

Corporate Aspects of Trading and Investing Belgium

1. INTRODUCTION

Belgian company law recognises the commercial company in various forms. The most common forms commercial companies can take are: the Joint Stock Company (*société anonyme/naamlooze vennootschap*), the private limited liability company (*société privée à responsabilité limitée/besloten vennootschap met beperkte aansprakelijkheid*), the Co-operative company (*société coopérative/coöperatieve vennootschap*), the European Economic Interest Grouping (*groupement européen d'intérêt économique/economisch samenwerkingsverband*).

These companies may open a Branch or create a subsidiary.

Businesses operating in more than one member state of the European Union can now incorporate as just the one pan-European company, or Societas Europaea (*société européenne/europese vennootschap*), rather than operating as a network of nationally based subsidiaries.

In Belgium, commercial distribution law covers in particular the franchise contract, the agency contract and the dealership contract.

2. METHODS OF MARKET ENTRY IN BELGIUM

2.1 DISTRIBUTION AND AGENCY

Franchising (*franchise/franchising*) is a method of collaboration between two independent partners, according to which one of them, called the franchiser, places at the disposal of the other, the franchisee, in return for remuneration and under well-defined conditions, the right to exploit a marketing formula or production system that he has developed and which has been tried and tested. The Belgian Act of 19 December 2005 protects the franchisee in the pre-contractual phase. On the otherhand, common law applies for all other phases of contracts of this kind.

The sales agency contract (*contrat d'agence/handelsagentuurovereenkomst*) is regulated by the Act of 13 April 1995. The sales agency contract is a contract by which one of the parties, the sales agent, is permanently charged by the other party, the principal, in return for remuneration but without being subject to the latter's authority, for the negotiation and possibly the conclusion of affairs in the name and on behalf of the principal. Sales agents organise their activities as they see fit and spend their time as they wish. The Act of 13 April 1995 envisages, under certain conditions, the respect of a predetermined period of notice and the granting of indemnities, customer-related in particular, in the event of cancellation of the contract.

Belgium has adopted some specific legislation with regard to the cancellation of the exclusive open-ended dealership contract (*contrat de concession de vente exclusive à durée indéterminée/onbepaalde tijd verleende concessies van alleenverkoop*).

The terms and conditions for cancelling such a contract are strictly regulated by the Belgian Act of 27 July 1961, which envisages, in certain conditions, the granting of a period of notice and indemnities, customer-related in particular, to the dealer.

2.2 BRANCH

The branch (*succursale/filiaal*) is subject to strict formalities (registration with the Company Crossroads Bank, appointment of Belgian representatives, publication of the headquarters' Articles of Association, and so on) and must in particular annually communicate and publish the financial data, sometimes confidential, relating to the foreign headquarters.

As the branch does not have its own legal personality, its headquarters will be liable for its activities. It is sometimes simpler and more effective to constitute a new subsidiary company (*filiale/dochtermaatschappij*), with its own legal personality.

2.3 PARTNERSHIPS

The General Partnership (*société en nom collectif/vennootschap onder firma*) is formed when two or more people put something in common, in order to carry on one or more given activities and with the aim of obtaining direct or indirect profit from their assets for the partners, in principle they form a company. Any collaboration between people satisfying this definition can be described as a partnership, which does not have a legal personality.

The partners of such a company are committed towards third parties either by virile shares, when the business purpose is civil, or jointly, when this purpose is commercial. Exemption from this liability is only possible when expressly stipulated in an instrument signed with third parties.

The Limited Liability Partnership (LLP) (*société en commandite simple/gewone commanditaire vennootschap*) is that “which is formed by one or more liable and interdependent associates, who are called general partners, and one or more simple sponsor associates, who are called limited partners”. The general partners have joint and unlimited liability for all of the company's debts, whereas the limited partners have no liability beyond their individual investments. The limited partners' shares are personal and inalienable.

The Limited Partnership With Share Capital (LPSC) (*société en commandite par actions/commanditaire vennootschap op aandelen*) is that which is formed by one or more liable and interdependent associates, who are called general partners, with one or more limited partners who have the capacity of associates, and who are liable only up to a predetermined stake. The LPSC therefore comprises two groups of associates: the general partners have joint and unlimited liability for all the company's debts, and the limited partners have no liability beyond their individual contributions.

The limited partners own registered or bearer shares.

The situation of the general partners, for its part, is the same as that of their counterparts in the LLP.

The Co-Operative Company (CC) (*société cooperative/coöperatieve vennootschap*) is that which is composed of associates whose contributions are variable and whose shares cannot be transferred to third parties. This form of company has two essential characteristics: the

variability of the associates and contributions, and the strictly limited transferability of the ownership rights.

In terms of capital, distinction is made between the limited liability co-operative company (LLCC) (*société coopérative à responsabilité limitée/coöperatieve vennootschap met beperkte aansprakelijkheid*) and that with unlimited liability (ULCC) (*société cooperative à responsabilité illimitée/coöperatieve vennootschap met niet beperkte aansprakelijkheid*). For the latter, no starting capital is necessary but it should be known that in return, the associates are personally and jointly liable for corporate debts to the extent of their entire assets.

2.4 BELGIAN LIMITED LIABILITY COMPANIES

The limited liability co-operative company (LLCC) (*société coopérative à responsabilité limitée/coöperatieve vennootschap met beperkte aansprakelijkheid*) is similar to the co-operative company with unlimited liability (ULCC) except that the liability of the former's associates is limited to their contributions.

The Joint Stock Company (JSC) (*société anonyme/naamlooze vennootschap*) is that which is formed by a number of people who commit themselves to paying a predetermined stake and who are liable for the debts of the company pro rata to their contributions. The associates' liability is therefore limited to the amount of their stakes.

The private limited liability company (²LLC) (*société privée à responsabilité limitée/besloten vennootschap met beperkte aansprakelijkheid*) is that which is incorporated by one or more people who commit only their contributions and where the ownership rights are transmissible only under certain conditions. A person can be a sole associate in only one limited company; otherwise he or she in principle becomes the joint and several guarantor of all the commitments of the other limited companies until the particular moment when a new associate is allowed into those other limited companies.

The Non-Profit-Making Association (NPMA) (*association sans but lucratif/vereniging zonder winstoogmerk*) is a grouping of persons or entities pursuing a disinterested objective. The NPMA can procure no material gain for its members. This prohibition means that the members of a non-profit-making association cannot receive the profits that might result from the association's activities. This is a major difference compared to commercial companies, the vocation of which is to enrich its shareholders. Contrary to the Partnership, the NPMA has its own legal personality independent of that of its members. The legal personality means that the NPMA has rights and obligations. The members have limited liability and do not in principle commit their personal wealth for the association's commitments.

2.5 SUPPRESSION OF THE "HODLING SHARES" (ACTIONS AU PORTEUR)

The Act of the 14th of December 2005 set up the suppression of the "holding shares".

The objective of the reform initiated by the Government was the suppression of the anonymity attached to the holding shares by the mean of the conversion of these shares into non "realized certificates" or "nominated certificates".

Are concerned all the movable values issued to a shareholder in Belgium (shares, obligations, certificates, beneficial parts, Sicav, State loan, etc.).

In order not to penalize too much the actual owners of these holding shares and avoid precipitation of them, the Government set up a period of conversion being relatively long which will end on the 31st of December 2013 for the shares issued before the publication of this Act at the Belgian Official Gazette (on the 23rd of December 2005). The shares issued after the publication of the Act will need to be converted before the 31st of December 2012.

The emission of new holding shares is not authorized after the 1st of January 2008. From this date, every holding share issued at the date of the 31st of December 2007 will be automatically converted in a “realized certificate”.

At the expiry of these delays, the shares whose conversion would not be applied will be automatically converted in “realized certificates” and will be inscribed by the intervention of the issuer into the account of the owner.

At the date of the 31st of December 2015, the shares whose owner remain unknown will be sold after publishing advice at the Official Gazette and in the press. The product of the selling will be deposited at the administration (“Caisse des Dépôts et Consignation”). If the owner shows up after this moment, he will recover his money by the payment of a fine of 10% (per year of delay) of the amount being asked.

3. FORMATION OF A LIMITED LIABILITY COMPANY

The basic conditions for the incorporation of an **LLCC** are as follows (and also apply for a **ULCC**):

- a minimum capital of €18,550;
- the total subscription of the capital;
- a minimum amount of €6,250 paid-up;
- 25 % of each share being paid-up; and
- a minimum of 3 associates.

For an LLCC, a notarial act is necessary (whereas for the ULCC, the memorandum of association can be under private seal, unless one of the associates contributes a building).

For the **JSC**, the basic conditions are the following:

- a minimum capital of €61,500;
- the total subscription of the capital;
- the minimum capital being totally paid-up;
- 25 % of each share being paid-up; and
- a minimum of 2 shareholders.

A notarial act is necessary, and the shares are either bearer or registered. A bill of 01 August 2005 however envisages the suppression of bearer shares as from January 2008.

The basic conditions for the incorporation of a **LLC** are the following:

- a minimum capital of €18,550;
- the total subscription of the capital;
- a minimum amount of €6,200 being paid-up. For a sole shareholder limited company, €12,400 of the capital must be paid-up; and
- 20 % of each share being paid-up.

A notarial act is necessary, and the shares are registered.

Unlike other legal forms such as the JSC or the LLC, the constitution of an **NPMA** does not require any starting capital. The NPMA can be incorporated by simple deed under private seal.

4. MANAGEMENT OF A LIMITED LIABILITY COMPANY

4.1 THE CO-OPERATIVE COMPANY

Associates

The rules pertaining to the admission, resignation and exclusion of the associates are laid down by the Articles of Association. These also indicate the body authorised to resolve such questions: the general meeting, the board of directors or another body. In the absence of statutory provisions, the decision belongs at the general meeting, without any possible appeal.

General Meeting

The greatest freedom is left to the founders with regard to the organisation of the powers and workings of the General Meeting. The law indeed specifies that the memorandum of association must indicate the rights of the associates, the calling of the meeting, the majority necessary for the validity of the deliberations and the voting mode. For the remainder, the rules of the Joint Stock Company apply.

Administration

Once again, the greatest latitude is left to the founders on this point. They are indeed allowed to entrust the administration of the Co-operative to a manager or to one or more directors. In the event of silence on the question in the Articles of Association, a director appointed by the General Meeting will manage the company.

The Articles of Association normally determine the powers of the manager or the directors. If they are not evoked therein, the director is invested with full management power - he or she will therefore be able to accomplish all acts necessary or useful for the achievement of the company's purpose.

Auditors

The Auditor has the role of controlling the financial situation, the annual accounts and the regularity of the operations to be noted in the accounts according to the legislation on commercial companies and the Articles of Association. The appointment of an auditor is not necessary for small companies.

4.2 THE JOINT STOCK COMPANY

General Meeting

The General Meeting assembles all of the company's associates or shareholders. It has the most extended powers for all acts that are of interest to the company.

Certain acts must obligatorily be submitted to the General Meeting of the associates or shareholders:

- approval of the annual accounts;
- amendment of the Articles of Association; and
- appointment, revocation and replacement of directors and managers.

Board of Directors

The Joint Stock Company is represented by a Board of Directors appointed at the time of the formation of the company or in the course of a General Meeting.

The Board of Directors of a JSC must contain at least three members (there is no maximum). The number of directors can however exceptionally be limited to two when the company consists of only two shareholders.

The Board of Directors has all the powers necessary for managing and representing the company. It can indeed accomplish all acts of management except for those that the law reserves for the General Meeting. Moreover, it represents the company for all deeds and in judicial matters. The Joint Stock Company's Board of Directors can delegate part of its powers to a Managing Director (if the delegate him or herself is a director) or to a General Manager (if the delegate is a third party). The directors are responsible to the company for all the acts that they accomplish while in office and for any faults that they may commit. It is however the company that will have to assume all the consequences of those faults since the directors act on its behalf. If the General Meeting wishes to sanction a director, it can revoke him or her and, if necessary, have him or her replaced. In the event of the company's insolvency, the Official Receiver can personally prosecute the directors in the event of a specific serious fault.

Auditors

An Auditor for a JSC has the same role and responsibilities which have been described above in relation to the LLCC.

4.3 THE LIMITED LIABILITY COMPANY

General Meeting

The rules expounded for the JSC apply.

Management

The LLC is represented by one or more Managers appointed at the time of the formation of the company or on the occasion of a General Meeting.

Each Manager can accomplish all acts of management necessary or useful for achieving the company's purpose except for those that the law reserves for the General Meeting. Each Manager represents the company for all deeds and in judicial matters.

Auditors

An Auditor for an LLC has the same role and responsibilities which have been described above in relation to the LLCC

5. OFFICERS' LIABILITY OF A LIMITED LIABILITY COMPANY

5.1 FOUNDER LIABILITY

The founders can be held jointly liable for any irregularities committed at the time of the foundation of the company (constitution of the capital, invalid incorporation, undertakings contracted by incompetents).

5.2 DIRECTOR AND MANAGER LIABILITY

For as long as the directors and managers fulfil their assignments normally, they assume no personal liability. They represent the company and the legal entity alone is bound by their acts. The same is not the case, however, when directors commit faults in the performance of their duties.

Management Faults

In an LLCC, a JSC or an LLC, the directors are liable with respect to the company for their management faults, i.e. when they fail to discharge their directorships correctly.

Infringement of Company Law or Articles of Association

The directors and managers can also have to answer with regard to the company and to third parties for an infringement of the Companies Code, the accountancy laws or the Articles of Association. This liability is in principle a joint liability.

Insolvency

In the event of insolvency, if the directors or managers have committed a specific serious fault, and insofar as this fault has contributed to the insolvency, they can be held personally liable for all or part of the company's debts to the extent that the assets allow.

Tortious Act

Ordinary criminal and quasi-criminal liability is based on Clauses 1382 and 1383 of the Belgian Civil Code.

Conflict of Interest

A director's liability can also be engaged if he or she has taken part in a board deliberation concerning an operation in which it had an interest different from that of the company, and insofar as it would have been prejudicial to the company or to a third party.

In the event of a new issue of capital, the liability of the directors or managers is the same as that of the founders.

Shareholder Liability

In an LLCC, a JSC or an LLC, the shareholders do not have to answer for the debts of the company. Their liability is limited to their contributions.

6. TAXATION OF PROFITS

Companies, associations and organisations with legal personality are subject to Belgian tax on corporate profits if they are engaged in a commercial or profit-making activity and if their statutory head office, main establishment or effective management office is located in Belgium.

In principle, foreign entities are subject to Belgian corporation tax if they exercise commercial activities in Belgium via a branch (a permanent establishment).

Since the 2004 tax year, the **corporation tax rate** has been 33.99 %. A reduced rate of 24.98 % can be applied to Small and Medium Enterprises (SME), under certain conditions.

In general, the **tax base** for corporation tax is the world income minus the authorised deductions. All the income generated by a company is in principle considered to be the corporate income. Similarly, all the costs created by a company are in principle considered to be the corporate costs. In principle, the expenditure incurred or created by the company for the taxable period for the purpose of obtaining or ensuring the company's taxable income is regarded as tax-deductible.

The distribution of dividends in Belgium is an expensive business. Taking into account the corporation tax and the withholding tax of 25 % retained on the distribution of dividends, the total rate of tax applied more or less represents the marginal rate of personal income tax. It is nevertheless possible, under certain conditions, to benefit from a preferential overall tax rate by reducing the tax on the dividend allocation.

When a company owns several subsidiaries, the officers of the parent company are required to **consolidate their accounts**, in order to present the economic reality of the whole.

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