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A comprehensive memorandum on

Directors' liability, accounting obligations & recent changes

in International Non-Profit Associations (A.I.S.B.L./I.V.Z.W.) under Belgian law

13 July 2020

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A. INTRODUCTION: A RECENT CHANGE IN THE BELGIAN LEGISLATION

1. Over the past decades, non-profit associations under Belgian law have been governed by the Act of 27 June 1921, relating to the non-profit associations (hereafter referred to as "ASBL"), the international non-profit associations (hereafter referred to as "AISBL") and the private foundations.

That long-know situation was modified and remodelled with the adoption of the Act of 23 March 2019 introducing the new "Code on Companies and Associations" (hereafter: the "new Code" or "CSA") which came into force on the 1st of May 2019 for all companies, associations and foundations (i.e. legal persons of private law) created as from that date.

2. In terms of *ratio legis*, centralizing under a single, common set of rules made sense in view of the modernisation of the law on associations and its growing[1] convergence towards company law. As in practice, legal loopholes or imprecisions of the Act of 1921 would be compensated with solutions borrowed from company law.

Under the new Code, uniform solutions are henceforth adopted with respect to *inter alia* the liability of directors for breach of the articles of association, alongside with the publicity of social documents, nullity of the entities and of their decisions, permanent representation of a legal person director, day-to-day management, conflicts of interest.

Given this harmonisation of their legal regimes, the main distinction criterion between companies and associations (N.B. both entitled to carry out profitable activities) lies in the permission vs. interdiction to distribute benefits.

3. Entities already existing prior to the 1st of May 2019 obviously enjoy a transitory phase.

For existing entities which did not make their articles of association CSA-compliant prior to the 1st of January 2020[2] the new law became applicable for the first time on the 1st of January 2020. Since that date, all imperative provisions of the new Code are applicable, as well as supplementary provisions that are not contradicted by statutory provisions.

More in detail:

- statutory provisions which conflict with imperative provisions[3] of the CSA are considered as being "non-written" since 01.01.2020;
- the first modification of the articles of association taking place as from 01.01.2020 onwards must aim at making these compliant with the new Code, subject to the directors' liability (Art. 31 §1, al. 3 CSA);

[1] Convergence already present under the Act of 1921.
[2] N.B. only a possibility (≠ obligation) for existing entities.
[3] Provisions which aim to protect the interests of a category of individuals that are considered « weak » - typically: all provisions pertaining to the director's liability regime (Art. 2:55 – 2:57 CSA).

- in any event, the CSA will enter into force integrally (incl. supplementary provisions) and for all existing entities on 01.01.2024, which is therefore the ultimate deadline to make the articles of association compliant, subject to directors' liability;
- one exception to the above "automatic" working: the interdiction for associations and foundations to carry out trade operations as principal activity is maintained until 01.01.2029 (instead of being admitted as from 2024) unless their articles of association are made compliant with the CSA (Art. 31, §4).

4. Provisions pertaining to directors' liability are typically imperative provisions, and therefore already entered into force since the 1st of January 2020.

Of course, the liability regime did not change entirely and only some of new Code's provisions present an innovative character, compared to what pre-existed under the previous regime, based on the Act of 1921, doctrine and case-law.

Therefore, before addressing a number of other noteworthy general changes (see point C. below), the present memorandum will focus on the liability regime *henceforth* applicable to Associations, with highlighting of the "new" aspects (see point B. below).

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B. MEMBERS' LIABILITY IN AN INTERNATIONAL NON-PROFIT ASSOCIATION

5. The members of an A(I)SBL are not, directly or indirectly, liable with respect to the commitments of the Association. This is provided in the law and often additionally confirmed in the articles of association of the legal entity.

Of course, members can be *contractually* liable to e.g. pay the annual fee due to their Association.

C. DIRECTORS' LIABILITY IN AN INTERNATIONAL NON-PROFIT ASSOCIATION BEFORE THE CSA

6. In terms of director's liability, the Act of 1921 merely provides that directors "are not personally bound by the commitments of the Association" (see Articles 14bis and 49 of the Act)

Such (non)liability principle, which is maintained in Article 2:49 of the CSA, is a result of the representation doctrine and – by extension – of the "body theory" (representation of a legal entity through the association bodies), i.e. the person (agent) who acts on behalf of and for the account of another person (principal), commits the latter, and not him/herself.

Regarding ASBL, the Act of 921 further provides that directors bear a specific liability towards any interested party in case of transformation of the ASBL into a company (Article 26*septies*).

Considering those limited legal provisions, director's liability under the Act of 1921 is based – vis-à-vis the Association and third parties equally – on the **ordinary liability regime** and thereby:

- Directors, day-to-day managers and mandatories liable for the due execution of their mandate toward the Association (contractual liability);
- They can be held liable towards third parties if committing extra contractual faults (tort/extra-contractual liability);
- The General Assembly is however free to grant directors a discharge and
- The legal liability claim being subject to a 1 year-prescription period.

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D. DIRECTORS' LIABILITY IN AN INTERNATIONAL NON-PROFIT ASSOCIATION UNDER THE CSA

7. For non-profit Associations, the new regime introduced by the CSA brings important modifications in terms of director's liability.

Of course the above (non)liability principle is maintained under Article 2:49 CSA and the distinction between contractual liability (towards the Association) and tort/extra-contractual liability (towards third parties) remains applicable as well.

However, whereas companies, ASBL and AISBL each used to have their own legal set of rules regarding director's liability, the CSA brings a sensible change by instituting a common set of rules applicable to all legal entities at hand (companies, associations, foundations etc.) – albeit certain causes of liability remain specific to one or the other type of legal entity.

The new, common set of rules is to be found in Book II of the CSA, Article 2:56 and following.

8. Substantially,

- While the classical distinction between management error vs liability for breach of the law/the articles of association remains applicable (see below), directors henceforth have a **positive obligation of "due execution"** of their mandate, with a marginal control of the Judge regarding potential departure from the "due execution" standard;
- The liability regime is henceforth expressly extended to the ***de facto* directors/managers**;
- The **principle of solidarity** (joint liability) between directors is somewhat modified, since the solidary (joint) liability prevails even in case of a mere management error.

For ASBL and AISBL, the liability of directors is in several ways much clearer under the new Code, which expressly provides for: a fault-based (limited) liability (Art. 2:56), limitations regarding financial liability (Art. 2:57) and the prohibition of exoneration clauses and/or guarantees (Art. 2:58).

a) The fault-based liability regime (Art. 2:56 CSA)

9. While directors of non-profit associations are henceforth subject to the same liability standards as company directors (see above), the new regime takes into account the associative context in which they operate and provides for limitations of their liability as well.

In order to engage a director's liability, whether towards the Association or towards third parties, the traditional conditions (fault – damage – causal link) must be met unless the law otherwise provides. We hereafter comment of the different types of fault (management error or a violation of the CSA / the articles of associations) based on which a director's liability can be engaged.

10. Pursuant to Art. 2:56 CSA, directors and day-to-day managers are liable, **towards the A(I)SBL**, for the faults committed in the execution of their duties, as well as **towards third parties**, provided the fault committed is non-contractual. They are however only liable for those decisions, actions or behaviours which **manifestly** exceed the margin in which normally careful and diligent directors, placed under the same circumstances, can **reasonably** have a different opinion (§1).

The members of a management body are **jointly** liable – towards the moral entity as well as towards third parties – for any damage resulting from **violations of the provisions** of the Code or of the articles of association (§3).

They are however **discharged** of their liability for such violations to which they did not take part, if they have reported the alleged violation before all other members of the management body (§4).

11. The legal action based on Art. 2:56 CSA can be brought against a current director, a past director or even a *de facto* director, i.e. "any person holding or having held the power to effectively manage the legal person" (Art. 2:51 CSA).

This alignment of *de facto* director's liability with the liability of those actually holding a mandate from the Association is an innovation under the CSA (under the previous regime, only their extra-contractual liability could be invoked).

12. The nature of a Director's liability will differ depending on the type of fault committed:

- A mere "management error" engages the individual liability of the director to which it can be attributed *towards the Association only* (and not towards third parties);
- A tort or extra-contractual fault engages the individual liability of the director to which it can be attributed towards third parties;
- A violation of either the CSA or the articles of association engages the joint liability of all directors as much towards the Association as towards third parties.

a. Contractual liabilities

13. Article 2:56 CSA covers two types of contractual fault-based liability: the individual liability for management breaches (§1 – *internal* liability) and the joint liability for violations of the Code and/or the articles of association (§3 – *internal or external* liability).

The burden of proof and the possibility for the failing director to escape such types of liability based on a "reasonability" test traditionally depend on whether the failing director was faced with a (i) best effort obligation (usually the case for management breaches) or with a (ii) result-based obligation (usually the case for statutory violations).

As its name suggests, a result-based obligation aims at a well-described result (e.g. filing an application for subsidies within the prescribed deadline). When this result is not achieved, the debtor is presumed to be liable, unless he can provide evidence that he is not to blame. A violation of a best effort obligation on the contrary only takes place when the debtor has not reasonably done everything in his power to achieve the aimed result (e.g. obtaining the subsidies).

i. Liability for management breaches (internal and in principle individual)

14. **Notion.** Every member of the Board is first and foremost liable towards the A(I)SBL for a correct performance of his mandate, in accordance with the agreement of mandate that exists between the involved person and the A(I)SBL.

Article 2:51 of the CSA expressly provides each director or day-to-day manager with a positive obligation, vis-à-vis the legal entity, of "due execution" of its mandate (subject to a marginal control of the Judge regarding potential departures from the "due execution" standard).

This is a matter of *internal* liability.

The legal relationship between the director and the A(I)SBL is to be considered as a contract of mandate: the director acts on behalf of and for the account of the A(I)SBL. Therefore, directors are personally and individually liable for the faults committed in the execution of their mandate towards their principal, i.e. the A(I)SBL.

That said, CSA specifies that when directors form a Board ("college"), they are jointly liable for committing management errors.

15. The obligation to correctly manage the A(I)SBL – expressly provided for in Article 2:51 of the CSA – is generally a best effort obligation. It is also by nature a contractual obligation, towards the A(I)SBL, subject therefore (only) to internal liability.

A management breach generally designates a failure of the director in his contractual assignment to execute properly the duties with which he/she is entrusted with as director without such duties needing to be clearly identified in the articles of association or in the Code.

Examples of management errors include :

- concluding an agreement of which one knows or should have known that the A(I)SBL could not carry it out / abstention to take the necessary measures to limit/constrain the consequences of the non-fulfilment of a contract ;
- paying an undue debt or accepting and paying by mistake an undue bill / paying a non-outstanding debt (Comm. Courtrai 1984) or granting excessive compensations
- negligence to actively participate in the management / absenteeism at a Board meeting, in the case of a company – cf. Gand 1996;
- entering into contracts at adverse conditions;
- insufficient monitoring of the day-to-day management or a managing director;
- entrusting a completely incompetent person with the daily management;
- neglecting to achieve the necessary formalities to obtain the payment of a subsidy to which the A(I)SBL is entitled;
- etc.

16. **Assessment.** The CSA legally confirms the principles of marginal assessment and a priori assessments, in practice already applied by the jurisdictions under the previous regime. A director shall only be held liable for those actions which "manifestly" exceed his/her discretionary power.

Such failures can be assessed by reference to the "reasonability test" as provided for in Article 2:56 §1 in fine of the CSA.

In order to assess of the existence and serious character of such a breach, the criteria developed in practice over the years[4] remain applicable under the news regime, i.e.:

- the criterion of the "bonus pater familias" (abstract criterion, when the Court uses as the reference person a duty conscious, morally cautious and predictive director placed in the same conditions);
- the test of reasonability (only the breaches which fall outside the scope of a caution, dedicated and skilled director, with a certain margin of error, can be sanctioned). In other words, the director is only liable for wrongful management or mismanagement, but not for bad management;
- not post factum assessment (obligation for the judge to place himself at the moment and place of the action or behaviour);
- to a limited extent, distinction between paid and honorary (unpaid) director;

[4] See our Memo of April 2014.

- in case the director acts under an employment agreement, his liability will be governed by social laws which is much more protective.

17. Except in case of fraud, a director is in the context of contractual liability only responsible for damages that « were foreseen or could have been foreseen » at the start of the mandatory agreement. Moreover, only damages that are an immediate and direct consequence of the non-execution of the mandate will be compensated.

18. Notwithstanding the foregoing, claims of A(I)SBL towards their directors remain (very) exceptional. This can be explained by the fact that members of the general assembly usually do not have any personal financial interest in the pursuit of a liability claim. Moreover, the benevolent commitment of the directors (as the case may be) may tend to discourage the members to initiate claim.
Since the CSA does not provide for a joint liability of all body members for this type of breach, the management breach can only be charged to the specific director(s) who committed it or who is/are responsible for it, in case of negligence.

The claim resulting from a management breach is, like the obligation, of a contractual nature and can only be submitted by the A(I)SBL (excl. third parties). The decision thereto is taken by the general assembly by simple majority of votes. There is no "minority claims" with regards to A(I)SBL, unless the articles of association provide otherwise.

ii. Joint liability for violations of the Code / the articles of association

19. Directors of Associations are, same as company directors, obviously also liable for non-complying with the provisions of Code (and of the Royal Decrees executing it) and with the written rules agreed amongst the members of the A(I)SBL (articles of association, internal rules etc.)

Contrary to the Act of 1921 which did not provide for a similar provision, the CSA provides for a joint liability of all members of the management body – as much towards the legal entity as towards third parties - for any damage resulting from a breach of the Code's provision or of the articles of association (Art. 2:56 §3 CSA).

This type of liability may thus here be of an internal or external nature and it is for the A(I)SBL or the third party invoking it to specify which legal or statutory provision has been breached and to demonstrate the reality of the breach.

20. **Legal obligations** of directors under the CSA currently include:

- managing the accounts in accordance with the applicable accounting principles (Art. 3:47 §2 CSA);
- preparing the annual accounts and budgets (Article 3:47 §1 CSA);
- convening and holding the annual general meeting (Article 10:6-7 CSA);
- the timely filing of the annual accounts (Article 3:47 §7 CSA);
- compliance with the statutory formalities
- deliberating upon measures aimed at ensuring the continuity of the association's economic activity during a period of minimum 12 months when it appears that serious and concurring circumstances are likely to endanger the association's continuity (Art. 2:52 CSA);
- complying with the procedure pertaining to conflict of interests (Art. 9:8 CSA);
- establishing a managing report in case of a large A(I)SBL (art 3:48 CSA)
- etc.

The category of faults constituting a violation of the Code grows larger with each new Act complementing the law applicable to legal entities and imposing new duties on directors.

It is for instance admitted that any breach to the principles of accounting law committed in the establishing of annual accounts (cf. *supra*) constitutes a breach to the CSA likely to engage the joint solidarity of all directors - including those playing no accounting role -, provided the breach caused a damage[5].

21. Possibilities of **statutory violations** are more or less numerous depending on the completeness of the articles of association and of the more or less binding character of said articles.

Possible violations of statutory provisions include :

- letting the A(I)SBL act beyond its statutory object(s);
- non-compliance with the statutory rules on the delegation of powers of representation / rules pertaining to the appointing, dismissal or the powers of the day-tot-day manager;
- breach of the statutory restrictions brought to the managing power of the Board of Directors;
- the granting of remuneration to directors without prior authorisation as required by (and thus in breach of) the articles of association;
- unduly refusing a member the right to access the general assembly;
- etc.

22. Most of the aforementioned legal and statutory obligations impose result obligations on the directors, the assessment of which cannot be subject to a test of reasonability.

23. **Joint solidarity.** Same as for management errors attributable to a Board of directors (supra), the directors will be held jointly liable for legal and statutory violations on the mere ground that the result is not achieved, "*unless*…" (Art. 2:56 al. 4 CSA).

Joint solidarity is the rule; a new rule, for directors of Associations, and one that considerably burdens their liability compared to the previous regime.

The reversed burden of proof provided under Art. 2:56 al. 4 CSA allows directors to escape the joint liability:

- for violations / faulty acts they have not personally taken part in (whether the minutes of the meeting shows that they protested it or whether they were legitimately excused at the meeting during which the faulty decision was adopted)
- provided they have denounced / opposed it (in writing) to all directors / the Board of directors of the Association.

b. External liability for non-contractual faults (Art. 1382 of the Civil Code)

24. Pursuant to Article 2:56 §1 CSA, directors and past or present *de facto* managers are liable towards third parties (for the faults committed in the execution of their duties) *provided the committed fault presents an extra-contractual character.*

This provision legally confirms the old-established principles admitted in application of general civil law, i.e. that the particular responsibilities which directors are faced with does not discharge them from the general duty of due care which rests on everyone.

25. Since the directors of an A(I)SBL have no contractual relationship with third parties, the aforementioned liability-claim will necessarily be a non-contractual one (such as specified in Article 2:56 §1 of the CSA) i.e. a liability based on articles 1382 of the Belgian Civil Code.

Consequently, a wrongful act putting the external liability of a director at risk requires a non-contractual fault, i.e. adopting a behaviour which a normally prudent and diligent director would not adopt, whether that

[5] See DAVAGLE Michel (coord.), *Le nouveau visage des ASBL après le 1er mai 2019*, Anthémis 2019, pages 212-213.

consists the violation of a legal standard or a violation of the general standard of prudent and diligent behaviour (and, of course, a causal link with the damage claimed).

26. In presence of a (mere) managerial error or breach, i.e. a violation of the agreement between the director and the A(I)SBL (see point a (i) above), the personal and external liability of the director with respect to third parties will only be at stake if the wrongful act committed not only causes a pure management breach but also, at the same, time a tort.

While assessment principles are similar (see above: marginal and a priori discretion), the non-contractual fault therefore differs from the mere managerial error in both nature and gravity (not all managerial errors imply a tort and vice-versa).

Concretely, non-contractual liability of directors towards thirds parties can be based on any faulty behaviour which – without constituting a violation of the CSA or the articles of associations – goes beyond the mere managerial error… some of which even subject to criminal penalties.

27. While the liability assessment will depend of the concrete circumstances of each case and the characteristics of each fault, the principle remains that director's tort liability can only be engaged if their behaviour can be considered faulty regardless of their position of representative of the A(I)SBL, i.e. insofar a director could be held liable if he/she behaved accordingly in the management of his/her own affairs[6].

Therefore, in practice, there are not so many cases (to our knowledge) in which directors of associations have been held liable towards third parties. Most of these consists of situations where the director(s):

- continue(s) significantly unreasonably loss-making activities;
- enter(s) into agreements which they knew or should have known the association would never be able to carry out;
- refrain(s) from transferring withholding taxes or paying employee wages;
- etc.

28. The director(s) and de facto director(s) of A(I)SBL above a certain size (see amounts below) can be held jointly liable for the payment of certain taxes, in particular advance personal income tax and value added tax (see Article 51 of the Code on debt Recovery), if as a result of a tort committed by the director(s) the taxes were not paid as and when due.

The associations concerned are those which, at the closing date of their financial year, reach the amounts set out below[7] for at least <u>two of the three following criteria</u> :

- 5 workers, on yearly average, employed full time, duly declared and registered
- 312.500 EUR of total profits, other than exceptional, excl. VAT ;;
- 1.249.500 EUR for the total balance sheet.

[6] *Ibidem,* p. 203, footnote 42.

[7] N.B. Those amounts are defined by Article 17 §3 of the (abrogated) Law of 1921 to which Article 51 of the (recent) Recovery Code refers… No doubt that a reference to the amounts provided under the CSA – which are more recent - would make sense.

b) Legal limitations of liability and prohibition of exoneration clause/guarantees

a. New "cap system" Art. 2:57 CSA

29. A major and perhaps the most important innovation of the CSA, for A(I)SBL, is the institution of a "cap system", expressed in absolute amounts above which a director cannot be held liable. The Act of 1921 indeed did not provide for any liability ceiling.

The liability limitations, set out in Article 2:57 of the CSA, apply:

- to each member of a management body or person to whom the day-to-day management has been delegated,
- as much towards the legal entity as towards third parties,
- regardless of the nature of the liability, i.e. in case of mere management error as well as infringement of the CSA or statutory provisions,
- and also in application of specific laws (e.g. Articles XX.25 and XX.27 of the Code on Economic Law – liability for debts of the legal entity in case of serious breach having contributed to the bankruptcy and to the faulty continuation of a deficit activity).

The limitations however do not apply when a person who is a director sees his/her liability invoked in his/her capacity not of director but of e.g. founder.

30. The liability ceiling is fixed in absolute amounts between 125.000 EUR and 12.000.000 EUR, depending on (i) the size of the A(I)SBL, determined by its average turnover (pre-tax value) generated over the 3 last years preceding the liability claim and (ii) the average balance sheet total during the same period (See. Art. 2:57 §1, al. 1, 1° to 5° CSA).

N.B. Pursuant to Art. 2:57, §2, al. 2 CSA, those maximum amounts apply to all members of an administration body (or to all day-to-day managers) "taken as a whole", meaning the cap-amount does not get multiplied by the number of defending parties to the legal action).

Schematically:

Average turnover ("T.") over the 3 last years	**AND/ OR**	**Average BST over the 3 last years**	**Liability limited to***
< 350 000 EUR	AND	< 175.000 EUR	125.000 EUR
350 000 < 700 000 EUR	AND	< 350.000 EUR	250.000 EUR
700 000 < T. < 900 000 EUR	AND	< 4 500 000 EUR	1 000 000 EUR
9 000 000 < T. < 50 000 000 EUR	AND	< 43 000 000 EUR	3 000 000 EUR
50 000 000 EUR < T.	OR	> 43 000 000 EUR	12 000 000 EUR

*Amounts automatically indexed (Art. 2:57, last indent of the CSA)

Very many small associations fall within the lowest threshold.

31. By way of **exception**, Article 2:57 §3 CSA provides that the above limitations do **not** apply:

- in case of a minor fault of customary (rather than accidental) character, a serious fault or when the fault is committed with fraudulent intent or to cause distress;
- to obligations imposed on directors by Articles 5:138, 1° to 3°, 6:111, 1° to 3°, and 7:205, 1° à 3° of the CSA;

- to cases of joint liability as referred to in [Article 51 of the Code on debt Recovery][8] (non-payment, by A(I)SBL of a certain size, of the withholding tax on professional income or of the VAT) an in Art. 458 of the Code on Income Tax / Art. 73sexies of the Code on VAT (joint liability to pay eluded tax based on a criminal conviction);
- to cases of joint liability as referred to in article XX.226 of the Code on Economic Law (ONSS arrears identified in the event of insolvency).

b. Prohibition of exoneration clauses or guarantees – Art. 2:58 CSA

32. To ensure the foreseeability of the above regime, Article 2:58 CSA prohibits:

- any clause limiting the liability of directors or day-to-day managers beyond the ceiling provided in Article 2:57 CSA (1st indent);
  N.B. Such interdiction does not prevent the general assembly from granting **discharge** to the directors, knowingly, after a fault has been committed, or that the association from granting, at its cost, an insurance cover to the directors, for the event that their liability would be engaged – see below;
- mechanisms by which the association engages itself in advance to exonerate or guarantee its directors or day-to-day managers of their liability towards the association[9] or third parties (2nd indent).

Any clause or provision contrary to the above interdictions, whether resulting from a contract, the articles of association or an engagement undertaken by an unilateral declaration, shall be considered "unwritten" (3rd indent).

33. In other words, with the adoption of the CSA, the legislator no longer allows the so-called **"hold harmless" agreements**, i.e. agreements by which an A(I)SBL commits itself to safeguard its director(s) against financial consequences of a director's liability claim.

Such agreements, previously allowed, are prohibited by the CSA, as they work against the incentive for directors to avoid committing any fault or negligence in the execution of their duties.

However, it remains possible for third parties to provide directors with guarantees as for the A(I)SBL, it can always enter into an insurance contract in favour of its directors (see below).

c) Other means to prevent or limit director's liability

34. Prior to and besides the insertion of the above cap system, there have been different means to limit or manage the risks pertaining the directors' liability in an A(I)SBL.

a. Resignation

35. In general, a director - who is of the opinion that the acts of the association are no longer in conformity with the criterion of the *bonus pater familias* - can resign at any time, without notice period or motivation, provided that he/she avoids resigning carelessly (e.g. without allowing the A(I)SBL sufficient to replace him/her).

Towards the A(I)SBL, the liability of the director ends as from the notification of the resignation onwards. Towards third parties, the resignation will only have effect once the resignation has been published in the Belgian Official Gazette, unless it can be demonstrated that said third parties were otherwise made aware of the resignation.

[8] To be precise: Art. 2:57 § CSA currently (still) refers to Art. 442quater of the Code on Income Tax 1992 and Art. 93undecies C of the Code on VAT have been abrogated and replaced by Art. 51 of the Recovery Code.
[9] The provision reads "company" but that must be a mistake.

The resignation has of course no influence on the liability of the concerned director regarding faults committed before the resignation took place. In order to avoid any (joint) liability regarding specific management acts, it is recommended for the director to complain, in writing, about the concerned acts at the first general assembly.

b. Discharge

36. Granting discharge to a director implies that the general assembly of the A(I)SBL renounces to its right to submit a liability claim against the director, with respect to the acts performed during the past year. However, third parties are not bound by the decision of the A(I)SBL regarding the performance of the mandate.

c. Prescription (statute of limitation)

37. The 5-years prescription (statute of limitation) applicable to liability claims against directors is expressly confirmed in Article 2:413 §2 of the CSA.

d. Insurance

38. Director's liability can be covered by a liability insurance.

The insurance agreement will generally be entered into by the A(I)SBL and the insurance policy will only cover acts whereby the directors perform their director's mandate.

e. Director via Limited Liability company

39. Years ago, the Corporate Governance Act of 2002 modified article 61 of the Company Code by adding an obligation for companies appointed as company director to appoint a **permanent representative**, who would incur the same liability as the company director, thereby limiting the use of this technique in order to limit the liability risks. However, the aforementioned article did not directly apply to directors of A(I)SBL. Therefore, this could be used as a technique in order to prevent a director in an A(I)SBL from being held responsible personally as a director.

Now, Article 2:55 of the CSA provides for a unified regime regarding permanent representatives (see below) so that the above technique is likely no longer available for A(I)SBL.

Art. 2:55 : « *When a legal person carries out a mandate as member of an administration body or day-to-day manager, it appoints a physical person as permanent representative entrusted with the execution of said mandate, on behalf and on the account of that legal person. This permanent representative must satisfy to the same conditions as the legal person and is subject, jointly with the latter, to the* ***same civil and criminal responsibilities****, as if he/she had carried out the mandate in his/her own personal name and on his/her own account. (…) » (free translation; emphasis added).*"

40. For the purpose of this Memo, we do not address the wide issue of director's liability in the context of an A(I)SBL in distress. Do however not hesitate to contact us for any question is this regard.

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E. ACCOUNTING OBLIGATIONS OF AN INTERNATIONAL NON-PROFIT ASSOCIATION

41. Under the CSA, same as under the Act of 1921, A(I)SBL must keep accounting and draw up financial statements according to a criterion of size. Articles 1:28 and 1:29 of the CSA define two categories of A(I)SBL:

- small associations,
- micro associations, and
- large associations (i.e. the ones that do not qualify as small ones)

a) Small A(I)SBL (Art: 1:28 CSA)

42. An A(I)SBL is considered under Belgian law to be "small" provided it fulfils no more that one of the three (3) criteria listed below at the closing date of its financial year:

- annual average of employed workers (in full-time equivalent, registered in the staff register – see §5): 50
- total income generated on a yearly basis, excluding VAT: 9.000.000 EUR
- balance sheet total: 4.500.000,00 EUR.

A(I)SBL which enter this category can keep **simplified accounts** (with income statements and expenditure schedule)[10] if at the closing date of its last financial year, they do not exceed more than one of the criteria set out in Article 3:47 **§2** of the CSA:

1° a number of 5 workers employed, on annual average ;
2° 334 500 EUR of total income (other than exceptional revenues not arising from the normal activities of the association), excl. VAT;
3° 1 337 000 EUR of total assets/cash;
4° 1 337 000 EUR of total debts.

b) Micro A(I)SBL (Art: 1:29 CSA)

43. A small association is considered under Belgian law to be a "micro-ASBL" or a "micro-AISBL" provided it fulfils no more that one of the three (3) criteria listed below at the closing date of its financial year:

- annual average of employed workers (in full-time equivalent, registered in the staff register): 10;
- total income generate on a yearly basis (other than exceptional revenues not arising from the normal activities of the association), excluding VAT: 700.000 EUR ;
- balance sheet total: 350.000,00 €.

Micro A(I)SBL may establish their annual accounts according to a **micro-schema** (to be determined in 2021 by Royal Decree) (Article 3:47 **§4** CSA).

44. Associations other than small (or micro) ASBL or AISBL – which may be called "large" associations, by contrast with the latter – must entrust one or several **auditors** with the control of their financial situation, annual accounts and the regularity, in face of the law and of the articles of association, of operations which must be stipulated in the annual accounts (art. 3:47 **§6** CSA).

Those A(I)SBL are subject to a complete accounting regime, same as is imposed on industrial/commercial companies, such as (i) the keeping of dual entry accounting, (ii) use of accounts in accordance with the

[10] See Royal Decree of 26 June 2003.

minimum standard accounting principle, (iii) establishment of a balance sheet at the beginning and the end of the financial year, etc.

45. According to Article 3:47 **§7** of the CSA, the annual accounts of associations other than very small and micro (see threshold described in Art. 3:47 §2 CSA) must be filed **by the directors** with the National bank of Belgium within 30 days of their approval by the general assembly, in order to be made public.

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F. OTHER CHANGES REGARDING EXISTING INTERNATIONAL NON-PROFIT ASSOCIATIONS

a) Definitions

46. Under the new Code, "an **association** is composed by convention of two or more persons, called members. It conducts one or several determined activities which form its objects and aim at fulfilling a *disinterested*[11] purpose. It may not distribute, nor confer – directly or indirectly - any patrimonial advantage to its founders, members, directors nor to any person, other than in accordance with the non-profit purpose as determined in the articles of association. (…)" (Art. 1:2 CSA).

An **AISBL** is « *an association the legal personality of which is recognised by the King and which follows a purpose of international utility.* (…) » (Art. 10:1 CSA).

So, as long as they refrains from any distribution, associations under Belgian law may henceforth – as enterprises – conduct any activity of industrial or commercial nature as required by their disinterested purpose (of international utility, for A(I)SBL).

47. As they are now all considered as "enterprises" under Belgian law, the Enterprise Court (also known as "Business Court" or "Commercial Court) has jurisdictions for all legal entities covered by the CSA, whether or not active in trade, including Associations.

b) Head of office (transfer)

48. The new Code simplifies the transfers of head office which do not involve a modification of the language in which the articles of association are drafted, i.e. transfers taking place within a same Region of Belgium.

To that effect, Art. 2:4 CSA provides that from now on, only the Region must be mentioned in the articles of association. The precise address of the head office – which was a component of the instrument of constitution – may, but does not have to be mentioned anymore (Art. 2:4, al. 1 CSA).

49. The new Code also creates, unless otherwise provided in the articles of association, a competence of the Management body / Board of Directors to transfer the head office (with or without modification of the articles of association, depending on the case) without any intervention of the general assembly when the transfer does not entail a modification of the language in which the articles of association are drafted (Art. 2:4, al. 2 CSA).

c) Publication formalities - Modification of the articles of association

50. With respect to the amendment of the articles of association of an AISBL, the same rules as before apply, i.e.

- Any modification pertaining to the functioning of the general assembly, the conditions for modifying the articles of association or the conditions for dissolving / liquidating the association must – subject to nullity – be acted by a **notary**;
- Any modification pertaining to the non-profit goal and the association's core activities must – subject to nullity – be approved by **royal decree**;

[11] The term "non-profit" is not entirely appropriate, as associations are allowed to make profit.

- Any other modification (pertaining to other provisions of the articles of association) may be adopted by a **private deed**.

51. With respect to modifications, Art. 2:5 §4 CSA clarifies (for all associations) that only the modifications brought to the articles of association must be made in the form prescribed for the instrument of constitution, i.e. a notarial deed.

This confirms that a modification to non-statutory provisions of the instrument of constitution (such as e.g. whether the directors' mandate is paid or not) may be adopted by a private deed.

To avoid any doubt, the new Code clearly distinguishes between statutory and non-statutory provisions of the instrument of constitution, which is useful to determine the scope of the notary's intervention (see Art. 2:5 §3, al. 2 CSA which refers to Art. 2:10 §2 CSA). (See Annex)

52. **Association's file** (kept at the Court's registrar). The new Code maintains the principle that for each legal entity, a file is kept at the registrar of the Enterprise Court of the head office's location (Art. 2:7, §1, al. 1 CSA).

The CSA also provides for the creation of a database, publically accessible, regrouping the first version of the articles of association as extracted from the instrument of constitution and their coordinated version after each modification (Art. 2:7 §2 CSA). This way, next to the data pertaining to the persons who manage and represent the Association, articles of association applicable on the day of their consultation will become the most relevant source of information for third parties.

For AISBL, the documents to be added to the file are henceforth listed in Article 2:10 CSA. While there used to be no deadline for filing the documents to the Court's Registrar, all legal entities including Associations will now have 30 days to update their file.

53. **Publication to the Annexes of the Belgian Official Gazette – Improvement**. In view of the evolution of computer technics and IT, the previous period of max. 30 days (as of the date of the filing) has been reduced to 10 days, subject to damages payable by the civil servants responsible for the omission or tardiness (Art. 2:13 CSA).

d) Nullity of the AISBL and of its decisions

54. Noteworthy under the new Code is the question of the AISBL's nullity, which is distinct from the nullity of its bodies' decisions (cf. *infra*).

The Act of 1921 did not provide for a nullity of the AISBL itself, except in the case where the AISBL was not constituted by notarial deed (Art. 46, 2nd indent of the Act).
For the sake of consistency with the ASBL regime, article 10:4 of the CSA provides for a limitative list of 4 additional cases (mix of formal irregularities and reasons of ground) in which the nullity of the AISBL itself can be pronounced:

- Number of founders validly engaged inferior to 2 ;
- Articles of association fail to contain the mentions the Association's name, the indication of the Region in which its head office is located (the full address being optional) or a description of the Associations' purpose and core activities;
- Purpose of object of the Association contravenes public order;
- The Association is constituted in order to offer its member (or any other person) a direct or indirect patrimonial benefit, outside of its non-profit purpose.

55. The CSA also provides for a unified regime of nullity applicable to the decisions of all associations' bodies (i.e. not only of their general assembly), in terms of procedure, cause or effects of the nullity (Art. 2:41 -> 2:48 CSA).

Causes of nullity. Pursuant to Art. 2:42 CSA, any decision will be void in the following cases:

1° when the decision was adopted irregularly, if the claimant can prove that the irregularity was of such nature as to influence the deliberation or the vote, or that it was committed with a fraudulent intent ;
2° in case of legal abuse or abuse misuse of power;
3° when voting rights have been carried out despite being suspended in virtue of a legal provision (outside the Code) and that, without these voting right shaving been illegally carried out, the conditions of the quorum or of majority required for the decisions of the general assembly would not have been met;
4° for any other cause as foreseen under the Code.

CSA innovates by expressly providing for the possibility to claim the nullity of a vote, based on the same grounds as for any legal act (e.g. lack of consent of the voter). The nullity of a vote causes the nullity of the decision adopted based on that vote, if it can be established that the vote at hand may have influenced the decision or other votes - see Art. 2:43, 1st indent of the CSA.

Procedure and effects are set out in Article 2:44 to 48 of the CSA:
- nullity must be pronounced by the Enterprise Court (cf. supra);
- at the request of any person having an interest in the infringed rule being complied with (i.e. mostly the members of the Association and its bodies >< third parties).

e) Functioning and powers within the AISBL

56. As far as the functioning of the AISBL is concerned, the legal regime remains characterised by the great flexibility which the founders and members enjoy in terms of internal organisation (see in this regard our Memorandum of April 2014).

CSA does not departs from that principle and does not provide for any imperative rule on functioning, leaving it entirely to the articles of association, as regards both the general assembly and the board of directors.

57. In terms of powers, Article 10:5 CSA henceforth clarifies that a decision of the general assembly of the members is required for:
- Appointing and dismissing the auditor and determining his/her remuneration;
- Approving the annual accounts;
- Any other case where the law or the Statues require it.

f) Management body / Board of Directors

58. The CSA brings a few important innovations regarding management; essentially:
- The designation of permanent representatives, previously ruled upon by reference to the Company Code, is maintained (for associations as well as for companies) with several clarifying adaptations (a);
- A common regime of directors' liability is introduced (cf. supra – section B) and
- The possibility to establish Internal Rules via statutory authorisation (b).

a. Clarifying adaptations with respect to permanent representative (PR)

59. CSA specifies that a PR must be designated when an Association carries out a mandate as member of a management body OR as person to whom day-to-day management had been delegated. Thus: extension of the regime to all "organic" mandates conferred upon the Association.

Said PR is necessarily a physical person and the choice of the PR no longer limited to "partners, managers, directors, members of the BoD, or workers" of the director-Association.

Rules on conflict of interest applicable to directors and members of the management body henceforth also applicable to the PR when the latter founds him/herself personally involved in such a situation of conflict (regardless of whether the director-Association is or isn't itself faced with a conflict of interest);

New rule: the Association's PR may not at the same time sit in the concerned management body in personal name as well as the representative of another legal-person director/manager (rule aimed at limiting duality).

b. Possibility for Management / the Board of Directors to edict Internal Rules

60. With this possibility expressly confirmed in the law, the scope and legal validity of such Internal Rules is no longer uncertain. In accordance with Art. 2:59 CSA, internal rules

- must be announced in the articles of association so that all members, present or future, are aware of their existence, and
- are promulgated by the management body (or the general assembly if the articles of association so provide).

They cannot contain provisions:

- contrary to imperative legal provisions or the articles of association (obviously);
- relating to matters for which CSA requires a statutory provision (to be checked);
- affecting the rights of members, powers of a body of the entity or the organising and functioning of the general assembly.

Any modification of the Internal Rules must be communicated to the Members and the articles of association must, at all times, include a reference to the latest version approved (reference which the management body can adapt in the articles of association and publish).

g) Dissolution and liquidation

61. A great deal of provisions which used to apply to companies are extended to associations in order to remedy the shortcomings of the Act of 1921 (especially regarding liquidation).

There are still three types of dissolution: voluntary (Art. 2:110 CSA), legally automatic (Art. 2:111 and 2:112 CSA) and judicial (Art. 2:113 CSA), the two main modifications being that:

a) "large" associations in which an auditor must be appointed (see Art. 3:47, §6 CSA) must – upon voluntary dissolution – follow the same procedure as companies (see 2:110 §2 CSA), and
b) the deadline for bringing an action in (judicial) dissolution of an association on the ground that it failed to file its annual accounts is – for all entities – shortened from 13 to 7 months (Art. 2:113, §2, al. 2 CSA).

The liquidation of associations (Art. 2:115 to 2:139 CSA) is subject to many more developments.

h) Legal actions and prescription (statute of limitation)

62. The 5-year prescription period contained in Art. 25 of the Act of 1921 is maintained under Art. 2:143 §2 CSA. A shorter prescription period abbreviated to **6 months** is provided for nullity claims as referred to in Art. 2:44 CSA (against a body's decision) as from the date on which the adopted (and challenged) decision becomes opposable to the plaintiff or is known of by the plaintiff (Art. 2:143 §4, al. 2 CSA).

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