

Yesterday. Today. Tomorrow.

Linklaters



Year in review,
Year to come
Belgian Law

December 2018

Year in review

Belgian Law in 2018

Year in Review 2018 Year to Come 2019 summarises a selection of the major developments in law last year, and major developments expected over the coming year, with links to further reading where available. A broad range of legislative updates were made in 2018 focused around company law, civil law and procedure, banking and financial regulatory, as well as digital and security policy.



Brexit:

EU-UK negotiations have resulted in the [Withdrawal Agreement text](#) and [Political Declaration](#) on the framework for the future relationship. In June, the [EU Withdrawal Act](#) was passed, preparing the UK's legal system for Brexit. The Government began tabling [statutory instruments](#) to amend existing laws to fix deficiencies arising from Brexit. Acts providing for post-Brexit policies were passed in relation to data protection, nuclear safeguards, customs, sanctions and anti-money laundering.

Corporate income tax reform:

The general corporate income tax rate has been reduced from 33.99% to 29.58% (and it will be further reduced to 25% in 2020) and the dividend received deduction has been increased from 95% to 100%. "Compensating measures" were introduced as well, such as a limitation on the use of carried forward tax assets. [Read more...](#)

New mandatory EU disclosure rules (DAC6):

Pursuant to the new EU Directive, EU intermediaries must disclose reportable cross-border arrangements to the tax authorities as of 2020, provided that at least one of the pre-defined so-called 'hallmarks' is met. The information received on the reported transactions will be automatically exchanged among EU Member States. The first arrangements reportable in 2020 will be those with a first implementation step as of 25 June 2018.

New Companies & Association Code - Final approval

The draft new Companies and Associations Code was adopted in second reading at parliamentary commission level on 27 November 2018. The last legislative step is approval in plenary session which is expected to take place before the end of 2018. See our Year to come for more info.

The general data protection regulation:

This applied across the EU as of 25 May 2018 marking the biggest shakeup of European privacy laws for 20 years with new obligations for businesses, new rights for individuals and new enforcement powers for regulators.

[Read more...](#)

Dawn raids:

The Belgian Competition Authority ("BCA") conducted dawn raids in the cosmetics, fire protection and pharma sectors. Two were conducted in cooperation with other national competition authorities. Concurrently, the Supreme Court subjected dawn raids to greater scrutiny, ruling that dawn raids without a prior judicial warrant are unlawful, and that any evidence seized during unlawful raids may not be used.

Joint lobbying:

The Supreme Court rejected an appeal against a decision of the Court of Appeal which held that joint lobbying does not constitute an illegal concerted practice because it takes place outside of the market. In 2013 the BCA, whose decision was annulled on appeal, had fined cement producers, their professional association, and a non-profit organisation in charge of standardisation in the cement industry for jointly lobbying the Belgian authorities. This was done with the aim of delaying the approval process of a specific form of ready-made-cement, thereby excluding a potential new entrant from the market.

Trade Secrets:

Implementing EU Directive 2016/943 on the unlawful acquisition, use and disclosure of undisclosed trade secrets, the Act of 30 July 2018 on the protection of trade secrets modifies several provisions of Belgian law. It also aligns new procedural measures and remedies with existing intellectual property laws. This includes the seizure of infringing goods as well as cease-and-desist orders prohibiting the unlawful use of trade secrets and the (continued) production of infringing goods.

[Read more...](#)

2018 highlights

A final approval of the draft new Companies and Associations Code is expected at the end of 2018.

2018 highlights

The EU has confirmed its openness to foreign investments. However, it has also recognised the need to defend its essential interests. At the same time, the Chinese Government is reducing foreign investment restrictions.

New corporate criminal liability regime:

The Law of 11 July 2018 has introduced two major changes. First, legal entities can now be held criminally liable for offences that are committed negligently by one or more natural persons, without any additional conditions compared to offences that are committed intentionally. Secondly, the Law abolishes the criminal immunity of state entities, which can now be criminally prosecuted and convicted, although no criminal sanctions can be imposed on them.

Enterprise Court:

The Law of 15 April 2018 changed the name of the Commercial Court to the Enterprise Court. The jurisdiction of the Enterprise Court has also been extended. It is competent for all disputes between legal entities, except state entities, other public law entities without economic activity and except where competence is reserved for other courts. This Court is also competent for all disputes between undertakings without legal personality and between self-employed people, except if the dispute obviously does not relate to their economic activity.

Appeal proceedings:

The Laws of 6 July 2017 and of 25 May 2018 changed some of the rules on civil procedures that may have important consequences especially in front of appellate courts (i) It is no longer possible for the defaulting party to file an opposition against a decision that may be appealed. (ii) If, in a multiparty dispute, an appeal is only directed against certain parties, these parties have a new deadline (usually one month) to appeal against the other parties. (iii) The respondent may only file an incident appeal in its first trial brief following the principal or incident appeal filed against it.

The DPA Act:

The Belgian law of 3 December 2017 has transformed the Privacy Commission into the Data Protection Authority (the "DPA"). Set up as an independent supervisory body (with legal personality) at the Belgian Chamber of Representatives, the DPA monitors compliance with the rules governing the protection of personal data in Belgium. The new law has restructured the DPA providing enhanced powers in line with the GDPR. The DPA represents Belgium in the European Data Protection Board. The reform of the DPA has been part of a two-step process to adapt the Belgian legislation to **the GDPR** (the other step being the Law on the protection of individuals with regard to the processing of personal data of 30 July 2018). To date however, the appointment of the new leaders of the DPA is still pending making its task more difficult to implement.

Introduction of the Profit premium:

Bonuses have become a common practice and different reward systems exist in Belgium. The profit premium is a new – popular – bonus system, introduced as from the beginning of this year, which is easy to implement, exempted from social security and to which a lower tax rate applies. For further info – see our [newsletter](#).

New notice periods for employees with less than six months' service:

To a certain extent, the increased progressivity introduced by the law implicitly revives the old regime of trial periods (the concept of a trial period has been abolished in Belgian employment law since 2014). For further information – see our [newsletter](#).

Parental, medical assistance and palliative leave:

Since the beginning of October, the legislator has created flexibility for employees through thematic leaves (e.g. no fixed day per week anymore). Also, an employee taking parental leave can now reduce working time by 1/10th. Previously, this could only be done full-time, at half-time or at 1/5th of the time.

EU benchmarks regulation:

The EU Benchmarks Regulation became applicable on 1 January 2018. Under the Regulation, certain types of regulated entities, "supervised entities", must produce and maintain robust written plans to address material changes to, or cessation of, a benchmark and reflect these in their contractual relationships. In the context of derivatives, ISDA published the ISDA Benchmarks Supplement in September to assist market participants in complying with this obligation. The Regulation also mandates disclosure of the registration status of the benchmark administrator in prospectuses required under the Prospectus Directive or UCITS Directive. While transitional provisions currently apply in many cases, the Regulation restricts use of benchmarks by supervised entities to those for which the administrator has been registered. [Read more...](#)

PRIIPs regulation:

PRIIPs started to apply in January imposing requirements for pre-contractual, standardised disclosure for packaged retail and insurance-based investment products.

New rules on zoning and environmental law:

The Flemish Decree with respect to zoning and environmental law (the "Codex train") was adopted in December 2017 with a phased entry into force. As of 1 August 2018 the single permit, which already included the building permit, the allotment permit and the environmental permit, also contains the socio-economic permit and the permit for the modification of vegetation (previously the nature permit). Finally, the Flemish Decree of 25 April 2014 on the enforcement of the single permit entered into force on 1 March 2018 bringing new enforcement rules with respect to the single permit.

Further regionalisation of the lease legislation:

On 1 July 2014, leases became regional matters. In 2017 the Brussels Region adopted its new Ordinance regulating housing leases which came into force on 1 January 2018. In the Walloon Region (i) a new Decree on residential leases came into force on 1 September 2018, and (ii) a new Decree on short-term commercial leases came into force on 1 May 2018. In the Flemish Region, entry into force of the Decree on residential leases on 18 May 2018 was postponed until 2019.

Co-ownership in Real Estate:

The management and decision-making processes of co-ownerships are being amended, with effect as from 1 January 2019. The main changes include (i) the softening of certain decision-making majority requirements, (ii) the (limited) possibility for the signatories of the initial co-ownership statutes to amend the statutes before the provisional delivery of the common parts and (iii) the reservation of the right to vote to the paying co-owners, in relation to parts of the costs borne only by part of the co-owners.

Adoption of new Walloon Soil Decree:

The Walloon Decree on Soil adopted on 1 March 2018 introduces soil information obligations in the event of a transfer of land in the Walloon Region, (the transfer of land is defined in a broad sense). The new rules will come into force on 1 January 2019.

Year to come

Belgian Law in 2019

2018 saw a significant number of new legislation affecting our clients and their sectors directly – and there is more to come in 2019.



Brexit:

The UK is set to leave the EU on 29 March 2019. If the Withdrawal Agreement with the EU is **ratified** there will be a transition period until at least the end of 2020, during which the UK will for most purposes be treated as a member of the EU.

New Companies & Associations Code – Listed Companies:

The new Code will allow listed companies to introduce double voting rights to reward shareholders' loyalty. A decision will need to be taken by the shareholders' meeting by a two-thirds majority. If a company opts for that system, all shareholders of the company having held their shares in registered form for at least two years will benefit from double voting rights for as long as they do not transfer their shares or convert them into dematerialised shares. Each company will need to carefully assess whether or not to propose the introduction of double voting rights to the shareholders' meeting.

New Companies & Association Code – SRL/BV new style:

The SARL/BVBA becomes the SRL/BV and is put forward as the reference company form, for both (very) large companies and SMEs. It is a modern vehicle that will provide greater flexibility, for instance in private equity or real estate transactions, for family owned businesses or when setting up a joint venture structure. The notion of capital is abolished and parties can more freely determine the rights attached to shares (including multiple voting rights). There is greater flexibility, both in terms of amount and figures on the basis of which distributions are made. If the articles of association so provide, an exit can take place at the expense of the company's assets. With this greater flexibility comes greater responsibility: for instance, a double test applies for any kind of distribution. One must have specific reasons to still choose (the more complex and sophisticated rules governing) the SA/NV in the future.

New Companies & Associations Code – Directors' Liability:

The new Code also introduces a cap on the amount for which directors can be held liable. The cap is proportionate to the size of the company, being determined on the basis of its average balance sheet total and turnover (VAT excluded) over a period of three financial years. It ranges from EUR 250,000 to EUR 12 million. The cap applies vis-à-vis the company and third parties, regardless of whether the liability has a contractual or extracontractual basis. In addition, the cap applies to all directors as a group and for each event (or combination of events) that gives rise to liability, regardless of the number of claimants or claims. Any possibility of prior exoneration of liability (in the articles of association or in an agreement) is excluded by the Code. However, third parties, such as the parent company/controlling entity or shareholders of the company, may undertake to indemnify the directors for liability that they might incur in the performance of their duties.

New Companies & Associations Code – Transitional law

The new Code will apply to new companies as from 1 May 2019 and to existing companies as from 1 January 2020. Articles of associations of existing companies will have to be brought into conformity with the (entire) new Code at the first occasion that these articles of association are modified after 1 January 2020 (subject to limited exceptions) and by 1 January 2024 at the very latest. Mandatory provisions of the new Code will have full effect as from 1 January 2020, regardless of contradictory provisions in the articles of association. Existing companies may decide to "opt in" for full application earlier (with effect as early as from 1 May 2019).

2019 highlights

Exciting, extensive changes to Belgian company law are on the horizon. Companies will be able to operate in an attractive modern and flexible legal framework, enhancing Belgium as a hub for investments.

2019 highlights

An extensive legislative reform of the Belgian Civil Code is underway. It aims to modernise, clarify and integrate backbone rules of the law in the areas of Property, Obligations, Contracts and Evidence.

Reform of the Civil Code – Book III:

A comprehensive reform of the Belgian Civil Code is underway, including a reform of the section on property law (future Book III). A first draft of Book III is already available and is expected to be approved by Parliament before the end of 2018 and come into force in 2021. Book III brings together the various scattered laws on rights in rem, modernises antiquated legal concepts and introduces the concept of volumes in property law, allowing for flexibility in complex real estate projects.

Reform of the Civil Code – Book V:

In March 2018 the Council of Ministers gave the green light for the reform of the law of obligations. The reform aims to (i) *codify* existing concepts developed by the case law and the legal authors, (ii) *restructure* the various regimes (sources, contracts, obligations), (iii) *introduce new concepts* such as hardship theory, anticipatory breach, price reduction as sanction for a (quantitative) partial execution of a contract and also at (iv) *increase the creditor's power to manage a contract* by only requiring a unilateral written notification to the debtor in order to declare the contract null, to replace the debtor or to terminate the contract.

Reform of the Civil Code – Book VIII:

Book 8 of the new Civil Code, which was approved by the government on 25 October 2018, aspires to adapt the Belgian rules on evidence to the needs of litigants in the 21st century. The reform aims at: (i) providing for a uniform and contemporary definition of crucial concepts (such as signature and writing); (ii) codifying existing principles developed by case law and legal scholarship (such as the duty to collaborate in the administration of evidence); (iii) relaxing the evidentiary formalism (e.g. by elevating the threshold above which documentary evidence is required from EUR 375 to EUR 3,500); and (iv) introducing some new techniques (such as a reversal of the burden of proof in exceptional circumstances).

Excess profit rulings state aid case:

The EU Commission concluded in 2016 that the “excess profit rulings” constitute an illegal state aid scheme. In the course of 2016, Belgium and several alleged aid beneficiaries applied to the EU General Court for the annulment of the Commission’s decision. In the summer of 2018 an oral hearing took place in two pilot cases. The timing of the final decision of EU General Court in this two pilot cases is unclear. However, a final decision is expected in the course of 2019. In the meantime, the EU Commission continues investigating tax rulings issued by several EU Member States.

Horizontal monitoring:

The roll-out of a “co-operative tax compliance programme” has started, which should become a new pro-active and cooperative procedural framework for ‘very large’ companies to consult on an ongoing basis with the tax authorities, which should lead to more legal certainty and less complex tax audits. Participants must have been fully compliant with their tax obligations during the last three years. The exact rules/practical implementation of the monitoring/interplay with the Ruling Commission are still uncertain.

Reform of the Belgian Civil Code and its impact on contractual obligations and evidence in IT transactions:

The new Civil Code will enshrine, *inter alia*, new provisions on the conclusion of agreements via electronic means, as well as new rules on e-evidence and e-signature. The draft bill on evidence was approved by the Federal Government and sent to the Parliament for review and adoption. The draft bill on contract law has been reviewed by the Federal Government and the Council of State, but has not been sent to the Parliament yet.

ePrivacy regulation:

During 2019 the EU is expected to adopt this Regulation which supplements the General Data Protection Regulation and contains specific rules on the use of cookies and electronic marketing.

The implementation of the NIS Directive:

The EU adopted the Directive on security of network and information systems (2016/1148) (“NIS Directive”) on 6 July 2016. Pursuant to the NIS Directive, digital service providers and companies that operate essential services must protect their information technology systems and notify security incidents to the competent regulator.

The NIS Directive would be implemented by 9 May 2018. In Belgium, a draft bill was approved in April 2018 by the Federal Government and reviewed thereafter by the Council of State. This draft is now with the Parliament awaiting review and adoption.

Prospectus law and offer Royal Decree:

A **new prospectus law** was published in July 2018. The law implements certain aspects of the **EU Prospectus Regulation 2017/1129**, and brings changes to the Belgian public takeover bid regime. Like the Prospectus Regulation, the law provides for a phased entry into force with full application from 21 July 2019. A **Royal Decree** on the publication of an information note, public takeover bids, squeeze-out offers and commercialisation of investment instruments to retail consumers complements the new prospectus law.

Register of Ultimate Beneficial Owners (UBO):

Pursuant to the **Royal Decree** on the practical modalities of the UBO register, each Belgian legal entity must disclose specific information about its ultimate beneficial owners. This information will be published in the publicly available UBO register. The deadline for providing the register with the relevant information on UBOs has been extended to 31 March 2019.

Anti-money laundering:

MLD5 was published in July. The Directive amends MLD4 and has to be implemented by January 2020. The Directive toughens EU rules on information concerning the beneficial ownership of companies and trusts and has important implications for virtual currencies. It also updates EU rules on the use of prepaid cards and due diligence for high risk countries and aims to improve information sharing between AML / CFT authorities and bank supervisors. [Read more...](#)

New guidelines on information exchange:

In September 2018, the BCA issued draft guidelines on information exchange by professional associations and market intelligence companies. They are modelled on the European Commission’s guidelines. An open call for views from interested parties was closed mid-November, so the guidelines are likely to be formally adopted early 2019. This may lead to closer scrutiny of professional associations and market intelligence companies.

Enforcement priorities:

In its 2018 enforcement priorities paper, the BCA indicated that it would focus on the telecom, distribution and pharmaceutical sectors. Regarding the telecom sector, the BCA has concerns about packaged services (TV, Internet, mobile, land line). It also indicated that it would continue to pay close attention to bid rigging in public procurement. Although the BCA will only formally announce its enforcement priorities for 2019 at the start of the new year, it is unlikely that there will be fundamental changes. Looking further ahead, the new leadership of the BCA should take office in the second half of 2019 and may shift priorities for 2020 onwards.

“Soft end-of-career system” for older employees:

Following an initiative from the legislator, as from 2019, employees who are at least 58 years old may be able to decrease their work schedule on an individual basis in mutual consent with their employer. The objective is to keep such employees working longer. In that respect, the employer can grant an indemnity to the employee which is exempt from social security contributions to compensate the loss of remuneration due to a decreased work schedule.

Belgian legislation transposing IORP II:

At the end of August 2018, the Council of Ministers approved a draft bill transposing the IORP II Directive into Belgian legislation. In this respect, the current Belgian legislation on Institutions for Occupational Retirement will be amended and new governance requirements amongst others will be implemented.

What now?

Your contacts

We hope that you have found this guide useful.
Please contact your usual Linklaters contact, if you would like to discuss any of these matters further.



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