

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

I – Introduction

The CED will be electing its Treasurer and three Directors at the November 2025 General Meeting.

This paper provides a brief description of the responsibilities and legal obligations of the CED President, the CED Treasurer and the CED Directors¹ under the 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 election.

This document is a further update from a document that was first drafted in 2013 and that has been updated previously inter alia in August 2022.

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

II.1 General

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;

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

- 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.

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. 2 – New legal framework in 2019: implementation and transitional provisions

In recent years the Belgian legislator set forth the ambition to streamline the Belgian legislation on associations and companies. Several new legislation has been adopted.

In a final step, the Belgian Parliament adopted on 28 February 2019 the new Code of Companies and Associations (hereafter referred to as: the "**CCA**"). The CCA was published in the Belgian State Gazette on 23 March 2019. The Royal Decree regarding the execution of the CCA was published in the Belgian State Gazette on 29 April 2019 (hereafter referred to as: the "**RD CCA**").

The CCA aims to replace inter alia 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 statutes and internal rules have been amended several times and for the last time on 24 May 2024. The new CCA fully applies to CED.

II.3 - 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.4 - 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 3:103 CCA).

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

II.5 - CED Annual Accounts and bookkeeping

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 Enterprises on behalf of the CED.

Since the financial year 2017 the CED has appointed professional 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 Bedrijfsrevisoren Burg. CVBA” have been appointed as statutory auditors for the financial years ending on the 31st of December 2017, 2018 and 2019. The same firm was appointed as contractual professional auditors for the financial years ending on the 31st of December 2020 and 2021, as well as 2022 and 2023.

Following the decision of the CED General Meeting in May 2017, CED annual accounts were reviewed by the CED Budget Reference Committee. The CED Budget Reference Committee met in May 2018, in May 2019 and in November 2020. During their meeting of 19 November 2020, the CED Board decided to change the name of the body to the Financial Transparency Committee to better reflect its role. The CED Financial Transparency Committee met for the first time in June 2021 and then again in May 2022, May 2023, May 2024, May 2025. Its role and organisation might be further revised in the future.

The CED is allowed to have and applies a simplified bookkeeping (Article III.85, §2 Belgian Code of Economic Law).

The annual accounts of a not-for-profit association can be filed in simplified form if it is considered to be a “small” not-for-profit association (article 3:47 CCA).²

A not-for-profit association is considered to be “small” if not more than one of the following criteria are exceeded:

- 1) An annual average of five full-time employees;
- 2) Income for an amount of 391.000 EUR (exceptional revenues and VAT not included);
- 3) A total of 1.562.000 EUR of assets;
- 4) A total of 1.562.000 EUR of debts.

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 Court of Enterprises or the National Bank of Belgium within thirty days after the approval by the General Meeting.

² For the purpose of this guidance document, we consider a “small” not-for-profit association to be an association that applies a simplified bookkeeping and files simplified accounts.

Note that article 2:113 CCA 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 and, in order to guarantee continuity, need to have the support of their 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 22.3.1 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 22.3.3 of CED Statutes). The re-eligibility restriction does not apply to any members of the Board of Directors standing for President or Treasurer. If a member of the outgoing Board of Directors is elected as President or Treasurer, this position of President or Treasurer can only be held by the same person for a maximum of two consecutive periods of three years (Article 22.3.5 of CED Statutes). An individual may serve on the CED Board for a maximum of 4 mandates of three years in the course of their lifetime, irrespective of the position held on the Board of Directors (Article 22.4 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 22.3.3 of CED Statutes).

IV.2 - Duties related to the CED General Meeting

CED President:

- calls a General Meeting when at least one fifth of Member Associations so request. In this case, a General Meeting shall be convened within 21 days of the request to convene and shall take place at the latest on the 40th day following the request (18.7 of the Statutes);
- decides the date and place of the General Meeting (Article 18.1 of the Statutes);
- sets the agenda of the General Meeting, in cooperation with the Board and with the Brussels Office (Article 19.2 of the Statutes);
- opens General Meetings (19.3 of the Statutes);
- grants the floor to speakers (Article 19.4.4 of the Statutes);
- is permitted to issue warnings and cut the speakers short (Article 19.4.7 of the Statutes);
- declares the discussion closed (Article 19.4.8 of the Statutes);
- ensures that the General Meeting takes place in an orderly fashion (Article 19.7.1 of the Statutes);
- is permitted to reprimand participants, call them to order and deny them the floor (Article 19.7.2 of the Statutes);
- is permitted to exclude a participant from the Meeting (Article 19.7.3 of the Statutes);
- is permitted to interrupt or suspend proceedings if the meeting can no longer be carried out in accordance with Statutes and Internal Rules (Article 19.7.4 of the Statutes);
- 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 20.1.2 of the Statutes);
- co-signs the minutes of the General Meeting (Article 21.1 of the Statutes);
- chairs General Meetings and ensures that the statutes are adhered to (Article 28.2 of the Statutes);
- appoints the Electoral Committee for CED elections (Article 23.2 of the Statutes), co-signs election results (Article 23.6.1 of the Statutes) and announces results of elections (Article 23.7 of the Statutes).

CED Treasurer:

- directs and supervises the Brussels office to establish the budget, accounts and balance sheet (Article 29.2. point 6 of the Statutes);
- prepares the annual budget and the annual accounts (Article 31.2. 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 31.2.1 of the Statutes).

CED Directors:

- are nominated, dismissed and discharged by the CED General Meeting (Articles 17.2.2 and 17.2.4 of the Statutes). The General Meeting has the right to terminate the mandate of

each director at any time, with immediate effect and without justification, with a resolution passed by a qualified majority of two thirds of the votes cast (22.10 of the Statutes);

- may participate at the CED General Meeting as CED Directors but they may only vote if they are Member Delegates (Article 22.8 of the Statutes).

The Board of Directors as a body:

- 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 17.2.11 and 17.2.12 of the Statutes);
- implements the CED's policy as well as any and all resolutions and decisions of the General Meeting (Article 22.2 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 22.2 of the Statutes);
- is responsible for acting within the constraints of the approved budgets. Exceptions are possible in urgent cases (Article 22.2.1 of the Statutes);
- prepares the annual budget and presents the annual accounts to the General Meeting (Articles 31.2.1. and 31.3. 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 Financial Transparency 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.5 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 24.1 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 III.3 of Internal Rules);
- has the casting vote in the event of a tied vote in the Board (Article 24.4 of the Statutes);
- co-signs the minutes of the Board meeting (Article 25.1 of the Statutes);
- has the right to decide whether approved minutes may be changed (minor amendments) during the following Board meeting (Article 25.2 of the Statutes);
- chairs Board meetings and ensures that the statutes are adhered to (Article 28.2 of the Statutes).

CED Directors:

- should attend the meetings of the Board of Directors; they can participate via any means of telecommunication allowing an effective and simultaneous deliberation, such as a

telephone conference or a videoconference (Article 24.2.1 of the 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 III.3 of Internal Rules);
- cannot vote by proxy (Article 24.4.1 of the Statutes);
- receive the Board minutes in all official working languages within two weeks of the Board meeting and present any comments to the President or the Brussels Office within two weeks of receipt (Article 25.2 of the Statutes).

IV.4 - Specific duties

CED President:

- has all powers of day-to-day management, which he may delegate to the Board of Directors or the Brussels office (Article 26.1. of the Statutes);
- signs alone all acts binding the association within the limits of the day-to-day management (Article 27.1 of the Statutes);
- can represent the association in justice as plaintiff or as defendant (Article 27.2. of the Statutes);
- is the chairman of the CED (Article 28.1 of the Statutes);
- provides day-to-day direction to the Brussels Office (Article 29.2 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 29.2 point 6 of the Statutes);
- prepares the annual budgets and accounts (Article 31.2 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 III.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 1-2 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 24.5 of the Statutes);³

- 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 27.1 of the Statutes).
- can represent the association in justice as plaintiff or as defendant if so appointed for this purpose by the Board of Directors (Article 27.2 of the 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) or Observer Association(s) from the country concerned (Article III.5 of Internal Rules);
- can mandate special and specified powers to one or more persons (Article 22.2 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 V.2 and V.3 of Internal Rules);
- shall adopt decisions by a simple majority of the votes cast. In case of a tie, the President has a casting vote (Article 24.4 of the Statutes);
- can subdelegate to the Brussels Office the day-to-day management powers which were to them delegated by the President of the CED (Article 26.2 of the 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.

³ 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.

V.2 - Insurance

Under Belgian law, it is not mandatory that the professional liability of CED Directors is 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.

From April 2016, CED Directors are covered by the “Directors’ and Officers’ Liability Insurance” policy. For period from 6 April 2025 until 5 April 2026, the policy is subscribed by the CED with AON Belgium Bv/srl. The limit of liability under the policy is 1.000.000 EUR (total aggregate, for all insureds under all insurance covers and extensions of cover combined) 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 defence costs etc. (with applicable sublimits).

V.3 -Directors liability

V.3.1. Introduction

As the CED has adopted new statutes and internal rules at the General Meeting of 20 November 2020 and again amended the statutes at the General Meeting of 20-21 May 2022 later modifying them on 26 May 2023 and 24 May 2024, the new CCA fully applies to CED.

A transitional provision is foreseen specifically for directors’ liability pursuant to which the date of the damaging event determines whether the CCA or the previous Associations Law is applicable. For the CED this means that if the damaging event occurred prior to 1 January 2020, the Associations Law will still apply. The application of the Associations Law has been set out in our note of 22 August 2019. If, on the other hand, the damaging event occurs on or after 1 January 2020, the CCA will apply as set out below.

V.3.2. General provisions directors’ liability under the CCA

A) General liability for faults

The CCA⁴ stipulates that each member of a management body or executive director has the obligation to properly perform the tasks assigned to him.

In this context the CCA⁵ further defines the liability that could be incurred in case a director does not fulfil this obligation.

⁴ Article 2:51 CCA:

“Each member of a management body or executive director is required to properly perform the tasks assigned to him.”

⁵ Article 2:56 CCA:

“The persons referred to in article 2:51 and all other persons who have or have had actual management authority in respect of the legal entity, shall be liable towards the legal entity for any faults committed in the performance of their duties. This also applies towards third parties insofar as the fault committed is a non-contractual fault. However, these persons shall only be liable for decisions, conduct or acts which are manifestly outside the range within which normally prudent and careful directors, placed in the same circumstances, can reasonably disagree.

If the management body forms a board, their liability for the decisions or omissions of this board shall be joint and several.

The directors' liability for damages caused by faults of directors during the execution of their mandate applies regardless whether it concerns a liability towards the association (a contractual liability) or towards a third party (tort liability).

A director is not liable for all faults committed. As test to be applied the CCA explicitly refers to the comparison of the conduct of the director with the conduct of a "*normal, reasonable and prudent director placed in the same circumstances*" ("*bonus pater familias*"). In other words the court will examines whether a normal and prudent director, placed in the same circumstances, would have acted in the same manner.

The court will determine that a director has committed a fault that gives rise to directors' liability if the action of that director was manifestly or obviously imprudent or unreasonable.

A claim can be initiated by both the association and third parties.

In order to invoke tort liability a claimant must prove three elements in his claim towards the director: fault (as defined above), damage, and a causal link between fault and damage.

B) Liability for infringements of the CCA or the statutes

Directors are liable towards the association and towards third parties for any damages as a result of an infringement of the CCA or the statutes of the association

Some of the most common statutory violations committed by directors are:

- making decisions beyond the powers granted;
- directors should respect the limitations of the corporate object of the association;
- bad functioning of the corporate bodies such as neglecting to call meetings of the board of directors or of shareholders, damages resulting from late publication of corporate documents;
- negligence in preparing the annual reporting and the annual accounts.

A claim for infringement of the CCA and/or of the statutes can be initiated by both the association and third parties.

C) Joint and several liability

The CCA distinguishes liability incurred when the management body forms a board and when it does not:

- When the management body forms a board (such is the case for the CED): if one director commits a fault, all other directors are considered to be jointly and severally liable. This

Even if the management body does not form a board, its members are jointly and severally liable both to the legal entity and to third parties for all damage resulting from violations of the provisions of this Code or of the statutes of the legal entity.

Regarding the faults referred to in the second and third paragraph, to which they did not participate, they shall, however, be exempted from their liability if they have reported the alleged fault to all other members of the management body, or, as the case may be, to the collegiate management body and to the supervisory board. If it is submitted to a collegiate management or supervisory body, this report, as well as the discussion to which it gives rise, shall be recorded in the minutes."

joint and several liability applies to all actions (or negligence) that result in directors' liability.

Consequently, a director is required to supervise and to keep himself informed.

A director cannot avoid liability by arguing that (i) the matter was not his competence or that (ii) he was not aware of the fault.

- When the management body does not form a board: joint and several liability is only foreseen in case an action (or negligence) result in an infringement of a provision of the CCA or the statutes.

However, the CCA does foresee the possibility for a director to escape joint and several liability when the following conditions are met:

- He has no participation to the fault;
- He has notified the alleged fault to all other members of the management body.

This notification and the discussion hereon is recorded in the minutes.

V.3.3. Directors' liability under other legislation

A) Liability in case of bankruptcy

A.1. 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.

A.2. Manifestly gross error that leads to bankruptcy (Article XX.225 ELC)

The ELC⁶ sets out a specific form of directors liability in case of a manifestly gross error that contributed 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 (point II.5 of the present guidance document) 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.

The provision 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.

The court will have to determine whether or not it will convict the directors to pay compensation with or without joint and several liability. This specific directors' liability is considered to be 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.

⁶ Article XX.225 ELC

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).

A.3. Liability of Directors for overdue social security contributions in case of bankruptcy (article XX.226 ELC)

The ELC⁷ sets out specific provisions concerning the liability of Directors for social security contributions in case of bankruptcy of the association.

Directors are personally jointly liable for all social security contributions to be paid by the association 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. This liability does not only cover the social security contributions themselves, but also all interest and additional charges or fines as a result of late payment.

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 this provision is also applicable to “small” not-for-profit associations.

A.4. Liability of Directors for wrongful trading (article XX.227 ELC)

Finally, the ELC also includes a provision⁸ for the liability of directors in case 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

⁷ Article XX.226 ELC

⁸ Article XX.227 ELC

(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.

B) Special Liability for the payment of withholding tax on professional income (“*bedrijfsvoorheffing*”) / VAT (“*Btw*”)

Belgian law⁹ stipulates that, except in case the association can be considered to be a small not-for-profit association (as defined in article 3:47, §3 CCA – see point II.5 of the present guidance document), directors should be aware for special liability for the payment by the association of withholding tax on professional income (“*bedrijfsvoorheffing*”). For shortcomings concerning VAT a similar provision¹⁰ is foreseen.

The directors in charge with the daily management of the association are jointly and severally and individually liable for shortcomings concerning the tax on professional income if this shortcoming is due to their fault¹¹ as committed in the management of the association.

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;

The presumption of fault does not apply in case the non-payment is the result of financial difficulties which have given rise to the opening of a judicial reorganisation, bankruptcy or judicial dissolution.

The tax administration is obligated to inform the taxpayer by registered letter that it will file such a claim, after which the tax administration must wait one month before filing the claim, in order to allow the taxpayer to pay the debt or to prove that no fault has been committed.

C) Special Liability for the payment of Social Security Contributions

Under Belgian law¹², the Belgian social security office can request the information of clients and third parties, as well as the outstanding payments of the third parties and clients, as from the

⁹ Article 51 of the Code of 13 April 2019 on the amicable and compulsory collection of tax and non-tax claims.

¹⁰ Article 93undecies C VAT Code.

¹¹ Fault as defined in article 1382 Civil Code.

moment that the employer has not paid the social contributions in respect of two due quarters during the last 12 months without having an amicable settlement which is being respected.

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

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 a fault that contributed to the non-compliance with the communication obligation.

V.3.4 Limitation of directors' liability

The CCA¹³ has introduced a limitation ("cap") on the directors' liability in case of:

- liability according to article 2:56 CCA (see our comments sub V.3.2.);
- any other form of liability for damages following out from the CCA or other legislation;
- liability for the association's debts referred to in articles XX.225 ELC (manifestly gross error – see our comments sub V.3.3.A.2.) and XX.227 ELC (wrongful trading – see our comments sub V.3.3.A.4).

However, this limitation applies only for accidental minor faults.

This provision excludes the application for special liability for tax¹⁴ or social security debts¹⁵, serious tax fraud, repeated minor faults, serious faults and in the case of fraudulent intent or intent to cause damage.

The maximum amounts are applicable to liability towards both the legal entity and third parties and apply to all directors together.

They apply per fact or set of facts that may give rise to liability, regardless of the number of plaintiffs or claims.

Maximum amount	Average Annual Turnover (excl. VAT)		Total assets
€125.000	Between 0 and €350.000	and	Between 0 and €175.000

¹² The law of 20 July 2006 which foresees a new article 40ter in the Law of 27 June 1969 which amends the Decree of 28 December 1944 concerning the social security for workers.

¹³ Article 2:57 CCA

¹⁴ Article 442^{quater} WIB92

¹⁵ Article XX.226 ELC

€250.000	Between €350.000 and €700.000	and	Between €175.000 and €350.000
€1.000.000	Between €700.000 and €9.000.000	or	Between €350.000 and €4.500.000
€3.000.000	Between €9.000.000 and €50.000.000	or	Between €4.500.000 and €43.000.000
€12.000.000	Over €50.000.000	or	Over €43.000.000

The reference period for the turnover, excl. VAT and the total assets is the 3 financial years prior to the liability claim or for the period since the incorporation if less than 3 financial years have passed.

This new legislation was introduced in order to facilitate the conclusion of insurance policies by directors.

However, since the scope of the cap is limited, legal doctrine questions the effectiveness of the described limitation of directors' liability.

V.3.5. Prohibition of contractual exoneration and indemnification

The CCA¹⁶ also introduces an explicit prohibition of contractual exoneration and limitation of liability.

It is not allowed to limit the liability of a director further than specified in point V.3.4 here above.

Any provision in the statutes, in an agreement or in a unilateral statement that foresees otherwise will be deemed not to have been written.

V.3.6. Prescription of directors' liability

A) General rule

The CCA¹⁷ sets out a prescription period of 5 years for legal actions against the following persons because of transactions in relation to their functions:

- directors, managing directors, auditors, liquidators, permanent representatives of legal persons who hold one of the aforementioned positions, or
- all other persons who in respect of the association or foundation have had effective management authority

¹⁶ Article 2:58 CCA

¹⁷ Article 2:143 CCA

This 5 years period has to be counted as from such transactions or, if they are intentionally concealed, as from discovery.

B) Specific legislation

Some prescription periods under other legislation than the CCA:

- Overdue payment of withholding tax on professional income: 5 years
- Overdue payment of VAT contributions: 3 years. If it concerns taxable transactions which were not declared in Belgium in certain cases or if it concerns fraudulent non-declaration: 7 years.
- Overdue payment of Social Security Contributions: 5 years.

V.3.7 Criminal liability

Besides the civil liability, a director can be held liable for criminal offences. The penal code and several other laws impose penal sanctions to enforce the director to abide to those laws. It would be beyond the scope of this memo to give a full description of the criminal offences under the penal code.

Of course, directors are, as any other person, bound by the penal code. Because of the particularity of their function some provisions apply more directly to directors, such as the sanctions in case of: embezzlement of funds, fraud and falsification.

In addition to the penal code, sanctions for criminal offences are, amongst others, included in the environmental laws, the laws on the bookkeeping obligations, labor law, the laws on the public issue of bonds or stock, tax laws, fair trade practices and food and drugs laws.

V.3.8. Extra-contractual liability – Current law - application of the quasi-immunity doctrine

Under current Belgian law, the doctrine of (quasi-)immunity of the execution agent or auxiliary person is applied.

An auxiliary person ("*hulppersoon*") is defined as a physical or legal person entrusted by a person having a contractual obligation with the performance of all or part of that obligation, regardless of whether he performs that obligation for his own account and in his own name or for the account and in the name of the debtor. Directors of companies and non-profit associations fall under the definition of auxiliary persons since the company or association acts and performs its obligations through its bodies, among which the board of directors.

Under this quasi-immunity doctrine, an auxiliary person cannot, in principle, be held directly liable by the co-contractor. So, in principle, a third party who enters into a contract with the association and suffers damages in its performance will not be able to hold the director of the association personally liable.

More specifically, the third-party co-contractor cannot hold the director directly liable unless:

- (i) the director's fault constitutes not only a breach of his contractual obligation, but also a breach of the general duty of care, and

(ii) the damage is different from the damage resulting from the contractual fault. However, some exceptions do apply to this quasi-immunity. In practice, these usually imply that a liability claim is still possible in case of a criminal act.

V.3.9. Extra-contractual liability – Future law: Abolition of quasi-immunity with Book 6 of the New Belgian Civil Code

A) General principle

Under Article 6.3.§2 of the new Civil Code, an aggrieved person can not only address his contracting party but also the auxiliary person of the contracting party to claim his damages. In other words, a director who fails to (correctly) perform a contractual obligation of the association can henceforth be held directly liable by the co-contractor.

In this regard, the directors can invoke the same defences as the association towards the co-contractor. The defences that directors can invoke include (i) the defences based on the terms of the contract between the association and the co-contractor, as well as (ii) the defences resulting from the legislation on special contracts and the defences from the special prescription rules applicable to the contract (such as, for example, the limits provided for in the CCA regarding directors' liability).

Directors can also invoke the defences arising from the contract between the association and the director.

However, those defences cannot be invoked for damage resulting from an impairment of physical or psychological integrity or as a result of a fault committed with the intent to cause damage.

B) Possibility of excluding or limiting directors' extra-contractual liability.

Article 6.3. BW is of supplementary law which means that parties can, to a certain extent, exclude or limit their extra-contractual liability by contract.

Thus, firstly, in a contract between the association and co-contractor - in addition to the limitation or exclusion of liability of the association towards the co-contractor - the extra-contractual claims of the co-contractor towards directors may also be limited or excluded.

Secondly, the directors' agreement between the association and the directors may also to some extent provide for a limitation or exclusion of liability.

C) Entry into force of Book 6 of the New Belgian Civil Code

Book 6 of the New Belgian Civil Code will in principle enter into force on 1 January 2025.

Hereby, the provisions of this Book 6 will apply to facts occurring after the entry into force of the new law. This means that the new provisions of Book 6 of the Civil Code will also apply to existing contracts.
