# European Company Law

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Pearson Professional Limited
Maple House
149 Tottenham Court Road
London
W1P 9LL

Tel: +44 (0) 171 896 2222
Fax: +44 (0) 171 896 2274

# Me M. Dekeyser - Lawyer (Avocat)

## CHAPTER 11: BELGIUM

### MAIN LAWS

The law relating to companies in Belgium is contained mainly in the Commercial Code of 1873, Book I, Title IX as co-ordinated by Royal Decree of 30 November 1935. Although the Commercial Code remains the framework of company law, the Royal Decree was amended by several laws of which the main ones are : the law of 10 November 1953, which deals with stocks and shares; the law of 1 December 1953, which deals with auditors and provisions for companies making public issues (such companies must appoint an auditor who is a public accountant); the law of 6 January 1958, which makes possible amendments to essential elements of the company statutes, including its purpose; the law of 30 June 1961, which establishes a system of evaluation of capital contributions other than in cash; the law of 23 July 1962 which concerns the issuing of convertible bonds and also makes possible the transformation of one form of company into another form of company while keeping its legal personality; the law of 6 March 1973, which implements the First Directive on company law; the law of 17 July 1975 and subsequent legislation implementing the Fourth Directive on annual accounts; the law of 5 December 1984, implementing the Second Directive on harmonisation of company law in respect of formation of companies and representation of capital; the law of 21 February 1985, which has substantially modified the control and audit rules applicable to all forms of company; the law of 15 July 1985 which has substantially modified the status of the SPRL; the law of 14 July 1987 which introduced the one shareholder-company under the form of a SPRL; the law of 17 June 1995 which introduced notable changes on the minimum amount of capital of the SA, on rules governing Directors' conflicts of interest and on rules regarding purchase by a company of its own shares.

### CLASSIFICATION

In Belgium, there are two main forms of commercial limited company: société anonyme (SA), a public-type company, and société privé à responsabilité limitée (SPRL), a private-type company. The equivalent Dutch names are, for a public-type company, Naamloze Vennootschap (NV), and for a private-type company, Besloten Vennootschap met Beperkte Aansprakelijkheid *(BVBA)*.

### PUBLIC-TYPE COMPANY (Société anonyme – SA)

#### Formation

The minimum number of shareholders, whether individuals or corporate, is two.

There are two procedures for the formation of companies. Formation directly by all shareholders, and formation by way of public subscription (a form rarely used).

Founders may be personally liable if the company is clearly undercapitalised and is declared bankrupt within three years of incorporation.

## Statutes

The statutes are confirmed by founders or, exceptionally, 'incorporators' who must appear either in person or by proxy before a Belgian notary. The notary authenticates the statutes and signs the statutes together with the founders or their representatives.

The company statutes are registered and filed in the register of the commercial court for publication in the Belgian State gazette. All publications in the gazette must be in either French or Dutch or in both languages, depending on where the head office of the company is located.

The registered office (siège), which is the legal address of the company, is usually fixed in the statutes. They normally provide that it may be changed by decision of the board of directors. The change of a company's address must be published in the State gazette.

The company name, form, registered office, registration number, place of registration, VAT number and bank account number must appear on all the documents issued by the company.

The objects of the company may be widely described in the statutes. The objects may only be amended by special shareholders' meetings. Acts of the company not falling within the objects may be *ultra vires*. This may not be invoked against third parties dealing with the company in good faith.

## Capital

The minimum capital required for an SA is BFr2.5m to be fully paid up.

Contributions to capital in kind must be verified by a certified public accountant (réviseur d'entreprises, bedrijfsrevisor). The statutes may authorise the board of directors to increase paid up capital up to the amount of authorised capital. Authorisation is valid for a period of a maximum five years after its publication in the Belgian State gazette. It may be renewed several times for an overall period not exceeding five years.

## Board of directors (conseil d'administration)

The company is managed by a board of directors made up of at least three directors. They need not be shareholders or Belgian citizens or residents. They may be individuals or corporations. Since June 1995 two directors only are permitted for companies with no more than two shareholders. Directors are elected by shareholders for a maximum renewable term of six years and may be removed at any time by a majority of shareholders with or without cause. Election and dismissal of directors are published in the State gazette.

The power of the board of directors is collective and the management of the company is entrusted to it. The board is vested with all powers to manage the company which are not reserved to shareholders by law. Limits to the board of directors' authority to manage the company may not be invoked against third parties even if included in the statutes.

In principle, Directors incur no personal liability for a company's deeds and acts, other than for violation of the statutes or of the company law – such liability is joint and several. They are individually responsible to the company for the proper execution of the duties of their office. They also have specific personal liability for serious offences committed which lead to the bankruptcy of the company or its insolvency.

The Board elects a chairman and possibly one or more vice-chairmen. The chairman calls directors' meetings and generally conducts board meetings and general meetings of shareholders. Meetings are conducted according to the procedure set out in the statutes, if any, or the usual rules of 'deliberating assemblies' are applied. Under exceptional circumstances due to urgency, decisions may be taken with the written and unanimous approval of all the members.

The board provides the day-to-day management of the company. It usually appoints one member to act as a managing director (administrateur délégué) or one general manager who is not a member of the board. The written deed of delegation of the day-to-day management is published in the State gazette. Limits to the scope of daily management, may not be invoked against third parties even if published.

Directors with interests which conflict with or may conflict with, those of the company must notify the board. Where a company benefits from public savings schemes, directors who have such conflicts of interest may neither attend the meeting nor cast their votes in that regard.

Specific rules are also provided where a director's decision of a company quoted on an exchange in any EU country relates to any particular advantage for the benefit of one shareholder who is in the position to appoint the company's directors.

## Shares

The company statutes may provide for one or more classes of shares. It is possible for a class to be entitled to preferential treatment with respect to payment of dividends and distribution of capital at the time of winding up. The statutes may also create non-capital 'beneficiary shares' issued to founders or promoters, or as compensation to employees for services. The holders of such shares may be entitled to share in the company's profits or in a proportion of the company's net worth at the time of winding up, but their voting rights are restricted by law.

Share capital may be denominated as bearer shares or nominal shares registered in the name of the holder in the shareholders' register. Par or no par value shares may be issued. Each shareholder has a right to participate in the distribution of dividends as defined in the terms of the issue. Holders of capital shares are entitled to a proportionate distribution of the net worth of the company at the time of the company's liquidation.

Existing shareholders have a right of first refusal to subscribe for newly issued shares. This right may only be waived where strict formal requirements are observed.

## Transfer of shares

Bearer shares are transferable without formalities. Transfer is made by physical delivery of the share certificates. Since title to nominal shares is evidenced by their registration in the shareholders' register, transfer must be made in writing and recorded in it. Certificates of shares may be issued to registered shareholders. Such share certificates do not represent title to the shares, are not negotiable, and may not be transferred by way of endorsement. The statutes or private agreements may restrict the transfer of shares. Such restrictions may not result in actually preventing a transfer.

All shares remain nominal until they are fully paid up. Only once they have been paid up will bearer shares be transferable. 'Beneficiary shares' and warrants directly or indirectly

granting rights to such shares may not be transferred until 10 days after publication of the second annual balance sheet following the date of issue or, if the assignment prior to this date is notified to the company, within one month of the assignment.

Companies may acquire their own shares according to strict rules based on the Second Directive.

### Shareholders' meetings

The company statutes normally set out the formalities required for attendance at shareholders' meetings, and determine voting rights of shareholders and the manner in which the meetings are held. Capital shares entitle holders to be present or represented at annual and special meetings. Shareholders may vote in person or be represented by a proxy holder who need not be a shareholder, unless there is a restriction in the statutes. If all the shares are of equal value, each share is entitled to one vote. If all the shares are not of equal value or some have no express value, each share is entitled to the number of votes in proportion to the capital it represents.

The statutes may restrict the total number of votes that a shareholder may use (for example, not to vote more than 20% of the company's capital).

The statutes determine the voting rights of the holders of beneficiary shares. They may not be entitled to more than one vote per share. The total number of votes attached to all the beneficiary shares may not be more than half the total number of capital shares' votes represented at the meeting and more than two-thirds of the vote of the total capital shares.

Private voting agreements amongst shareholders are allowed.

### Annual general meeting

At least one shareholders' meeting must be held every year. The time and place of the meeting is specified in the statutes. At that meeting, shareholders discuss and approve the reports of the board, if any, and of the statutory auditors, and the annual accounts. The meeting decides notably on the allocation of profits and losses and may appoint, remove or re-elect the directors and statutory auditors, fix their remuneration and release them from possible liabilities in respect of acts performed during the past trading year. If not specified in the company statutes, the quorum of shareholders must be a majority of voting shares attending the meeting except to amend the statutes in which case special majorities are required.

The law defines the content of the annual reports by the board of directors and the statutory auditors to the shareholders. Both reports must be filed with the clerk of the commercial court together with the annual accounts of the company and other information required by law.

### Special meetings

Apart from the annual ordinary meeting, extraordinary meetings may be held at the initiative of the board of directors. These are called to discuss matters for which shareholders' action is needed. Extraordinary meetings must be called by the board of directors on request by shareholders representing at least one-fifth of the company's capital. Extraordinary meetings may be called notably to discuss interim removal or

election of Directors or statutory auditors. No special quorum of shareholders is required and decisions are by majority vote except where the statutes provide otherwise.

### Accounts and audit requirements

Belgian companies must keep and publish accounts in accordance with certain statutory rules set out principally in the Royal Decrees of 10 October 1976 and 7 March 1978. These decrees have been issued according to the Fourth Directive on annual accounts.

The accounts must be audited by a statutory auditor (commissaire) who must be a certified public accountant. However, the audit is not compulsory for small companies. Companies qualify if they have:

- total balance sheet net asset value of not more than BFr100 m;
- turnover of no more than BFr200m;
- average workers or employees of under 50.

Appointing a statutory auditor is compulsory where the company employs at least 100 persons. These criteria are computed on a group-consolidated basis when the company is quoted on an exchange. Where no statutory auditor is appointed, each shareholder has, individually, the right to have the company's books examined.

### Dissolution

Voluntary dissolution may be decided immediately by special meeting of the shareholders at any time. It requires a 75% or more majority vote.

Bankruptcy judgments will occur either at the company's request (voluntary bankruptcy) or following such a request by one or more creditors. Unless the company is able to obtain the agreement of its creditors to a compromise, its assets will be entrusted to a receiver who will proceed with the liquidation.

Special provisions apply where the net equity of the company drops below 50% of the share capital due to heavy losses. The board of directors must call an extraordinary general meeting of shareholders to deliberate on the winding-up of the company. The quorum needed for such decision is the same as for amendment to the statutes of the company. If the board proposes to the general meeting of shareholders to continue the activities of the company, it must highlight the measures to be taken to improve the financial situation of the company. If the net equity drops below 25% of the share capital, the same procedure applies but the decision to wind-up the company may be taken by 25% of the shareholders, present or represented.

If the net equity drops below the minimum share capital of BFr2.5m, the winding up of the company may be requested by any interested party addressed to the court. The court may grant a period to the company to regularise its situation.

When all the shares of a corporation are transferred to a single shareholder, the company is not automatically dissolved. However, if a second shareholder is not found within one year, the single shareholder will be liable for the company's debts which have arisen since the time he/she became the sole shareholder.

## PRIVATE-TYPE COMPANY (Société Privée À Responsabilité Limitée – SPRL)

### Formation

An SPRL may be formed with only one shareholder but is usually formed by two persons. Shareholders may be individuals or companies, Belgian or foreign ones.

The SPRL is formed by formal deed of incorporation signed before, and authenticated by, a notary. An extract of the deed must be published in the Belgian State gazette.

### Statutes

The statutes include the constitution of the company and the statutes. They must state the name, type, registered office, purpose and duration of the company, identity of the founding shareholders, number of capital shares, restrictions on transfers, management provisions, date of trading year, date of annual ordinary meeting, and costs of incorporation.

A 75% majority is needed to amend the statutes of the company not falling within its objects may be *ultra vires* but bind the companies *vis-à-vis* third parties dealing in good faith with it.

An SPRL is permitted to carry out insurance, banking and savings activities.

### Capital

The minimum capital required for an SPRL is BFr750,000. The minimum paid up capital is BFr250,000. Authorised capital in excess of that amount must be at least 25% paid up.

### Management

The company is managed by one or more managers (gérants). Only individuals may be managers unlike SAs. Each manager has full power to act on behalf of the SPRL except for those acts which are legally reserved to the shareholders. Limits on the powers of the managers may not be invoked against third parties in good faith even if contained in the statutes. The same rules as described for the SA are applicable to conflicts of interest between the company and a manager.

### Shares

Shares must be registered shares with a minimum nominal value of at least BFr1,000. No beneficiary shares may be issued. SPRLs may not issue debentures.

The existing shareholders have a right of first refusal to subscribe for newly issued shares in the event of an increase of capital.

### Transfer of shares

Share transfers are restricted by law and may not be made to third parties unless the transfer is approved by half the shareholders representing three-quarters of the capital. Share transfers to certain defined classes of relatives are, however, permitted unless specifically restricted by the statutes.

### Shareholders' meetings

The company statutes determine the formalities required for attendance at the shareholders' meetings, the voting rights of shareholders and the manner in which the meeting is held. Shares entitle holders to be present or represented at the annual and special meetings. Shareholders may vote in person or be represented by a proxy holder who does not need to be a shareholder. If all the shares are of equal value, each share is entitled to one vote. If all the shares are not of equal value or some have no express value, each share is entitled to vote in proportion to the capital it represents.

### Annual general meeting

At least one shareholders' meeting must be held each year. The time and place of the meeting is specified in the statutes. At the meeting, shareholders discuss and approve the report of the board if any, and of the statutory auditors, and the annual accounts. The meeting may also decide on the distribution of profits and may appoint or remove or re-elect the directors and statutory auditors, fix their remuneration and release them from possible liabilities in respect of acts performed during the past trading year. If not specified in the statutes, the quorum of shareholders which must be present is a simple majority of voting shares.

### Accounts and audit requirements

The same rules apply to the SPRL as to the SA.

### Dissolution

Voluntary dissolution may be decided by special meeting of the shareholders at any time. It requires a qualified majority vote.

Bankruptcy judgments will occur either at the company's request (voluntary bankruptcy) or following such a request by one or more creditors. Unless the company is able to obtain the agreement of its creditors to a compromise, its assets will be entrusted to a receiver who will proceed with the liquidation.

When an SPRL incurs heavy losses reducing the net equity below certain levels, the same rules apply as for an SA.