impact of the execution, by an association, of an economic activity as its primary occupation: in the absence of a legislative modification, does it mean that associations will no longer be subject to the legal favourable tax regime of entities, but to the ordinary regime of companies tax? Alternatively, will tax law be adapted to fit the new definition provided in the reform?

Accreditation of non-profit organisations (ASBL) as an alternative to company with a social purpose and to professional unions

The draft Code proposes to abolish the company with a social purpose and the professional unions as distinct legal forms.

However, to take into account the social economy, non-profit organisations would have the possibility to be certified as a "social enterprise" under the following conditions:

- To have as main purpose, in the general interest, to generate a positive social impact for human beings, the environment or society;
- To use the liquidation surplus, after clearance of the liabilities, in a way that corresponds as much as possible to the purpose of a certified social enterprise.

As for the professional unions currently governed by the law of 31 March 1898, the draft Code includes them in the form of non-profit organisations certified as "professional unions". Such certification allows the association, by derogation to the general rules, to initiate judicial proceedings to defend its members' personal rights in relation to its object.

Accreditation as "professional unions" (or "federation of professional unions") is exclusively for non-profit organisations meeting the following conditions:

- They exclusively focus on the study, protection and development of the professional interests of its members;
- They do not practise any profession or professional activity.

In practice, the existing professional unions can still launch judicial proceedings as long as they convert into non-profit organisations certified as such.

Innovations regarding operational modalities of the organs of associations and foundations

With a view to being in line with the regime applicable to companies, which was already used by analogy in the event of a shortcoming of the law of 27 June 1921, a series of changes to the operational modalities of the associations' and foundations' bodies are proposed, notably:

- the application, unless otherwise provided in the articles of association, of the ordinary rules of the general meeting to the general assemblies of associations, that is, according

to the preparatory works, decisions taken by a simple majority of the members present or represented, with the exclusion of the absentees, void votes and abstentions;

- a common nullity regime applicable to all decisions of the legal entities' bodies sanctioning, on the one hand, formal irregularities which may have influenced the vote or the deliberation or committed with fraudulent intent and, on the other hand, irregularities exhaustively listed (including misuse of power and abuse of rights);
- a nullity regime specific to votes, allowing the judge, in case of minority abuse, to provide, if necessary, that his decision will be considered as a favourable vote;
- an "alarm bell" procedure to be initiated by the administrative body when it appears that the business continuity is likely to be compromised by serious and corroborating facts;
- the possibility for the members of an administrative body to elect domicile at the registered office of the legal entity for all matters relating to the exercise of their mandate;
- the requirement for "organic" mandates exercised by a legal entity to appoint a permanent representative: a natural person responsible for carrying out that mandate;
- a legal definition of day-to-day management broader than the one established by the Court of cassation which should include, these criteria not being cumulative anymore, acts and decisions relating to day-to-day needs, of little importance or urgent;
- mandatory regulation of conflicts of interest extended to associations and foundations and applicable to the permanent representative;
- the possibility for foundations to provide for a single-person board of directors;
- the legal time period to convene the ordinary general assembly of associations is extended to 15 days.

Alignment of directors' liability standards with companies law

The draft Code establishes a general system of liability applicable to the members of administrative bodies of legal entities as well as to *de facto* managers.

Management errors are subject to joint liability when the administrative body works collegially, which is the case in non-profit organisations and foundations. The same principle applies in case of a violation of the articles of association or the Companies' and Associations' Code. The manager who did not take part in the wrongful act wishing to avoid joint liability can dissent by denouncing the (alleged) fault to the other members of the board.

The project provides for a limitation of such liability to a maximum amount up to which the director's liability can be involved. This cap varies depending on the size of the legal entity, which is measured on the basis of its balance sheet and its turnover. By way of exception, the limitation of liability would not apply in a series of cases including criminal or intentional offences.

Amendment to the rules on dissolution / liquidation / restructuring

The draft Code amends in several respects the current dissolution/liquidation rules applicable to associations and foundations. With a view of consistency with the rules applicable to companies, the draft Code notably provides for:

- the introduction of a new judicial dissolution cause: the non-compliance with the interdiction to distribute direct or indirect financial benefits as detailed above;
- a liquidation process modelled on that of companies which requires, in case of deficit liquidation, to submit the appointment of the liquidator to the court for confirmation or approval;
- the possibility for associations to conduct a dissolution/liquidation in a single act subject to certain conditions;

- the possibility for foundations to go into a voluntary dissolution, without liquidation, to bring assets to other foundations;
- a process of reopening a deficit liquidation upon the initiative of any unpaid creditor when forgotten assets appear.

The draft Code also creates new restructuring opportunities for associations and foundations.

The current set of rules only provides for a procedure allowing to transfer free of charge a branch of activity or a universality. Hence, the new Code suggests introducing a new merger and demerger regime specific to associations and foundations. This system would primarily consist of a dissolution without liquidation to bring all assets of the dissolved entity to one or more existing non-profit legal entities, but which are not necessarily of the same nature, with some restrictions depending on the specificity of the foundations.

Conclusion

The draft Companies' and Associations' Code approaches the legal speciality of associations/foundations innovatively, allowing them to pursue an economic activity (without distribution of profits). It also provides for new operating and restructuring methods following a harmonisation trend of the laws applicable to legal entities.

Its entry into force is expected this year, with an extended transition period to allow all necessary statutory adaptations.

Where does the legislative process stand at the moment?

After the Council of Ministers' approval in May 2018, the draft Code is currently under discussion at the Parliament, where the commission for commercial and economic law requested a new opinion from the Council of State.

Paul Alain Foriers, partner at Simont Braun, is one of the four experts chosen by the Minister of Justice Koen Geens to reform the Belgian Companies' Code. Hence, Simont Braun very well positioned to keep you informed on the progress of the upcoming Code and to guide you with pragmatism through the coming changes.

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