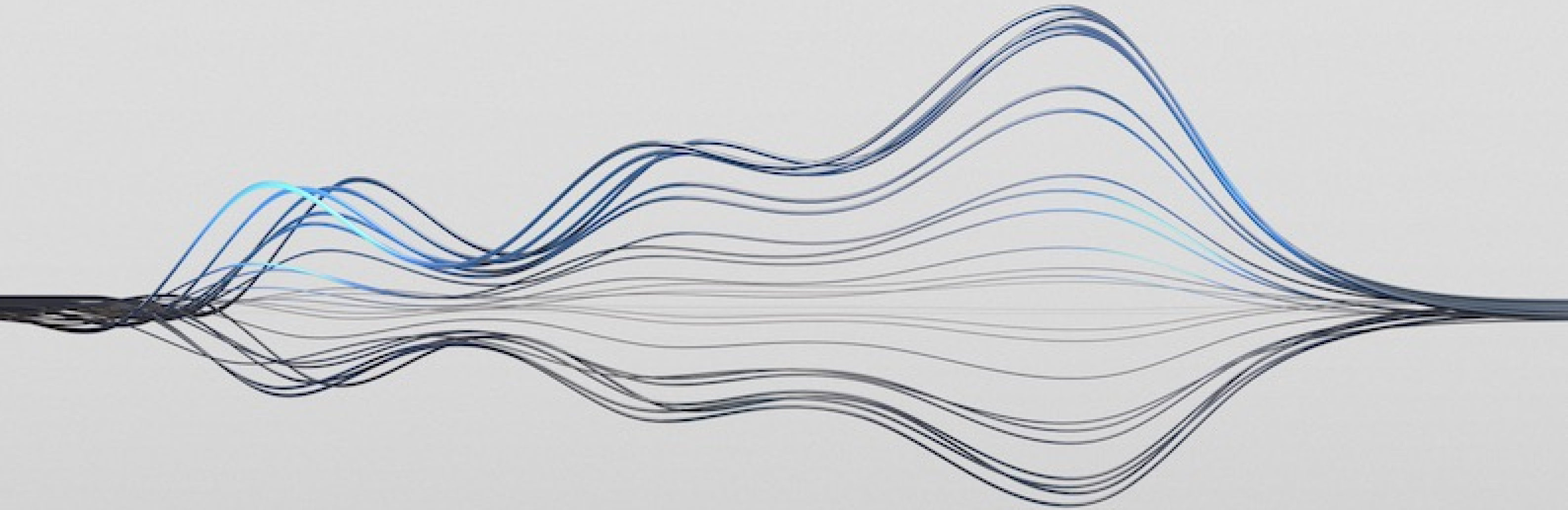
BELGIUM

Global Guide to Directors' Duties



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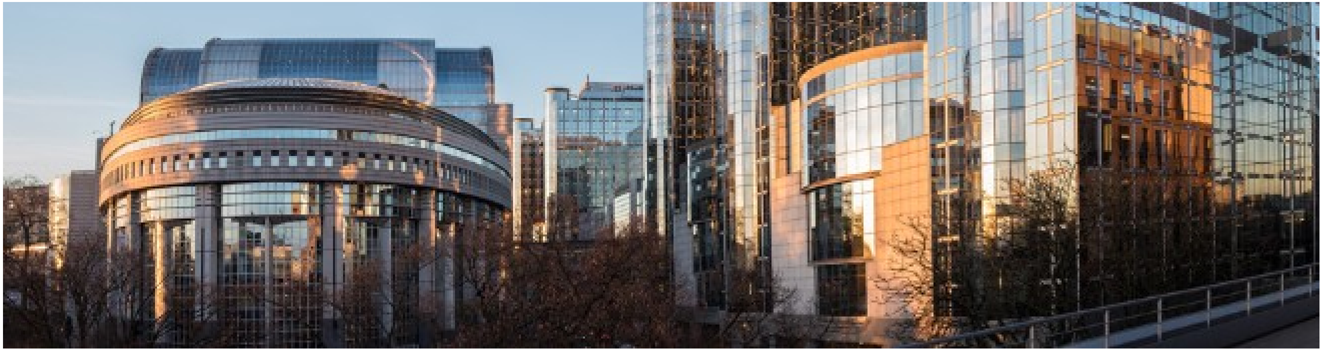

Belgium

Last modified 31 January 2024

Corporate entities

What type of company is typically used in group structures?

In Belgium, the two most commonly used company types are:

- The private limited liability company (*besloten vennootschap (BV)/société à responsabilité limitée (SRL)*).
- The public limited liability company (*naamloze vennootschap (NV)/'société anonyme (SA)*).

This guide therefore focuses on these two types of limited liability companies. Unless stated specifically otherwise, the commentary in this guide applies to both company types.

Types of director

What is a "director"?

A director is a (member of a) corporate organ of the company. As such, a director is basically regarded as someone who manages (either individually or together with others, depending on the company type and board structure) the affairs of the company on behalf of its shareholder(s).

What are the different types of director?

In general, Belgian company law does not differentiate between different types of directors – all directors are subject to the same duties. It should be noted that, under Belgian law, a director cannot be bound with the company through an employment agreement for the execution of their director duties. In joint venture structures, a director may also be appointed upon the explicit proposal of a particular shareholder. In addition, a de facto director is a person who acts as though they are a director, but is not validly appointed as such; such de facto directors may also be subject to directors' liability. Finally, for listed companies, a regime for independent directors is provided.

Under Belgian law, it is also possible to entrust someone (either a director or a non-director) with the daily management of the company (see also below). If a director of the company is charged with such daily management, they will commonly be named a managing director (*gedelegeerd bestuurder/administrateur délégué*).

Also, some articles of association provide that the managing director is the director who can externally represent the company individually in all matters (including those that go beyond the daily management).

Eligibility

Who can be a director?

There are no nationality or residency requirements imposed on directors. It is also possible to have a legal entity (Belgian or foreign entity) appointed as director - in which case however the legal entity must appoint a "permanent representative" (i.e. a natural person who represents that legal entity when carrying out the director's mandate in the company). Note that a natural person cannot have a seat in the same management organ twice (i.e. in their own name and as a permanent representative of a legal entity).

Minimum / maximum number of directors

The minimum number of directors depends on the company type and the chosen board structure. There is no legal maximum number of directors (unless the articles of association specify a maximum).

A private limited liability company must have at least one director. The company's articles of association may however specify a greater minimum number of directors.

The default regime in a public limited liability company is a one-tier structure consisting of a "board of directors" (a collegiate body), which consists of at least three directors (unless there are only two shareholders or fewer, then the board of directors may consists of only two directors). The articles of association, however, may provide for the possibility to install a sole director regime (meaning that a single director will manage the company).

Alternatively, it is also possible to install a two-tier structure in a public limited liability company, consisting of a supervisory board and a management board (each composed of at least three members). Members of the supervisory board cannot have a seat in the management board as well, and vice versa. This two-tier structure is essentially meant for large corporations (e.g. those listed on the stock exchange). For other entities (e.g. affiliates of multinational groups), the less-complex one-tier structure (board of directors or a sole director) is much more common.

In the two-tier structure, the competences of the supervisory board and management board are structured as follows:

- The supervisory board is competent for the general policy and strategy of the company and also has a number of exclusive powers (i.e. powers that in a one-tier structure would be considered key powers of the board of directors – such as the preparation of the annual accounts and convening of the shareholders' meeting). In addition, they supervise the management board.
- The management board is competent for all managerial acts that are not exclusively attributed to the supervisory board (i.e. residual powers). They report to the supervisory board and at least once a year, they need to provide a written report to the supervisory board which contains the main points on the general strategic policy, the general and financial risks and the managerial and control systems of the company.

Appointment and removal

How are directors appointed?

Directors (i.e. members of the board of directors, supervisory board or sole directors) are appointed by the company's shareholder(s) - via a general shareholders' meeting or by unanimous written resolution. Unless the articles of association of a company provide otherwise, the board of directors (one tier) and supervisory board (two tier) may temporarily fill up a vacant mandate.

In the two-tier structure (public limited liability company), the members of the management board are appointed by the supervisory board.

In a private limited liability company, a director is in principle appointed for an unlimited duration, unless specified otherwise (i.e. for a specified duration).

In a public limited liability company, the members of the board of directors (in a one-tier structure) or members of the supervisory board (in a two-tier structure) are appointed by the shareholders for a maximum term of six years (which can be renewed an unlimited number of times). A sole director can be appointed for an unlimited duration, as can the members of the management board (in a two-tier structure).

For enforceability vis-à-vis third parties, the appointment decision needs to be filed and published in the Annexes to the Belgian State Gazette and details of the director need to be submitted with the clerk's office for their registration in the Belgian Crossroads Bank for Enterprises (i.e. a copy of their passport or identity card, a director's residential address and, for foreign directors, a recent utility bill or other document proving their residential address).

How are directors removed?

Directors can in principle be dismissed *ad nutum* (at any time with immediate effect and without any reason) by the shareholder(s), unless the articles of association or the appointment decision states otherwise. However, the general shareholders' meeting may always, at the moment of dismissal, provide for a notice period or a severance payment - unless the articles of association state otherwise. In the case of dismissal for legal cause however, a director will not be entitled to such compensation. In addition, a director may in principle also voluntarily resign at any time by informing the management organ.

For directors appointed in the articles of association (which is possible in a private limited liability company – but is rather uncommon), resignation or dismissal will require an amendment of the articles of association for the removal of said directors.

When a director resigns or is dismissed, the resignation or removal decision needs to be filed and published in the Annexes to the Belgian State Gazette to be effective vis-à-vis third parties.

Board / management structure

Typical management structure

A private limited liability company in principle consists of a one-tier structure made up of one or more directors.

In the case of a public limited liability company, it is possible (but not common) to choose between a one-tier structure (consisting of a board of directors or a sole director) or a two-tier structure (consisting of a supervisory board and a management board).

How are decisions made by directors?

In a private limited liability company, the directors usually have individual management power, which means they can each make decisions on their own. To comply with good corporate governance practices, however, the directors will often take joint decisions. Alternatively, the articles of association may provide otherwise and install, for instance, a collegiate management body.

In a public limited liability company, the board of directors (in a one-tier structure) or supervisory board and management board (in a two-tier structure) will act as a collegiate body (meaning that they do not have individual management powers and will make decisions jointly, through a majority vote, unless the articles of association provide for stricter majority requirements). In the case of a sole director, the sole director will evidently have sole management power.

A meeting of directors can be held either physically or through teleconference (unless the articles of association prevent this). Unanimous written resolutions are also possible, unless the articles of association provide otherwise.

Authority and powers

Under Belgian law, a distinction needs to be made between internal management powers and external representation powers.

Internal management powers

The management organ is competent to carry out all acts and take all decisions that are necessary or useful in order to realise the company's corporate purpose, except for those powers which the law explicitly attributes to the general shareholders' meeting (i.e. the "residual" powers reside with the management organ).

The articles of association may limit the powers of the management organ (by submitting certain decisions to a shareholders' meeting), but such limitation is not effective vis-à-vis third parties (even if disclosed).

External representation powers

As far as representation vis-à-vis third parties is concerned, the following distinction needs to be made depending on limited liability company type:

- In a private limited liability company, the company is, in principle, validly represented by each director (given the fact that they dispose of individual management power). However, the articles of association may deviate (for instance, by installing a collegiate management body and requiring double signatures).
- In a public limited liability company, the company is, in the case of a board structure (be it a one-tier structure or a two-tier structure),

validly represented through the majority of its board members. Evidently, in case of a sole director, such director will solely represent the company.

In a two-tier structure, the representation powers of the supervisory board are limited to its specific competences, whereas the management board has full representation powers.

The articles of association commonly provide for specific signature clauses - for instance, a single signature clause (e.g. a (managing) director acting alone) or a joint signature clause (two directors acting jointly)). Such signature clauses are effective vis-à-vis third parties (if published), but do note that any qualitative or quantitative restrictions in such signature clauses are not effective vis-à-vis third parties, even if disclosed.

Delegation

In the case of a collegiate management body structure (be it a one-tier or two-tier structure in a public limited liability company, or the instalment of a collegiate body in a private limited liability company), the board members can agree on a specific task division amongst them. Such division is however not effective vis-à-vis third parties, even if disclosed.

In addition, the directors can attribute the daily management powers, including the representation of the company in this respect, to one or more persons, that may act individually, jointly or as a collegiate body (as specified in the appointment decision). The daily management concerns all actions and decisions that do not go further than the day to day needs of the company, as well as the actions and decisions that, either due to their minor importance or due to their urgent nature, do not justify the intervention of the directors. Any limitations to the daily management representation powers of the persons(s) entrusted with the daily management are not effective vis-à-vis third parties (even if disclosed).

Duties and obligations of directors

What are the key general duties of directors?

There is no exhaustive list laid down in law of the key duties of directors. The law merely states that the management organ of a company has, through its director(s), the (residual) power to perform all acts necessary or useful for the realisation of the object of the company, except those for which the general shareholders' meeting is authorised by law. In fact, directors are responsible for both the strategy as well as the overall monitoring of the organisation.

The management duties can in general be described as follows:

- **Duty of care and duty of loyalty.** The directors have a general duty of care, meaning that they must be diligent in the performance of their tasks and (actively) participate in board meetings. They are required to manage the company's business and affairs to the best of their ability and in the best interest of the company. They also have a duty of loyalty towards the company which encompasses both a duty of confidentiality and a duty not to compete with the company.
- **Decision making with respect to the general strategy of the company and acting as a reasonable, prudent and diligent person.** Directors have to act within the company's interest and exercise their powers for the purposes for which they were given and not for any collateral purpose.
- **Financial duties.** As part of its financial duties, the management organ is in charge of the drafting of the annual accounts and the management report.
- **Operational duties.** As part of its operational duties, the management organ enters into agreements with third parties, grants special powers to special proxy holders and supervises them.
- **Convening of and reporting to the general shareholders' meeting.** The management organ convenes the general shareholders' meeting at least once a year and replies to questions of the shareholders at the general shareholders' meeting. The management organ is obliged to convene a general shareholders' meeting if the shareholders who represent one tenth of the company's shares/share capital request a general shareholder's meeting.

What are directors' other key obligations?

In general, directors are responsible for ensuring that the company complies with its statutory and legal obligations, for example under company law, environmental and health and safety laws, employment laws, consumer protection laws, competition laws and

bribery/anti-corruption laws.

In addition, the directors must comply with, amongst others, the following duties:

- Convening a general shareholders' meeting within two months, and preparing of a special report, if the company's financial position meets certain negative exact criteria (the so-called "alarm bell procedure").
- In case of a distribution of dividends in a private limited liability company, the management organ needs to determine that the company will still be able to pay its debts when they become due over a period of at least twelve months (liquidity test).
- Preparing of all legally prescribed reports (e.g. in case of capital increase, issuance of convertible bonds or subscription rights, cancellation or limitation of the preferential subscription right, issuance/abolition of categories of shares or profit certificates or changing its rights, setting up of the authorized capital, the dissolution of the company, conversion of the company).
- Preparing of all proposals and legal reporting in case of a corporate restructuring of the company (i.e. (cross-border) merger, (partial) demerger, contribution of a branch or a universality).
- Ensuring the timely establishment and filing of the annual accounts with the National Bank of Belgium, and take care of all other filings that need to occur in the Annexes to the Belgian State Gazette and the Crossroads Bank for Enterprises.

Transactions with the company

In the event that a director has a direct or indirect interest of a financial nature which is opposed to the interest of the company with respect to a matter or a transaction upon which the management organ has to decide, the director must give prior notice of the conflict to the other directors.

The declaration of the director as well as any justifications of the decisions taken have to be recorded in the minutes of the meeting of the other directors. The conflicted director may not take part in the deliberations (in case of a collegiate management body), nor vote, with respect to the conflicted decision or transaction.

When all directors have a conflict of interest, the decision or transaction is escalated to the general shareholders' meeting (or the supervisory board in case of a two-tier structure with a conflict at the management board level).

In the event of failure to observe these rules: the company may claim the directors' resolution is null; the director who neglected to inform the other directors of their conflict of interest could be found liable for the damages the company incurred; and other directors may be held jointly and severally liable, in the event they could have reasonably been aware of the conflict of interests or it was known to them and they did not ensure compliance with such rules.

Even if the conflict of interest procedure has been observed, the directors may still be held personally and jointly liable for damages suffered by the company or by third parties, if the operation or resolution approved by the directors results in an unjustified benefit for a director, to the detriment of the company.

For listed companies (and their subsidiaries), a specific regime exists for transactions of the company with 'related parties' (in the sense of IAS and IFRS, with the exception of subsidiaries) that's part of the competence of the board of directors. The procedure requires a preliminary assessment by a committee of 3 independent directors, where required assisted by experts, after which the board of directors (excluding directors that are involved in the transaction or the decision) will decide. If all directors are 'involved', the decision must be taken by the general assembly.

Liabilities of directors

Breach of general duties

As a general principle, directors are not personally liable for actions taken by them during the performance of their mandate. Actions taken will be imputed to the company. In certain cases however, a director can be held responsible for acts taken during the performance of their mandate both towards the company and towards third parties.

Generally speaking, directors may be held liable, towards the company and/or third parties, for: management faults (if their acts go beyond the margin of appreciation in which normal, prudent and careful directors, in the same circumstances, could reasonably have deviating views); breach of law or breach of the articles of association; and under the general extra-contractual regime or for

infringements of criminal law or special laws.

As a general rule, fault, damage and a causal link between fault and damage must be established if the legal proceedings are to be successful.

If the legal person has several directors, a distinction is made whether the managing organ constitutes a collegiate body or not:

- If the management organ acts as a collegiate body, the members are jointly and severally liable for the faults committed by the collegiate body.
- If the management organ does not act as a collegiate body, then each director is only liable insofar as they can be blamed for fault. However, if the error consists in the violation of a provision of company law or the articles of association, the members of the management organ are jointly and severally liable for all damage resulting from this fault.

However, a director shall be relieved of liability if they did not take part in the fault committed and they have reported the alleged fault to all the other members of the management organ. This denunciation and the discussions to which it gives rise shall be recorded in the minutes.

The liability regime affects not only the members of the management organ, but also the persons entrusted with the daily management, as well as the de facto directors, understood as those who have held the power to effectively manage the legal person. Finally, the permanent representative of a legal entity appointed as director - necessarily a natural person - shall be jointly and severally liable with that legal person, as if they had exercised this mandate personally.

Liabilities on insolvency

In addition to the general liabilities of directors, specific liabilities may arise if the company is insolvent or nearing insolvency. More particularly, a director (both former and current, including a de facto director) may, inter alia, incur liability for:

- Failure to comply with the obligation to file for bankruptcy/judicial reorganisation within one month of the cessation of payments where it satisfies the conditions for bankruptcy (i.e. the company has stopped paying debts as they fall due and it no longer has access to credit).
- The insufficiency of the company's assets/unpaid debts if it is demonstrated that a manifestly serious mistake on their part has contributed to the bankruptcy of the company.
- The insufficiency of the company's assets (debts surpass the income) in the case of wrongful trading, i.e. where the director knew or should have known, at any time prior to the bankruptcy, that the company had no reasonable prospect of avoiding a bankruptcy, and has not acted in accordance with how a reasonable prudent director would have acted in the same circumstances. If these cumulative conditions apply, the director may be held personally (and jointly and severally) liable to pay the whole or part of the deficit to the company's estate. A claim can however solely be initiated by the curator.

It is sufficient that the error contributed to the bankruptcy. It is up to the courts to decide whether or not such directors will be held severally liable and the portion of the existing liabilities they will have to bear.

Other key risks

There are a number of specific liabilities to take into account as a director, such as:

- **Liability for the incorrect application of the liquidity test in a private limited liability company.** If it is established that the directors knew, or ought to have known, given the circumstances, that the company would no longer be able to pay its debts over a period of at least 12 months as of the date of distribution of the dividend, then they are jointly liable vis-à-vis the company and third parties for all damages that follow from it.
- **Liability for not complying with the conflict of interest procedure** (see Transactions with the company).
- **Liability for not complying with the alarm bell procedure** (see What are the key general duties of directors?). If the general shareholders' meeting has not been convened, then any third party damages will be considered to follow from the lack of convocation.
- **Tax liabilities.** A joint liability of directors applies in case of the non-payment of professional withholding tax and VAT, and, in case of the bankruptcy of the company, for the outstanding social security contributions (which is frequently called upon in an insolvency context).

- **Tort liability.** Third parties can bring a claim against a director for damages resulting from a tort committed by such director. Typical cases involve creditors, employees, etc (e.g. failure to enter into an insurance, false appearance of solvability and proceeding with a manifest deficit activity). Limitations however apply on the combination of claims under contract and other tort.
- In certain cases, criminal liability may arise (e.g. non-compliance with legal obligations relating to the annual accounts, forgery, misappropriation of company funds and goods, money laundering, etc.).

Protection against liability

How can directors be protected from liability?

The following protection mechanisms exist:

- **Informing board members.** A director can avoid joint and several liability (for violations of company law or the articles of association), if certain conditions are met:
  - The board member may not have taken part in the wrongful action (e.g. they voted against the resolution by the board).
  - The board member must have notified the board of directors of their protest against the wrongful action. The notification to the board must be recorded in the minutes of the board meeting.
- **Capped liability.** The law provides for a maximum liability for directors who cause damages due to mismanagement. The cap of liability benefits each member of a management organ, a director, or the delegates for day-to-day management. The amount of the cap varies depending on the size of the company and applies as an aggregate for all directors concerned for claims based on the same fact(s) regardless of the number of plaintiffs. The liability cap applies both vis-à-vis the company and third parties, and is irrespective of the ground or basis of the liability claim (contractual or non-contractual).

  Importantly, the cap does not apply in case of common minor error, gross misconduct or fraudulent intent; nor in case of the joint and several liability resulting from unpaid withholding taxes, unpaid VAT, unpaid social security contributions in case of bankruptcy of the company or certain other liabiilties vis-à-vis the authorities.

  The company - and its subsidiaries or entities it controls - cannot provide for prior exoneration or further limitation of the directors' liability against the company or third parties. Any provision in the articles of association or in an agreement in this respect will be deemed null and void. However, exoneration by the parent company is thus considered possible.
- **D&O Insurance.** Directors' and officers' (D&O) insurance is often used in Belgium. Policy exclusions typically include claims in respect of a director's fraud, intentional fault or criminal behaviour.
- **Discharge of liability.** When the annual accounts are approved, discharge is granted to the directors by the shareholders for the exercise of their directors' mandate. This discharge is valid only if the annual accounts contain no omission or false indication concealing the real situation of the company and, as regards acts done in violation of the articles of association or company law, only if they have been specifically indicated in the notice convening the general shareholders' meeting. A valid discharge given by the company covers both liability for lack of due care and liability resulting from the violations of company law and the articles of association.

  However, the fact that a company has discharged its directors does not limit claims brought by third parties.

Finally, it should be noted that any action against directors, permanent representatives, or against all other persons who have effectively held the power to manage the company expire after five years for acts committed in the course of their functions, from the day of those acts or, if they have been concealed by fraud, from the discovery of those acts.

What practical steps can directors take to avoid liability?

Directors should:

- Keep themselves informed about the affairs of the company, particularly its financial position. Directors should have access to up to date financial information, prepare thoroughly for, and regularly attend, board meetings and familiarise themselves with key legislation affecting the business.
- Make full disclosures to the other directors at the board meeting if they have a conflicting interest in any proposed or existing

transaction or arrangement with the company.

- Keep records – directors should ensure that full written records of board proceedings are made reflecting the reasoning behind key decisions. This should include any alternative courses of action considered. Minutes should also record any disagreement amongst the board and the reasons for that.
- Take advice – directors should take professional advice for decisions based on areas outside their personal expertise, for example from legal professionals and accountants.
- Be aware of, and comply with, any group-wide governance policies. These may cover areas such as health and safety, ethics, bribery/anti-corruption, and human rights. Compliance with these can often help directors (and employees) fulfil their duties and obligations and minimise the risk of liability.
- In the case of a group situation, it should be kept in mind that directors must act in the best interest of their group company. Whilst group interests and that company's interests are usually aligned, this may not always be the case (e.g. when their group company's solvency is adversely impacted). It is important to keep communication and reporting lines as open and clear as possible between parent and subsidiary companies when issues may arise and seek appropriate advice.

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