

Belgian Code on Companies and Associations

A practical handbook on the new law

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Introduction

On 28 February 2019, the Belgian parliament enacted a new Belgian Code on Companies and Associations.

The Belgian Code on Companies and Associations (the “BCCA”) repeals the existing Belgian Companies Code (the “Current BCC”). The BCCA aims at modernising and simplifying company law in order to make Belgium more attractive for both domestic and foreign businesses. The BCCA will offer more flexibility to Belgian companies, but will also require them to amend their articles of association and bring them in line with the provisions of the BCCA. We have created this guide in order to give an initial overview of the main changes which the BCCA ushers in. We hope it is helpful, and remain available to answer any questions you may have.

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Key changes

- Some company forms, such as the Comm.VA/SCA, have been abolished
- The BVBA/SPRL has been rebranded as BV/SRL and becomes the standard form for non-listed companies with limited liability
- Both the BV/SRL and the NV/SA can have one single founder or shareholder
- The registered office will be the only relevant factor to determine the applicable company law
- Non-profit organisations are now allowed to pursue profit-making activities, provided that the profits are not distributed to members or directors

1/ Key changes

Reduction of company forms

The BCCA reduces the number of possible company forms. Some company forms are abolished, such as the Commanditaire vennootschap op aandelen (“Comm.VA”)/ Société en commandite par actions (“SCA”). The remaining company forms will be granted the flexibility to adopt the specificities of the abolished forms in the articles of association, if desired.

The Besloten vennootschap met beperkte aansprakelijkheid (“BVBA”)/Société privée à responsabilité limitée (“SPRL”) remains as a company form, but has been rebranded as Besloten vennootschap (“BV”)/Société à responsabilité limitée (“SRL”). There will be no minimum capital requirements for the BV/SRL (as discussed below), and its founders (or shareholders) will enjoy considerable contractual freedom in drafting the articles of association. It is therefore expected that the BV/SRL will become the standard form for non-listed companies with limited liability.

The cooperative company with limited liability (Cooperatieve vennootschap met beperkte aansprakelijkheid (“CVBA”)/ Société coopérative à responsabilité limitée (“SCRL”)) remains a company form, but will be reserved for companies which aim at stimulating the shareholders’ economic or social activities. Companies currently incorporated as a CVBA/SCRL which do not meet the definition of the BCCA will need to be converted into a BV/SRL.

No minimum number of shareholders

Both the BV/SRL and NV/SA can be incorporated by one single founder. Moreover, after incorporation, the fact that all shares are in the hands of one shareholder will not mean that that shareholder is personally liable for all of the company’s debts. This important change will generally enable the simplification of company group structures and facilitate the corporate housekeeping within those groups.

Real seat replaced by registered seat

Under current Belgian conflict-of-law rules, the nationality of a company, and therefore the applicable company law, depends on the place where management decisions are taken. The BCCA abandons this “real seat” doctrine and adopts the “incorporation” doctrine. This means that the location of a company’s registered seat becomes the only relevant factor to determine the applicable company law. Hence, a company with its registered seat in Belgium will be able to move its headquarters abroad while still being considered as a Belgian company and being governed by Belgian law. However, for corporate income tax purposes, the place of effective management will remain an important criterion for determining whether a company qualifies as a Belgian tax resident.

Furthermore, the BCCA contains a specific procedure allowing Belgian companies to convert to a foreign company form. Such conversion requires the transfer of the registered seat by an 80 per cent majority of the votes in the shareholders’ meeting and the involvement of a notary public. Conversely, the BCCA also contains a procedure allowing foreign companies to become a Belgian company by moving their registered seat to Belgium.

Non-profit organisations

The BCCA not only regulates companies, but also non-profit organisations, such as non-profit associations (Vereniging zonder winstoogmerk (“VZW”)/Association sans but lucratif (“ASBL”)) and foundations. Under the BCCA, it will be possible for such organisations to pursue profit-making activities, provided that those profits are used exclusively for the realisation of their social purpose. It remains strictly prohibited for non-profit associations and foundations to distribute profits to their members or directors. Hence, the distinguishing criterion between non-profit associations and companies becomes profit distribution, rather than profit seeking.

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Share capital and distributions

- The concepts of share capital and minimum capital requirement have been abandoned for the BV/SRL
- Interim dividends can be declared throughout the entire financial year and without waiting periods, including by a BV/SRL
- Companies are allowed to repurchase more than 20 per cent of their shares

2/ Share capital and distributions

Share capital and minimum capital requirement abandoned in BV/SRL

The concepts of share capital and minimum capital requirements have been abandoned for the BV/SRL. This does not mean, however, that shareholders no longer need to contribute to the company's equity. The founders of a BV/SRL will be obligated to provide "sufficient" equity, in view of the company's anticipated activity, taking into account the other financing sources. In this respect, the founders shall justify such equity amount in a more elaborated financial plan. Existing share capital will be automatically converted into a statutory unavailable reserve, which companies can make available for distribution by changing their articles of association.

The abolishment of share capital within the BV/SRL implies the amendment of various other rules, which were until now linked to the concept of share capital:

- The requirement to establish a legal reserve fund has been abolished
- All distributions to shareholders (e.g., payment of dividends or share repurchase) are governed by the same rule: No distribution shall take place if, as a result of the distribution, the net assets of the company would become negative (solvency test) or the company would not be able to honor its debts within twelve months following the distribution (liquidity test). The same tests apply to financial assistance, i.e., a company financing the acquisition of its shares by granting loans to shareholders or providing collateral for such loans
- The "alarm bell" procedure shall be applied if the company's net assets have become or threaten to become negative

Interim dividends

Under the BCCA, it becomes possible for the BV/SRL to distribute interim dividends. Moreover, it becomes easier for both the BV/SRL and the NV/SA to declare such interim dividends: (i) the interim dividends may be distributed out of the profit of the previous financial year as long as the annual accounts of that year have not been approved; (ii) the interim dividends may be declared throughout the entire year and not, as is currently the case, after a waiting period of six months following the end of the previous financial year; and (iii) no minimum waiting period between two distributions applies anymore. Interim dividends still require prior authorisation of the board of directors in the articles of association.

Repurchase of shares

Under the BCCA, it becomes easier for companies to repurchase their own shares: The repurchase is not limited to 20 percent of the shares, and the company is not obliged to resell the shares within two years. Instead, companies may choose either to destroy the shares or to keep them on their balance sheet. Other mandatory requirements remain in place, and the repurchase of shares by the BV/SRL is subject to the solvency and liquidity test described above.

3/

Shares and other securities

- The BV/SRL is allowed to issue subscription rights and convertible bonds
- Non-listed companies are allowed to issue shares with multiple voting rights
- Listed companies are allowed to issue loyalty shares
- Founders or shareholders of a BV/SRL are allowed to opt out of transfer restrictions
- Special approval and publication requirements for change of control provisions only apply to listed companies
- Simplification of the rules applicable to bonds and the bondholders' meeting

3/ Shares and other securities

Categories & form of securities in BV/SRL

Under the Current BCC, the BVBA/SPRL is only allowed to issue shares and bonds in registered form. Under the BCCA, the BV/SRL is allowed to issue any kind of securities, such as subscription rights and convertible obligations, both in registered and dematerialised form. Furthermore, securities of the BV/SRL may be listed on the stock exchange, in which case various rules applicable to the NV/SA shall apply by analogy to the BV/SRL.

Shares with multiple voting rights

Under the Current BCC, multiple voting shares are prohibited. Under the BCCA, the principle of “one share, one vote” becomes a default rule, from which companies may derogate in the articles of association. Non-listed companies are allowed to issue shares (or other securities) with double or multiple voting rights.

Listed companies may also derogate from the principle, subject to certain conditions aiming to reward loyal investors of such companies. Shareholders holding their registered shares for two consecutive years may see their shares entitled to a double voting right. Such right must be provided in the articles of association, which can be modified for this purpose by a majority of two-thirds of the votes. These “loyalty shares” will lose their double voting rights upon transfer until the transferee has also held the shares for two consecutive years.

Shares without voting rights

Finally, the BCCA removes most limitations to the issuance of non-voting shares in the BV/SRL and the NV/SA. Consequently, companies may freely issue such shares and determine the rights attached thereto in their articles of association. The holders of non-voting shares must, however, remain entitled to vote on modifications of the rights attached to their shares and on some types of corporate restructuring.

Transfer restrictions and change of control provisions

Under the Current BCC, the transfer of shares in the BVBA/SPRL, both inter vivos and by reason of death, requires the consent of the shareholders’ meeting. Under the BCCA, the articles of association may opt out of this rule, for instance by stipulating that the shares are freely transferable. Hence, the BV/SRL may decide not to remain a closed company. This change means that shares in the BV/SRL will be more readily available as financial collateral, without transfer restrictions hindering the enforcement of pledges over such shares.

In the NV/SA, it remains possible to include transfer restrictions in the articles of association or a shareholders’ agreement, subject to certain conditions. Under the BCCA, a share transfer which violates a transfer restriction will not be effective against the company and the shareholders, provided that the restriction is included in the articles of association and published in the annexes of the *Belgian State Gazette*.

Finally, under the BCCA, requirements applicable in respect of a change of control provisions entered into by a company (i.e., approval of the shareholders’ meeting and publication in the *Belgian State Gazette*) will only be applicable to listed companies and provided that such clause can have a significant impact on the financial situation of the company or create a significant obligation for the company.

New legal regime for bonds

The legal regime on the issuance of bonds has been substantially changed. The rules on decision-making by the bondholders’ meeting have been modernised, allowing, for instance, written resolutions and electronic voting. The requirement of court homologation has been abandoned. Furthermore, in order to streamline the decision-making process, the bondholders’ meeting or the issue conditions may appoint one or more agents, authorised to act on behalf of all bondholders. The agents may also be authorised to alter the terms and conditions of the bonds. Holders of non-convertible bonds are no longer required to be invited to the shareholders’ meeting, which will make convening the shareholders’ meeting less burdensome in some cases.

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Governance

- Companies can appoint a single director
- Companies incorporated as an NV/SA can opt for a two-tier board
- Companies may grant a severance payment to directors or stipulate a notice period
- Boards may adopt resolutions in writing
- Daily management is defined as day-to-day business of the company, as well as decisions and actions which either are urgent or have little impact

4/ Governance

Choice between three types of governance

Under the Current BCC, companies incorporated as an NV/SA are governed by a board of directors consisting of, usually, at least three (but sometimes two) directors. Under the BCCA, this is still the default rule, but companies have the possibility to opt for the appointment of a single director, who has the same powers and responsibilities as a board. This option also remains available within the BV/SRL. Besides the board of directors and the single director, companies incorporated as an NV/SA will also have the possibility to opt for a two-tier board, whereby the company is managed by a management board (directieraad/conseil de direction) and a supervisory board (raad van toezicht/conseil de surveillance).

Revocability of directors

The BCCA abandons the principle that the directors of an NV/SA must always be revocable at will (*ad nutum*), and explicitly provides for the possibility to grant a severance payment or to stipulate a notice period. The appointment is still limited to a maximum duration of six years. Directors of a BV/SRL may still be appointed for a fixed term, whether or not this is specified in the articles of association, for a duration which may exceed six years.

Permanent representatives

When a legal entity is appointed as a director, such legal entity must appoint a permanent representative. In order to avoid a non-transparent cascade of permanent representatives, the BCCA requires the permanent representative of a legal entity to be a natural person. Furthermore, it is explicitly stated that a permanent representative of a legal entity cannot personally be appointed as a director of the same company.

Under the Current BCC, the permanent representative must be a shareholder, manager, director or employee of the legal entity. The BCCA abandons this requirement, which means that companies will have more flexibility in appointing a permanent representative, provided it is a natural person.

Daily management redefined

The board of directors may entrust daily management of the company to one or more natural persons or legal entities. This is henceforth also possible for a BV/SRL. The BCCA also gives a new definition of daily management, which shall cover the day-to-day business of the company, as well as decisions and actions that are either urgent or have little impact.

New rules on decision-making

The BCCA introduces various new rules in relation to the decision-making process of the board of directors (or the supervisory board). The board may unanimously adopt all resolutions in writing, unless the articles of association stipulate otherwise. Furthermore, it has been explicitly confirmed that the board of directors (or the supervisory board) may be authorised by the articles of association to issue an internal regulation, in which it sets out the procedural rules of its decision-making process. Such regulation must, in principle, not be published.

Under the Current BCC, members of the board of a non-listed company who have a personal, financial interest in a board decision which conflicts with the company's interest, must disclose their conflict of interest. In listed companies, such directors must also refrain from participating in both the deliberations and the vote on that board decision. The BCCA extends this rule to all companies, whether listed or not. If all directors (or, as the case may be, the single director) face a conflict of interest, the decision must be made by the shareholders at the shareholders' meeting.

5/

Liability and conflict resolution

- Director liability is capped to certain amounts in case of 'slight' negligence.
- Contractual arrangements regarding the price will be binding upon the court in case of judicial exclusion or exit
- Board decisions can be rescinded by the court on the same grounds as shareholder resolutions

5/ Liability and conflict resolution

Director and manager liability

In relation to liability of directors and members of the daily management team, the BCCA aims at finding a balance between responsibility and predictability of the amounts of the liability. On the one hand, it limits the liability of directors and members of the daily management team to a certain amount, which varies between €125,000 and €12,000,000 depending on the size and activities of the company. The cap, however, does not extend to cases of repeated negligence, gross negligence, fraud, any kind of liability to the tax and social security authorities, and to various other special liability regimes. On the other hand, it is henceforth prohibited for companies (and their subsidiaries) to waive any claim against directors or managers in advance (i.e., prior to the act or event giving rise to the liability), or to hold them harmless from liability incurred toward either the company or third parties. It remains, however, possible for the company to subscribe to director liability insurance.

Rescission of board decisions

Currently, shareholders' resolutions may be rescinded by the court on certain grounds, such as fraud, abuse of majority or violation of the law. Under the BCCA, the court will be authorised to rescind board decisions on the same grounds.

Exclusion and exit

Under the Current BCC, shareholders can be forced by the court to sell (judicial exclusion) or purchase each other's shares (judicial exit) in case of "valid reasons" as a way to resolve conflicts within a company. The BCCA maintains those possibilities for both the NV/SA and the BV/SRL, and now explicitly confirms that the court will be bound by provisions in the articles of association or a shareholders' agreement which determines the price of the shares.

In addition, the articles of association of a BV/SRL may give the possibility to the shareholders' meeting to exclude a shareholder for reasons specified therein, or conversely grant the possibility to the shareholders to have their shares redeemed by the company. Such possibility does not exist in the NV/SA.

6/

Dissolution and liquidation

- Companies having unpaid debts to third parties are eligible for the simplified dissolution procedure if certain conditions are met
- Appointment of liquidator must not be confirmed by the court in certain circumstances

6/ Dissolution and liquidation

Simplified dissolution procedure

The BCCA expands the scope of the “simplified dissolution procedure”, i.e., dissolution and liquidation of a company taking place on the same day, in one notarial deed, without the appointment of a liquidator. Companies with unpaid debts to third parties that do not deposit sufficient funds to honor those debts may apply the simplified dissolution procedure subject to the following conditions: (i) the respective debts have been included in the statement of assets and liabilities drawn up in the context of the dissolution procedure; and (ii) the respective creditors have provided their written consent to the application of the simplified dissolution procedure.

New rules on the appointment of the liquidator

The appointment of a liquidator must not be confirmed anymore by the president of the Enterprise Court, provided that it concerns a solvent liquidation. The confirmation is still required in case of an insolvent liquidation, except if the company only has debts to its shareholders and these shareholders confirm in writing that they agree with the appointment.



Entry into force

- BCCA applies to new companies incorporated after 1 May 2019
- BCCA applies to existing companies as of 1 January 2020, except for certain rules or in case of 'opt-in'
- Abolished company forms will be automatically converted on 1 January 2024, unless the company voluntarily decides to convert prior to that date

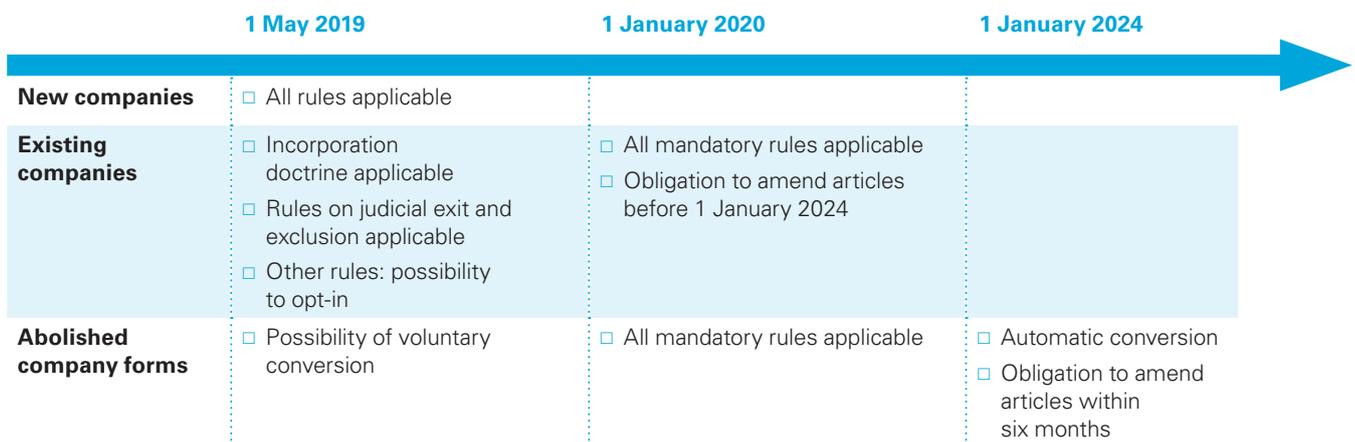
7/ Entry into force

The BCCA enters into force on 1 May 2019 and will immediately apply to companies which are incorporated after 1 May 2019. In respect of companies already existing on 1 May 2019, the BCCA shall apply as of 1 January 2020. Companies may, however, decide by a 75 per cent majority of the votes in the shareholders' meeting, that the company shall be governed by the BCCA prior to this date ('opt-in'). It is important to note that the incorporation doctrine and the new rules on judicial exclusion and exit shall apply to existing companies as of 1 May 2019, whether or not the company has opted in.

Companies are under an obligation to bring their articles of association in line with the BCCA before 1 January 2024. However, if a company modifies (any provision of) its articles of association prior to that date (e.g., a capital increase in an NV/SA), then it shall have to modify them entirely, at that point, in order to bring them in line with the BCCA. During the period in which the articles of association have not been amended, the company may not always be able to benefit from the flexibility offered by the BCCA. We therefore recommend amending the articles of association as soon as reasonably practicable.

Company forms which have been abolished shall be automatically converted into a different company form on 1 January 2024. For example, the Comm.VA/SCA will be converted into an NV/SA. Prior to 1 January 2024, companies may voluntarily convert into the designated company form by following a simplified procedure. If a different company form is chosen, the normal procedure for conversion must be complied with. Between May 1, 2019 and the conversion, the abolished company form will be simultaneously governed by the provisions of the Current BCC and the mandatory provisions of the BCCA. We therefore recommend that companies convert to another company form as soon as reasonably practicable.

It is important to note that the directors shall be jointly and severally liable for any damage to the company, or to any third party, that is a result of the failure to adapt the articles of association to the BCCA in time.



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