

Over & out for the merchant notion

The law of 15 April 2018 has transposed a significant reform of our company law into practice. The merchant notion is abolished. Instead a new business definition is introduced. The law of evidence is transferred to Civil Law Code. The changes apply in principle as from 1 November 2018.

New business definition is a fact

The merchant notion can be deleted from your memory. The merchant and trade notion refer to the previous century. The notion is obsolete and conflicts with the current economic reality. After more than 200 years the notion makes way for a modern business concept. The new concept business replaces the notions 'merchant', 'trader', 'trading company' and related notions. And the new concept is broad. By businesses is meant:

- individuals exercising independently a professional activity (so also practitioners of liberal professions);
- companies/corporations, including not-for-profit organisations and foundations, even if they do not offer goods or services on the market. Also public bodies unless they do not offer goods or services onto the market. But not the Federal state and its decentralised entities;
- other organisations without legal personality having a payout intention and making payments to their members or persons having a decisive influence on the policy of the organisation. Example: the so-called 'factual associations' fall outside the scope of the business concept, while partnerships and other corporations without legal personality still fall within the scope of the business concept.

The use of a material criterion (economic objective) gives way to a definition with formal criteria.

Consequences for the law of evidence: yes

These changes clearly have also consequences for the law of evidence. The trade law of evidence what now is found in the Trade Law Code - which dates from 1808 !! - is reformed into the business evidence law. All corporate evidence provisions are transferred to the Civil Law Code. They apply to all companies falling within the new business concept. Consequently they will also apply between and against liberal professions, not-for-profit organisations, foundations, .. Henceforth the Commercial Court will be named Business Court.

Consequences for the freedom of proof: no

There are no substantive changes to the law of evidence. Between or against businesses proof can be provided by any legal means, except for legal exceptions.

The freedom of proof only applies to transactions made by the business. It does not apply to businesses which want to prove against a party which is no business. On the other hand, the latter can use any legal means.

COMPTAFID-Benelux NV SA
Brussels

Bld. Edmond Machtensl. 180/100
B-1080 Brussels
Tel: +32 (0)2 410 75 75
www.comptafid.be

COMPTAFID-Benelux NV SA
Antwerp

Schijnparklaan 45
B-2900 Antwerp (Schooten)
Tel: +32 (0)3 658 89 02
www.comptafid.be

COMPTAFID (Schweiz) AG
Zürich

Seefeldstrasse 19 – Postfach
CH-8032 Zürich
Tel.: +41 44 250 2929
www.comptafid.ch

Legal transactions of individuals having a business, but which do not relate to this business, remain subject to the proof provisions which apply in civil cases. This means that independent individuals which are a business, liberal professions and farmers included, have to appear before the Business Court only for cases relating to this independent activity, and not for e.g. matrimonial problems.

Accounting as proof

The accounting of a business can serve as proof between businesses. The condition that this should be a lawful accounting is deleted. However, the lawfulness of the accounting will still play a role when the judge assesses its evidential value.

The judge can during a trial order the complete or partial disclosure of the accounting. He can do this in his official capacity or on demand of one of the parties. By doing so, he can impose measures to guarantee the confidentiality of the documents. Restrictions to the possibilities for the judge are no longer foreseen.

The accounting can be no proof against persons which are no business, except for the provisions concerning the oath.

The invoice as proof

The evidential value of an invoice is expanded to all sort of agreements and is no longer restricted to buy and sale agreements. An invoice accepted by a business provides evidence against that business.

As from November 2018

The above measures apply as from 1 November 2018. A royal decree can provide for an earlier date.