CED COUNCIL OF EUROPEAN DENTISTS

18 September 2018

RESPONSIBILITIES AND LEGAL OBLIGATIONS OF CED PRESIDENT, CED TREASURER AND CED DIRECTORS

I – Introduction

The CED will be electing its President and three Directors at the November 2018 General Meeting.

This paper provides a brief description of the responsibilities and legal obligations of CED President, CED Treasurer and CED Directors[1] under CED Statutes and Internal Rules, as well as under Belgian law. It intends to inform potential candidates and help them decide whether they should put forward their candidacy for the November 2018 election. It is an update of a document on this topic from 2013 and reflects changes in Belgian legislation and well as amendments to CED Statutes and Internal Rules voted on in May 2018.

This paper has been reviewed and contributed to by the law firm “MVVP” (www.mvvp.be).

II – General Information about the legal status of the CED

The CED is a not-for-profit association (ASBL – “Association Sans But Lucratif”) set up in accordance with Belgian law and governed by Belgian law. The purpose of the association is to defend the collective interests of its members and to represent them vis-à-vis third parties. On an independent basis, but with the help of its Members, Affiliate Members and Observers, the CED develops and executes policy and strategy in order to:

- Promote the interests of the dental profession in the EU;
- Promote high standards of oral health;
- Promote high standards of dentistry and dental care;
- Contribute to safeguarding the protection of public health;
- Monitor, analyse and follow up on all the political and legal developments and documents of the EU that involve dentists, dental care and oral health;
- Actively lobby the European Institutions and Parliament, in order to serve the legal and political interests of dentists, with due consideration of patients’ rights and safety;
- Support and represent Member, Affiliate Member and Observer Associations with regard to the information and support they need in connection with national and EU institutions, provided this is not their own responsibility.

Given the fact that in the CED’s lobbying activity and work, the collective interest of its members is predominant, the CED is most likely to be considered as a “Trade Union” organisation under Belgian law.

[1] The obligations of CED Directors apply also to the CED President and CED Treasurer, but the CED President and CED Treasurer have some additional obligations, as listed in this document

The legal framework of an ASBL under Belgian law is provided by the Law of 27 June 1921 regarding non-for-profit associations, foundations and European political parties and foundations, as amended, among others, by the Law of 2 May 2002 and the Law of 25 December 2016 (hereafter referred to as: the "**Associations Law**").

The CED's core activities are financed by annual subscriptions from each Member, Affiliate Member and Observer Associations (membership fees). The CED has in the past and might again in the future participate in projects funded by the European Commission and receive EU funding.

II.1 - Minutes of the CED General Meeting

The minutes of the General Meetings are kept by the law firm "MVVP" on behalf of the CED.

II.2 - Minutes of the CED Board of Directors

CED Member, Affiliate Member and Observer Associations have the right to read and investigate the minutes of the Board, as well as the financial documentation of the association (Article 10 of the Associations Law).

The minutes of the Board of Directors are kept by the law firm "MVVP" on behalf of the CED.

II.3 - CED Annual Accounts

The CED annual accounts are kept by the CED external accountants "Ackmo Accountants & Tax Advisers Burg. Bvba." This entity also files the accounts to the clerk of the court of commerce on behalf of the CED.

Since the financial year 2017 the CED has appointed professional statutory auditors per decision of the CED General Meeting in May 2017. Notwithstanding the absence of a legal obligation to appoint such a professional statutory auditor (an auditor who is a member of the Institute of Auditors). "VGD Bedrijfsadvisoren Burg. CVBA" have been appointed as statutory auditors for the financial years ending on the 31st of December 2017, 2018 and 2019.

Following the decision of the CED General Meeting in May 2017, CED annual accounts are also reviewed by the CED Budget Reference Committee. The CED Budget Reference Committee met for the first time in May 2018, its role and organisation might be revised in the future.

The CED has simplified accounting (Article17 paragraph 2, and 26novies of the Associations Law).

The annual accounts of a not-for-profit association can be simplified in conformity with the Royal Decree of 26 June 2003 if it is considered to be a "small" not-for-profit association.

A not-for-profit association is considered to be a "small" not-for-profit association, **unless** at least two of the three following criteria are fulfilled:

1) The organization has an annual average of five full-time employees;

2) The income of the organization shall at least be 312.500 EUR (exceptional revenues and VAT not included);

3) The balance sheet total exceeds 1.249.500 EUR;

At the time of writing of the present guidance document, the CED exceeded the maximum turnover, but did not exceed the maximum balance sheet total, or the number of employees. Consequently the CED, at the time of writing of the present guidance document, is considered to be a "small" not-for-profit association. If in the future at least two of the above criteria would be fulfilled, the annual accounts will have to be drafted in conformity with the provisions set out under Chapter 2 of Title 3 of book III of the Belgian Code of Economic Law.

The annual accounts and the budget will be presented to the Annual General Meeting. This meeting needs to be held within six months after the closing date of the financial year. The annual accounts must be filed with the Commercial Court or the National Bank of Belgium within thirty days after the approval by the General Meeting.

Note that article 18, 4° of the law of 27 June 1921 prescribes that the court may dissolve the association at the request of any member, interested third party or the public prosecution service if the association has failed to duly file its annual accounts (unless the missing accounts are yet filed prior to the final court hearing).

III – Political Commitment of Directors

CED Directors need to act in the interest of the CED (Article 18.8 of CED Statutes) and, in order to guarantee continuity, need to have the support of the respective national dental association or chamber throughout their entire term. The leadership (president or other) of the national dental association or chamber is asked to indicate their support for the candidate standing for election via a letter submitted with the candidacy. National dental associations or chambers are expected to continue to politically and financially support the elected Board member until the end of his or her mandate in the CED Board, regardless of internal changes within the national dental association.

In order to serve the CED’s best interests and to encourage open dialogue in CED Board deliberations, CED Directors are expected to respect the principles of confidentiality which include a duty not to speak about internal Board discussions to non-Board persons and not share Board working materials with non-Board persons, unless if there is an agreement to do so or if this is foreseen by CED Statutes or Internal Rules.

IV - Obligations under CED Statutes and Internal Rules

IV.1 - General

CED Directors need to be dentists and members of a national dental association or chamber that is a Member Association of the CED but do not necessarily have to be members of the Board of Directors of a national dental association (Article 18.3.1 of the Statutes). All mandates are for a period of three years and can be renewed once for a new consecutive period of 3 years (Article 18.3.3 of CED Statutes).

CED Directors can resign by registered letter to the Brussels Office but they remain in office for a reasonable delay until they are replaced (Article 18.3.3 of CED Statutes).

IV.2 - Duties related to the CED General Meeting

CED President:

- decides the date and place of the General Meeting (Article 15.1 of CED Statutes);
- calls an extraordinary General Meeting within 21 days of a request signed by half the Member Associations (Article 15.8 of the Statutes);
- sets the agenda of the General Meeting, in cooperation with the Board and with the Brussels Office (Article III.3 of Internal Rules);

- opens General Meetings (Article III.4.1 of Internal Rules);
- chairs General Meetings and ensures that the statutes are adhered to (Article 23.2 of the Statutes);
- appoints the minute-taker and the person responsible for managing the list of speakers (Article III.4.3 of Internal Rules);
- grants the floor to speakers (Article III.5.4 of Internal Rules);
- is permitted to issue warnings and cut the speakers short (Article III.5.7 of Internal Rules);
- declares the discussion closed (section III.5 of Internal Rules);
- ensures that the General Meeting takes place in an orderly fashion (Article III.8.1 of Internal Rules);
- is permitted to reprimand participants, call them to order and deny them the floor (Article III.8.2 of Internal Rules);
- is permitted to exclude a participant from the Meeting (article III.8.3 of Internal Rules);
- is permitted to interrupt or suspend proceedings if the meeting can no longer be carried out in accordance with Statutes and Internal Rules (Article III.8.4 of Internal Rules);
- has the casting vote in the event of a tie at the first meeting and provided one third of the Member and Affiliate Member Delegates present did not seek a postponement; equally, has the casting vote if the first meeting is adjourned and there is a tie at the second meeting (Article 16.1.2 of the Statutes);
- appoints the Electoral Committee for CED elections (Article IV.2 of Internal Rules), co-signs election results (Article IV.6.1 of Internal Rules) and announces results of elections (Article IV.7 of Internal Rules);
- co-signs the minutes of the General Meeting (Article 17.1 of the Statutes);

CED Treasurer:

- prepares the annual budget and the annual accounts (Article 26.2. of the Statutes);
- directs and supervises the Brussels office to establish the budget, accounts and balance sheet (Article 24.2. point 6 of the Statutes);
- presents, on behalf of the Board of Directors, the annual accounts for the past year and the budget for the next year to the General Meeting for approval (Article 26.2.1 of the Statutes).

CED Directors:

- are nominated, dismissed and discharged by the CED General Meeting (Articles 14.2.2 and 14.2.4 of the Statutes). They can be dismissed if they are found to act against the interest of the CED on a resolution passed by a majority of two thirds of the votes cast (Article 18.8 of CED Statutes);
- may participate at the CED General Meeting as CED Directors but they may only vote if they are Member Delegates (Article 18.7 of the Statutes).

The Board of Directors as a body:

- implements the CED’s policy as well as any and all resolutions and decisions of the General Meeting (Article 18.2 of the Statutes);
- is responsible for acting within the constraints of the approved budgets. Exceptions are possible in urgent cases (Article 18.2.1 of the Statutes);

- has all the powers of administration, except for those which fall within the competence of the General Meeting. These include communication and representation of the CED towards third parties, in particular, the European Institutions (Article 18.2 of the Statutes);
- can submit to the General Meeting any specific issues for decision and the General Meeting can submit to the Board of Directors any issue that it considers necessary (Articles 14.2.11 and 14.2.12 of the Statutes);
- prepares the annual budget and presents the annual accounts to the General Meeting (Articles 26.2.1. and 26.3. of the Statutes); in practice, this is done by the CED Treasurer with the support of the CED Office. The CED annual accounts are also reviewed by the CED Budget Reference Committee The Board of Directors as a body is also responsible for the proper filing of the annual accounts and the yearly tax return; in practice, this is done by the CED's external accountants (see point II.3 of the present guidance document).

IV.3 - Duties related to the Board of Directors meetings

CED President:

- calls the meeting of the Board of Directors (Article 19.1 of the Statutes);
- sets, in cooperation with the Brussels Office, the agenda of the Board meeting and include those Directors' suggestions received by the deadline set by the Brussels Office (Article V.3 of Internal Rules);
- chairs Board meetings and ensures that the statutes are adhered to (Article 23.2 of the Statutes);
- has the casting vote in the event of a tied vote in the Board (Article 19.4 of the Statutes);
- co-signs the minutes of the Board meeting (Article 20.1 of the Statutes);
- has the right to decide whether approved minutes may be changed (minor amendments) during the following Board meeting (Article 20.2 of the Statutes).

CED Directors:

- should attend the meetings of the Board of Directors; they can participate by conference call (video or audio) or similar communication methods allowing all persons participating in the meeting to hear each other simultaneously (Article 19.2.1 of CED Statutes). Four regular Board meetings are organised each year; May and November meetings are organised on the day before the General Meeting and March and September meetings can be organised in Brussels or in one of CED Member countries. Further Board work is done by e-mail; Board members receive several e-mails a week and are usually expected to reply to them within a week;
- can make suggestions to the Board meeting's agenda (Article V.3 of Internal Rules);
- cannot vote by proxy (Article 19.4.1 of the CED Statutes);
- receive the Board minutes in all official working languages within two months of the Board meeting and present any comments to the President or the Brussels Office within one month of receipt (Article 20.2 of the CED Statutes).

IV.4 - Specific duties

CED President:

- is the chairman of the CED (Article 23.1 of the Statutes);

- has all powers of day-to-day management, which he may delegate to the Board of Directors or the Brussels office (Article 21.1. of the Statutes);
- provides day-to-day direction to the Brussels Office (Article 24.2 of the Statutes);
- signs alone all acts binding the association within the limits of the day-to-day management (Article 22.1 of the Statutes).

  Can represent the association in justice as plaintiff or as defendant (Article 22.2.2 of the Statutes).

CED Treasurer:

- provides direction to the Brussels Office for establishing the budget, accounts and balance sheet and for managing the CED's bank account (Article 24.2 point 6 of the Statutes);
- prepares the annual budgets and accounts (Article 26.2 of the Statutes);
- decides on the reimbursement of travel expenses (Article II.3 of Internal Rules);

CED Directors:

- must be member of at least one CED Working Group or Task Force and be responsible for following up and reporting its work in the Board meetings (Article V.6 of Internal Rules). Current Board members each act as liaisons/chairs for between 1 and 2 Working Groups or Task Forces: they attend their meetings (usually 1-4 in-person meetings a year and additional online meetings) and communicate with them by e-mail;
- through his/her Member Association, bears the cost of his/her own travel expenses (travel, accommodation, subsistence) for Board Meetings, General Meetings, Working Group and Task Force meetings as well as all other activities (Articles II.1.2. and II.1.3. of Internal Rules and Article 19.5 of the Statutes); [2]
- can represent the association in justice as plaintiff or as defendant if so appointed for this purpose by the Board of Directors (Article 22.2 of the CED Statutes);
- within the limits of the day-to-day management and with the signatures of two Directors acting together, can bind the CED in connection to third parties (Article 22.1 of the CED Statutes).

The Board of Directors as a body:

- cannot address any national institution or body in any Member Country, Affiliate Member Country or Observer Country without the prior and explicit consent of the Member Association(s), Affiliate Member Association(s) of Observer Association(s) from the country concerned (Article V.5 of Internal Rules);
- can mandate special and specified powers to one or more persons (Article 18.2 of the Statutes);
- defines the mandate of the CED Task Forces and appoints its respective Chairpersons (the Task Force mandate shall be for a period of two years which can be extended by decision of the Board. The members of the Task Force are CED Directors but there can be experts selected outside the CED Board - Articles VII.2 and VII.3 of Internal Rules);

[2] In some exceptional cases, and if the travel is deemed important for the CED, the Director can apply for reimbursement under the same conditions as other CED Members (Article II.2 of Internal Rules). The decision on reimbursement is taken by the CED Treasurer and, in case of doubt, by the CED Board. However, CED reimbursement budget is limited and should not be considered as replacement for national financing.

- shall adopt decisions by a simple majority of the votes cast. In case of a tie, the President has a casting vote (Article 19.4 of the CED Statutes);
- can subdelegate to the Brussels Office the day-to-day management powers which were to them delegated by the President of (Article 21.2 of the CED Statutes).

V – Duties under Belgian Law not expressly mentioned in CED Statutes and Internal Rules

V.1 - General

The CED holds a record of all members of the Board which must contain their complete name, home address and copy of their ID card/passport, in order to publish the nomination and resignation of Directors in the Belgian State Gazette in the 8 days which follow their nomination or resignation. CED Directors are asked to sign a data protection consent form; by signing this form, they confirm that they are aware of their rights and consent that pursuant to the relevant Belgian and European legislative acts on (Personal) Data Protection, the CED may process their personal data for the purposes of facilitating and recording their participation in the relevant CED working bodies, including where applicable, Board Meetings, General Meetings, Working Group and Board Task Force meetings.

V.2 - Insurance

Under Belgian law, CED Directors do not need to be covered by an insurance policy. Whether or not it is recommendable depends on the nature of the activities of the association and the level of involvement of Directors.

As from April 2016, CED Directors are covered by the "Directors' and Officers' Liability Insurance" policy subscribed by the CED with AIG Europe Ltd (lead insurer – 80%; expected to be transferred to AIG Europe SA on 1 December 2018), QBE (co-insurer – 12,5%) and Hiscox Nederland (co-insurer – 7,5%). The limit of liability under the policy is 1.000.000 EUR (aggregate) and covers management liability, special excess protection for independent directors, investigation costs, regulatory crisis response costs, prosecution costs, reputational recovery costs, occupational health and safety, employed lawyers, emergency defense costs etc. (with applicable sublimits).

V.3 -Directors liability

V.3.1. Introduction

The Associations Law contains limited provisions regarding the liability of Directors, namely:

- Article 14 of the Associations Law establishes that the association is responsible for the faults which can be attributed to its agents or the bodies through which it acts;
- Article 14bis of the Associations Law establishes that, without prejudice to article 26septies of the Associations Law, the Directors do not engage any personal liability regarding obligations affecting the association. Article 26septies of the Associations Law deals with Directors' liability in case not for profit organisations change into a corporation.

The Directors are not personally liable for the proper execution of the commitments of the association, so that the commitments which the Directors enter into on behalf of the association, will only bind the association, but they remain liable for the consequences of faulty behaviour.

As a general principle, the directors' liability of a not-for-profit association is an individual liability and not a joint and several liability. The individual members will be liable for the damage caused by their personal fault. If the individual fault cannot be identified, the directors may still be held liable joint and severally. No distinction will be made between active and non-active directors.

Directors cannot avert liability by arguing that (i) the matter was not their competence or that (ii) they were not aware. Directors have an obligation to supervise and to keep themselves informed.

The rules regarding the liability of Directors are mostly found in the principles of general liability (contractual and tort liability).

The main principles are set out hereafter.

V.3.2. Liability for default in management – Nature and scope

In order to determine whether or not there is a *“management default”* the actions and the conduct of a Director are compared with the actions and the conduct of a *“normal, reasonable and prudent Director placed in the same circumstances”* (“*bonus pater familias”*). In other words, would a normal and prudent Director have acted in the same manner? There is a Directors’ fault if the Director has been manifestly or obviously imprudent or unreasonable. The court has a right of a marginal judicial review. The court may not judge the business or the economic opportunity of a Director’s act.

A second criterion is the association’s interest. Each Director has the overarching obligation to act in the best interest of the association.

An exhaustive list of Directors’ faults is impossible to draft. The following acts can be seen as management faults:

- The systematic absence from board meetings. This is one of the obligations of CED Directors as mentioned in Article V.2.1 of Internal Rules and Article 19.2.1 of the CED Articles of Association);
- Granting loans without adequate guarantees;
- Incurring unreasonably high costs of publicity;
- Concluding agreements against obviously unfavourable conditions;
- Exercising obviously insufficient control of the delegated Director or any other organ of daily management;
- Failing to conclude a fire insurance policy;
- Granting a delay in payments without requiring sufficient securities for the repayment.

The liability has a contractual character, since it is based on the contractual relationship between the association and the Director. This contractual relationship is governed by the general rules of a mandate according to the Civil Code.

Due to the contractual character, in principle only the association itself can lodge a claim against its Directors for reasons of management default. Such a claim is called the **actio mandati**. Introducing a claim requires a decision of the CED General Meeting.

V.3.3. Tort Liability

Some management defaults might also constitute a tort liability towards third parties (such as creditors), but conditions (developed by case law) are very strict.

Tort liability is triggered in case of:

1. breach of legal obligation;
2. breach of a general obligation of *“good behaviour”* which is imposed to anyone *(“good behaviour”* means acting as a normal prudent person under the same circumstances).

In order to successfully claim the liability, one needs to prove three elements:

a) fault

b) incurred damage;
c) causal connection between the fault and the damage.

Most common examples of torts are:

- Lack of payment of social contributions, aggravating the liabilities of the association and with prejudice of the organisation's creditors;
- Engaging the organisation for obligations which it can reasonably not execute;
- Lack of payment of salaries;
- Alienate goods of the association;
- False accounts or manifestly improper accounts.

V.3.4. Special Liability for the payment of Social Security Contributions

In accordance with the law of 20 July 2006 (which foresees a new article 40*ter* in the Law of 27 June 1969 which amends the Decree of 28 December 1944 concerning the social security for workers) the collection service of the National Social Security Service can request the **information of clients and third parties**, as well as the outstanding payments of the third parties and clients, as from the moment that the employer has not paid the social contributions in respect of 2 due quarters during the last 12 months without having an amicable settlement which is being respected. If the Directors who are in charge of the daily management of the association, do not comply with the specific communication obligation as set out above or false information has been communicated, they can be held **jointly and severally and individually liable** for a part or the whole of the debts. This liability can be extended to the other Directors of the association when it can be established that these managers have committed an error that contributed to the non- compliance with the communication obligation.

The liability of the Directors is triggered if the social security contributions for of two quarters remain unpaid during the last 12 months and if there is no amicable settlement.

The non-payment of social security contributions is also enforced by criminal law in application of article 218 of the Social Criminal Code. Contrary to the social and fiscal liability, the **criminal liability** regarding outstanding **social security contributions** and tax is not joint and several liability. When only one Director (or the association) has made an error, only this person (or the association), can be held criminally liable, excluding the other Directors. When a Director as well as the association have made an error, there will be a cumulative criminal liability when the following conditions are fulfilled:

- The physical person (Director) who intervened has to be identified;
- The liability of the association has been exclusively triggered as a result of the intervention of that physical person;
- The physical person has acted knowingly and willingly.

When these three conditions are met, the Director as well as the association can be held criminally liable and can be penalised with a criminal fine of 400 EUR to 4.000 EUR and/or with an administrative fine of 200 EUR to 2.000 EUR, to be multiplied by the number of employees concerned. When the natural person who has made the fault in respect of the non-payment of the social contributions was not identified, only the association can be held criminally liable.

V.3.5. Special Liability for the payment of withholding tax on professional income (*"bedrijfsvoorheffing")* / VAT ("*Btw*")

Article 442quater of the Belgian Income Tax Code stipulates that, in case **two of the three following criteria** (as defined in article 17, §3 of the Associations Law) **are fulfilled**, Directors should be aware for special liability for the payment of withholding tax on professional income (*"bedrijfsvoorheffing")*:

1) The organization has an annual average of five full-time employees;
2) The income of the organization shall at least be 312.500 EUR (exceptional revenues and VAT not included)
3) The balance sheet total exceeds 1.249.500 EUR

A similar provision is included in article 93undecies C of the Belgian VAT Code, for shortcomings concerning the VAT.

If two of the three criteria are fulfilled, the directors in charge with the day to day management are **jointly and severally and individually liable** for shortcomings concerning the tax on professional income if this is due to their fault within the meaning of article 1382 Civil Code committed in the management of the entity.

This joint and several liability can be extended to other Directors if they have committed faults which have contributed to the shortcoming as mentioned above. Except demonstrated to the contrary, a repeated nonpayment is presumed to result from faults as stated above. There is repeated nonpayment:

- In case the tax needs to be paid quarterly, if there is a lack of payment of at least two debts within one year;
- In case the tax needs to be paid monthly, if there is a lack of payment of at least three debts within one year;

There is no presumption of fault if the non payment is the result of financial difficulties which have given rise to the opening of a procedure of judicial re-organisation, bankruptcy or judicial dissolution.

V.3.6. Liability in case of bankruptcy

A) Introduction: expansion scope Belgian insolvency legislation, including directors liability in case of bankruptcy, as from 1 May 2018

Prior to 1 May 2018 a not-for-profit association could not go bankrupt. However, on 11 September 2017, the Law of 11 August 2017 adding a new Book XX to the Economic Law Code ("ELC") was published in the Belgian State Gazette. Book XX brings together the existing Continuity of Enterprises Law of 31 January 2009 and the Bankruptcy Law of 8 August 1997 in a single text, which at the same time is integrated within the ELC.

The new rule is that all "legal entities" fall within the scope of the insolvency law ratione personae, making it applicable to many additional entities. The link with the concept of "legal entity" means that as from 1 May 2018 not-for-profit associations, international not-for-profit associations and foundations all fall within the scope of Belgian insolvency law.

Additionally, the legislator transferred from company law to insolvency law a number of existing legal provisions relating to the liability of directors in the case of bankruptcy. The relevant provisions are included in Section VII of Book XX of the ELC, which also apply to not-for-profit associations.

In each case, the liability provisions target current or former directors, managers, managing directors, members of a board of directors or supervisory board, and all other persons who had real managing authority in respect of the business of the enterprise (referred to below as "**the Directors**" for the sake of brevity).

The ELC foresees three types of specific directors liability in case of bankruptcy.

B) Manifestly gross error that leads to bankruptcy (Article XX.225 ELC)

Article XX.225 ELC sets out a specific form of directors liability in case of a manifestly gross error that leads to bankruptcy.

Article XX.225 ELC is not applicable in case the bankrupt enterprise is considered to be a “small” not-for-profit association. Please see above (Chapter II.3 - CED Annual Accounts) for an explanation of the concept of a “small” not-for-profit association.

At the time of writing of the present guidance document, the CED is considered to be a “small” not-for-profit association. If in the future the CED no longer meets the criteria of a “small” not-for-profit association article XX.225 ELC will become applicable to its Directors.

When at the bankruptcy of an enterprise it appears that the debts exceed the assets, all Directors can be held personally and jointly and severally liable for the whole or a part of the debts of the enterprise up to the amount of the deficit, provided that a manifestly gross error they made contributed to the bankruptcy of the enterprise.

In this regard legal doctrine underlines 4 conditions to be satisfied simultaneously:

- Bankruptcy;
- Assets are insufficient to cover the debts;
- Directors have committed a manifestly gross error; and
- This error has contributed to the bankruptcy.

It is sufficient that the manifestly gross error is one of the determining causes that led to the bankruptcy, without being the only or necessary cause of the bankruptcy.

Legal doctrine defines manifestly gross error as an error that a normal, prudent and reasonable director would not have made and that includes a violation of the essential behavioral norms of a society. It should be an unforgivable error, of which the Director should have been aware that the error would contribute to the bankruptcy.

Article XX.225 ELC specifies that at least all forms of organized serious tax fraud are to be considered as a manifestly gross error. Additional examples, defined by case law and legal doctrine, are: absence of bookkeeping, fraudulent bookkeeping, fiscal fraud, lack of control of debt collection, gross abuse of the current-account, continuing a serious loss-making activity with disregard for the interests of the creditors, etc.

It is up to the court to determine whether or not it will convict the directors to pay compensation with or without joint and several liability. It is an individual liability of the directors, so the conditions should be proven for each specific director. Consequently, it is possible that Directors are convicted in various degrees, taking into account the distributions of the tasks and the gravity of their errors. The claim can only be submitted by disadvantaged creditors (for damages suffered by themselves – should notify the bankruptcy trustee) or the bankruptcy trustee of the enterprise (for collective damages).

C) Liability of Directors for overdue social security contributions in case of bankruptcy (article XX.226 ELC)

Article XX.226 ELC sets out specific provisions concerning the liability of Directors for social security contributions when the enterprise goes bankrupt.

Directors are personally jointly liable for all social security contributions to be paid by the enterprise if they, in the last five years prior to the bankruptcy, were involved in at least two bankruptcies or liquidations resulting in unpaid Belgian social security contributions. The joint liability not only covers the social security contributions themselves, but also all interest and additional charges or fines as a result of late payment.

11. In this regard legal doctrine underlines 3 conditions to be satisfied simultaneously:

- Bankruptcy;
- Non-payment social security contributions; and
- Director has been involved, in the last five years prior to the bankruptcy, in at least two bankruptcies or liquidations resulting in unpaid Belgian social security contributions.

This claim can only be submitted by the Belgian government service for social security or the bankruptcy trustee of the enterprise.

Please note that article XX.226 ELC is also applicable to “small” not-for-profit associations.

D) Liability of Directors for wrongful trading (article XX.227 ELC)

Article XX.227 ELC sets out a rule of liability of Directors based on the principle of "wrongful trading",

Article XX.227 ELC is not applicable in case the bankrupt enterprise is considered to be a “small” not-for-profit association.

At the time of writing of the present guidance document, the CED is considered to be a “small” not-for-profit association. If in the future the CED no longer meets the criteria of a “small” not-for-profit association article XX.227 ELC will become applicable to its Directors.

In case of bankruptcy the Directors may be held personally and/or jointly liable for the whole or a part of the net liabilities when (i) at any time before the bankruptcy, they knew or ought to have known that there was manifestly no reasonable prospect of maintaining the enterprise or its activities and avoiding bankruptcy, **and** (ii) the person concerned was a Director at the time, **and** (iii) from that moment on, the person concerned did not act as a normal, prudent and prudent director would have acted in the same circumstances.

This claim can only be submitted by the bankruptcy trustee of the enterprise.