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SHAREHOLDER INSPECTION RIGHTS IN BELGIUM: UNPOPULAR OR UNNECESSARY?

WP 2022-18

Hans De Wulf

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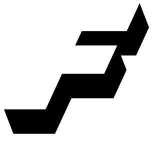

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Abstract

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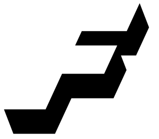

The first Belgian Companies Act of 1873 already contained provisions on shareholder inspection rights, but even after an amendment of the rules in 1991 to make their exercise easier, such inspection rights are rarely used in Belgium: between 1873 and 2021 fewer than 70 reported cases can be traced. Inspection rights allow shareholders to have experts appointed to inspect all company documents and to have a report drafted on certain corporate transactions, but the procedure is only open to shareholders owning at least 1 % of the company who can convince a court that there are indications that the interest of the company are seriously jeopardized. Plaintiffs have to pre-finance the costs of the procedure and will have to bear the final costs of court proceedings if their request is rejected.

In small companies, that have not appointed a statutory auditor, the statutory procedure is superfluous, because in such a company every single shareholder has the right to inspect the company's books (meaning de facto virtually all corporate documents) without resorting to a court, and if need be with the help of an accountant. Also, if shareholder lists are what a shareholder is after, in every company every shareholder has the right to consult the full share register, enabling him, in non-listed companies (where shares are not held through intermediaries), to find out the identity and number of shares held by every holder of registered shares.

At the time of writing, important litigation concerning shareholder inspection rights in a listed company is ongoing (the Nyrstar case) which could determine the attractiveness of this tool for many years to come.

This contribution criticizes the opinion, also expressed in one judgement in the Nyrstar case, that shareholders should only be allowed to bring an inspection rights case if they can show that they have standing to bring a subsequent derivative claim against the company's directors, or another substantive claim. While it is true that the Belgian legislator introduced inspection rights with a view to facilitating derivative actions, and that in practice they are usually used by minority shareholders who are preparing for a (judicial) fight against other (majority) shareholders, it should be recognized that the exercise of inspection rights is a valuable independent (stand-alone) tool to hold a company's management to account.

This WP contains the first draft of a chapter on Belgium in a book on shareholder inspection rights edited by Randall Thomas, Paolo Giudici and Umakanth Varottil (Edgar Elgar, 2023). This draft was finalized too early to include a discussion of the November 2022 Antwerp Court of Appeal decision in Nyrstar (denying the minority shareholders access to inspection rights, but on other grounds than the district court).

The author welcomes your comments at hans.dewulf@ugent.be

The final version of this paper will be published in a book on shareholder inspection rights edited by Randall Thomas, Paolo Giudici and Umakanth Varottil (Edgar Elgar, 2023)

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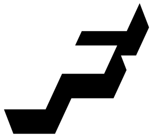

Shareholder Inspection rights in Belgium: unpopular or unnecessary ?

Hans De Wulf, Financial law Institute, Ghent University

This WP contains the first draft of a chapter on Belgium in a book on shareholder inspection rights edited by Randall Thomas, Paolo Giudici and Umakanth Varottil (Edgar Elgar, 2023). This draft was finalized too early to include a discussion of the November 2022 Antwerp Court of Appeal decision in Nyrstar (denying the minority shareholders access to inspection rights, but on other grounds than the district court).

I. Introduction: an old but rarely used shareholder right

1. Fewer than 70 reported cases between 1873 and 2021

Shareholder inspection rights have been on the books in Belgium since 1873[1]. They allow minority shareholders holding at least 1% of the shares of a corporation to go to court to have one or more experts appointed to investigate the affairs of the company, provided the plaintiffs can convince the judge that the interests of the company are seriously jeopardized. The idea is that, in a legal system where US-style discovery is unknown and also considered undesirable, shareholders who are not at the same time managers or board members should have a means of gathering the information about corporate transactions they need to bring a derivative claim or other substantive claims that are intended to safeguard their interests -to the extent these overlap with the company's interest, defined by Belgium's highest court in these matters as the long term interest of the shareholders as a group.[2]

[1] They are currently enshrined in articles 5: 106, 6:91 and 7:160 of the Belgian Code on Companies and Associations (BCCA), the new version of the Belgian companies act that became effective on May 1 2019.
[2] See Cass. 28 November 2013 AR C.12.0549.N *TBH* 2014, 853, critical note D. Willermain.

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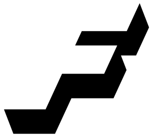

Even though it is next to impossible to gather reliable empirical data[3], inspection rights have by all accounts been rarely used in Belgium[4]. One of the two leading commentaries on commercial and corporate law of the 1950-1980 period stated that the statutory provisions on inspection rights were "useless"[5]. J. Lievens traced 14 court decisions from the 1873-1950 period[6]. The first post-1950 decision I was able to find dates from 1958[7] and the next one from 1962[8]. In total I found 44 published cases for the 1950-2020 period, with a clear spike in the 1990s.[9]Only two cases from the post 1949 series concerned listed companies (The Fortis case and the Nyrstar case, see *infra*). Although I haven't checked systematically, probably the vast majority concerned companies that took the legal form of a public company (NV/SA) since until a 1991change to the companies act, there were doubts whether inspection rights were

[3] This is because in Belgium, only the decisions of the three highest courts are all published in a publicly accessible database, the rulings of the 5 courts of appeal and of first instance judges are not publicly available, unless they are published in a law review. Publication in a law review is influenced by all kinds of biases (mostly: what judges, lawyers and the editors of the law review find noteworthy). This is a disgraceful state of affairs, for which budget constraints are not the only and in my view not even an important reason. Resistance from within courts is the main reason why no externally accessible database of all judgements exists.
The result is that for statements about the "facts" concerning inspection rights procedures, this article needed to rely on the limited number of published cases and on what practitioners (attorneys, three judges) have told the author over the years.

[4] An early complaint was J. Mommaerts "Du droit d'investigation de l'article 124", *RPS* 1890, 173; later e.g. G. Horsmans and F. 'T Kint, "Chronique de jurisprudence. La société anonyme et SPRL", *JT* 1977, 430, nr. 33; J. Lievens, "De gerechtelijke commissaris (art. 191 Vennootschappenwet): onbekend en -ten onrechte- onbemind" *BRH* 1982, 191; more recently K. Byttebier, A. François et al. ,"Omgaan met conflicten in vennootschappen: regeling van geschillen is meer dan geschillenregeling" in K. Byttebier et al. *Omgaan met conflictcten in vennootschappen*, Antwerp: intersentia, 2009, 87, who also point out (like several other authors) that the 1991 change to the law should have and probably did increase the number of cases.

[5] J. Van Ryn, *Principes de droit commercial*, Brussels: Bruylant, 1960, I, nr. 736, p. 453.

[6] See J. Lievens, "De gerechtelijke commissaris (art. 191 Vennootschappenwet): onbekend en -ten onrechte- onbemind" *BRH* 1982, 191 who writes that about 25 decisions seem to have been published. He cites 14 from before 1950 and 5 from after that period (until 1982, when his article was published).

[7] Enterprise court Antwerp, 23 January 1958, *RW* 1957-58, 2137 This judgement was mainly noteworthy because it ruled that, in view of the literal text of statute (which used a word – "aandeelhouders"-which was normally reserved for the shareholders in public corporations), inspection rights were not open to shareholders ("vennoten") of private corporations. This decisions was criticised in literature (e.g. J. Ronse et al., "Overzicht van rechtspraak. Vennootschappen (1969-1977), *TPR* 1978, 893, nr. 288) and already before the 1991 change to the law which explicitly opened inspection rights for closed companies, at least one court had ruled that such claims could also be brought by shareholders of closed companies: Enterprise court Verviers, 9 April 1971, *RPS* 1971, nr. 5656, p. 253.

[8] Enterprise court 10 February 1962, *RPS* 1962, nr. 5067, p. 202 note P. Coppens=*RW* 1961-62, 1665.

[9] These numbers only include cases brought on the basis of the companies act. It is impossible to trace cases which were brought under the general rules on civil procedure, but essentially had the same purpose as a companies act inspection rights claim. The cases were distributed as follows per decade: '50s: 2; '60s: 1; 70s: 3; '80s: 4; '90s: 22, 2000-2010:9; 2011-2021: 4 (not counting the 5 as yet unpublished Nyrstar decisions). These figures are completely unreliable as an indicator of the real number of cases, as they only concern published cases and many biases influence what gets published. Also, in more recent decades, there were many more companies than earlier, and it's only since 1991 that it is beyond dispute that inspection rights are available in private companies as well. Nevertheless, it seems safe to deduce from the spike of published cases in the 1990s that the 1991 reform (extension to closed companies, lowering of threshold for public companies to 1% ownership, scrapping of the "exceptional circumstances"-requirement) did have the effect of bringing more cases to court.

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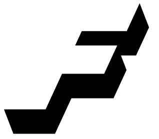

available in private companies and because in private companies it's more likely shareholders have other means of getting access to the information they want.

One reason why until the 1990s hardly any cases seem to have been brought probably was that until a change to the companies act by Act of 18 July 1991[10], not only was the ownership threshold very high (20%), but plaintiffs needed to prove "exceptional circumstances" for their claim to be admissible[11]. One of the merits of the 1962 judgement just mentioned was that it ruled that these words had to be broadly construed, that the judge would rule in discretionary fashion whether the circumstances were indeed exceptional, and that plaintiffs did not need to actually fully prove the alleged facts, but only had to convince the judge that there were indeed "indications" of irregularities. Despite this, it's difficult to find any cases before 1992.

As we will further discuss in this chapter, the sparse use shareholders make of their inspection rights should be seen against the backdrop of two features of the Belgian legal landscape. First, Belgian legislators have never made an effort to allow judges to intervene, albeit indirectly, in corporate management but are on the contrary suspicious of any such court interference: whereas Belgian company law contains many (more or less effective) provisions protecting minority shareholders, the whole legal culture seems somewhat hostile to instruments that allow minority shareholders to ask a judge to intervene in company *management*, and that is what happens when a court appoints experts to investigate "the company's affairs". My speculation is that it's no coincidence that Belgian law contains relatively well-functioning rules on, for example, shareholder exit and redemption rights, preemption rights, shareholder protection in mergers -issues where there's no need for courts to intervene at board or management level- but makes derivative actions and more generally any claim against directors difficult. Inspection rights are mainly intended as preparation for derivative claims, and their exercise itself interferes (somewhat) with the running of the company[12].

The second likely factor explaining the limited use shareholders make of inspection rights is that in small companies that have not appointed an external auditor, shareholders don't need them, since in such companies every shareholder can inspect virtually all corporate documents, with the assistance of one or more accountants who can act as his chosen experts, and all this without the need to go to court (see art. 3:101 BCCA as discussed below). *These* inspection rights are, by all accounts from practitioners, used very often (exactly how often is of course unknown since no courts are involved). Shareholder inspection rights in the sense of art. 7:160 BCCA may therefore be largely unnecessary in private firms. Large public and listed firms are a different story. There they are useful but not often used.

[10] Official Gazette 26 July 1991. This law changed what was then art. 191 of the Companies Act (coordinated version 1935).

[11] As explicitly confirmed in the only ruling by the court of cassation on inspection rights, Cass. 4 February 1909, *Pas.* 1909, I, 128.

[12] Management will have to make time to deal with the request for information of the experts.

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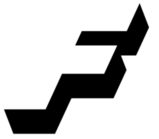

As just indicated, inspection rights are not used very often, especially not in public let alone listed companies. At the time of writing, however, somewhat spectacular litigation about inspection rights in a listed Belgian company is drawing to a close. This is the "Nyrstar litigation" [13] This litigation could have a galvanizing effect, but could also nip a potential flower in the bud, since in the so far latest ruling, a court held that shareholders who do not have standing to bring subsequent substantive claims (like a derivative action), cannot be granted a request to have inspectors appointed, even if they meet the admissibility requirements for bringing an inspections rights claim[14]. Because I will refer regularly to the five judgements issued so far in this battle between some thirty[15] minority shareholders in Nyrstar and Nyrstar itself and its main shareholder Trafigura, in order to illustrate several points about inspection rights in Belgium, I will first briefly sketch some of the main relevant facts that gave rise to this litigation.

Nyrstar was until recently a jewel in the crown of Belgian industrial firms. It is the largest zinc smelter in the world and is a listed company. At the end of 2009 it made disastrous investments in zinc mines, which led to very substantial losses. Under new management the mines were sold (in 2015), but this was apparently not sufficient to keep the company out of financial trouble, which became serious in 2015 and led to a situation where Nyrstar in 2018 almost missed a bond payment. Over the course of 2018 the share price of Nyrstar collapsed and it has remained low ever since. In 2014 Trafigura, one of the largest commodities traders in the world, bought about 10% of the shares in Nyrstar and by the end of 2015 held slightly more than 25%, making it by far the largest shareholder in Nyrstar. At the end of 2015 Trafigura entered into a series of supply and buy agreements with Nyrstar, followed in early 2016 by an equity injection into Nyrstar and the granting of a "working capital facility". In 2018 a complex series of deals was struck between the two companies resulting in the most interesting assets of Nyrstar being hived off to a separate new company in which Nyrstar itself only held about 2% of the shares, the other 98% being in the hands of Trafigura, which simultaneously took on a large part of the debts of Nyrstar. Prior to this transaction, Trafigura had already extended

[13]So far this has resulted in 5 court decisions, two by Brussels courts, three by Antwerp courts. The first four judgements have been published in *TBH-RDC* 2021, p. 325-370: Enterprise court Brussels 24 June 2019; Enterprise court Brussels 28 August 2019; Enterprise court Antwerp 7 January 2020, Enterprise court Antwerp, 30 October 2020. The most recent decision is as yet unpublished, but I have it on file: Enterprise court Antwerp, 9 November 2021, roll number C/21/00024. An extensive case note on all Nyrstar decisions by M. Caluwaerts will be published in the Belgian law review *Revue de droit commercial belge -Tijdschrift voor Belgisch handelsrecht* once the appeal against the latest decision, of 9 November 2021, will have been decided by the Antwerp court of appeal, which is set to rule in November 2022.

[14] Enterprise court Antwerp, 30 October 2020, *TBH-RDC* 2021, 347.

[15] The initial claims before the Brussels Enterprise Court were brought by a coalition of 95 minority shareholders. These claims, just like the first one brought in Antwerp, were mainly about additional information that according to plaintiffs had to be provided to the general meetings of Nyrstar and were not based on art. 7:160, but on the general powers of judges under the rules on summary proceedings (art. 583 ff Code on Civil Procedure). The last two Antwerp cases were about inspection rights, and these cases were brought by only 34 shareholders.

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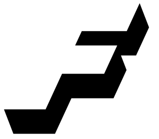

credit facilities to Nyrstar. Minority shareholders of Nyrstar were unhappy about this series of transactions and essentially argued that Trafigura had hoisted unnecessary debt onto Nyrstar and had acquired the Nyrstar assets (the 98% stake in the Newco) on the cheap, thereby leaving the minority shareholders with Nyrstar as an almost empty shell. Some minority shareholders of Nyrstar, at some stages holding slightly less than 1%, at others slightly more than 1% of the company's shares, insisted on the disclosure of very detailed information on the transactions between Nyrstar and Trafigura, and especially on the hive-off transaction. Nyrstar was unwilling to disclose the information the minority shareholders wanted, even after a dispute with its external auditor who also argued that he needed more information on the transactions and, subsequently, with the Belgian securities markets regulator FSMA which forced Nyrstar to disclose slightly more information than it had initially disclosed. As already mentioned, the whole affair led to (so far) five court decisions , all rendered in so-called summary, i.e. expedited proceedings decided by the court's president, and all focusing on the information rights of the minority shareholders, although it should be mentioned that the first three decisions were not brought on the basis of art. 7:160 BCCA -the core statutory provision on inspection rights in the Belgian companies act- but concerned attempts by minority shareholders to force the company to disclose additional information prior to and during its general meeting, and these claims were procedurally based on the general rules on summary proceedings from the Belgian Code on civil Procedure (CCP)[16] that allow the president of a court of first instance to take provisional measures[17] in case of urgency.

II. Corporate inspection rights sensu stricto (art. 7: 160 BCCA) in the context of out of court inspection rights

1. Companies act inspection rights (art. 7:160 BCCA)

Belgium has three corporation-like forms of company: the NV/SA or public company; the BV/SRL or private company and the cooperative company. In all three company forms, shareholders who own at least 1% (NV) or 10% (BV or cooperative) of the shares have the right to ask a court for the appointment of experts to inspect the books and accounts of the company. The new Belgian Code on Companies and Associations (BCCA), which became effective on May 1 2019, talks about "the appointment of experts"[18], but that is what is meant by "shareholder inspection rights" in US/UK parlance.

[16] Esp. art. 584, first paragraph CCP.

[17] In reality, these measures are often not very "provisional" but rather final and long-lasting. It is well established (as a result of rulings by Belgium's highest court in these matters, the Cour de cassation) that measures imposed by the court president in summary proceedings meet this "provisionality requirement" if it's not factually impossible for a later judgment to undo their effect (on the situation of the parties to the litigation).

[18] In this chapter, when we talk about "experts", we mean experts in the sense of the inspection rights procedure as set out in art. 7:160 BCCA, unless otherwise indicated.

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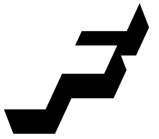

In Belgian partnerships -in the sense of companies[19] whose shareholders are personally liable for the company's debts- statutory inspection rights do not exist, no doubt because the legislator deemed them unnecessary in these entities where the partners can and do exercise control over the companies' operations on a daily basis, as they work together through the partnership on a daily basis as well.

Article 7:160 BCCA contains the Belgian rules on inspection rights of shareholders in public corporations, meaning companies that have adopted the form of an NV/SA[20].

That article states: "*At the request of one or more shareholders who hold at least 1% of the total number of votes, or who possess securities*[21] *that represent at least EUR 1.250.000 worth of legal capital, the president of the Enterprise Court can in summary proceedings appoint one or more experts to check the books and accounts of the company as well as the transactions that were performed by the company's organs*[22]*, when there are indications that the interests of the company are seriously jeopardized or threaten to be seriously jeopardized.*

The president decides whether the expert report should be publicly disclosed. He can among other things decide that the report will be publicly disclosed at the expense of the company according to the rules he determines."

[19] In Belgium, as in the rest of continental Europe, partnerships are deemed to be companies just like corporations. In the US and UK, partnerships usually seem to be considered a class of business entitity separate from corporations, but this is not the case in continental Europe.
[20] Comparable to the German *Aktiengesellschaft* or the French *société anonyme* and similar legal forms in other European countries. Shares in such a company are freely transferable and it usually has a collegiate board of directors. A collegiate board was mandatory until May 1 2019, since then public companies are also allowed to operate with only 1 director (unless they are listed). They can also adopt a dual board structure, but then both boards are collegiate.
[21] This refers to shares or "profit-sharing certificates" ("winstbewijzen"). The latter can only be issued by public companies; their defining feature is that they are issued in exchange for a contribution that is not booked in the accounts as legal capital, in other words they do not represent legal capital, hence their issuance is not subject to the rules on legal capital (e.g. no mandatory control of auditors on the value of contributions in kind when they are issued against such certificates). These certificates were/are mainly used to give founders disproportionate voting rights and, more frequently, to create the equivalent of profit-sharing but non-voting shares. The use of non-voting *shares* (representing legal capital) was until the 2019 reform subject to all kinds of limitations that did not apply to non-voting but profit-sharing certificates.
[22] In continental European legal parlance, the board of directors and the general meeting of shareholders, sometimes in addition to a few other entities (like the CEO, or the liquidators), are "company organs", namely the essential decision-making bodies of the company (who sometimes, as in the case of the board, also have the power to represent he company towards the outside world.). "Organ" is a legal term of art, e.g. the so-called Prokura doctrine enshrined in what used to be art. 9 of he first EU Company Law Directive is only applicable to company "organs", not to other officers or corporate bodies and decisionmakers.

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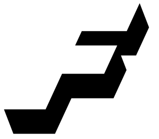

Article 5:106 BCCA for private companies[23] and article 6:91 for cooperative companies contain identical provisions, except that in those two company forms the threshold for bringing the action is "*10% of the total number of issued shares*".

Shareholder inspection rights were introduced into Belgian company law in 1873, when Belgium adopted its first "purely Belgian" Companies Act -before 1873, companies had largely been governed by the Napoleonic *Code de Commerce* (Commercial Code), introduced in France in 1806, at a time when what later (1830) became Belgium was part of the French empire. The *Code de commerce* did not contain rules on inspection rights comparable to those in the 1873 Act and present-day legislation. The *travaux préparatoires*[24] explicitly indicate that Belgian lawmakers were inspired by an 1856 English Act to introduce inspection rights into the Belgian companies act as well.[25]

2. Inspection rights that can be exercised without a court order

An important feature of the 7:160 inspection right is that shareholders need to go to court to have he "inspectors" (experts) appointed, and that only shareholders holding at least 1 % (public companies) or 10% (private companies) can bring a claim. There are, however, two sorts of "inspection" that a shareholder can perform himself, without resorting to a court, and without the need to own a minimum percentage of the shares in the company.

a. Right to inspect the share register

First, there's the right for every shareholder to view the share register[26]. This can hardly be considered a crucial minority protection right -even though disputes about share registers play an important role in court and other battles between shareholders, because one party will often allege that the other is registered with too many shares and, conversely, when shareholders have to prove that they meet certain ownership thresholds, like the 1 or 10% required to bring an inspection claim, they will of course primarily rely on the share register to prove their

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[23] That is companies that take the BV/SRL form, where the default rule is that shares are not freely transferable (unless the articles provide otherwise; the shares can even be listed) and one director is sufficient and if there are several, they are each individually competent unless the articles state otherwise.

[24] Report of the parliamentary proceedings concerning a draft piece of legislation.

[25] See the references in J. Guillery, *Des sociétés commerciales en Belgique. Commentaire de la loi du 18 mai 1873*. Brussels, Bruylant, 1883 (2nd ed.) vol. III, p. 383. It's clear that the drafters of the 1873 act were impressed by the industrial and imperial might of the UK at the time and therefore often looked at English law when designing new Belgian rules on corporate or financial matters. For instance, the first generation of regulation of bond markets and of the position of bondholders in relation to the company was also inspired by English approaches, see e.g. Explanatory Memorandum to the Bill of 20 February 1904 with a view to amending the 1873 companies act, *Doc. Parl.[parliamentary proceedings]* 1903-4, p. 68.

[26] See art. 5: 24 BCCA (closed company) and art. 7:28 (public company).

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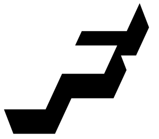

ownership. The 2019 BCCA outlawed[27] a type of clause which used to be common in the articles of association of Belgian companies and that limited the right of a shareholder to see other parts of the register than the extract pertaining to the shareholder itself. Under the new rules, every shareholder is entitled to inspect the complete register, thus enabling the shareholder to check how many shares are owned by whom. This could have some utility for shareholders wishing to build a coalition (e.g. to meet the 10% threshold), but in reality in companies with few shareholders, they will usually have a pretty good idea about each other's stakes without the help of the share register, and in listed companies Euroclear, the settlement organization and custodian for virtually every company listed on the Brussels stock exchange, is usually the only (nominee) shareholder registered in the register (the ultimate, beneficial owners are not mentioned), which means the share register is pretty useless as a tool for minority shareholders looking for coalition partners.

b. right to inspect the books of the company in companies without an external auditor (art. 3:101 BCCA)

More important in our context is the right that every shareholder in every Belgian company has "to inspect the books of the company", provided no external auditor has been appointed.[28] In smallish companies (without an auditor) this allows shareholders without a management position to keep a close eye on the finances of the company. The original statute talked about the company's "books" in the sense of accounts, but this had always been broadly construed as meaning the shareholder has access to the same documents an external auditor would have access to, meaning all documents that are relevant to interpreting and verifying the (draft) annual accounts, so in reality most corporate documents[29]. This well-established interpretation was codified in the text of the companies act in 1985. At least one court decision[30] took this reference in the statutory text to "the same information as an external auditor" rather literal, and ruled that a shareholder could only get access to corporate documents pertaining to the present accounting year, since those are the documents an auditor would need access to as part of his audit of the draft annual accounts. Such a narrow interpretation of the law is to be rejected. The function of the rule clearly is to allow shareholders who don't have access to documents concerning the company's finances because they are neither manager nor board member, to get access to those documents.

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[27] See the second sentence of arts 5:24 and 7:28 BCCA.

[28] Under Belgian and indeed EU law, all companies that exceed certain thresholds as far as balance sheet, turnover and/or employees are concerned (see art. 1:24 BCCA for the exact thresholds) are mandated to appoint an independent external auditor whose foremost task is to audit the annual accounts in order to certify whether they present a true and fair view of the company's financial situation. In a whole range of economic sectors, like banking or hospitals, companies and other legal entities need to appoint an external auditor irrespective of size. The same goes for listed companies (some of which may be small).

[29] See e.g. K. Geens, "Over de uitgestrektheid van de individuele onderzoeks-en controlebevoegdheid van de vennoot en over zijn vertegenwoordiging door een accountant", *TRV* 1989, 224.

[30] Enterprise Court Brussels 13 October 1988, *TRV* 1989, 220. By contrast, a decision of a commercial court less reputable than the Brussels one, ordered a company to hand over to a shareholder every corporate document originating in the past three years: Enterprise court Dendermonde (summary proceedings), 1 March 1989, *TRV* 1989, 223, note K. Geens.

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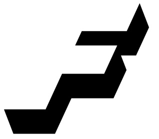

This inspection right is very often used by shareholders (small and large) who prepare for "war" with each other, to gather information to bolster their case, e. g. a claim to hold another shareholder who's also a director liable for breach of duty as a director. In such a tense situation, controlling shareholders will often call a general meeting to have an auditor appointed even though the company does not have to appoint one on the basis of statute, simply to prevent other (minority) shareholders from getting their hands on corporate data that could underpin legal claims (as statute determines, this type of inspection right lapses when an auditor is appointed). Such "unforced" appointments of auditors are in their turn regularly attacked before the courts by minority shareholders who, sometimes successfully, claim that the appointment constitutes an "abuse of majority power"[31], since the sole intent of the appointment is to rob the shareholders of their article 3:101 inspection right. If the judge is convinced that the appointment constitutes an abuse of majority power, this is grounds for suspending the decision of the general meeting and/or having it declared null and void.[32]

Statute explicitly states that shareholders can be "represented[33] or assisted by an external accountant" in exercising their art. 3:101 inspection rights, in effect meaning they can enlist an expert (albeit only an accountant) without resorting to a court or without meeting any share ownership thresholds.[34] However, they will have to bear the costs of the accountant they choose to hire, unless either the company consents to the appointment -rare in situations of conflict between major shareholders- or if a court orders the company to bear the costs. Art. 3:102 explicitly gives courts the power to issue such an order, but of course few shareholders take on the risks and costs of launching a separate court case simply for establishing that the company should bear the cost of the accountant the shareholder chose to hire. I haven't found a single (published) court case that was only about this cost issue.

One Belgian first instance court has ruled at least twice that it would be disproportionate to grant a claim for the appointment of expert investigators if a shareholder has not first used the personal investigation right it has under article 3:101 BCCA in corporations where no external

[31] A concept developed from the 1940s onwards by case law, and codified in the companies act as a ground for nullity of decisions of general meetings in 1993, and for board decisions in 2019, see at present article 2:42 BCCA.

[32] See e.g. Court of Appeal Brussels, 14 January 1999, *RPS* 1999, 301, note W. Derijcke. For a discussion of such case law, see K. Byttebier, A. François et al. ,"Omgaan met conflicten in vennootschappen: regeling van geschillen is meer dan geschillenregeling" in K. Byttebier et al. *Omgaan met conflictcten in vennootschappen*, Antwerp: Intersentia, 2009, 53-54.

[33] Meaning here: replaced in the exercise of the inspection right.

[34] The same judgement that ruled that the inspection could only pertain to documents of the current accounting year also ruled that a shareholder who had chosen to be "represented" by an accountant could not at the same time himself be present in corporate offices to inspect corporate documents along with the account he hired (Enterprise Court Brussels (summary proceedings) 13 October 1988, *TRV* 1989, 220). This part of the judgement was simply wrong and wrongheaded, since statute explicitly allows the shareholder to be "represented or assisted" and "assisted" no doubt implies that shareholder and accountant can act simultaneously, including being in the same room looking at the same documents together.

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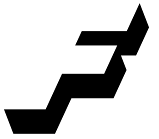

auditor has been appointed.[35] There is some justification to this approach, as art. 3:101 BCCA explicitly allows such a shareholder to hire an accountant to help him with his investigations, or to perform the investigation on his behalf; the experts appointed in the 7:160-procedure discussed in this text are usually either accountants or attorneys[36]. However, this type of "subsidiarity" reasoning can only be convincing if one accepts that the scope of investigations by the shareholder under art. 3:101 BCCA is essentially the same as that of the experts under article 7:160, which in turn implies, for consistency's sake, that one rejects the (lower) court decisions that ruled that art. 3:101 -investigations can only pertain to documents of the current accounting year (a limitation that nobody would argue applies to art.7:160- expert investigations).

III. Conditions for the exercise of art. 7:160 BCCA inspection rights

1. *Ownership requirements generally*

The threshold for bringing an action based on art. 7:160 BCCA is that the shareholder holds 10% of the total number of shares in a private company or cooperative, and 1% of the votes[37] or shares representing 1.250.000 euros of capital in a public company.

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[35] Enterprise court Dendermonde, 20 February 2014, *RW* 2014-15, 988= *DAOR* 2015, issue 115, 24. See also, different but in the same spirit Enterprise Court Antwerp 10 September 1997, *V&F* 1997, 322 and enterprise court Brugge 24 August 1996, *DAOR* 1996, issue 40, p.99, who both ruled that if the annual accounts and the use of the right to ask questions of the board during the general meeting provided the shareholders with sufficient information, there is no need to grant them inspection rights.

[36] In the 3:101 BCCA -procedure, the "hired help" must be an accountant, that is, a member of the Belgian Institute of Accountants. This rule is unnecessarily restrictive, but when the drafters of the bill that led to the 2019 new companies act tried to abolish this monopoly for accountants, they met with such fierce (and unexpected) lobbying from the accounting profession that the competent minister backed down in order not to sink the chances of the whole reform effort (The accountants seem to regard this (very small) monopoly as their just reward for supporting the creation in 1991 of a quasi-governmental accounting oversight body which they help fund).

[37] Under the previous companies act, which did not formulate the threshold with a reference to voting rights, it was ruled that the suspension of the voting rights of the shares of the plaintiff did not prevent that plaintiff, who held more than 1% of the shares, from bringing an inspection rights claim: Enterprise court Ghent, 23 June 1992, *TBH* 1994, 1028, note K. Byttebier. In my view this interpretation would still be commendable under the new BCCA, since inspection rights claims are often brought while battle has been raging for several months between shareholders (at least one of whom is usually also a board member and/or controlling shareholder) and as part of such multi-front legal fights, a shareholder may have his voting rights suspended by a court; this should not rob such a shareholder of the legitimacy to demand an inspection. However, we have to admit that the literal wording of art. 7:160 BCCA refers to "shareholders who have at least 1% of the total number of votes" and not, as some other articles in the BCCA do, to "who have shares or other securities giving them x % of voting rights/to which x % of voting rights are attached". This could be used as an argument by those who reject our interpretation, but in my view this "literal text"- argument should be outweighed by the policy consideration I mentioned.

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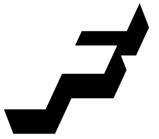

Even though every shareholder meeting the threshold requirements can bring a claim for the appointment of experts, the tool is clearly intended primarily to help minority shareholders, who usually are not part of the company's board. It is a "minority protection tool", among others, like the derivative action, which was also introduced into Belgian legislation in 1873, then was dropped from the companies act "inadvertently" in 1913 but reintroduced in 1991. The same 1991 companies act reform that reintroduced the derivative action also lowered the threshold for bringing an inspection claim, from holding 20%[38] to holding 1% of the total number of shares. That way, the thresholds for bringing a derivate claim and a claim for an inspection were made identical. The threshold was modified slightly for public companies (NV/SA) by the 2019 BCCA, in that it's no longer formulated in terms of 1% of the total number of shares, but 1% of the total number of votes attached to shares or other securities. It's somewhat incongruous that the same amendment was not made for the private company and the cooperative, because since 2019 these companies may also issue shares with multiple votes attached (in addition, they have been allowed to issue non-voting stock since 1991). I believe this (small) difference between the three company types cannot be justified and is not the result of a conscious policy decision, but rather results from carelessness on the part of the drafters of the 2019 BCCA[39].

Even though inspection rights are clearly intended as a minority protection tool, nothing in black letter law prevents a majority shareholder from instigating the procedure[40]- case law has confirmed this point.[41] However, even though a plaintiff whose claim meets the criteria of art. 7:160 BCCA must not formally prove he has a personal interest in bringing the claim in the sense of art. 17 Code on Civil Procedure (CCP)[42], courts have held that if a shareholder has other less intrusive means at its disposal to gather the information it could gather through an inspections procedure -which will often be the case if the shareholder is a controlling shareholder, and almost always when he is at the same time a director of the company- then such a shareholder lacks the required interest to bring the inspections claim.[43]

2. *Are the thresholds justified? Difference with threshold for derivative actions and link between inspection rights and derivative actions*

[38] That had been the threshold from 1873 until 1991.
[39] I was on the 4 person drafting committee.
[40] J.M. Nelissen-Grade en S. Loosveld, "Het deskundigenonderzoek in geschillen omtrent het bestuur van vennootschappen", in *Gerechtelijk deskundigenonderzoek, de rol van de accountant en belastingconsulent*, Brugge: die Keure, 2003, 452.
[41] Enterprise court Ghent, 23 June 1992, *TBH* 1994, 1028 (with case note K. Byttebier); Enterprise court Dendermonde, 15 February 1996, *RW* 1996-97, 404 (plaintiff holds 50% of the shares)
[42] In this sense, the 7:160 claim is a derivative claim: it can only be brought by shareholders who allege that the company's interests are threatened, and in that sense is intended to protect the company's interests. Therefore, a shareholder need to show a personal, in the sense of non-derivative, interest.
[43] See in this sense Enterprise court Kortrijk, 7 December 1995, *DAOR* 1996, issue 40, 85. Also e.g. J.M. Nelissen-Grade en S. Loosveld, "Het deskundigenonderzoek in geschillen omtrent het bestuur van vennootschappen", in *Gerechtelijk deskundigenonderzoek, de rol van de accountant en belastingconsulent*, Brugge: die Keure, 2003, 452.

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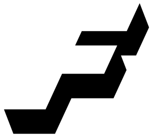

The percentage thresholds were clearly introduced because policymakers were of the opinion in the 19th century and still are today that the exercise of inspection rights can be somewhat disruptive to company management and that therefore only shareholders who have some serious skin in the game should be allowed to bring an inspection rights claim. As indicated above, the original 1873 threshold was 20%, which was lowered to 1% in 1991, when the alternative threshold for public companies of shares with a par value of 1.250.00 euros was added and inspection rights were extended to the private and cooperative company forms (for shareholders at the 10% level).

a. The thresholds are excessively high

The thresholds can be criticized from different angles. Although it's not obvious that thresholds are required at all to mitigate the possibility of too many (disruptive) or too many unmeritorious requests for experts -after all, the plaintiffs have to bear the initial cost of court proceedings- it was until recently reasonable to assume that a shareholder holding less than 10% of a private company is indeed such small fry that his interests in the company are insignificant. But this could change in the near future. Until the 2019 reform, the private company form (BV/SRL) was, with few exceptions, used only for relatively small firms; these were always closed, as the companies act contained mandatory rules restricting share transfers[44] and these rules could only be made stricter in the articles, relaxing them was not allowed. The 2019 reform did away with all that: a core goal of the reform was to turn the BV/SRL company form into the default corporation, to be used by all types of firms, from the smallest to the large. Even though by default the closed company form is indeed still closed, the articles can deviate from this and determine that the shares are freely transferable; BVs may now even be listed[45]. In other words, it is likely that in the near future, Belgium will have a substantial number of large firms with a large number of dispersed shareholders and the shares of which can be freely sold and bought that have chosen to organize themselves in the form of a private company (BV/SRL). In such a *de facto* public company that has the legal form of a private company, a 10% threshold is excessively high.

Arguably, the 1% threshold for public companies is also excessively high. Not in the tens of thousands of small firms that, until about 2008, were regularly set up in the legal form of public companies (NV/SA)[46]. But in a large company, 1% is a relatively high threshold. True, there is an alternative threshold expressed in euros, which was introduced to make it easier for shareholders to reach the threshold in large listed companies, where sometimes nobody

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[44] Basically to offspring or parents, unless the transfer was approved by 2/3rds of the votes of fellow shareholders.

[45] For a discussion of all these rules, see H. De Wulf and M. Wyckaert, "Effecten bij BV, NV en CV: categorieën, soorten, overdracht, uitgifte en inkoop" in H. De Wulf & M. Wyckaert (eds.) *Het WVV doorgelicht*, Antwerp: Intersentia, 2021, 77 ff.

[46] For tax reasons: only public companies could issue bearer shares, and bearer shares can be donated to (grand)children without paying tax, whereas registered shares cannot be donated without paying tax. But bearer shares were outlawed in Belgium by a 2005 law that became effective January 1 2008, and since then the number of public companies has declined from about 140.000 to about 85.000.

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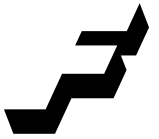

reaches the 1% threshold, or the largest shareholder has about 1%. This euro threshold means that one needs to hold shares with a par value of 1.250.000 euros. But this too is a substantial hurdle. This euro value refers not to market value but to the par value, i.e. so-called nominal value or fractional value, and refers to the fraction of the total amount of legal capital represented by the shares held by a shareholder. Few listed Belgian companies have a legal capital (as opposed to total equity, which includes share premiums and retained earnings) running into the hundreds of millions of euros, so that 1.25 million euro will rarely represent less than 0.5% of the company.

b. The link with derivative actions

The threshold is more or less but not completely aligned with the threshold for bringing a derivative action. For Belgian public companies, derivative actions were introduced in the same 1873 act that also introduced inspection rights. Since 1991, the threshold for bringing a derivative claim has also been at 1% of share capital (since 2019: of voting rights) or 1.25 million worth of capital[47]. But whereas shareholders need to hold 1% on the day they file their claim with the court to have expert-inspectors appointed, in order to bring a derivative action, they need to hold 1% on the day of the general meeting that votes on the discharge of directors' liability. Under Belgian law, the annual general meeting, provided it has first approved the annual accounts, must vote on whether to grant the directors a so-called discharge[48]. If the meeting votes in favor of the discharge- which is the case if a simple majority (50% plus 1 vote) is obtained among the votes cast, abstentions not being counted as votes- this means the company waives it right to hold the directors liable for any (non-criminal) breach of duty they committed during the time period covered by the annual accounts. [49]Only when (and after) directors receive such discharge can shareholders who did not vote in favor of it and who hold at least 1% of the voting rights attached to all the company's shares, bring a derivative action[50] (there is no additional requirement to make a Delaware-style demand on the board, or to show demand futility).

In the Nyrstar litigation, the president of the Antwerp enterprise court ruled on November 9 2021 that she was revoking the inspection right of the minority shareholders she had granted in her October 2020 ruling[51]. She did so because the shareholder group who brought the inspection rights claim owned more than 1% of Nyrstar shares on the day they filed their claim, so that their claim was and remained *admissible*. But, the president ruled, the claim was *unfounded* because it had been brought to her attention that this same minority shareholder group (consisting of slightly more than 30 shareholders) held less than 1% of the shares of

[47] At present art. 7:157 BCCA.
[48] See e.g. (public companies) art. 7:149 BCCA.
[49] See again art. 7:149 BCCA. If the breach of duty consists of a violation of the BCCA or the articles of incorporation, then the discharge is only valid if the breach was specifically brought to the attention of the shareholders through a notification in the agenda for the meeting as it was sent out to shareholders when the meeting was called.
[50] See art. 7: 157 BCCA.
[51] Enterprise Court Antwerp, 9 November 2021, roll number C/21/00024, not yet published.

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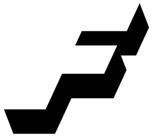

Nyrstar *at the date of the last general meeting* that had voted on directors' discharge prior to the launching of the inspection rights claim. Therefore, it was certain that this group of minority shareholders would not in future be allowed to bring an admissible claim for a derivative action, so that, according to the President, their inspection rights claim had to be denied. The difference in the number of shares the plaintiffs held on the day they brought their claim (more than 1%) and the number of shares they held on the day of the last general meeting (less than 1%) was explained by the fact that some plaintiffs had bought additional shares between that general meeting and the bringing of the claim. Thus the court seemed to have been convinced by the argument of Trafigura that some plaintiffs had bought additional shares with speculative intent, more specifically only in order to be able to bring the inspection rights claim against Nyrstar. (Trafigura, the dominant shareholder in Nyrstar, had not been a party to the October 2020 litigation, but under Belgian civil procedure has a right to ask for a review of the court decision since its rights were affected by it, see art. 1122 Belgian Code on Civil Procedure. That is why the ownership argument could still be made by Trafigura in the autumn of 2021 whereas it had apparently not been brought up by defendant Nyrstar in the initial litigation resulting in the October 2020 judgement).

c. Why the November 9 2021 Nyrstar ruling is open to criticism

The 9 November 2021 Nyrstar judgement raises several interesting questions. Perhaps the least important of these is whether it should be held against the minority shareholders that they bought additional shares between the general meeting and the lodging of the inspection rights claim. If all shareholders bringing the inspection rights claim were already shareholders at the time of the general meeting granting discharge to the directors[52], it is debatable whether one can convincingly argue that they bought additional shares with speculative intent. Even if one assumes that every additional share bought was bought with a view to reaching the 1% threshold to bring an inspection rights claim, the fact remains that the shareholders were already shareholders at the time of the general meeting (only with fewer shares) and that they apparently thought their own interests and/or those of the company had been negatively affected at the time of that general meeting, causing them to launch the battle which would lead to the inspections right claim. If such shareholders, who feel their and the company's interests have been violated, buy additional shares only to make sure they can exercise a claim before the courts by passing he 1% threshold, should policymakers deter them from doing so? This seems doubtful, especially since their interests and perhaps rights as shareholders may have been violated, and (like in the Nyrstar case) they may first have tried to get redress through negations with the company and/or its controlling shareholder and only considered litigation (for which they then indeed bought additional shares) when it became clear that negotiations would not yield a satisfactory result. Buying additional shares could even arguably be seen as a "patriotic" act of shareholder engagement, since the inspection rights claim can only succeed if the plaintiffs show that the company's interest are being threatened. In my opinion, such a situation -where all members of the plaintiff group are shareholders at the time of the general meeting and the time the complaint is filed- can usefully be

[52] I'm not sure this was the case in the Nyrstar litigation, although it seems to have been; but the point is relevant outside the specific Nyrstar case.

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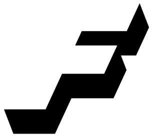

distinguished from the situation where some plaintiffs, whose shares are needed to reach the 1% threshold, were not shareholders at all at the time of the general meeting, so that their interest as shareholders were not impaired by the alleged "wrongful behavior" by the directors and it is consequently indeed rather likely that they bought shares only to benefit from the outcome of the litigation, i.e. with speculative intent.

A more fundamental objection to the link made by the judgement between inspection rights claims and derivative actions, is that the BCCA itself makes no such connection.[53] To be sure, it's hardly a coincidence that the derivative action and inspection rights were introduced simultaneously in 1873, with very similar threshold requirements, and grouped together in a separate chapter of the companies act. It's very likely that in the mind of lawmakers, the inspection rights procedure was at least partially or even mainly intended to allow minority shareholders to gather the evidence required to underpin a substantive claim against company directors, which minority shareholders can only bring derivatively. But concluding from this that inspection rights can only be exercised when the same plaintiffs would have standing to pursue a derivate claim -which in Belgium can only be brought against directors in order to hold them liable, not against anyone else nor on other grounds than liability- is unwarranted for several reasons. First, one could imagine that if plaintiffs who were entitled to do so bring a successful inspection rights claim, perhaps even resulting in a damning report by the experts, other shareholders, who did not join the inspection rights procedure, might be tempted to join a subsequent derivative action, so that the threshold for bringing such an action, would be passed. Second, inspection rights can be exercised for other purposes than preparing a derivative claim, for instance in order to prepare a claim to have a board decision or decision of the general meeting declared null and void, or more generally in any situation where the shareholder is preparing a fight with another shareholder (provided he can show the interests of the company have been seriously jeopardized). Attorneys say that in the relatively rare cases where inspection rights claims are brought, it's often as part of fights between shareholders that will lead to a shareholder exclusion procedure[54]. The Antwerp court in Nyrstar acknowledged that inspection rights claims may be brought in order to prepare different types

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[53] When literature prior to the November 2021 Nyrstar judgement expressed an opinion on the question of the link between derivative actions and inspection rights it always, as far as I can see, was that plaintiffs in the inspection rights procedure did not need to launch a simultaneous derivative action nor did plaintiffs need to show the intention of launching such a procedure; neither did they have to show that the evidence to be gathered would potentially be useful in bringing a derivative claim . See e.g. J.M. Nelissen-Grade en S. Loosveld, "Het deskundigenonderzoek in geschillen omtrent het bestuur van vennootschappen", in *Gerechtelijk deskundigenonderzoek, de rol van de accountant en belastingconsulent*, Brugge: die Keure, 2003, 452.

[54] Under Belgian law, in non-listed public and private companies, a shareholder holding at least 30% of the shares can ask a court to force another shareholder to sell his shares to the plaintiff at a price determined by the court, provided the plaintiff can invoke "just grounds" (often: two major shareholders cannot work together through the company any longer because of irreconcilable differences); conversely, any shareholder who can invoke "just grounds" against another shareholder can force that defendant (through the courts) to buy his shares at a price determined by the court. See section 2: 60 ff. BCCA. These procedures are used very often. For an example of a case where a 7:160 claim was indeed brought in preparation of a 2:68 claim (right to be bought out by another shareholder on just grounds), see Enterprise court Charleroi, 24 December 1999, *DAOR* 2000, 275; in that case, the court rejected the inspection rights claim precisely because it deemed that it would only serve the interest of the plaintiff-shareholders, not those of the company as such.

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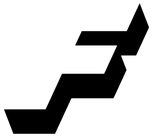

of claims than derivative actions. The plaintiffs in the case had explicitly argued that for that reason, the judge could not find their claim ill-founded for the single reason that they did not meet the threshold for a derivative action. The Antwerp court also ruled, however, that in this specific case, it was unlikely that any other remedy than a derivative action would either be open to the plaintiffs or lead to useful relief for them. It is doubtful whether it is wise for the president of a court, acting in summary proceedings, to make an implicit judgement about the legal possibility and appropriateness for plaintiffs to bring these other types of claims.

This leads us to our third objection against the approach taken by the Antwerp court president in *Nyrstar*. In a 1992 judgement, the Brussels enterprise court ruled that an inspection rights claim can be granted not only when the plaintiff has not yet brought a derivative action or has not signaled he intends to launch one, but also when it is not clear that the plaintiff intends to bring any substantive claim at all[55]. In my opinion, that Brussels judgement represents the desirable approach. Using inspection rights should be regarded as an independent means for minority shareholders to check the board and management. As we'll discuss below, Belgian courts are rightfully wary of "fishing expeditions". But such expeditions to find possible wrongdoing at a moment when it's not apparent yet that the board or controlling shareholders may have done anything wrong, are kept in check by the statutory requirement that inspection rights claims can only be brought if the plaintiff shows that there are "indications" that the interest of the company are "seriously" jeopardized. Inspection rights can be a useful technique to allow minority shareholders to put pressure on the board but also potentially on controlling shareholders to respect the corporate interest, i.e. the long-term interest of all shareholders. The text of art. 7:160 makes clear that inspection rights can be used to inspect "the books and accounts" of the company and the transactions that its organs (plural) engaged in. This should take away any doubt that the inspection may also pertain to decisions taken by the general meeting: any transaction by any company organ is a potential target[56]. But in Belgium a derivative action can only be brought against one of those company organs, namely the board of directors (or some members of it). This proves to my mind that statute does not create a necessary and exclusive link between the exercise of inspection rights and the pursuit of a derivative action. Also, the publication of the experts' report, which the court can order, also only makes sense if the 7:160-procedure is regarded as an independent, stand-alone procedure, which shareholders can use to "derivatively" demand respect for the company's interests. The publication of the report could of course also inform other shareholders than the plaintiffs of problems with the way company organs have run the company, reinforcing the

[55] Enterprise Court Brussels 3 September 1992, *TBH-RDC* 1994, 166 and *DAOR* 1992, issue 25, 93, note J. Billiet.

[56] See also Enterprise court Dendermonde, 15 february 1996, *RW*1996-97, 404, ruling that inspection rights claims can be brought against the liquidator(s) of a dissolved company and Court of appeal Brussels, 19 June 2002, *JDSC* 2004, note M. Caluwaerts, holding that not only is the appointment of experts also possible in companies that have a statutory external auditor (self-evident), but that the judge can order the experts to look into how the external auditor performed his job. Enterprise court Hasselt 8 October 2003, *TRV* 2007, 305 ruled that inspection rights may not be exercised after the company has been declared bankrupt, because at that stage the board has lost its powers (an unconvincing part of the judgement, since the inspection could of course pertain to past, pre-insolvency board actions) nor be used to look into the performance of an insolvency trustee, since such a trustee is court appointed and also supervised by a judge.

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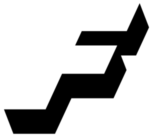

point that as a result of the investigation, other shareholders than the initial plaintiffs may be tempted to join a subsequent derivative action.

3. *General hostility in Belgian legal circles towards court intervention in company management (distrust of judges in corporate affairs)*

This having been said, as I have argued elsewhere[57]it seems clear that the majority within the Belgian corporate law community, including attorneys, are wary of the creation of an independent judicial mechanism which would allow judges to deal with minority shareholder protection in a streamlined way. An aversion against turning the inspection rights mechanism into an independent technique to check those in control of the company is part, I believe, not so much of an aversion against minority shareholders, but rather of a desire to keep judges out of corporate affairs, especially out of actual management decisions. Belgian attorneys and academics have always been mistrustful of giving judges broad discretionary powers to intervene in management affairs. This may explain the contrast between the limited use of inspection rights in Belgium compared to the very frequent use in the Netherlands of the "enquêteprocedure" ("investigation procedure", often translated as "enquiry procedure"). Belgium and the Netherlands are similar in many respects, but they have a quite different corporate law culture: the Dutch trust their judges far more, creating a range of statutory provisions that intentionally introduced very vague standards instead of rules, allowing judges to second-guess whether company organs acted in a way that is "reasonable and equitable" (see e.g. art. 2: 8 Dutch Civil Code, the most famous of these norms). The Netherlands are probably at one extreme of the European spectrum in this regard[58], but Belgium and probably also France belong to the other extreme. My hunch is that these different legal traditions and cultures help explain why Belgian lawmakers never even considered introducing something similar to the Dutch "enquiry procedure" ("*enquêterecht*"). Most of the measures that a Dutch judges can take as a result of an "enquêteprocedure" are also open to Belgian judges (except dismissing directors, but appointing a "provisional administrator", partially replacing the board, a power Belgian courts have awarded themselves without any statutory basis, comes close to this[59]). But Belgium has no procedure that is systematically intended to thoroughly investigate a company's affairs and how the company has been run,

[57] H. De Wulf "Niet-genoteerde vennootschappen in het Belgische Wetboek van Vennootschappen en Verenigingen" in *Ondernemingsrecht in de Lage Landen*, Deventer, Wolters Kluwer, 2020, (1), 62-65.

[58] Very good analyses of the phenomenon are contained in the various essays in *De rol van de rechter in het Ondernemingsrecht* , H.J. de Kluiver (ed.), Zutphen, Paris publishers, 2020, a book in honor of the departing advocate-general of the Dutch Supreme Court Vino Timmerman who was also an academic and a great believer in the usefulness of the "fair and equitable standard". My answer to Timmerman's belief in "fair and equitable" judicial review has always been: a judge or advocate-general would of course be in favor of such a standard since it allows them and the Dutch Supreme Court to create a smokescreen behind which they can intervene in company management as it seems fit to them, in spite of lip service they pay to avoiding hindsight bias through the typically Dutch-Belgian doctrine of "marginal review" (a light and very vague version of the Delaware business judgement rule, with totally different effects in practice -what courts do, not what they say they do- than the Delaware rule).

[59] On provisional administrators, the classic discussion of the development of case law through which courts arrogated this power for themselves is M. De Roeck and E. Pottier, "L'administrateur provisoire: bilan et perspectives", *TBH* 1997, 220.

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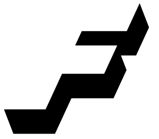

and then gives broad discretion to the judge to react to the findings of the investigators he appointed. Instead, when shareholders have a problem with how the board and management or a controlling shareholder runs the company, they have to rely on a wide array of types of claims that are open to them[60], often resulting in a crossfire of claims (and counterclaims by defendants, esp. if the *de facto* defendant is an important shareholder), sometimes even brought before different courts. I suspect- but admittedly can't prove- that Belgian policymakers do not want to introduce a more streamlined technique to allow a court to deal with all these issues at once and, importantly, based on a thorough investigation of the company's affairs, on the Dutch model, because this would allow judges to intervene in company's affairs on a discretionary basis, and Belgian policymakers (and attorneys) don't trust corporate law judges to do anything but apply black letter law (and not standards). Some, like the Antwerp judge in Nyrstar -herself a former partner in the corporate department at an international law firm and emblematic of a new generation of commercial judges who more often than their predecessors, do have a good insight in how large firms work and are financially literate, which should lead to less distrust on the part of Belgian policymakers- will even forge an explicit link between inspection rights and derivative actions instead of accepting that the result of an expert investigation could be used to underpin all kinds of different legal claims other than derivative actions.

4. Other procedural issues

The 1% or 10% thresholds are so-called admissibility requirements. Under the general rules of civil procedure in Belgium, admissibility requirements must be checked on the day a claim is filed with the court, in other words the conditions must be met on that day, and on that day only[61]. Thus, if a group of plaintiffs pass the 1% threshold on the day they file their claim, they will have met this admissibility requirement and the fact that some plaintiffs later sell shares, or die, or give up on the claim, causing the plaintiff (group) to drop below the 1% threshold, this has no effect on court proceedings; the claim will remain admissible and the case will proceed. This may be an undesirable rule in those (rare) cases where some plaintiffs would voluntarily dispose of their shares after the claim has been filed, but the rule has never been disputed.

The plaintiff could of course be a single shareholder who on its own passes the 1 or 10 % thresholds, but in larger companies there will often be a plaintiff group consisting of several shareholders[62] who individually hold fewer than 1% of the shares/voting rights, but collectively pass the threshold. There is no need for these plaintiffs to sign a formal agreement

[60] E.g. they can ask to declare decisions of the board or general meeting null and void or have them suspended, demand the appointment of a "provisional administrator" (court-appointed person who replaces part of the board or exceptionally the complete board, or who has to give prior permission for certain board decisions), a sequestrator, an expert-sequestrator, a "representative ad hoc" (court-appointed person with a specific task, like organizing a general meeting when board members, as a result of internal fights, do not call a meeting), etc.

[61] e.g. Court of cassation, 9 January 1968, *Pas.*, I, 1968, 554.

[62] e.g. in the Nyrstar case there was a group of 34 plaintiffs demanding the appointment of experts.

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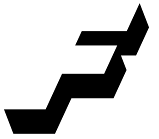

or to be "acting in concert" for their claim to be admissible, it's sufficient that they jointly file the claim (meaning they're all mentioned as plaintiffs on the citation that introduces the claim to the court and that is assigned to the defendant corporation). It is technically possible and allowed that one person acts as "formal plaintiff" on behalf of a group of "substantive plaintiffs", based on power of attorney granted by the latter to the former, but this technique, while sometimes used in for instance securities litigation, has to my knowledge never been used in an inspection rights case. It is not possible in Belgium to bring an inspection rights claim by way of class action.

The corporation must always be cited as defendant, since it's the corporation's affairs that will be investigated. Controlling shareholders are sometimes assigned as well, to avoid any doubts that the judgement can be invoked against them, so as to make sure they do not hinder the experts in their work, and to avoid that they delay proceedings by filing so-called "third party opposition"[63] to the initial judgement. Under Belgian rules on civil procedure, a person who was not a party to court proceedings but whose interests are affected by the judgement, may file such a third party opposition. As a result, if the "opposition" is admissible, the judge who issued the initial judgement will have to reopen the case and debates to take into account the arguments of the opposer. Such a procedure can run parallel to an appeal to a higher court by one of the parties to the initial proceedings. This course of events unfolded in the Nyrstar litigation: the plaintiffs had only assigned Nyrstar as a defendant. Trafigura, its major (25%+) shareholder, did not intervene voluntarily, as would have been its right. After an October 2020 judgement appointed a committee of experts to investigate some transactions between Nyrstar and Trafigura, the latter company decided to file a "third party opposition", resulting in the initial judge revoking its initial judgement and ruling that the claim was unfounded, because Trafigura had convinced the judge that the plaintiffs would not be able to launch a subsequent substantive claim, and in particular did not meet the 1% threshold for bringing a derivate claim (see above). In the meantime Nyrstar had launched an appeal against the initial judgement, but he court of appeal had not ruled on this yet. The judgement as a result of Trafigura's third party opposition was issued about 13 months after the initial judgement granting the investigation. All this does not come across as very efficient, to say the least, but is a normal consequence of the rules on third party opposition under Belgian civil procedure.

5. "indications that the interests of the company are seriously threatened": case law

In order to bring a successful claim, the plaintiff must prove that there are indications that the interests of the company are seriously jeopardized. Here are some typical examples from case law of indicia that have been accepted as meeting that standard:

- The discovery of a money-laundering circuit to which some directors seemed complicit[64];

[63] "Derdenverzet"/"tierce-opposition", see art. 1122 Code on Civil Procedure.
[64] Enterprise court Ghent, 23 June 1992, *RBH-RDC* 1994, 1028.

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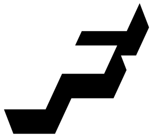

- The board refuses to take into account remarks made by the external auditor about the draft annual accounts, or at the very least refuses to draw up a new version of the accounts after the auditor had expressed the opinion that the company should book a loss on its holdings in other companies, and doing so would probably lead to a "serious loss procedure" being triggered, meaning the board would be under the statutory duty to call a general meeting (within two months) in order to allow the shareholders to vote on the future of the company, including the possibility to dissolve the company;[65]
- Important assets were transferred in related party transactions to a major shareholder and there are doubts about the true independence of some of the nominally independent directors that drafted the related party transactions report -one of them used to work for an outfit linked to the major shareholder[66];
- The company and its largest shareholder have not communicated transparently about the price of important long-term contracts, the auditor made a remark about that in his report on the annual accounts and the supervisory authority thereupon started an investigation against the company. The fact that serious questions have been raised about a liquidity crisis at the company and about a restructuring through which the controlling shareholder obtained most assets, can in itself justify the appointment of experts[67]
- Enduring rows between directors that paralyze the normal functioning of the board, with a negative impact on the company's business and doubts about the validity of certain contracts the company entered into;[68]
- Inspection rights were granted in a case where a director invoiced services performed through the company through another company in which he was a shareholder[69], an important shareholder did not receive the agenda of the general meeting, the company did not hold the necessary permits for its activity anymore and had clearly lost much of its value over a 10 year period.[70]

Case law has rightfully stressed that grave financial difficulties at a company, though these can obviously be a serious threat to the company, are not in themselves sufficient grounds for the appointment of investigative experts[71]. Plaintiffs will have to show that the board or general meeting or individual directors took decisions -or remained inactive when it is questionable that it was appropriate to remain passive- that threatened the company's interest, at least that there are indications the company's interest is jeopardized as a result of such actions.[72] The text of article 7:160 does not require the proof of a link with actions or inaction

[65] Enterprise court Kortrijk, 13 January 1992, *TRV* 1994, 344.
[66]Enterprise court Antwerp, 30 October 2020, *TBH-RDC* 2021, 347
[67]Enterprise court Antwerp, 30 October 2020, *TBH-RDC* 2021, 347.).
[68] Court of appeal Brussels 12 December 2008, *TRV* 2009, 67.
[69] Another case where unlawful competition by a director was seen as grounds for granting an inspection was Court of appeal Antwerp, 8 May 2000, *DAOR* 2001, 56.
[70] Enterprise court Dendermonde 25 February 2008, *TRV* 2009, 770.
[71] Enterprise court Liège, 21 January 2005, *JDSC* 2006, note M. Caluwaerts. See also Enterprise court Liège, 15 March 2012, *DAOR* 2013, 135.
[72] See cases cited in the previous footnote. See also Enterprise court Hasselt 24 April 1998, *TRV* 2000, 461, ruling that it's not sufficient for plaintiffs to prove serious animosity between shareholders, if

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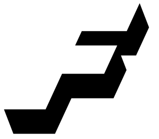

by some corporate organ, but this case law should nevertheless be approved, since it is clearly not the function of inspection rights to allow minority shareholders to have a crisis manager appointed at the helm of a struggling firm, but only to allow shareholders to have inspectors look into corporate policy when a threat to the company has been identified. On the other hand, the law certainly does not require plaintiffs to prove or even allege[73] that the serious threat to the company's interest is the result of a *breach of duty* or some other form of unlawfulness.

6. Rules on costs

Since May 1 2019, the standard rules on costs in civil procedure apply to inspection rights claims as well, as the previous special rules from the old companies act were abolished. This means every party bears its own costs, but the loser pays the court (i.e. court administration) costs, which include the expert costs, and a relatively small part of the attorney's fees of the winner[74]. This approach is a step forward compared to the statutory arrangement prior to 2019, when the companies act contained a clear disincentive for potential plaintiffs, by stating that the court that granted the request to have experts appointed *had* to fix the amount of the advance towards the expert's costs that the plaintiff had to immediately pay. In the Nyrstar case, the Antwerp court ruled that in a case like *Nyrstar*, pitting retail investors against a large listed company and where an extensive investigation by several experts seemed warranted, asking the plaintiff shareholders to advance the costs of he experts would in fact rob such shareholders from the use of inspection rights. This justified, according to the court, an order for the company to bear the provisional costs.[75]

The old as the new text of the law state that the judge can decide, at his discretion, that the company will have to bear the costs of the publication of the expert report if the judge orders such a publication. A publication only makes sense in listed companies or at least companies with dozens or more of shareholders, and does not cost much if it's done through the website.

they do not also prove there are indications that these hostilities threaten the interests of the company itself.

[73] Pleading standards in the strict sense are completely unknown in Belgian civil procedure. That is, of course a plaintiff will sometimes have to make certain allegations and prove them if its claim is to be granted by the court, but formally making allegations (and putting forward supporting proof) about certain facts is never an explicitly formulated hurdle for admissibility or for the case to proceed.

[74] See art. 1017 CCP for the general "loser pays" rule concerning court costs, art. 1018, 4° CCP for the rule that these include the costs of experts appointed by the court, and art. 1018, 6° in conjunction with art. 1022 CCP for the rule that the loser has to pay to the winner a compensation for the winner's attorney's costs, but as calculated and capped in accordance with the rules based on art. 1022, meaning that in practice in most cases involving corporate litigation, only a small part of the attorney's fees can be recovered (even though today a higher amount than before a series of reforms over the past 20 years).

[75] Enterprise court Antwerp, 30 October 2020, *TBH*-RDC 2021, 347, at p. 369, paragraph 7.

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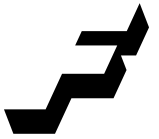

Judges could however also impose (and have in at least one case imposed)[76] publication of notices about the expert report in printed newspapers, and these can be quite expensive.

IV. Fear of fishing expeditions and the relationship with other procedures to have experts appointed

1. *No fishing expeditions, please*

A recurring theme in case law[77] and literature[78] about inspection rights is that judges should not allow "fishing expeditions", i.e. the appointment of inspectors when the plaintiff has no clear idea of whether and how the company's interest are actually potentially threatened. The plaintiff could try to (ab)use the inspection rights procedure to perform a sort of audit on how the company has been run by the directors and to check whether the directors have behaved

[76] Court of appeal Brussels 12 December 2008, *TRV* 2009, 67= *JT* 2009, 62 (Fortis). This case was a somewhat atypical use of shareholder inspection rights. As part of the rescue operation for the Fortis banking and insurance group (when it was on the verge of insolvency in autumn 2008) orchestrated by the Belgian, Dutch and Luxemburg governments, the banking unit of Fortis Group was sold to French BNP Paribas. Minority shareholders had doubts about the legality and soundness of this transaction and a flutter of litigation ensued. One of the claims ended up in the Brussels court of appeal which ordered the appointment of three experts to look into the transaction (but also to take other measures, like presiding over a general meeting that would vote on the sale of Fortis bank to BNP Paribas). The court ordered the publication of the experts' report on websites and of executive summaries of the report in national newspapers. At the stage of the ruling of the court of appeal, and certainly by the time the experts delivered their report, only very few minority shareholders were still entertaining legal action against the sales transaction, and the expert report would probably not be really helpful in the claims that both government agencies and individuals brought in both Belgium, the Netherlands and the US against certain directors and executives of Fortis. The appointment of experts in the Fortis case was probably not intended to help minority shareholders unearth information to underpin future legal claims, but came across as an important part of a public cleansing ritual concerning the whole Fortis trauma, hence the court of appeal's sound judgement that the public at large had a legitimate interest in getting access to the full expert report if they so wished.
[77] See for instance Enterprise court Dendermonde 20 February 2014, *DAOR* 2015, 24 (note Delang) holding that mere minor irregularities should not lead to an inspection rights procedure, in view of its disruptive nature, and stressing that plaintiffs (minority shareholders) should take into account the "principle of subsidiarity" when choosing their weapons. See also Court of appeal Brussels, 17 March 2000, *DAOR* 2000, 275, stressing that the expert inspection cannot pertain to all acts of the board or management during a certain period of time, but that plaintiffs must indicate a limited number of decisions they want investigated, and partly justifying this opinion with the remark that inspection rights are meant to protect the company's interest which is not to be confused with the shareholders' personal interest. Similarly, Enterprise court Charleroi, 24 December 1999, *DAOR* 2000, 275 (in this case plaintiffs admitted they wanted to use the inspection rights procedure to gather information to underpin their claim that they had just grounds to force another shareholder to buy them out under the procedure provided for in art. 2:68 BCCA.)
[78] See e.g. B. Tilleman, Deskundigenonderzoek in vennootschapszaken", *DAOR* 1996, 70. Art. 877 CCP, an (unfortunate) bedrock of Belgian civil procedure, is the expression of general hostility in Belgium against fishing expeditions as it states that a court can only order a party to proceedings to produce a document if the request by the party who wants to use the document is precise, plaintiff shows that the document would constitute proof of a relevant fact, and produces "serious and specific indications" that the defendant actually possesses the document.

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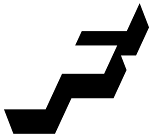

dutifully, actively trying to ferret out any wrongdoing by directors. Clearly, lawmakers did not want to allow such fishing expeditions, hence the requirement that the plaintiff must show that there are "indications" that the company's interests are under threat.

But courts should not set that threshold too high, since one of the core functions of inspection rights is undoubtedly to help minority shareholders get access to information about how the company is being run that they don't yet have, and to allow them to gather evidence in order to bring a derivative claim against the directors. The whole system would be close to useless if courts required plaintiffs to almost prove the suspicions they had before being granted inspectors that can help them unearth the evidence they are looking for. In this context, it's useful to point out that an inspection rights procedure is far less disruptive for the company's affairs than some other procedures that have been developed by courts or legislators to help safeguard minority shareholder interests. The possibility to have a "sequestrator" or a "sequestrator-expert" appointed comes to mind here[79]. Sequestrators are appointed by court presidents in unilateral summary proceedings (usually) when the plaintiff (e.g. a minority shareholders) is justified in believing there's a danger certain assets will be made to disappear, looted or diverted to the estate of a (usually controlling) shareholder. The assets in question could be physical assets like machines (as in the paradigmatic cases when employees, who sometime also bring such claims, fear a foreign parent company will transfer assets of its Belgian subsidiary abroad, thus robbing employees of assets they could seize when their wage arrears are not paid). But very often the sequestrated assets are accounting documents/computer files that could be useful as evidence underpinning a later substantive claim. Here courts usually demand that plaintiffs provide a very specific list of assets/documents they want sequestrated, because the sequestration means company managers temporarily lose the possibility to use those assets, documents, computer systems, which could be disastrous for the company. A "sequestration-expert" is a court-appointed expert who not only safeguards the assets or documents involved, but is also instructed to perform an expert investigation on these assets, such as a forensic audit of (part of) the accounts. Again, the sequestration element implies that the company and its managers cannot use the assets as long as sequestration and the expert investigation last (or are seriously limited in the use they can make of the assets). In most inspection rights procedures, by contrast, assets, documents, computer files and system can be used more or less as before. In the Nyrstar case, the plaintiffs had drafted an extremely detailed list of the types of documents they wanted the experts to investigate, and had more generally circumscribed the remit of the experts in great detail. In her October 2020 ruling granting the inspection procedure, the Antwerp court president did not copy these very detailed instructions. The court argued that experts should have some leeway in organizing their investigations -including choosing the documents they wanted to see- in such a way that they would be useful in helping to determine whether the company's interests had come under threat.[80]

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[79] For an overview of the principles and case law governing sequestrators in a corporate context, see e.g. B. Tilleman, "Het gerechtelijk sekwester in vennootschapsgeschillen", *TRV* 1993, 523. Practice has not changed since then.

[80] Enterprise court Antwerp, 20 October 2020, *TBH-RDC* 2021, 347; in the same spirit (experts should get some leeway to organize they work as they see fit and to look into documents that they think could be relevant) Enterprise court Dendermonde 25 February 2008, *TRV* 2009, 67.

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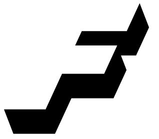

2. *Difference and links with the Code on Civil Procedure expert opinion-procedure*

There has been quite a bit of debate about the relationship between the inspection rights procedure from the BCCA and the possibility to ask the judge to appoint one or more experts in (almost) every civil procedure, based on art. 962 of the Belgian Code on Civil Procedure. (CCP)[81]. One reason is that such a CCP- expert can of course be demanded by anyone involved in litigation, not just shareholders, and especially also by shareholders who do not own 1% of the shares. Case law and literature agree that there should be no presumption that a shareholder who does not meet the 1% threshold and brings an art. 962 CCP claim to have experts appointed to look into a company's affairs -essentially the same task of BCCA experts- is abusing this possibility or is presumed to try and circumvent the companies act procedure. Rather, both procedures should be seen as independent, and anyone meeting the conditions of one of the two procedures, can bring a claim under that procedure.[82]

The civil procedure expert investigation can only be demanded if a case about a "dispute" is already pending before a court or if such a "dispute" is imminent, says the text of art. 962 CCP. In case of the companies act procedure, this is not required[83]. Some authors have denied this

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[81] The authoritative analysis of this relationship, which seems to have ended most debates about the issue, is J.M. Nelissen-Grade en S. Loosveld, "Het deskundigenonderzoek in geschillen omtrent het bestuur van vennootschappen", in *Gerechtelijk deskundigenonderzoek, de rol van de accountant en belastingconsulent*, Brugge: die Keure, 2003,253. See however a more recent thorough analysis (which comes to the same conclusions as Nelissen/Loosveld) in M. Roelants, "De drempel blijft een drempel voor het vorderen van een 'vennootschapsrechtelijke' deskundige", *TRV* 2012, 689 (who focuses on to what extent CCP-experts can be used or not to "evade" the BCCA ownership requirements). In her case note "De slagkracht van het vennootschapsrechtelijk deskundigenonderzoek als onderzoeksmaatregel", *TRV* 2012, 750, M. Roelants asks to what extent a plaintiff could invoke the general powers of court presidents in summary proceedings under art. 584 CCP to demand the appointment by the court of an expert with similar powers as an art. 7:160 BCCA expert. She rightfully points out that judges should not allow plaintiffs to try and use this route in order evade the substantive requirements of either art. 962 CCP (experts in "disputes") or art. 7:160 CCP, and also points out that in view of the hostility of Belgian civil procedure towards discovery-like mechanisms, it would be very hard to justify access by a CCP- expert to all kinds of unspecified documents, whereas under art. 7: 160 BCCA, provided the conditions of that provision are met (esp.: indications that the company's interests are seriously jeopardized), there is more leeway for the expert to look into transactions and therefore to demand access to any cache of documents that would be useful to evaluate those transactions. The case she annotates, Court of appeal Brussels 13 March 2012 confirms the points she makes (in this case, plaintiff had tried to get an expert to search company premises and had introduced his claim through a unliteral petition (= not notified to the potential defendant) and tried to convince the judge to deal with the case in summary proceedings, all to no avail; essentially, the court accused the plaintiff of asking for a search warrant for corporate premises in a unilateral civil procedure).

[82] See M. Roelants, "De drempel blijft een drempel voor het vorderen van een 'vennootschapsrechtelijke' deskundige", *TRV* 2012, 695 and J.M. Nelissen-Grade en S. Loosveld, "Het deskundigenonderzoek in geschillen omtrent het bestuur van vennootschappen", previous footnote and the references cited therein.

[83] See e.g. Enterprise court Brussels, 3 September 1992, *TBH-RDC* 1994, 166, also explicitly ruling that plaintiff does not need to show or make likely that he will bring any subsequent substantive claim.

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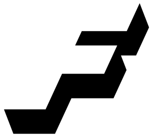

is a real difference; they argue that since plaintiffs in a BCCA case must put forward indications that the interests of the company are threatened, a "dispute" must exist or be on the horizon in the BCCA-procedure as well.[84] I disagree, since the wording of the CCP leaves little doubt that by "dispute" it means a case brought (and thus already pending) before a court, or at the very least the expert needs to be appointed now to safeguard (not: find) potential proof that would be useful in a case that could be brought in the near future.

The second and more important real difference between the two types of action is that the 7:160 BCCA claim is derivative in nature: a shareholder can bring it without showing that his personal interests have been impaired, in the sense that he himself has suffered damage, or at least proper, non-reflective damage. The shareholder can launch a claim because the company's interest is threatened, even though his own interests are only indirectly, reflectively (as in reflective damage) negatively affected[85]. For a civil procedure claim, one has to show a personal interest, meaning the claim, if awarded, can improve one's position, and the "personal" element also implies that the disadvantage one wants to put straight would not disappear if the company exercises its primary claim. This finding holds, even if one agrees that the question of whether only reflective rather than direct damage is at stake for the plaintiff-shareholder is not a question of admissibility, but will only be decided by the judge when he rules on the merits of the case.[86]

3. *CCP expert investigation especially tempting in corporate groups*

The BCCA procedure only pertains to a specific company and its affairs (decisions taken and transactions entered into through its "organs"). Some courts have construed this rather narrowly, ruling that if a company is part of a group of companies, the enquiry cannot pertain to the affairs of that other group company (parent, subsidiary, "sister company")[87]. While it is beyond doubt that a judge seized by a shareholder of company X cannot order company Y to disclose documents or have its affairs investigated under the BCCA procedure, a judge that orders an investigation into transactions between X and Y will necessarily allow the expert to look into the affairs of company Y as well to the extent this is relevant for an investigation into the affairs of company X. The problem does, however, remain, that in a BCCA procedure the judge cannot order officers of Y to actively cooperate or disclose corporate documents to the experts. Perhaps somewhat oddly, there seems to be widespread agreement that a judge who appoints an expert in a regular expert opinion procedure ordered on the basis of art. 962 Code on civil procedure, *is* allowed to order another group company and its officers -or anyone else,

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[84] J.M. Nelissen-Grade en S. Loosveld, "Het deskundigenonderzoek in geschillen omtrent het bestuur van vennootschappen", in *Gerechtelijk deskundigenonderzoek, de rol van de accountant en belastingconsulent*, Brugge: die Keure, 2003, at 455, nr. 9.
[85] Correctly identifying this as the defining difference between a BCCA and a CCP claim, see both Nelissen/loosveld and Roelants, previous two footnotes.
[86] Civil court Brussels, 3 February 2011, *TRV* 2011, 199. M. Roelants, "De drempel blijft een drempel voor het vorderen van een 'vennootschapsrechtelijke' deskundige", *TRV* 2012, 694.
[87] See Ch. Resteau, A. Benoit-Moury and A. Gregoire, *Traité des sociétés anonymes* Brussels, Bruylant, 1985, vol. III, 103.

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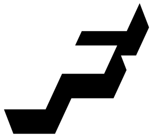

for that matter- to cooperate with experts looking into the "dispute" that arose between company X and someone else, possibly one of its minority shareholders[88]. This more lenient attitude may be another reason for shareholders to sometimes prefer the CCP procedure if they can. In any case, one Brussels decision somewhat controversially ruled that if a shareholder of parent company successfully applies for the appointment of BCCA-experts, the court can (if this is demanded by plaintiff) order and allow the experts to also look at documents from any company integrated into the consolidated accounts of the parent company[89]. While supporters of minority shareholder rights will certainly greet such a decision as it increases the usefulness of inspection procedures, I do not believe it accurately reflects Belgian law, as it seems to be a stand-alone decision and opponents can point to the text of art. 7:160 BCCA which seems to limit the inspections to 'the books and accounts of the company" in which plaintiffs hold shares.[90]

4. *Claims is brought as summary proceeding- implications*

The claim to have BCCA-experts (art. 7:160) appointed must be brought under summary proceedings[91]. This means the whole procedure will be faster than a regular court procedure, and that it will be decided by the president of the court[92]. No data exist on the time needed by court presidents to decide on the appointment of inspection rights experts, but talks with practitioners indicate that a judgement may usually be expected within three months after the claim has been lodged.[93] Before the 2019 BCCA entered into force (May 1 2019), statute did not

[88] For applications (in cases where plaintiff shareholders alleged directors had been complicit in illegal asset transfers to another company/controlling shareholder): Enterprise court Dendermonde, 25 February 2008, *JDSC* 2013, 226 note M. Caluwaerts "expert vérificateur ou expert de droit commun?"; Enterprise court Bruges 24 August 1996, *DAOR* 1996, issue 40, p. 99; Enterprise court Kortrijk 22 January 1996, *DAOR*, issue 40, p. 91.

[89] Court of appeal Brussels, 12 December 2008 *TRV* 2009, 67.

[90] If plaintiffs held more than 1% of both a parent and subsidiary, then they could apply for an inspection procedure in both companies, and procedural economy seems to justify and require (and the rules on joinder of cases in the CCP seem to technically enable) that one judge should be allowed, in one procedure in which both defendant companies have been assigned, to appoint one expert or teams of experts that would look into the affairs of both companies.

[91] This is mandated by art. 7:160 BCCA. The procedural rules and substantive conditions concerning summary proceedings are set out in art. 583 ff. Code on Civil Procedure.

[92] Not by another judge, nor with the help of the two "adjunct judges" -who are lay people, usually entrepreneurs or executives in firms, who also sit as a judge in every chamber of every enterprise court in addition to the professional judge. The same system (lay adjunct judges) is used in labor law courts in Belgium.

[93] Of course, if an expert investigation is ordered, this will often take several additional months to perform. Also, the initial judgement may be appealed. It would be very difficult to find out how often this happens, and no data on this exist. Conventional wisdom has it that decisions taken in summary proceedings in corporate matters are rarely appealed, or at least less often than decisions in regular proceedings, for the simple reason that an appeal is often not very useful for time reasons, in the corporate battle (e.g. between two major shareholders) that is continuing "on the ground", outside the courtroom. But of course this logic does not really apply to inspection rights cases, especially not for appeals against decisions that grant the investigation, since the experts can be stopped in their tracks by an appeal, "before its too late" from the perspective of the initial defendant. The Nyrstar saga is an illustration of this.

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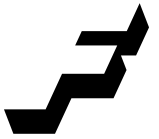

mandate summary proceedings, but plaintiffs usually requested such a procedure and this was usually granted by courts[94]. The general feeling was that if the appointment of experts was warranted, it was almost always needed urgently, hence the introduction of the new rule in the 2019 act that inspection rights procedures always proceed as summary proceedings[95]. This change to statute was probably meant to take away the need for plaintiffs to prove that the standard conditions for summary proceedings -essentially: the plaintiff showing the great urgency of a court decision- were fulfilled.

But in the Nyrstar case, the defendant corporation contested this view, and argued that even in inspection rights claims, plaintiffs need to actively prove that the case meets the urgency requirement applicable to any summary proceedings. They took the statute (art. 7:160 BCCA) to mean that no inspection rights claim could ever be brought anymore unless the plaintiff proved that the conditions for summary proceedings had been met. In the specific case, they argued that such urgency was not present, as the minority shareholders had waited for several months between finding out about the relevant facts and the lodging of their inspection rights claim. It was certainly true that plaintiffs had waited for several months. But during that period, they had tried to obtain information about the contested transactions between Nyrstar and Trafigura through other mechanisms, first by simply urging Nyrstar and its board to disclose certain documents, and then by trying to invoke the help of the company's statutory external auditor. The auditor had initially refused to sign off the accounts of Nyrstar because he did not have access to enough information to do so. The Belgian securities markets supervisory authority (FSMA) had then ordered Nyrstar to postpone a general meeting concerning its annual accounts but in which certain of the contested transactions would also be discussed, until the auditor had been provided with all information needed to certify the accounts. But Nyrstar continued to refuse to disclose to the shareholders certain documents that the shareholders wanted to inspect, such as the specific text of certain contracts between Nyrstar and Trafigura, instead of just an RPT[96] report by a committee of independent directors of Nyrstar on the transactions reflected in those contracts. It's only when it became clear to minority shareholders that even after having pressed not only the Nyrstar board but also the auditor and the FSMA, they would still not get access to the documents, that they decided to launch the inspections rights procedure. Judges should be careful not to punish minority shareholders with a loss of standing to bring an inspections rights claim for lack of urgency,

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[94] See the overview of cases in K. Geens, M. Wyckaert et al. "Overzicht van rechtspraak. Vennootschappen 1999-2010, *TPR* 2012, 249, nr.336.

[95] See Explanatory Memorandum to the 2019 BCCA, DOC 54 3119/001, *Parl. st.* 2017-18, p. 165-166 (comments on draft article 5:106) where this was given as the justification for introducing the rule into statute that under the new Act, inspection rights claims would always be dealt with under summary proceedings.

[96] Related party transaction. Art. 524 Belgian Companies Code which was applicable at the time required the board to have a prior report drafted concerning certain related party transactions, in which the contemplated transaction had to be evaluated (mainly financial impact on the company and whether the transaction could be said to be at arm's length). The report had to be drafted by 3 independent experts supported by an external financial expert (This procedure was replaced in April 2020 by the rules on RPTs in art. 7:97 BCCA, which implements the relevant parts of SRDII (the 2nd Shareholder Rights Directive)). Nyrstar had argued that the transactions with Trafigura did not fall within the scope of art. 524 of the (old) Companies Code but that they had voluntarily drafted this report (which they disclosed on their website).

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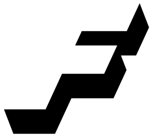

when these minority shareholders entered in good faith into a dialogue/negotiations with the board or/and controlling shareholders about getting access to the desired information, or tried to enforce their right to information through out-of-court channels (like waiting for a general meeting, or calling one[97], in order to grill the board by asking the board questions).[98]

In any case, the October 30 2020 Nyrstar decision by the Antwerp enterprise court held that under the new companies act, plaintiffs do not have to actively or separately prove that the requirements (urgency) for summary proceedings are present, at least not as a matter of admissability: the court rightly assumed that if a plaintiff can show -as he must if he is to win the case- that there are indications that the interests of the company are seriously threatened, there is a presumption that this shows the urgency of the case as required for summary proceedings. However, the defendant may show that such urgency is lacking. So in the end this is a matter of burden of proof: urgency is a requirement for a successful action, but it is presumed unless/until the defendant can prove its absence and whether the case is urgent is not a matter of admissibility, but pertains to the merits of the case which are only discussed by the court after it has ruled on admissibility.

The rules on summary proceedings also imply that the case must be initiated by a citation of the defendant, meaning the complaint is assigned to the defendant by an official bailiff (not by a letter of the court) and that the defendant gets a chance to present his case before the judge before the judge rules on the complaint. Under Belgian civil procedure rules, court cases can also exceptionally be initiated by "unilateral petition" if the use of this technique is "absolutely necessary"[99], which is generally assumed to be the case when even the shortened procedural terms of summary proceedings are too long in view of the extreme urgency of the case, or when the defendant is unknown (irrelevant in inspection rights cases) or when a unilateral petition is necessary in order not to undermine the effectiveness of the measures that are being requested of the judge[100]. Under a unilateral petition-procedure, the opponent in the dispute is not notified of the lodging of the claim and the court will issue a ruling without having heard the potential defendant. Courts have confirmed that the use of "unilateral petitions" is also allowed to bring inspection rights claims under those same general conditions that apply to any use of unilateral petitions.[101]

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[97] Which in Belgium is only allowed by shareholders holding 10% of the shares (art. 7:126 BCCA). In listed companies, shareholders holding 3% can demand the board add an item to the agenda (art. 7: 130 BCCA), but 3% is insufficient to force the board to call a meeting.
[98] In this sense also M. Caluwaerts, "La designation d'un expert vérificateur selon les nouvelles dispositions du CSA", note under the first 4 Nyrstar court decisions, to be published in *TBH_RDC* 2022 (probably February issue) (text on file with the author).
[99] Art. 1025-134 Code on civil Procedure.
[100] Standard example: the plaintiff is afraid corporate management will destroy or hide certain documents. Seizure of those documents and their hand-over to an expert for scrutiny can then be asked through a unilateral petition.
[101] See e.g. Court of appeal Brussels, 15 October 1997, *DSC* 2000, p. 265 and 13 March 2012, *DSC* 2013, p. 201. In both cases the court of appeal rejected the use of a unilateral petition by the plaintiff, but after having ruled that as a matter of law it is permissible to use the technique in inspection rights cases if indeed "absolute necessity" is shown. Compare also one of the Nyrstar decisions, Enterprise court Brussels 24 June 2019, *TBH-RDC* 2021, 325; this was, however, not an inspection rights claim as

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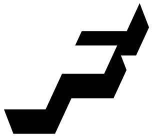

5. *(No) Link with due diligence*

When an investor is considering buying a company, it will often want to perform due diligence. The (potential) sellers in a share deal will be the existing shareholders, who may be eager to sell to a bidder and would therefore be happy to allow that buyer to perform due diligence. But performing a due diligence on a company is not possible without the at least tacit permission of the board of directors of the target company, nor without the active cooperation of the target's management. Of course, situations arise where shareholders would like to sell and want to grant due diligence, but board and/or management are less keen on the bidder and do not like the prospect of the bidder performing a due diligence. In such cases there is a conflict of interests (in the broad, non-legal sense of the word) between shareholders and directors. Such situations occur in both private and public companies, and also in listed companies where the offer takes the form of a public take-over bid. Legal practitioners are aware of the problem, but there is hardly any legal literature on it and, as far as we are aware, no case law at all[102]. The correct attitude for the board to take in such a situation is to be guided by the company's interest. The board should consider whether granting due diligence to the bidder is in the long term interest of the shareholders as a group. This means it's indeed the board, and not the shareholders, that is the final judge of whether due diligence will be granted. This was confirmed by Belgium's financial markets supervisory authority (the FSMA) in a high profile case in the 1990s. In 1992, the Dutch bank ING was mulling a take-over bid for the shares of Belgium's second bank at the time, BBL. ING wanted to perform a due diligence, which was reason enough for the board of BBL to take a *de facto* hostile attitude towards the offer, even though all directors declared they were conflicted under the then broad statutory definition of conflict of interest.[103]ING was granted a limited due diligence in preparation of a tender offer, but walked away from BBL after having performed this due diligence, with of course negative effects on the stock price and general market reputation of BBL bank. The FSMA had ruled that the directors of the target had exclusive powers to decide whether a due diligence should be granted, that in making that decision they did indeed had to be guided by the question whether granting a due diligence in preparation of a public bid was in the interest of the company, and that in the specific case they could potentially judge, taking into account all specific circumstances of the situation, that granting a due diligence to

such, but a claim to force the defendant corporation to disclose additional information in preparation of its annual meeting.

[102] For a text touching upon the issue, see O. Clevenbergh, "La communication d'informations confidentielles dans le cadre des "due diligence", en particulier dans le cas des sociétés cotées", *TBH-RDC* 2005, 115 ff. There is of course more literature on the application of insider trading rules in an M&A context, including the question to which extent the target board may share non-public information with potential bidders, for an excellent treatment (in light of the applicable EU Market Abuse Regulation and its many implementing rules) from Belgian literature, see L. Legein, "Application du règlement abus de marché aux operations de fusion/acquisition et d'OPA" in *Financiële regulering, een dwarsdoorsnede* (Financial Law Institute, ed.) Antwerp: Intersentia, 2019, p. 287 ff. But there is no link between this issue and shareholder inspection rights, at least not in Belgium.

[103] This broad definition was narrowed by a 1995 reform of the Belgian companies act to a large extent as a result of the ING bid for BBL, because many establishment figures thought it had been unfortunate that so many of the Belgian target board's members had been incapacitated by the conflict of interest rules.

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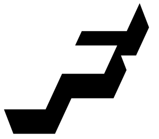

ING was indeed in the shareholders' and the company's interest, since it would be conducive to a sale[104].

Of course, a bidder who already, prior to launching a bid, owns at least 1% of the target company, could overcome the need to get board consent for a due diligence by invoking its inspection right in the sense of art. 7:160 BCCA . But in order to do so, he would need to go to court and prove that there are indications that the interests of the company are being seriously threatened (except if the M&A transaction concerns a small company that has not appointed an auditor, where the bidder could invoke art.3:101 BCCA, discussed above, to inspect all the company's documents). We are not aware of any Belgian court cases where a bidder has gone to court, based on the art. 7:160 BCCA inspection rights, to enforce access to target information, in order to perform the equivalent of a due diligence without the consent of the target board.

V. Conclusion

It's impossible to know whether this is true, but the impression among corporate law practitioners in Belgium seems to be that the use of inspection rights is on the rise, but that inspection rights cases are still very limited in number. In the 2019 overhaul of company law legislation, lawmakers maintained a 1% ownership requirement as a threshold for bringing claims. On the other hand, they did abolish a discouraging rule that plaintiffs needed to pay an advance towards the experts' costs. But since Belgium maintains its general mitigated form of the "loser pays" rule, the cost element is certainly not encouraging to minority shareholders. We have argued that courts should accept that inspection rights procedures can be used as stand-alone investigations into corporate affairs at the request of minority shareholders that are not necessarily linked to subsequent substantive claims against the company or its directors or controlling shareholders. Some courts have in the past indeed accepted this view on inspection rights. After all, potential abuse of the procedure is probably prevented sufficiently by the cost rules and by the statutory requirement that the plaintiff show that there are at least indications that the interests of the company are seriously threatened. But in a recent high profile judgement -that is being appealed as we write- a first instance court forged an explicit link between inspection rights and subsequent derivative actions, in that the court ruled that an inspection rights claim should be denied if the plaintiffs do not meet the threshold requirements to bring a subsequent derivative claim. The court did no go so far, however, as to rule that an inspection rights claim can only be brought in preparation of a derivative claim.

The fact that relatively few inspection rights claims are brought can probably be explained by several factors. The least important of this is the cost involved: if the claim is successful, the cost of the expert investigation will largely be borne by the defendant corporation and plaintiffs might even recoup a small part of their attorney's fees, so cost is not a major deterrent compared to other court procedures. A more important factor, in addition to the already mentioned ownership thresholds, probably is that subsequent derivative actions face even

[104] Commission bancaire (name at the time of what is now FSMA), *Rapport annuel 1992-93*, p. 102.

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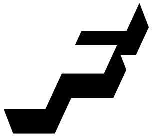

more serious procedural hurdles. While we've just defended that inspection rights should be allowed to proceed as stand-alone procedures, the fact remains that one of their potentially most useful applications would be to prepare for a derivative action. Another chilling factor is a lingering aversion among the majority of the corporate bar, older judges and academics about minority shareholders using their rights in a way that is perceived to disturb the smooth functioning of major firms. But a major explanation for the relative rarity of inspection rights court cases is no doubt that in SMEs that have not appointed an auditor, an efficient and often used inspection right exists, allowing every single shareholder to inspect all corporate documents than an external auditor would have access to, meaning virtually all documents. No court needs to be involved, except of course if management or the controlling shareholder prevent a minority shareholder from exercising its statutory right (which cannot be limited in the articles of association). Every shareholder using this individual inspection right can enlist the help of one or more accountants as experts.

The conclusion seems justified that Belgium has a properly functioning shareholder inspection rights system in closed companies, but that the system is not very attractive and therefore not used very often in large public companies and certainly not in listed ones. It's of course in the latter type of company that inspection rights would be most useful, in view of the distance between non-controlling shareholders on the one hand and the board and management on the other. At the same time, Belgium has had statutory rules on related party transactions in listed companies since 1995, rules that at the time were more advanced and useful in the protection of minority shareholder interests than what other EU member states had on offer. These rules have from the start entailed a duty to disclose to all shareholders, as part of the annual management report to the general meeting[105],the conclusions of the report on contemplated RPTs that three independent directors have to draft. These rules were reinforced by the implementation in 2020 of the rules on related party transactions from the 2nd Shareholder Rights Directive[106]. Still, even though listed companies will often disclose the full RPT report on their website, statute does not mandate this and only imposes an announcement of the RPT at the time of its conclusion with enough details to allow readers to judge whether the decision or transaction was reasonable and fair from the perspective of the company and its shareholders who are not related parties[107].These RPT disclosure rules should go some way in obviating the need for minority shareholders in listed companies to use their inspection rights. However, the Nyrstar case illustrates that minority shareholders will probably regularly not only want access to the full RPT report, but will sometimes (as in Nyrstar) find such a report insufficiently informative, and will want more contractual and financial details[108]. In those cases, the relatively steep inspection rights route remains the only one available for shareholders who suspect they are the victim of "tunneling" or other behavior by controlling shareholders that is to the detriment of the company.

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[105] Shareholders have access to this management report even when they don't attend the general meeting. In listed companies, it's put on the website of the company (in addition to official filings, also publicly available, as required by statute).

[106] See art. 7:97 BCCA as amended by Act of 28 April 2020, Belgian *Official Gazette* 6 May 2020.

[107] Art. 9:97 § 4/1 BCCA.

[108] In the Nyrstar case, minority shareholders wanted access to the full text of a series of contracts between Nyrstar and its major shareholder Trafigura.

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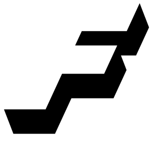

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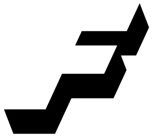

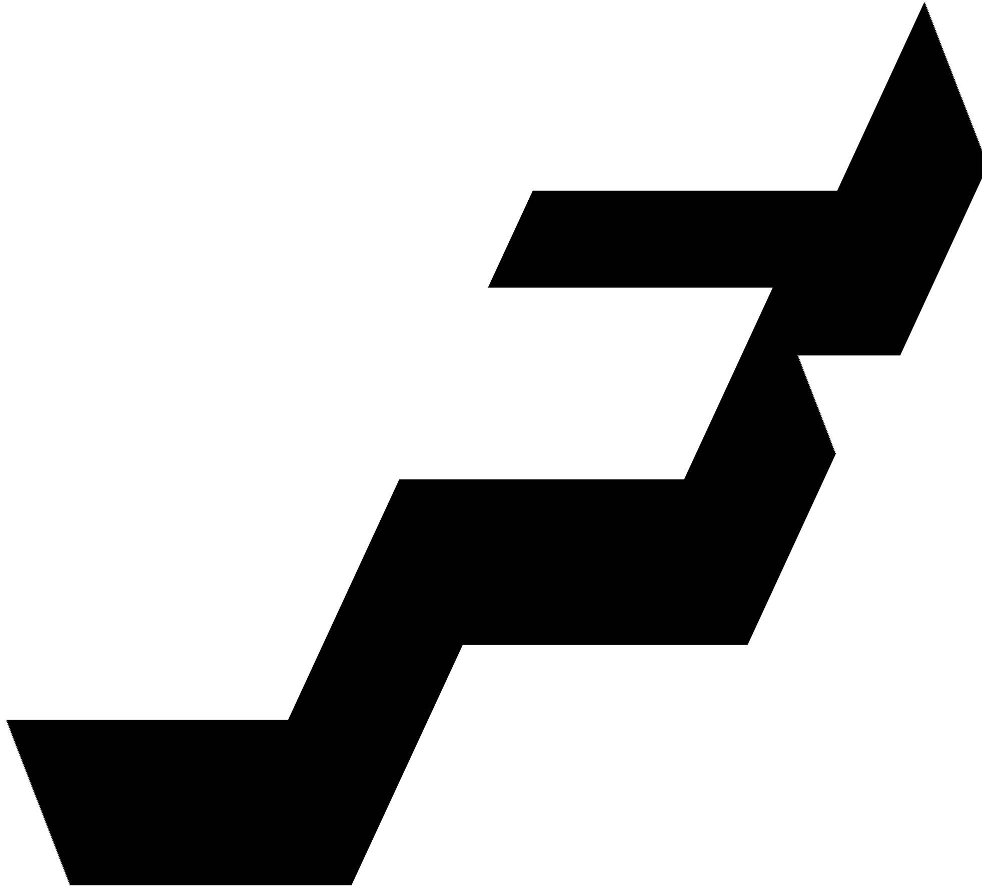

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