

NEW CODE OF COMPANIES AND ASSOCIATIONS

► IN A NUTSHELL ◀

#7

Not-for-profit: the end justifies the means

Until now, commercial companies, on the one hand, and not-for-profit entities, on the other hand, have been governed by separate laws. The main not-for-profit entities, being the not-for-profit association (VZW/ASBL), the international association (IVZW/AISBL) and the foundation (*stichting/fondation*) were still governed by a law of 27 June 1921.

Although this law was since amended from time to time, it was in some aspects outdated and incomplete. Legislative gaps were in practice filled by applying company laws by analogy.

By contrast ...

The new Code of Companies and Associations integrates the rules governing both companies and not-for-profit entities into one Code.

Furthermore, the Code strives to modernize the rules governing not-for-profit entities and to harmonize them, where appropriate, with the rules governing companies.

The most important innovations are the following:

- **“Not-for-profit” no longer excludes the pursuit of commercial activities for profit.** Under our current laws, a “not-for-profit” qualification has two

fundamental and mandatory dimensions: on the one hand, associations are in principle not allowed to pursue commercial activities for profit (except in an ancillary manner) and, on the other hand, they cannot directly or indirectly grant pecuniary advantages to their members. Under the new Code, the “not-for-profit” qualification will be limited to one dimension only, *i.e.* a prohibition to directly or indirectly grant pecuniary advantages to any person (other than the association’s or foundation’s altruistic purpose). In other words, associations and foundations are now allowed to pursue profits as an integral part of their activities, provided that such profits are used only for the benefit of their altruistic purpose (as set out in the articles of association).

- **Extensive flexibility for international associations and foundations is retained.** The extensive flexibility for international associations (IVZW/AISBL) and foundations (*stichting/fondation*) to organize their governance is retained under the new Code. For instance, Book 10 of the new Code on international associations consists of only 11 articles, whereby the provisions regarding the international association’s governance are largely non-mandatory law. As a result, an international association can, almost without any restriction, determine in its articles of association how it shall be governed and represented.
- **Reduction of number of required members for not-for-profit associations.** Today, a not-for-profit association should be incorporated by, and have, at least three members, whereas under the new Code two members is sufficient.
- **Flexibility with regard to the composition of the board of directors of not-for-profit entities.** Under the new Code, not-for-profit associations are no longer obliged to have less directors than members. The new Code only maintains the obligation for not-for-profit associations to have at least three directors, except if the association has only two members. In such a case, the association can be governed by a board of only two directors. Foundations will be allowed to have only one director.
- **Introduction of a mandatory conflict-of-interest procedure.** The new Code introduces the same (amended) conflict-of-interest procedure as applicable to directors of companies, also for directors of not-for-profit associations and foundations (but not for directors of international associations). As such, a director having a personal direct or indirect pecuniary interest in a decision of the association or foundation, which conflicts with the interests of the latter, will be required to notify the board of directors and abstain from the deliberation and the voting. In the event that all directors of an association are conflicted, the decision must be referred to the association’s general members’ meeting. This rule does not apply to foundations. If all directors of a foundation are conflicted, the Code provides that they can nevertheless decide under their own

responsibility. Large not-for-profit entities will in addition have to publish the reported conflicts of interest in their annual report.

- **New director liability regime.** Book 2 of the new Code, containing the provisions on director liability, applies to all legal entities. As a consequence, directors of associations and foundations will be subject to the same liability regime as directors of companies, including the rules regarding joint liability. Please refer to our [previous “In a Nutshell” newsletter](#) in this respect.
- **Harmonization of governance in associations and companies.** The new Code generally strives to harmonize the rules on associations and foundations with the rules governing companies where appropriate. For example, Book 9 of the new Code, which governs associations, now contains the obligation for the board of directors to draw up minutes, the possibility for the board to decide by unanimous written resolutions, as well as the possibility to provide in the articles of association that a director can be represented by another director at a board meeting.
- **Change in size criteria and reporting requirements.** The new Code also harmonizes the size criteria, and the corresponding terminology, applicable to associations and foundations with those for companies. Until now, associations and foundations were either categorized as “small”, “large” or “very large”. Like companies, associations and foundations will under the new Code be regarded as “micro”, “small” or “large”. As the size criteria themselves differ from those applied before, associations and foundations should re-evaluate which accounting formats to use. For example, “micro” associations and foundations are allowed to use a “micro format”. “Large” associations and foundations are obliged to draw up and file a complete annual report together with their annual accounts.

The harmonization of the laws on associations and foundations with the laws governing companies in the new Code results in significant improvements of the legislative framework that applies to not-for-profit entities. In order to benefit from these improvements, existing entities will have to amend their articles of association and adopt the new Code. The new Code provides for a transitional regime which we will summarize again in our next “In a Nutshell” newsletter.





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