Liability of directors and officers according to new corporate law

news
legal, profit, non-profit, private individuals, *05 June 2019*

A lot has been written about the new Belgian Companies and Associations Code (hereinafter 'CAC'). The CAC contains plenty of important new provisions, not least of which is the limited liability for company directors and officers. Here, the legislator has clearly reacted to the tendency of holding directors and officers increasingly liable for their actions. The new rules aim at making running a business sexy again and giving current and future directors and officers some peace of mind.

General liability

The CAC provides a general rule. It is 'general' because it applies to each and every legal person, regardless of their concrete form. It also applies to each member of a management body, hence to the executive manager and even to *de facto* directors. After all: *de facto* directors are the people who actually manage the company, even if they haven't been appointed as such (by the general meeting, with subsequent publication of the appointment in the appendices to the Belgian Official Journal).

Joint and several liability

All the above-mentioned persons are jointly and severally liable for errors made in the performance of their assignment. This means that each member is personally liable for decisions or failures of the management, regardless of whether or not the management forms a board. The members of the management body are jointly and severally liable towards the company as well as third parties for any damage arising from violations of the CAC or the company's articles of association. In other words: each director may be held liable in full for compensation of the affected party/ies involved.

Joint and several liability for mere management errors has thus been added to the former liability rules.

Is this a *fait accompli* for directors? Are they expected to simply go along with the new rules

and accept joint and several liability for damage just like that? Absolutely not! Directors are offered the option of reporting the alleged error to the other management members (or to another supervisory body). Only in that case can a director be released from their liability for errors in which they did not play a demonstrable role.

Statutory limitations of liability

Joint and several liability is a huge thing. Based on the foregoing you could be sceptical as to what is the purpose of a company after this. And justifiably so … Were it not for the fact that the CAC also provides for explicit limitations. The Code introduces a cap on the amount for which directors can be held liable. The cap depends on two variables: the average balance sheet total and the average turnover (ex. VAT) of the last three financial years prior to the filing of the action for liability.

The reason for introducing these limitations is to allow directors to take out reasonable liability insurance. At the same time, the aim is to remove inequality between managers who get 'insurance' as employees and those who get 'insurance' via management companies.

The limitation of liability is enforceable against the company as well as against third parties. Furthermore, it applies regardless of the (extra-)contractual ground for liability. The maximum amounts also apply to all of the persons indicated combined. They apply to each fact or set of facts that may give rise to liability, regardless of the number of claimants or claims.

Is further contractual limitation possible?

The CAC stipulates that further limitations, other than these provided by law is not possible. Provisions in the articles of association and in contracts, as well as unilateral indications of intent whereby directors are exonerated or indemnified from liability beforehand, are not taken into account. This means that one cannot renounce actions for liability against directors beforehand.

Furthermore, having another entity bear the financial consequences of the directors' and officers' liability is also prohibited, as this would easily erode the personal liability scheme of the director. That said, third parties such as parent companies, controlling entities or shareholders do have the ability to indemnify directors.

Exclusions

But, much like medals, these rules also have a flip side, for limitation of liability does not apply in the case of:

- frequently occurring minor errors;
- major errors;
- fraudulent intention or intention to harm;

- errors in legal obligations e.g. with respect to valid registration of shares, full payment of capital and capital increase;
- joint and several liability for tax debts (under certain circumstances);
- joint and several liability for social security contributions (under certain circumstances).

In other words: only random light errors qualify for limitation of liability. The question whether these limitations of liability are nothing more than an empty shell seems justified.

Points for consideration for directors or shareholders?

Now more than ever it is recommended to check articles of association and management agreements beforehand and update them where necessary.

The following are key points for consideration:

- the director's assignment must be described in as much detail as possible, as for the company, the director's liability is of a contractual nature. The preferred route would be to describe the assignment, define the errors and elaborate on the possible consequences as clearly as possible;
- even though derogation from the caps on the limitations of liability is forbidden, there is no rule against fine-tuning the provisions (e.g. evidence clauses and force majeure clauses);
- another possibility is to establish how joint and several liability compares between the different directors.

De juristen van aternio staan u graag bij met raad en daad om u te adviseren in deze materie. U kan ze hier contacteren.

Eveline Smet ***senior manager legal***
e.smet@atern.io