

Dividend distributions are not just a balance sheet process. There are rules that apply, and liability risks that come with it. In this Strelia Corporate Series, we provide an overview of these rules and risks for dividend distributions in NV/SA and BV/SRL companies.

1. Types

There are three categories of dividends under Belgian company law.

- **Ordinary dividends** (*gewoon dividend/dividende ordinaire*). These are decided at the annual general meeting approving the annual accounts. They originate from the profit gained in the financial year whose annual accounts are being approved and are increased by available reserves and increased or decreased by profits or losses carried forward, respectively.
- **Intermediary dividends** (*tussentijds dividend/dividende intercalaire*). These are paid out from the result of the latest approved annual accounts. They can be distributed at any time. In essence, this type of dividend is an ordinary dividend that has been distributed after the annual accounts have been approved. The distribution allows the general meeting to revisit its earlier profit allocation decision.
- **Interim dividends** (*interimdividend/dividende intérimaire*). These can be distributed at any time as well. They are paid out from profits of three sources: (i) profits from the ongoing financial year, (ii) carried-forward profits and, (iii) if the annual accounts for that financial year have not yet been approved, profits from the previous financial year.

2. Who Decides?

In principle, the general meeting decides on dividend distributions. However, for interim dividends, the decision-making power can lie with the board of directors, and the applicable rules differ between a BV/SRL and an NV/SA.

- BV/SRL: The general meeting may decide on interim dividends, but the articles of association can also grant this power to the board of directors. If there is such power allocation, both the general meeting and the board can decide.
- NV/SA: The general meeting may not decide on interim dividends. The articles of association may grant this decision-making power to the board. If so, the board has exclusive authority to distribute interim dividends.

Granting such power to the board increases flexibility, particularly in companies with a dispersed shareholder base in which convening a general meeting is impractical.

3. The Guardrails Before Payout

Excessive distributions can endanger a company's solvency and liquidity. Belgian company law therefore requires that distributions such as dividends undergo statutory tests, which differ according to the company type.

- In an NV/SA, only the net asset test (*nettoactietest/le test de l'actif net*) applies. No distribution may be made if net assets fall below the amount of paid-up (or, if higher, the called-up) capital plus unavailable reserves. The sum of net assets equals the total assets minus the liabilities and certain non-amortised costs. If a significant period has elapsed between the closing of the annual accounts and when the board decides to distribute, the board should verify whether distribution capacity remains available, taking into account any subsequent losses.

- In a BV/SRL, two tests must be conducted: the net asset test and the liquidity test. Under the net asset test, the company may not distribute dividends if net assets are negative or can become negative because of the distribution, or if they can fall below any amount of equity that is legally or statutorily unavailable. In addition, the board must perform a liquidity test before the actual distribution. For this test, the board must assess whether the company will be able to settle its payable debts in at least twelve months' time after distribution. This forward-looking assessment must be documented in a special board report and the statutory auditor (if one is appointed) must issue a special report.
- For interim dividend distribution in an NV/SA, Belgian company law requires an interim profit-and-loss statement not older than two months before the decision to distribute. In a BV/SRL, such statements are not required for an interim dividend distribution, although they remain strongly recommended to prevent distributions of sums that exceed the company's financial capacity.
- If the board has prepared an interim profit-and-loss statement, whether mandatorily (in an NV/SA for interim dividend distribution) or voluntarily (in a BV/SRL), the statutory auditor (if one is appointed) must issue a special report.
- The board must perform the net asset test when deciding on the distribution. For the liquidity test, this must be done on the dividend payment date (*datum van betaalbaarstelling/date à laquelle le dividende devient exigible*), not the date of the distribution decision. The liquidity test can be performed anticipatorily at the time of the distribution decision, but it must then cover the period from the payment date onwards. If circumstances change between the decision and payment dates, the board must update the liquidity assessment.

4. Assets Instead of Cash

Dividends may also be distributed in kind, subject to the same statutory distribution tests as those that apply to cash dividends. This mechanism is especially useful in group restructurings as it allows assets such as shares, intercompany receivables, or other assets to be transferred without cash outflows. Assets must be valued at fair market value for tax purposes (withholding tax and transfer pricing). In addition, applicable transfer formalities must be observed. These include registering the transfers in the company's share register or complying with formalities so that the transfer binds third parties, such as recording the transfer in a notarial deed.

5. Getting the Money Back

Both NV/SAs and BV/SRLs may seek recourse for unlawful distributions and recover the sums paid out. These would be unlawful if they were paid out in breach of the net asset or liquidity tests, or both. Courts may limit recovery to the amount exceeding the statutory thresholds. The recovery scheme differs according to company type: in an NV/SA, recovery could be sought only against the shareholders who acted in bad faith (i.e., those who knew or should have known the distribution was unlawful), whereas in a BV/SRL, unlawful distributions are in principle recoverable irrespective of the shareholder's good or bad faith. Claims must be brought within five years from the date of distribution.

Recovery actions are initiated by the board. In practice, boards may be reluctant to pursue claims against shareholders, particularly in a going-concern context. If the company fails to act and a creditor remains unpaid, that creditor may in principle bring a lateral claim (*zijdelingse vordering/action oblique*) in the name and on behalf of the company to seek recovery.

If the company is declared bankrupt, the insolvency administrator takes control of the bankrupt estate, which includes the company's assets and creditors' rights. If prior unlawful distribution occurred, the administrator may seek remedies on the company's behalf and seek recovery of such unlawful distributions.

6. **When Directors Pay the Price**

Directors can incur both civil and criminal liability for violations of the Belgian Code of Companies and Associations.

Directors can be held jointly and severally liable under civil law if they did not apply the net asset test and/or liquidity test correctly or at all. This liability for breach of the net asset test is an objective liability rule, meaning no fault of the directors must be proven. In a BV/SRL, directors can also incur civil liability if they knew or should have reasonably known that the distribution would manifestly prevent the company from being able to pay off its debts for at least twelve months after distribution.

In addition, directors can face civil liability if they breach their general duty of care, even if they had complied with the abovementioned statutory test. For example, they could be held liable if a dividend distribution endangers the company's solvency, material negative developments were ignored, or unlawful distributions are not recovered, as all these acts would jeopardize the company's interest. Such liability will be assessed case by case according to the standard of a normal, prudent, and diligent director.

Claims for director liability have a five-year limitation period.

Furthermore, the Belgian Code of Companies and Associations explicitly imposes criminal liability on directors for breach of the net asset test and for failure to perform the liquidity test.

These risks underline the need for careful financial assessment and proper documentation.
