

New Year's Day 2020 – Fireworks, Parades, and ...

... on the legal front, the new BCCA: Belgian Code of Companies and Associations. Granted, everyone should be an expert in Belgian company law by now, even long before this instrument reforming Belgian company law had entered into force on 1 May 2019.

For every legal entity that was newly incorporated after 1 May 2019, the BCCA was the go-to law. The BCCA immediately applied to them, and their articles of associations would simply be aligned with it. For all “old” entities (those incorporated before then), 1 January 2024 is their deadline for having their articles of associations adapted and aligned with the BCCA, but they were also given the possibility to “opt in” before 1 January 2024 to the BCCA’s scope of application. Apart from the adjustment time needed for legal practitioners, this transitional system and the BCCA’s entry into force seemed to be rather clear. But one important date in between these two dates seems to be somewhat overlooked. That is 1 January 2020: when the mandatory provisions of the BCCA will apply to every single legal entity in Belgium. The “old” entities that did not adapt their articles of associations yet in accordance with the BCCA are no exception to the rule. That is why we choose to feature in this December edition of our M&A Series the BCCA mandatory rules and their implications in practice.

Mandatory Rules

Identifying a mandatory provision is not always easy. Fortunately, the preliminary legislative works were able to guide us a great deal in this respect. It is generally accepted that the provisions that are not allowed to be deviated from, often backed by penalty of nullity, are mandatory provisions.

The BCCA’s mandatory provisions, whose mandatory nature is explicitly acknowledged by the legislature, which apply to every Belgian entity as from 1 January 2020, include: (i) the names and abbreviations of the types of entities, (ii) the (profit-) distributions to shareholders, (iii) the exclusion of employment contracts of directors in their capacity as director, (iv) the definition of day-to-day management, (v) the management of conflicts of interest in administrative bodies, (vi) some rules on shareholders at the expense of the equity of the company, (vii) some rules on the acquisition of own shares in public limited liability companies, (viii) the general framework on director’s liability, (ix) the nullity of decisions of corporate bodies, (x) the new liquidation rules, and (xi) the neutralisation of abstentions from voting in general shareholders’ meetings. Some of these provisions were already part of general or wide-spread knowledge, but they have now been codified and officially have mandatory status.

Practical Applications

For the purpose of this Series, we will concentrate on the most striking novelties.

Forms

First and foremost, if your company is not a public limited liability company (*NV/SA*), its form and the form abbreviation will change. But no need to worry too much on this as there’s no need to amend the articles of associations for this alone. The form change will apply immediately starting from New Year’s Day, and all you must do is to change the legal form of your company and its abbreviation on the official documents issued by the company. To illustrate this, for example, the *BVBA/SPRL* (*besloten vennootschap met beperkte aansprakelijkheid/société privée à responsabilité limitée*) will automatically have the new abbreviation *BV/SRL* (*besloten vennootschap/société à responsabilité limitée*). Other terminology-related changes have to be noted as well. In French and Dutch, the terms “*gérant*” and “*associé*” or “*zaakvoerder*” and “*vennoot*” in a *BVBA/SPRL* are out of the question, but for all entities, we will use the terms “*administrateur*” and “*actionnaire*” or “*bestuurder*” and “*aandeelhouder*”.

No Capital

More far-reaching for the newly created “no-capital” BV is that from 1 January 2020 on, the profit allocation will only be allowed after the performance of the net-asset test and the liquidity test. Furthermore, as a counterweight to the abolition of the capital requirement, the BCCA provides that, for accounting purposes, the paid-up part of the capital and the legal reserve of the BV and the CV will automatically be converted into a statutory unavailable equity account. The uncalled part of the capital will be converted in the same way into an accounting record named “uncalled contributions”. Here again, the conversions occur automatically and without any formality. It goes without saying that the absence of capital will also lead to the redefinition of certain other notions, such as the alarm bell procedure.

Governance

In terms of governance, important changes that will soon apply involve: (i) the specification of “one management-mandate per natural person” and (ii) the innovative liability cap for directors and members of the executive and supervisory board. Today, many directors wear two hats on the board of directors. Natural person A will be both a director in his or her own name and a permanent representative of a director-company B in the board of directors of the same company. The BCCA is stopping this practice. Every natural person may only be a member of an administrative body in one capacity. We advise directors who still wear two hats to resign from one of their capacities before the end of this year (2019). And last but not least is the directors’ liability cap, setting a limit on the sum of money for which a director can be held liable.

Articles of Association

Finally, be aware that “old” companies must bring all of its articles of association in compliance with the BCCA at the time of the first contemplated amendment of their articles of association after 1 January 2020, except in certain cases. In any event, starting from 1 January 2020, any provision in the company’s articles of association that contravene the BCCA mandatory provisions are regarded as null. All other supplementary provisions of the BCCA will only become applicable from that same date if they have not been excluded by statutory clauses.



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