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Code of Companies and Associations: What changes on 1 January 2020?

Since May 2019, Belgium prides itself on a modern Code of Companies and Associations (CCA). The legislature provided for a gradual entry into force of the new Code. This newsletter discusses what changes on 1 January 2020.

The CCA entered into force on 1 May 2019 for newly incorporated companies, associations and foundations. It was not yet applicable on those which already existed at that time. However, such existing companies, associations and foundations could voluntarily choose to "opt in" and already render the CCA applicable through a modification of their articles of associations.

1. Entry into force for existing companies, associations and foundations

As of 1 January 2020, the **CCA** is **applicable to all companies, associations and foundations** (*i.e.* not only the new ones). This means, first, that all provisions in their articles of association which conflict with the CCA's mandatory rules are null and void and that, second, the CAA's non-mandatory rules are also applicable, however, only to the extent that the articles of association do not deviate from these.

As a consequence, as of 1 January 2020, the following rules e.g. automatically apply:

- Companies have to use the **new denominations and abbreviations** of their corporate forms in all communication and acts. This obligation exists even if the articles of association have not been amended to reflect the new denomination. E.g., a private limited liability company ("BVBA" or "SPRL"), is now called a private company ("**BV**" or "**SRL**"); a limited liability cooperative company ("CVBA" or "SCRL") is now called a cooperative company ("**CV**" or "**SC**").
- The paid-up part of the **capital** of a private company ("**BV**" or "**SRL**") and the paid-up part of the fixed capital of a cooperative company ("**CV**" or "**SC"**), as well as their legal reserve are in the company's accounts automatically **abolished** and without any formality transformed into a statutory unavailable equity account. The unpaid part of the capital of a private company and the unpaid part of the fixed part of a cooperative company are similarly transformed into a separate equity account "unclaimed contributions".

- Private companies ("**BV**" or "**SRL**") can only **distribute profits** applying a double test: a net assets and a **liquidity test**. This means e.g. that the directing body which decides on the distribution must establish that the company will have sufficient cash to meet its obligations for the next 12 months. This requirement correlates with the abolishment of the concept of capital in private companies.
- **Directors** in private companies ("**BV**" or "**SRL**") and public limited liability companies ("**NV**" or "**SA**"), as well as the members of the management board and the supervisory board in public limited liability companies, may **not** exercise their mandate under an **employment contract**. This is a generalisation of the existing prohibition, which applied to directors of public limited liability companies.
- The new general provision that a director who has a **conflict of interest** is **not** allowed to **participate in** the **deliberation** of that decision applies to all directors of private companies ("**BV**" or "**SRL**"), public limited liability companies ("**NV**" or "**SA**") and non-profit associations. This means that a director who has an interest of a patrimonial nature, which conflicts with the company's interest (e.g. he wants to rent real estate to the company), is not allowed to participate in the deliberation on that decision. If all directors have a conflicting interest, the decision is submitted to the general meeting.
- The new provisions on **voting at the general meeting** and the neutralisation of abstentions in extraordinary general meetings apply. The latter means that **abstentions** are **not taken into account** in the calculation of the special majority. Under the old regime, abstentions were treated as votes against the proposed decision.
- Private companies ("**BV**" or "**SRL**") and public limited liability companies ("**NV**" or "**SA**") have to draft a **special report** in case of **issuance of new shares** and file it with the enterprise court registry. This report must contain a justification of the issue price and a description of the consequences on the patrimonial and membership rights of the shareholders. Up until now, such a report was only required in public limited liability companies when these new shares were issued below the fractional value of the old shares.

2. Obligation to bring articles of association in conformity

Companies, associations and foundations are obliged to **bring** their articles of association **in conformity with the CCA**. **When they modify their articles of association** after 1 January 2020, e.g. to issue new shares or to change the governance structure, they must in principle use this occasion to bring their articles in conformity. For companies, associations and foundations which do not modify their articles of association, there is the ultimate deadline of 1 January 2024 to bring their articles of associations in conformity with the CCA. Failure to do so will give rise to joint and several liability of the directors.

3. Abolished corporate forms

The objective of the legislature to simplify the existing corporate forms has led to the abolishment of several corporate forms. The only Belgian forms that remain are: the simple company without legal personality ("maatschap" or "société simple"), the general partnership ("VOF" or "SNC") or a limited partnership ("CommV" or "SComm"), the private company ("BV" or "SRL"), the public limited liability company ("NV" or "SA"), and the cooperative company ("CV" or "SC").

As for a cooperative company ("**CV**" or "**SC**"), the use of this company form is abolished for companies that do not pursue a cooperative ideal (e.g. law firms and accountancy firms).

Until these legal persons have converted into one of the remaining corporate forms, the former rules remain applicable on them. However, as of 1 January 2020, the **mandatory rules** of their **"equivalent" corporate form** have become **applicable**.

Legal persons whose corporate form is abolished can voluntarily convert into their "equivalent" corporate form. This requires a modification of their articles of association. Although it is recommended that such legal persons convert into one of the remaining corporate forms as soon as possible, the due date to do so is 1 January 2024. If such a conversion has not taken place before 1 January 2024, these legal persons will be automatically converted on that day.

4. Easier change of registered seat

The CCA makes it possible to change the registered seat more easily, i.e. without changing the articles of association. This is because the articles of association no longer have to indicate the address of the registered seat of the company. Now it is **sufficient that** the **articles indicate** in which **region** the seat is located without specifying the exact address.

This gives the flexibility to the directing body to relocate the registered seat within that region without having to change the articles of association.

For existing legal persons, the legislature provided the following transitional rules:

(i) Legal persons, whose articles of association already provide that the directing body can transfer the registered seat without intervention of the general meeting, can transfer their registered seat without a modification of the articles of association. The address of the registered seat is deleted upon the first coordination of the articles of association and replaced by an indication of the region in which the registered seat is situated.

(ii) Legal persons, whose articles of association do not grant such power to the directing body, need to modify their articles of association to transfer the registered seat. However, the directing body has the power to decide upon such modification.

5. Specific issues

Not all rules are applicable as of 1 January 2020. For several specific issues, the entry into force is organised differently:

- Companies that have a **direction committee** ("directiecomité" or "comité de direction") shall continue to apply the rules of the old Companies Code on the direction committee until they bring their articles of association in conformity with the CCA, the due date being 1 January 2024.
- Under the old rules, a **non-profit association** could not pursue **commercial activities**. The CCA abolishes this restriction and allows such associations to pursue the same activities as a company. However, this restriction is only lifted for existing associations after a modification of their articles of association to include such commercial activities.
- The provisions on **director's liability** (including the caps on such liability) are only applicable to such damaging acts, which take place after the date on which the CCA has become applicable. This means that those provisions will apply on **damaging acts as of 1 January 2020**, unless the company decided to opt-in earlier. For damaging acts that occurred before that date, the old rules will continue to apply, even when the director's liability is invoked later.

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